

**HERE'S DIRT IN YOUR EYE:
ADVANCED ISSUES IN REORGANIZATION
CASES INVOLVING HOMEBUILDERS;
OTHER RESIDENTIAL PROJECTS;
DEVELOPERS AND CONTRACTORS**

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A. Introduction

1. Real Estate Crisis

Economic growth for the first quarter of 2006 is slow. The economy grew only .6 percent, which is significantly lower than the previously predicted 1.3 percent and the weakest since 2002. Economists have given up on the idea that the National housing slump will be quick and painless, concluding the downturn will last at least through the end of 2007.

The housing market started to cool in mid-2005. Inventories of unsold houses have continued to grow. Single housing starts have declined 33% since early 2006, and they are predicted to remain low until 2008. The National Association of Realtors has predicted that new home sales will drop 18% in 2007. The National Association of Homebuilders has estimated that it may take until 2011 for the housing market to return to the level it reached in 2006.

Home sales have decreased significantly since 2006. Existing-home sales are projected to total 6.18 million in 2007 and 6.41 million in 2008, a decrease from 6.48 million in 2006. New-home sales are forecast at 860,000 this year and 901,000 in 2008, down from 1.05 million last year. As a result of the decrease in sales, the inventory of unsold homes in the United States is the largest since the National Association of Realtors started counting them in 1999.

Existing and new home sales prices are expected to decrease from last year, a first since the Great Depression. The national median existing home price is expected to decline by 1.3% to 219,100 in 2007 before rising by 1.7% in 2008. The median new home price will probably fall by 2.3% to 248,000 in 2007 and is expected to decrease by 2.6% in 2008.

As a result of these economic factors, many home builders have stopped new construction. In January 2006, construction began on 2.29 million homes, but this number has decreased significantly to 1.53 million homes in April 2007.

Stock prices for some of the largest home builders have fallen. Toll Brothers stock fell 7% this year through May 25, compared with the 25% slide of Hovnanian Enterprises. Shares of Pulte Homes declined 17%, while Centex Corp. dropped 14%, as Lennar Corp. fell 13% and D.R. Horton declined 11%. Additionally, the price of credit default swaps has risen sharply for several large builders, including Pulte Homes, Toll Brothers and D.R. Horton.

The surge in mortgage defaults has tightened up lending. Defaults and foreclosures are expected to rise as approximately \$650 billion in loans to sub-prime borrowers reset at higher interest rates by 2009.

2. The Challenges and Issues Presented

This real estate and home mortgage crisis has resulted in a nationwide increase of bankruptcy filings by homebuilders, developers and contractors. These materials will address many of the chapter 11 issues raised by real estate cases, analyze in depth key current cases and will conclude with a sampling of recently filed and currently pending cases.

Needless to say, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) will govern how “Dirt” cases will be presented to and resolved by Bankruptcy Courts across the nation. The most pervasive and difficult issues arise from the BAPCPA “Single Asset Real Estate” definition and resulting impact of the amendments to Section 362(d)(3), each of which is addressed at length in these materials. Also included are detailed discussions of recent cases which provide examples of efforts to avoid the consequences of the “Single Asset Real Estate” definition, their success and lessons to be learned. Other BACPA amendments also complicate “dirt” cases.

Related reorganization and other “dirt” issues are addressed herein as well. They include cure and reinstatement of fully accelerated debt; and an assortment of other timely topics.

Finally, these materials conclude with a sampling of recently filed and currently pending “Dirt” cases. These cases are intended raise issues to facilitate group participation and an active discussion of what is happening in the trenches, how a particular case addresses (or fails to address) developing issues arising from and related to these developing areas of the law, “Dirt” cases and the debtors who file them.

B. Single Asset Real Estate

1. History and the 1994 Act

The phrase “single asset real estate” has been around for awhile, and it has always had negative connotations. Case law adopted the phrase before Congress enacted the definition. *See In re Koopmans*, 22 B.R. 395, 400 (Bankr. D. Utah 1982); and *In re Oceanside Mission Associates*, 192 B.R. 232, 236 (Bankr. S.D. Cal. 1996). In fact, “single asset real estate debtors” were common in the 1980s and 1990s, when the Courts specifically addressed various abuses arising from early single asset debtors. *See, e.g., Sav. Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988); *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393 (11th Cir. 1988); *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989); *In re Humble Place Joint Venture*, 936 F.2d 814 (5th Cir. 1991); *Little Creek Development Co.*, 779 F.2d 1068 (5th Cir. 1991); *In re Thirteenth Place*, 30 B.R. 503 (9th Cir BAP 1983); and *In re Arnold*, 806 F.2d 937 (9th Cir. 1986).

In the Bankruptcy Reform Act of 1994 (“1994 Act”), Congress felt the need to pass

special, restrictive provisions applicable only to one class of debtors, adopting a new definition, “single asset real estate” (“SARE”). Congress also added a paragraph (3) to Section 362(d) of the Code concerning the circumstances under which relief from the automatic stay will be granted in cases of debtors owning “single asset real estate.” *See*, Section 101(51B) (former), Section 362(d)(3) (former); H.R. Rep. 103-835, 103 Cong.2d Sess. (1994). The scope of this new provision was limited, however, by the \$4 million cap contained in the definition.

In interpreting and applying the SARE definition enacted by the 1994 Act, Courts found the supporting legislative history “not illuminating,” In re Philmont Dev. Co., 181 B.R. 220, 223 (Bankr. E.D. Pa. 1995) or “unfortunately ambiguous,” In re Oceanside Mission Associates, 192 B.R. 232, 234 (Bankr. S.D. Cal. 1996). Early cases therefore established their own definitions to aid in analysis. In Philmont, the Court noted that “single asset real estate” encompassed a real estate project “owned by an entity whose sole purpose was to operate that real estate with monies generated by the real estate.” 181 B.R. 224. In re Kkemko, Inc., 181 B.R. 47, 51 (Bankr. S.D. Ohio 1995) concluded that “SARE” means “a building or buildings which were intended to be income producing, or raw land.” Other cases focused on whether the real estate is used in the operation of a business or whether it is simply held for income. *See, e.g.*, In re CBJ Dev., Inc., 202 B.R. 467, 472 (9th Cir, BAP 1996) (“hotel is sufficiently active in nature to constitute a business other than the mere operation of property”); In re Whispering Pines Estate, Inc., 341 B.R. 134, 15 (Bankr. D. N.H. 2006) (restaurant, gift shop and tour revenues are “reason enough to remove the hotel from the definition”); and Philmont Development, 181 B.R. at 224 (SARE was intended to encompass an apartment building, office building, or strip-mall shopping center “owned by an entity whose sole purpose was to operate that real estate with monies generated by the real estate,” holding that series of “semidetached” houses were a “single project” and therefore within SARE).

