Section 362(d)(3): A Singular Provision of the Bankruptcy Code

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I. INTRODUCTION

When the Bankruptcy Code was first enacted in 1978, there was no specific limitation on the relief afforded a debtor with a case totally dependent on one piece of real estate, other than the pre-existing blanket requirement of good faith. When the Bankruptcy Code was amended in 1994, Congress decided there was a need to curb abusive filings and protect secured creditors who were being stayed for long periods of time with no remuneration and no real hope of reorganization by the debtor.[1] The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act amended 11 U.S.C. § 362(d)(3) yet again.[2] This Article examines that statute section and the requirements therein.[3]

II. THE STATUTE

Section 362(d)(3) states:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay— . . . (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

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1. The Congressional record states:

> [Section 218] amends the automatic stay provision of section 362 to provide special circumstances under which creditors of a single asset real estate debtor may have the stay lifted if the debtor has not filed a 'feasible' reorganization plan within 90 days of filing, or has not commenced monthly payments to secured creditors.

140 CONG. REC. 27,695 (1994).

2. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

3. Unless otherwise noted, this Article addresses the 2005 version of 11 U.S.C. § 362(d)(3) (2000 and Supp. 2005).

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 . . . .[4]

III. WHAT CONSTITUTES A SINGLE ASSET REAL ESTATE CASE

The term "single asset real estate" is defined in § 101(51B) as follows:

> The term "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.[5]

One widely accepted test for whether a debtor is a single asset real estate debtor is set forth in *In re Philmont Development Co.*[6] Under that test, § 101(51B) enumerates four criteria that must be satisfied before real property can be considered single asset real estate for purposes of § 362(d)(3). These criteria are:

> [(1) The subject real property must constitute a] single property or project, other than residential real property with fewer than 4 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 [on the real property] other than the operation of [such] property . . . . [; and (4)] the debtor's aggregate non-contingent liquidated secured debt must be less than $4,000,000[7] [in amount].[8]

4. 11 U.S.C. § 362(d)(3) (2000 and Supp. 2005).

5. § 101(51B).

6. *In re* Philmont Dev. Co., 181 B.R. 220, 223 (Bankr. E.D. Pa. 1995).

7. The $4,000,000 debt limit was eliminated in 2005.

After a clearly defined start, the issue of what is a "single asset real estate" debtor became obfuscated by a myriad of issues, such as: how much weight should be given to the sparse legislative history; whether the definition applies to undeveloped real estate; what happens if the debtor has income from other businesses on, or related to, the real estate; should the definition and the restrictions apply in a Chapter 7 case; and other issues limited only by the imagination of the litigants.

The following is a sampling of the cases on the subject of what constitutes a "single asset real estate" debtor: In *In re Syed*, a debtor operated residential rental units prior to the City of Chicago halting operations due to safety reasons.[9] The *In re Syed* court stated:

> Debtor's only argument contends that the phrase "generates substantially all of the gross income of a debtor" in section 101(51B) is limited solely to present income (since the Premises currently generates no income) and does not include future income (even though Debtor seeks rehabilitation of the property so that it will then generate substantially all of her income and substantially all income used to fund the plan). It seems clear, however, from the relevant case law, that "single asset real estate" includes property formerly used and intended to be used in the future as income producing property.[10]

The debtor in *Philmont* had assets consisting of two undeveloped lots and interests in partnerships which owned semi-detached houses.[11] The *Philmont* court stated:

> . . . The [c]ourt moreover concludes that the particular type of property in question here falls squarely within the purview of the statute. In this respect, the [c]ourt is strongly influenced by the drafters [sic] decision to include two separate classifications of real property within the purview of section 101(51B). Under section 101(51B), real property includes "single property" as well as "single project[s]." The [c]ourt is convinced that even if the Debtor limited partnerships' real property does not fall within the scope of a "single property," because it consists of a string of semi-detached dwellings, the term "single project" can reasonably be interpreted as broad enough to encompass the series of semi-detached houses owned by the limited partnerships. . . .
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> . . . .
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> As already noted, section 101(51B) provides that "single asset real estate" means real property constituting a *single property or project.*" In other words, the drafters of section 101(51B) defined single asset real estate cases to include two separate classifications, single properties and single projects. It is an "elementary canon of

8. *Philmont Dev. Co.*, 181 B.R. at 223.
9. *In re* Syed, 238 B.R. 133 (Bankr. N.D. Ill. 1999).
10. *Id.* at 140.
11. *Philmont Dev. Co.*, 181 B.R. at 223.

> construction that a statute should be interpreted so as not to render one part inoperative." The Debtors' argument that the semi-detached houses are two single properties, and, accordingly, are precluded, as a matter of law, from the purview of section 101(51B) does not take into account the two separate classifications drawn by the drafters within section 101(51B). Accordingly, the [c]ourt rejects the Debtors' position. To do otherwise, would render the phrase "single project" in section 101(51B) inoperative.[12]

Courts have been uniform in their conclusion that if a debtor's only asset