Philmont is also cited for delineating the four statutory criteria which must exist for a SARE debtor: (1) real property constituting a single property or project, other than residential real property with fewer than four residential units; (2) the real property must generate substantially all of the income of the debtor; (3) the debtor must not be involved in any substantial business other than the operation of its real property and activities incidental thereto; and (4) the debtor’s aggregate non-contingent liquidated secured debt must be less than \$4 million. 181 B.R. at 223.

2. BAPCPA Amendments

Before BAPCPA, SARE cases were not common or significant because the \$4 million cap excluded most projects owned and operated by special purpose entities. BAPCPA has now eliminated the cap (and Fourth Philmont Factor) by the following revised language:

(51B) "single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental.

11 U.S.C. §101(51B)(as amended).

The definition of Section 362(d)(3) was also modified by BAPCPA to read:

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later –

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that –

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; ...

BAPCPA has both simplified and complicated litigation involving SARE cases. Section 362(d)(3)(B) makes it clear that payments can be made by the debtor from revenue subject to a security interest at the contract rate of interest on the unpaid debt up to the value

of the collateral, simplifying each of those issues. However, eliminating the \$4 million cap in Section 101(51)(B) means that the SARE rules will now apply to large real estate cases, including those owned by special purpose entities.

With the higher stakes of larger cases, extensive litigation is sure to follow regarding a number of issues. The current definition, although grammatically incomplete, will still exclude projects upon which the debtor operates a true business, such as a hotel, hospital, health care facility or farm, to name a few. Many questions remain regarding whether or not a particular case is, in fact, within the SARE definition, as well as a multitude of other issues created by the BAPCPA Amendments themselves.

3. Is it Possible to Postpone Payments?

SARE cash flow problems are complicated by the challenges created by the requirement to pay regular monthly interest within 90 days of the petition date, as many SARE debtors do not have the revenue from business operations from which to make those payments. Under BAPCPA, Section 362(d)(3) was amended to allow a party in interest to move to extend the time period for commencement of payments within the 90 days for "cause." Additionally, where the debtor contests the applicability of the SARE rules, payments are not required until within 30 days after a determination that SARE is applicable. Clearly, a potential SARE debtor will take advantage of these opportunities to delay payments.

Four recent cases are instructive on efforts to avoid the onerous SARE payment provisions enacted by BAPCPA. Although three of these debtors fail in their efforts, a detailed analysis of these cases and the relevant principles provides some helpful insight on how a potential SARE debtor may succeed where they have failed.

(a) Kara Homes – Substantial Business Operations?

In In re Kara Homes, Inc., 363 B.R. 399 (Bankr. D. N.J. March 28, 2007), Kara Homes, Inc. and 32 Affiliated Debtors ("Affiliated Debtors") who own separate real estate development projects for the construction of single family homes and condominiums filed for chapter 11 relief. Page one of each Affiliated Debtor chapter 11 Petition and the response to Question 18(b) of the Statement of Financial Affairs for each Affiliated Debtor indicated that each Affiliated Debtor was a SARE Debtor. After the Bankruptcy Court approved the employment of a crisis manager and post-petition financing, each Affiliated Debtor amended its Petition and Statement of Financial Affairs to indicate that it was *not* a SARE Debtor.

Thereafter, the Affiliated Debtors filed a Complaint for Declaratory Judgment seeking an order determining that they are *not* SARE Debtors, and a Motion to extend the Section 362(d)(3) deadline until 60 days *after* the Declaratory Judgment Complaint has been

determined. One week later, the Bankruptcy Court established a scheduling order for motions and cross-motions for summary judgment to be filed on the SARE issues.

The Affiliated Debtors sought to be excluded from the statutory definition of SARE because “it is the business of each Affiliated Debtor to acquire land, to design homes and/or condominiums suitable to that land, to arrange for the construction of these homes and/or condominiums and then to market and sell them to generate cash.” 363 B.R. at 402-403. Affiliated Debtors supported this argument by attempting to create separate business operations for each Affiliated Debtor from the separate construction trailer and model for each property, separate employees who conduct closings and supervise the construction work, and construction of common space, amenities and roadways incident to each project. The Affiliated Debtors also argued that, “in addition to holding the real estate, each affiliate researches and purchases developable land, conducts planning and construction of homes, markets and sells the homes and maintains each development.” 363 B.R. at 405.

The objecting lenders argued that each of the Affiliated Debtors is the classic SARE entity which owns a single real estate project that constitutes its sole asset, conducts no business operations other than the improvement and sale of real estate, and is required to abide by the “plan or payment” deadline of Section 362(d)(3). At the earlier DIP financing hearing, the Affiliated Debtors’ representative testified that each Affiliated Debtors’ “primary source of income, if not it’s only source, is ‘from the sale of homes.’” Additionally, Question 1 of the Statement of Financial Affairs for each Affiliated Debtor certified that 2004 and 2005 income was derived from “combined sales revenue for all entities.” 363 B.R. at 405.

Judge Kaplan rejected the Affiliated Debtors’ arguments that they are involved in substantial business other than the operation of each Affiliated Debtors’ real property and activities incidental thereto, concluding:

[I]t is palpably clear that a “single asset real estate” case is one in which the debtor performs functions intrinsic to owning and developing the real estate and not one where the debtor generates income from other activities not incidental thereto. The Affiliated Debtors are in the business of constructing and selling single family homes on the parcels of real estate owned by the Affiliated Debtors. ... All of the activities identified by the Debtors as reflective of “business operations” are merely incidental to the Affiliated Debtors’ efforts to sell these homes or condominium units, and do not constitute substantial business[.]

Kara Homes, 363 B.R. at 406.

However, in Footnote 5, Judge Kaplan suggests there may be a way around this result. For example, “planning, design, marketing, maintenance and other activities” for third parties would generate income and support an argument that the debtors were engaged in substantial business other than the operation of each debtors’ real property and activities incidental thereto.

(b) Heather Apartments – Is an Asset Sale “Cause”?

In In re Heather Apartments Limited Partnership, 2007 WL 926299 (Bkrtcy. D. Minn. March 28, 2007) 47 Bankr.Ct. Dec. 286, the debtor owned an apartment complex, admitted it was a SARE debtor and filed a Motion seeking to extend the 90 day deadline of Section 362(d)(3) for “cause” until a sale of the debtor’s primary asset could be concluded. The debtor’s motion referenced the “possibility” that a plan of reorganization would be filed prior to the hearing on the motion, and if so, the debtor would seek a determination that the plan had “a reasonable possibility of being confirmed within a reasonable time.” Inexplicably, the debtor failed to file a plan before the hearing on the Motion, held *two days before* the Section 362(d)(3) deadline.

Judge Kishel analyzed “cause” by “referring to the purpose of the underlying statutory requirement.” He found that “cause would consist of something extraordinary in the circumstances, something that tips the equities of a case outside the balance that Congress envisioned and then reinforced by establishing the underlying requirement.” The Court rejected the debtor’s arguments as having “only focused on the general bromides of bankruptcy,” rather than the specific requirements of Section 362(d)(3), p. 2.

In denying the debtor’s motion, Judge Kishel reviewed the limited evidence available, prior case authority and the “meager” legislative history for Section 362(d)(3). From the available evidence, the Court found that the debtor is a “financially-troubled real estate development; its operation suffers from undercapitalization, deferred maintenance, and insufficient cash flow,” with low occupancy and revenue insufficient to meet operating expenses, “let alone any debt service.” *Id.* The Court acknowledged that Congress was concerned about the relative unfairness of lengthy delay in Chapter 11 cases involving SARE projects, sought to expedite the proposal of meritorious plans of reorganization, and where the case does no “kick forward toward confirmation, a debtor must compensate its mortgagee ... by payment of interest at the original contractual rate,” p. 4.

The Court further held that “any proffer of cause for excusing a debtor’s compliance must include a concrete substitute for the creditor’s statutorily-fixed expectation of payment, if the debtor is to be excused.” In articulating this different standard of “cause” the Court held that “[u]nder Section 362(d)(3), however, the focus is entirely on an *in hand realization of cash* by the creditor, *during the pendency of the case*, while the property remains in the debtor’s hands. If a debtor is to be excused from having to surrender that cash right away, it must demonstrate a very substantial likelihood that the creditor would receive an equivalent

value from another source, quickly enough to minimize its risks of recovering the time value of money,” pp. 4-5 (emphasis in original). The Court then denied the Motion because the debtor failed to address the SARE issues and limited its response to an argument that “cause” is established by the alleged equity in the property. *Id.*

Heather Apartments does contain a ray of hope for SARE debtors who may be up to the challenge of establishing “cause” to delay Section 362(d)(3) payments until a real estate sale has closed. The Court did not completely rule out an asset sale as a substitute for the payments required under Section 362(d)(3)(B), noting “if it were to be considered, the debtor should bear a heavy burden of production as to the *likelihood* that a sale will close promptly, and that there would be enough proceeds to serve the needs honored by the statute,” suggesting that a binding purchase agreement, binding lender commitment and a demonstration that the buyer has “satisfied the ministerial minutiae for closing” would be required, p. 4.

(c) Land Preserve – Is Equity Enough?

The Debtor In re Land Preserve, LLC, 2007 WL 19640463 (Bankr. D. Conn. July 2, 2007) managed to remain in chapter 11 for almost nine months without making a single payment to its secured creditor. Unfortunately, like the debtor in Heather Apartments, the debtor admitted it was a SARE debtor, argued that equity in the property is sufficient to defeat relief from the automatic stay, and inexplicably failed to file a plan of reorganization prior to the expiration of the 90 day time period. The creditor’s relief from stay motion was filed seven days after the October 20, 2006 petition, came on for hearings December 27, 2006 and March 2, 2007, and the Court ultimately ruled against the debtor in its July 2, 2007 decision.

Both Heather Apartments and Land Preserve demonstrate cases in which debtors have ignored the SARE definition and Section 362(d)(3) to their extreme peril. In each case, the debtor has failed to timely and appropriately address the SARE-specific issues, relying instead on the “general bromides of bankruptcy” in an effort to defeat a motion for relief from stay solely on the basis of “equity.” Both debtors inexplicably failed to prepare and file a plan of reorganization before the 90th day, post-petition, a legitimate alternative to the payment of monthly interest at the contract rate which is expressly identified by Section 362(d)(3) and, provided that the plan “has a reasonable possibility of being confirmed within a reasonable time,” achieves the goal of obtaining the time necessary to successfully reorganize.

(d) Club Golf Partners – A Golf Club is Not SARE

On the petition date, the Debtor in In re Club Golf Partners, L.P., 207 WL 1176010 (E.D. Tex. April 20, 2007) filed a Motion for Determination that it is not subject to Section

362(d)(3). The debtor owns and operates a golf club which includes an 18 hole golf course, a driving range, tennis courts, and a casual club house with a casual dining restaurant.

Judge Rhoades granted the motion holding that the debtor's "business activities are variegated and multiple and are dependent on the entrepreneurial efforts and ongoing hard work of its principals and its other employees, and because it does not simply lease the property to tenants" as the owner of an apartment house does. The Court's reasoning was based upon the following interpretation of the SARE definition:

According to an active-versus-passive criterion that inquires into the nature of revenue generation on and by the property, that is, whether the revenue is the produce of entrepreneurial, active labor and effort – and thus not single asset real estate – or is simply and passively received as investment income by the debtor as the property's owner – and thus is single asset real estate. Real property that, for the generation of revenues, requires the active, day-to-day employment of workers and managers other than or additional to the principals of the debtor, and that would not generate substantial revenue without such labor and efforts, should not be regarded as single asset real estate. [Citation omitted.]

Golf Club Partners, L.P., p. 4. *See also* other cases holding a golf course is not SARE, In re Larry Goodwin Golf, Inc., 219 B.R. 391 (Bankr. M.D. N.C. 1997 (golf course, cart rentals, pool, concessions and undeveloped land for sale constituted separate businesses); In re Prairie Hills Golf & Ski Club, Inc., 255 B.R. 228 (Bankr. D. Neb. 2000) (develops and sells residential lots, continues to develop golf and ski areas, maintains golf and ski areas, sells liquor in the clubhouse and operates farmland); In re Perry Hollow Golf Club, Inc., 2000 WL 33679447 (Bankr. D.N.H. 2000) (golf course operation includes pro shop, food and beverage sales); and In re CGE Shattuck, LLC, 1999 WL 33457789 (Bankr.D.N.H. 1999) ("operation of a golf course involves significant income-producing activities that exist independently of the operation of real estate").

4. Other Cases of Interest

(a) Not SARE

In a case involving an unsuccessful motion by a secured creditor, the Court held that a debtor whose single asset was an 89 room hotel with room-cleaning, laundry service, continental breakfast, pool, phone and internet services was not a SARE debtor. *See, In re Whispering Pines Estate, Inc.*, 341 B.R. 134 (Bankr. D. N.H. 2006); *accord, In re CBJ Dev., Inc.*, 202 B.R. 467 (9th Cir. BAP 1996) (63 room hotel, similar facts, same result). *See also, In re KKemko, Inc.*, 181 B.R. 47 (Bankr. S.D. Oh. 1995) (marina docks were not real estate and were a business).

(b) Classic “Dirt” Cases

Depending upon your jurisdiction, there may be an open issue as to whether or not undeveloped or raw land that does not produce income is within the SARE definition. However, this question has been decided in the affirmative in the Ninth Circuit, South Carolina, Illinois and Pennsylvania. *See, In re Oceanside Mission Assoc.*, 192 B.R. 232 (Bankr.S.D. Ca. 1996); *In re Kinard*, 2001 WL 1806039 (Bankr. D. S.C. 2001); *In re Syed*, 238 B.R. 133 (Bankr. N.D. Ill. 1999); and *In re: Penisgnorkay, Inc.*, 204 B.R. 676 (Bankr. E.D. Pa. 1997).

5. Application of Payments

Prior to BAPCPA, a SARE debtor was required to make monthly payments "equal to interest at a current *fair market value* rate on the value of the creditor's interest in real estate." 11 U.S.C. § 362(d)(3)(B) (prior) (emphasis added). One positive result of BAPCPA is the change in the applicable rate of interest to "an amount equal to interest at the then applicable *non-default contract rate* of interest on the value of the creditor's interest in the real estate[.]" 11 U.S.C. §362(d)(3)(B)(ii) (as amended) (emphasis added), which should serve to eliminate some litigation and facilitate the administration of SARE cases.

Despite this clarification, one open question remains with respect to whether or not the payments will be attributable to interest or principal, because the language of the statute does not call these payments “interest payments.” It appears that the answer to this question will most likely turn on the determination of the creditor's status as undersecured or oversecured and the governing case authority. Colliers provides this supporting comment:

It should be noted that the payments are not necessarily payments of interest, but are in an amount “equal to” interest at the then applicable nondefault contract rate of interest. This suggests that the payments may be applied to principal rather than interest, which, if the creditor is undersecured, would reduce the obligation with

which the debtor must deal in a plan.

3 Collier on Bankruptcy, ¶ 362.07[5], p. 362-103 (15th Rev. Ed. 2007).

6. Relief From Stay is Not Mandatory Under Section 362(d)(3)

Although Section 362(d)(3) appears to mandate some relief where the debtor fails to satisfy the “plan or payment” requirements, at least one court has held that the unconditional lifting of the stay is *not* mandatory when ruling upon a motion pursuant to Section 362(d)(3), In re Archway Apartments, Ltd., 206 B.R. 463, 465 (Bankr.M.D.Tenn.1997). In Archway, the Chapter 11 debtor had failed to file a plan within the 90 day period by "simple, honest error" with no attempt by the debtor to deliberately delay the rights of the creditor. *Id.* Judge Lundin felt compelled by Section 362(d)(3) to grant relief to the creditor but he did so in the form of conditioning the stay upon a drop dead date for confirmation of the plan, rather than unconditional relief from the automatic stay. In doing so, he reasoned "[w]hile Congress may have enacted Section 362(d)(3) to protect the interests of secured creditors in single asset real estate cases, it did not completely abrogate the bankruptcy court's discretion to tailor the appropriate relief for failure to strictly comply with the requirements of Section 362(d)(3)." *Id.*

Indeed, the legislative history behind Section 362(d)(3) provides that: "[t]his amendment will ensure that the automatic stay provision is not abused, *while giving the debtor an opportunity to create a workable plan of reorganization.*" S.Rep. No. 168, 103d Cong., 1st Sess. (1993) (emphasis added); *accord In re LDN Corp.*, 191 B.R. 320, 326 (Bankr.E.D.Va.1996); Collier on Bankruptcy, 362.07[5][b] n.81 (15th rev. ed. 1997).

LDN Corp. does not require that relief from stay must be granted in response to a motion brought under Section 362(d)(3). In fact, under Section 362(d), the Bankruptcy Court is permitted to grant four different kinds of "relief," to wit: "terminating, annulling, modifying, or conditioning such stay." Consequently, LDN Corp. can be harmonized with the Bankruptcy Code to permit the Bankruptcy Court to "tailor appropriate relief" in the granting mandatory relief required by Section 362(d)(3), such as conditioning the stay upon a drop dead date for confirmation of a plan.

7. SARE Complicated by Section 1112

BAPCPA has increased the grounds for appointment of a trustee, conversion or dismissal; created a new test for dismissal, conversion or appointment of a trustee; and established a new procedure for section 1112 motions. Section 1104 has been amended with a new subsection (a) which states that the grounds for appointment of a trustee include all of the grounds for conversion or dismissal. Additionally, new Section 1104(e) permits the U.S. Trustee to seek appointment of a trustee if there are reasonable grounds to suspect fraud, dishonesty or criminal conduct on the part of debtor's management.

Section 1112 now contains 16 grounds to convert or dismiss a case, and where "cause" is established, Section 1112(b) appears to mandate conversion or dismissal, with appointment of a trustee as the Court's only alternative. New questions of fact are created by the matters which must be demonstrated to successfully defend such a motion. Motions must be heard within 30 days and decided within 15 days thereafter.

In certain jurisdictions, when a debtor is faced with a motion under Section 1112, it may be possible to use a statutory construction argument that with respect to a SARE case, the more specific SARE provisions contained in Section 362(d)(3) demonstrate a Congressional intent to override the more general provisions of Section 1112. In fact, this very argument was advanced and adopted by the Court in In re Jacksonville Riverfront Development, Inc., 215 B.R. 239 (Bankr. M.D. Fla. 1997).

Unfortunately, in the 11th Circuit, Jacksonville and other similar cases were expressly overruled when the 11th Circuit reaffirmed the continued vitality of the "single asset" bad faith standard established by In re Phoenix Piccadilly, Ltd., 849 F.2d 1393 (11th Cir. 1988), notwithstanding the separate statutory scheme for SARE cases. *See, In re State Street Houses, Inc.*, 356 F.3d 1345 (11th Cir. 2004); *accord, In re Siegel*, 340 B.R. 638 (Bankr. S.D. Fla. 2006) (applying Phoenix Piccadilly to a converted chapter 11 case, but finding no bad faith or abuse of the system); and In re Detienne Associates L.P., 342 B.R. 318 (Bankr. D. Mt. 2006) (non-SARE case dismissed for bad faith). Consequently, in a jurisdiction such as the 11th Circuit, a SARE debtor may also be faced with a motion to dismiss, convert or appoint a trustee based in part upon its "single asset" nature.

C. Other Topics Relevant To "Dirt" Cases

1. Cure and Reinstatement of Fully Accelerated Debt

Cure and reinstatement is clearly one of the most powerful tools in a "dirt" debtor's arsenal because it can avoid cram down and other costly plan confirmation battles. A debtor who is faced with the pre-petition acceleration or maturity of multi-million dollar secured debt, with the corresponding default rate of interest, can pay its secured creditor the dollar amount of the missed installment payment(s) plus the creditor's actual pecuniary costs incurred as a result of the bankruptcy, and thereby cure and reinstate the pre-petition debt. Cure and reinstatement will also eliminate any balloting or cram down issues because a creditor that is cured and reinstated is an "unimpaired" creditor for the purpose of plan confirmation.

The concept of impairment under Section 1124 determines whether a class of claims or ownership interests is required to vote on a plan of reorganization. A class that is not impaired under Section 1124, is conclusively presumed to have accepted the Plan pursuant to Section 1126(f), and a formal vote of such class is not required. *See, e.g., In re 405 N. Bedford Dr. Corp.*, 778 F.2d 1374, 1379-80 (9th Cir. 1985); *see also In re Barakat*, 99 F.3d 1520, 1527 (9th Cir. 1996). In general, if a creditor's legal, equitable, or

contractual rights are altered, the class will be deemed impaired. Congress, however, recognized the harsh result that this rule would have on some debtors, and it therefore carved out an exception to this general rule by enacting Section 1124(2), often referred to as the "Cure and Reinstate" provision.

Section 1124(2) allows the Plan to reverse a contractual or legal acceleration of a claim or interest and reinstate the contractual maturity date, and therefore, place the parties in their original position prior to the event of default. To effectively "deaccelerate" a claim or interest, Section 1124(2) requires the debtor to "cure" any defaults, other than an *ipso facto* default of a kind specified in Section 365(b)(2), or of a kind that Section 365(b)(2) expressly does not require to be cured. *See*, Section 1124(2)(A). Such a plan of reorganization can cure an accelerated loan, reinstate the contract maturity date and place the parties into the same position they were in immediately before the default occurred. Even "a creditor, holding a final judgment of foreclosure, is not impaired under section 1124(2) if the debtor's plan of reorganization cures the default of the accelerated loan before the foreclosure sale actually occurs or before a judgment merges into the mortgage under state law, thereby transferring title to the mortgagee," In the Matter of Madison Hotel Associates, 749 F.2d 410, 418-422 (7th Cir. 1984).

Although the Bankruptcy Code requires a chapter 11 plan to "provide adequate means for the plan's implementation, such as ... curing or waiving of any default," *see* Section 1123(a)(5), the Bankruptcy Code does not explicitly define "cure." The Ninth Circuit has adopted the Second Circuit's definition, which is as follows:

A default is an event in the debtor-creditor relationship which triggers certain consequences. ... Curing a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified. This is the concept of "cure" used throughout the Bankruptcy Code.

See, In re Southeast Co., 868 F.2d 335, 338 (9th Cir. 1989); and In re Entz-White Lumber and Supply, Inc., 850 F.2d 1338, 1340 (9th Cir. 1988); both citing In re Taddeo, 685 F.2d 24, 26-27 (2d Cir. 1982).

[B]y curing the default, [debtor] is entitled to avoid all consequences of the default – including higher post-default interest rates. This result is consistent with the treatment by other courts of the Bankruptcy Code's cure provisions.

In re Entz-White Lumber and Supply, Inc., 850 F.2d at 1342 (promissory note that matured pre-petition was cured and reinstated, avoiding all consequences of default including payment of default interest).

Since 1988, the Ninth Circuit has uniformly followed the Entz-White

interpretation of "cure," and it is still the law of the Ninth Circuit. *See In re Southeast Co.*, 868 F.2d at 338 (although not being required to pay post-default penalty interest is a modification or impairment, nevertheless the debt may be deaccelerated, reinstated, and any actual damages paid so as to leave the debt unimpaired); *In re Udhus*, 218 B.R. 513 (9th Cir. BAP 1998). *See also*, *In re Sylmar Plaza, L.P.*, 314 F.2d 1070, 1075 (9th Cir. 1988), *cert. den.* 123 S.Ct. 2097 (2003) (plan filed solely to cure and reinstate debt is not bad faith *per se*); and *In re Phoenix Business Park Ltd.*, 257 B.R. 517, 519-20 (D. Ariz. 2001) (1994 Amendments to the Bankruptcy Code did not legislatively overrule *Entz-White* and its progeny).

A cure and reinstatement plan must also provide for the payment of compensation to the holder of the claim or interest for any damages incurred as a result of any reasonable reliance by the holder on the contractual provisions or applicable law that permitted acceleration. *See*, Section 1124(2)(C). "The logic behind Section 1124(2)(C) is to protect an accelerating creditor from out-of-pocket losses incurred when a debtor files bankruptcy and undoes the acceleration." *In re Phoenix Business Park Ltd.*, 257 B.R. at 523. Such costs would include legal fees, foreclosure notice fees, court costs, and the like, but they would not include late fees. *Id. Accord, In re the Countrywood Investment Group, Ltd.*, 117 B.R. 338 (Bankr. M.D. Tenn 1990); *In re Rolling Green Country Club*, 26 B.R. 728, 733 (Bankr. D. Minn. 1982).

One reason for enacting the exception contained in Section 1124(2) was to make it clear that a creditor who receives the complete benefit of its original bargain is not impaired even if the Plan modifies the creditor's rights by preventing the creditor from using its contractual or legal right of acceleration and foreclosure to terminate a valuable contract of the debtor.

The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. The holder of a claim or interest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain.

In re Southeast Co., 868 F.2d at 335 (citing S. Rep. No. 989, 95th Cong., 2d Sess. 120, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5906).

In fact, the "impairment" exception of Section 1124(2) demonstrates that Congress believed reorganization is economically more efficient than liquidation.

Often, the return on assets that a business can produce is inadequate to compensate those who have invested in the business. Cash flow problems may develop, and require creditors of the business, both trade creditors and long-term lenders, to wait for payments of their claims. If the business

can extend or reduce its debts, it often can be returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.

In the Matter of Madison Hotel Assoc., 749 F.2d at 420 (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 220, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6179).

2. Mootness, Feasibility and “Release Price” Cram Down

A recent 10th Circuit BAP opinion involving a pre-BAPCPA case, In re Investment Company of the Southwest, Inc., 341 B.R. 298 (10th Cir. BAP 2006), is instructive on the issues of mootness, feasibility and a debtor’s unsuccessful attempt to cram down a release price repayment plan on its oversecured creditor, thereby eliminating the creditor’s additional security and cross-collateralization. The debtor is a real estate developer who filed for chapter 11 relief before its oversecured creditor could execute upon a 2002 judgment of foreclosure. In 2006, the debtor had owned the real estate for 15 years, started improvements 10 years prior, sold one lot prior to the 2001 foreclosure litigation, sold 15 more pre-confirmation and at plan confirmation had 119 remaining lots for sale. 341 B.R. 303.

In 2004, the bankruptcy court confirmed the debtor’s cram down plan that required an oversecured creditor who also held a judgment of foreclosure to release its existing liens and replace them with a repayment scheme based upon release price payments from the sale of the 119 lots which were significantly less than the market value of the property. A key component of the debtor’s plan was a drop-dead provision which allowed the secured creditor to quickly resume its state court foreclosure proceedings in the event of the debtor’s default under the confirmed plan.

The 10th Circuit BAP initially addressed the debtor’s motion to dismiss the appeal on grounds of mootness. Notwithstanding substantial consummation and the absence of a stay pending appeal, the BAP found that reversal of the confirmation order would not adversely impact the rights of third parties, citing the secured creditor’s consent to allow initial distributions to remain in place and the fact that the other distributions made were in the form of revised promissory notes. Additionally, there had not been any post-confirmation cash infusions or sales conducted outside the ordinary course of business. The debtor’s motion to dismiss the appeal as moot was therefore denied, as having failed to sustain its burden of proof of equitable mootness under In re Continental Airlines, 91 F.3d 553 (3rd Cir. 1996). 341 B.R. at 310.

The BAP next addressed feasibility of the debtor’s confirmed plan. Despite the fact that the plan required payments to secured creditors for seven and 20 years, the debtor submitted cash flow projections which covered only two years and were based upon payment amounts prepared for an earlier plan that called for a significantly longer repayment period and lower interest rates. Those projections as well as the debtor’s operating reports, were all cash flow negative. The plan also required balloon payments

to two creditors in five and seven years, but the debtor failed to present any evidence of its ability to make those payments at plan confirmation. 314 B.R. at 313.

In ruling upon feasibility the BAP reasoned:

A debtor like ICS, which is in the business of selling real estate held as inventory, is not required, in its plan, to predict with precision which of its dozens of lots will sell first, or require specific deadlines for the sale of specific assets ... That said, there must be some evidence that Debtor's overall plan to sell part or all of its inventory is reasonable, based on either past performance or identifiable factors indicating the likelihood of probable future performance, or both. What is important is that the trier of fact have evidence on which to base its finding that it is more likely than not that Debtor will be able to make all payments required by the Confirmed Plan.

In re Investment Company of the Southwest, Inc., 341 B.R. at 315.

The BAP then concluded that the plan was not feasible because: (1) debtor's own operating reports showed it had not sold properties during the post-confirmation period at a pace that is required to fund its plan; (2) there was a lack of evidence to explain how balloon payments were reasonably funded; and (3) the drop-dead provision did not make the -plan feasible as a matter of law. 341 B.R. at 315-317.

In reviewing the release price cram down provisions of the plan, the BAP provides the following analysis:

When a plan proposes to substitute or alter collateral, however, a creditor receives the indubitable equivalent of its claim only if the substituted collateral does not increase the creditor's exposure to risk. [Citation.] Where collateral is to be substituted, two attributes of the substituted collateral – its *value* and the degree of *risk* that it imposes on the secured creditor – determine whether the new collateral is sufficiently “safe” and “completely compensatory.”

New collateral with a value less than the value of the originally-pledged collateral cannot be “completely compensatory.” Similarly, new collateral with a value projected to be equal to, or even more than, the original collateral is not “completely compensatory,” if the new collateral is so much riskier than the original collateral that there is a substantially greater likelihood that the secured creditor will not ultimately be paid.

In re Investment Company of the Southwest, Inc., 341 B.R. at 319.

The BAP then rejected the release price cram down, finding that: (1) there is undisputed evidence that the aggregate of release prices is less than the payments due the secured creditor under the plan; (2) it is not sufficient to require the secured creditor to look to the sale of personal property not subject to its lien to satisfy its debt; (3) the hypothetical example provided by the secured creditor which details a method by which debtor could sell its more valuable and liquid assets, leaving the secured creditor with a lien on less valuable and less liquid assets precludes a finding of indubitable equivalent; (4) the plan eliminates any equity cushion the secured creditor enjoyed pre-petition; and (5) a quick default provision does not cure the lack of indubitable equivalence that results from the reduction of collateral value and quality through the release price mechanism. 341 B.R. 324-325.

See also, In re Webster, 84 B.R. 770 (Bankr. N.D. Fla. 1998) (court denied plan confirmation of individual chapter 11 plan proposed by electrician that required release of secured creditor's collateral and substitution of five acre tracts owned by debtor's mother to be repaid by release prices implemented by subdivision and sale of debtor's real estate, where debtor failed to demonstrate necessary cash flow and expertise to implement plan; case was *sua sponte* dismissed). *C.f., In re TMA Associates, Ltd.*, 160 B.R. 172 (D. Colo. 1993) (District Court affirmed cram down of negative amortizing plan that provided oversecured creditor would receive all principal and interest due through payment of release prices over a five-year term of plan because creditor was protected by an equity cushion in the various parcels).

3. Contractor and Mechanics Lien Issues

Real estate cases may also include a multitude of issues arising from mechanics and materialmen liens. In Nevada, the creation of a mechanics lien is governed by NRS 108.222, *et seq.*, and because these statutes are in derogation of the common law, they are strictly construed. In order to create and perfect a mechanics lien, certain specific steps must be accomplished within a particular time frame. They include pre-lien notice, recordation of the lien and the commencement of an action to foreclose the lien. *See* NRS 108.222, 108.226, 108.227, 108.233, 108.244, and 108.245. Other states have similar procedures and statutory schemes; however, it is beyond the scope of these materials to provide an in depth analysis of each of these processes and procedures.

Frequently, a chapter 11 case is filed prior to the completion of each step necessary to perfect the mechanics lien. Under the Bankruptcy Code, a mechanics lien is a statutory lien governed by Section 545. Any defects in the perfection of a mechanics lien can therefore be attacked and possibly avoided pursuant to Section 545(2).

With certain exceptions, the Bankruptcy Code permits the perfection of a mechanics lien after the commencement of a bankruptcy case. A mechanics lien recorded after the filing of the petition does not violate the automatic stay, Section 362(b)(3). This same section also permits any additional perfection to be made by notice pursuant to Section 546(b)(2), such as the filing of a notice in lieu of commencing the

lien foreclosure action. *But see In re Worldcom, Inc.*, 362 B.R. 96 (Bankr. S.D. N.Y. 2007) (contractor failed to give Section 546(b)(2) notice, filed post-petition action to foreclose lien which was voluntarily dismissed as part of a settlement with debtor; and after engaging in an extensive analysis of the interplay of Nebraska mechanics lien law and Sections 108(c), 362(b)(3), 546(b)(2), 1124, 524, which distinguishes lien perfection from lien enforcement, the court sustained the debtor's objection to contractor's oversecured claim).

Mechanics lien claimants frequently assert that their liens are superior to a senior secured creditor of the debtor. In Nevada, such claims are frequently premised upon Nevada statutes which provide priority if construction commenced prior to the recordation of the lenders' deed of trust, or based upon future advances under the deed of trust, raising a tension between Nevada statutes and common law. *Compare* NRS 106.300, *et seq.*, with *Charitz v. Cardelli*, 279 P. 761 (Nev. 1929) and *Southern Trust Mortgage Co. v. K & B Door Co.*, 763 P.2d 353 (Nev. 1988) These issues are most often determined by the state court in the prepetition mechanics lien litigation, but they are sometimes addressed in the Bankruptcy Court as well.

The Nevada *Sunrise Suites*, *Aladdin* and *Resort at Summerlin* chapter 11 reorganization cases involved extensive mechanics lien litigation, some of which included priority litigation. The lien priority issues raised by mechanics lien claimants in the *Resort at Summerlin* case were ultimately resolved by the Nevada Supreme Court, *see, In re Resort at Summerlin Litigation*, 127 P.3d 1076 (Nev. 2006). In light of current economic and market conditions, these and other mechanics lien issues will continue to arise in real estate bankruptcy cases.

4. Brownfield Industry Cases

Two recent cases have been filed which involve the "Brownfield Industry" (development, management and remediation of environmentally impacted real estate). They are:

The Environmental Trust, Inc., 05-02321-LAH, San Diego, California: TET, California non-profit public benefit corporation formed to acquire, maintain and monitor environmentally threatened and sensitive real estate and engaging in environmental land mitigation and credit sales, filed a chapter 11 case on March 23, 2005. Chapter 11 relief was necessary due to chronic endowment underfunding, cost overruns and inefficiency due to poor planning and losses in the Endowment Fund due to stock market factors. On the petition date, TET owned 2,380 acres (92 parcels) in fee simple, held conservation easements on 1,202 acres (37 parcels) and the associated Endowment Fund. TET's plan confirmed in February of 2006 provides for TET's liquidation and eventual cessation of business by sale of assets which can be sold and serially offering its interests to "Permittees" (developers or those subject to conservation statutes), "Designated Holders" (qualified not-for-profit entities), the United States Fish and Wildlife Service and the California Department of Fish and Game. Any property not accepted through this

process will be abandoned to the State of California.

RFI Realty, Inc., 04-10486-CGC, Phoenix, Arizona: Three affiliated chapter 11 debtors involved with the “brownfield industry” and “brownfield investments” (development, management and remediation of environmentally impacted real estate) filed for relief on June 15, 2004. Chapter 11 relief was necessary in order to resolve multiple lawsuits involving Zurich Insurance Company, lien claimants and others. Pre-confirmation, the Debtors reached a compromise and settlement with Zurich Insurance Company and obtained approval for a sale of substantially all of their assets to a third party for \$51.5 million, a profit participation, payment of \$15 million towards a remediation settlement, and payment of \$4 million to satisfy operating and administrative expenses. The Plan of Reorganization implemented the previously approved Zurich settlement and asset sale.

5. Developer Cases

A sampling of cases involving debtors who are developers is as follows:

Turner-Dunn Homes, 06-0961-JMM, Tucson, Arizona: Five affiliated chapter 11 Debtors involved with construction, development and sale of residential homes in two separate subdivisions in Tucson, Arizona filed for chapter 11 relief on August 14, 2006, in the face of a state court receivership action by its primary secured creditor. Debtors were subject to state court litigation regarding over 400 mechanics and materialmens lien claims, resignation of the qualified employee needed to maintain their contractor’s license, no construction activity for two months pre-petition, leaving about 150 partially constructed homes exposed to the elements, failing to insure or secure construction sites, inability to account for over \$2 million in construction draws and gross mis-management both pre- and post-petition. A chapter 11 Trustee was appointed. The case resolved by an asset sale for a price sufficient to satisfy all secured creditors, including mechanics and materialmens lien claimants, and administrative claims.

Sage Ranch Estates, LLC, 06-50111-GWZ, Reno, Nevada: The chapter 11 petition was filed on March 9, 2006, by James Cutler on behalf of the debtor. Pre-petition, Cutler was convicted of bank and tax fraud, serving a one year sentence. He was also ordered to pay restitution of \$1.38 million and forfeit assets of \$29.775 million. Between his April 2002 indictment and April 2005 conviction, Cutler formed the debtor to develop and construct 100 homes in Northern Nevada. The chapter 11 petition was filed in the midst of litigation involving a business partner in the debtor. In response to the partner’s Motion to Dismiss, Cutler consented to the appointment of a chapter 11 trustee.

VesCor Development 3, LLC, 06-12094-MKN, Las Vegas, Nevada: On August 16, 2006, three single asset real estate entities owning real estate at the Apex Industrial Park North of Las Vegas, Nevada, filed for chapter 11 relief to avoid a foreclosure sale of their primary assets. Adequate protection payments were not

commenced, and two days prior to the expiration of the 90 day time period of Section 362(d)(3) the debtors filed a Joint Plan of Reorganization which proposed to cure and reinstate the fully accelerated debt of about \$54 million by payment of the missed installment payments of approximately \$7 million within 90 days after plan confirmation.

The deed of trust holders challenged the plan's classification scheme, attacked the cure period and sought relief from the automatic stay. In response, the debtors amended their plan to reduce the cure period to 70 days from plan confirmation. Judge Nakagawa denied the creditor's motions and required the debtors to further amend the cure and reinstatement language of their plan to classify the definitions and provisions for payment of the secured creditor's actual pecuniary losses. After contested plan confirmation hearings, in March of 2007, Judge Nakagawa confirmed the Debtors' Joint Plan.

6. Condominium Cases

Condominium cases present an interesting mix of real estate issues. They include the ownership and ability to transfer certain property rights, such as entitlements (zoning, planning and subdivision documents and rights), and whether or not those matters require third party consent. *See, e.g., In re Northwood Properties, LLC*, 356 B.R. 81 (D. Mass. 2006) (although plan of reorganization successfully revised phasing rights by the acceptance of 83% of unit-owners, District Court vacated and remanded order approving reorganization plan that gave debtor/developer full control over development rights because Massachusetts law requires the consent of objecting unit-owners before developer can move forward with construction of new units).

In Nevada, current market conditions have resulted in chapter 11 petitions filed for two Las Vegas high-rise condominium projects. Both were commenced by involuntary petitions, and one remains an involuntary debtor. One project never broke ground on construction; the other has commenced construction but it has been stalled for more than a year. The projects are:

Nevada Towers, LLC, 07-11325-BAM, Las Vegas, Nevada: An involuntary chapter 7 petition was filed by three undersecured mechanics lien creditors on March 14, 2005, which was consolidated with the March 15, 2007, a voluntary chapter 11 petition. Nevada Towers owns three parcels of real estate near the Las Vegas Convention Center, each of which is improved by a residential apartment building. In November of 2005, Nevada Towers received County approval to build Las Vegas Central. The \$400 million Las Vegas Central project proposed to build 1,000 high-end residential condominiums in two 40-story towers, with prices starting in the \$300,000s, eight swimming pools, 100,000 square feet of commercial retail space and other amenities by summer of 2007. Due to changed market conditions, the project did not move beyond architectural, planning and design work. The debtor did not oppose a motion to designate it as a single asset real estate debtor, and a cash collateral agreement entered into with the two primary secured creditors contains a blueprint for resolution of the case. The cash collateral agreement establishes deadlines for filing a plan and selling the debtor's primary assets, requiring a sale no later than October 12, 2007, with substantial consummation of the

plan required by December 3, 2007.

Tower Homes, LLC, 07-13208-BAM, Las Vegas, Nevada: On May 31, 2007, an involuntary chapter 11 petition was filed against Tower Homes by three undersecured mechanics lien claimants, and five more mechanics lien claimants have joined the petition. Tower Homes is developing yet another Las Vegas high-rise residential condominium project, Spanish View Tower Homes, described as a luxurious 15-acre guard gated community consisting of three 18-floor towers, seven acres of recreational facilities and four floors of inside parking, with prices ranging from \$800,000 to \$8 million per unit, depending on location. Although construction has commenced, it is far from completion and there has been no progress on the project for over a year. Mechanics liens in excess of \$30 million encumber the property. The holder of a first deed of trust on the property was set to foreclose in early June, 2007, and Tower Homes is engaged in numerous lawsuits, including the mechanics lien claims and a lawsuit by condo purchasers who claim Tower Homes has misappropriated their deposits. Tower Homes has contested the involuntary chapter 11 petition. Discovery is ongoing at this time. A summary judgment motion will be heard on August 15, 2007, and if necessary, a trial on the involuntary petition will be held October 5, 2007.

USACM Investors VI, LLC, 06-13925-LBR, Las Vegas, Nevada (an affiliate of the USA Capital cases (06-10725-LBR)): On December 15, 2006, an involuntary chapter 11 petition was filed by representatives of secured creditors of the debtor, who owes over \$20 million to various persons and entities holding undivided interests in a promissory note secured by a deed of trust on the debtor's primary asset. The debtor owns a hotel in Palm Springs known as the Hotel Zoso, formerly known as the Marquis Hotel. A voluntary chapter 11 petition was subsequently filed by the Trustee for the manager of the debtor, and the cases were consolidated. The case presents some unique real property issues arising from a lease entered into with a Native American tribe, as well as other issues arising from condominium units located at the hotel. Pre-petition negotiations for sale of the property have resumed, post-petition.

7. Contractors and Sub-Contractors

Sundance Framing, Inc., 05-17008-RTB, Phoenix, Arizona: Framing sub-contractor filed for chapter 11 relief on September 8, 2005, alleging that it was required to seek bankruptcy relief because of the 1999 and 2004 bankruptcy filings of three developer clients, lost revenue resulting from the need to "competitively underbid" for new contracts due to increased competition for fewer jobs and cash flow problems which resulted in severe delinquencies in payment of employee withholding taxes. Sundance was able to enter into and complete numerous contracts post-petition, including one contract which permitted a developer to advance post-petition operating funds to Sundance in conjunction with the contract. Additionally, Sundance was able to continue post-petition operations, participating in several opportunities to bid new jobs. The plan confirmed April 12, 2007, restructures and satisfies numerous secured debts, pays priority debts with interest at the rate of \$11,000 per month, and will pay 35% of

unsecured claims within one year of plan confirmation.

Jade Summit, LLC, 06-12180-BAM, Las Vegas, Nevada: On August 23, 2006, the debtor, an offsite and underground sub-contractor, filed for chapter 11 relief. The primary focus of the case has been to marshal assets, collect accounts receivable and resolve pre-petition claims, and litigation on some of those matters is anticipated. Debtor's exclusivity period was extended to February 21, 2007, does not appear to have been further extended, and a plan has not been filed by anyone.

Americabuilt Construction, Inc., 07-607-JMM, Tucson, Arizona: On April 12, 2007, the debtor whose business is building and construction services, filed for chapter 11 relief. An unsecured creditors committee has been appointed.

American Landmark Group, Inc., 07-06060-PWB, Atlanta Georgia: On June 6, 2007, the debtor, a fence builder in Marietta, Georgia, filed for chapter 11 relief. Describing itself as Georgia's largest fence-builder, it appears that the company has now gone out of business.

Luminate, LLC, 07-16392-SBB, Denver, Colorado: On July 11, 2007, the debtor, who provides domestic and international engineering consulting services, filed for chapter 11 relief. An emergency motion for authorization to pay critical vendors has been filed, seeking an order shortening time.

8. Commercial Real Estate

Sunwood Village Joint Venture Limited Partnership, 06-12463-BAM, Las Vegas, Nevada: On September 12, 2006, Sunwood, the owner of a 262-unit apartment complex in Las Vegas, commenced its chapter 11 petition based upon the maturity of the secured debt secured by the property which could not be refinanced due to state court litigation with an entity seeking to specifically enforce a contract for sale of the complex, and in response to which Sunwood has asserted certain counterclaims for fraud and damages. The state court litigation was removed to bankruptcy court by the plaintiff and it is pending as Adv. Proc. 06-1194. The removed action was bifurcated by Judge Markell into liability and damages phases, and the liability phase will be tried in August of 2007. The debtor's exclusive period to file a plan has been extended to September 10, 2007.

Altus Development Corp., 07-02719-SCC, Phoenix, Arizona: On June 13, 2007, the debtor filed a chapter 11 petition. The debtor owns the Queen Creek office building valued at \$3.5 million.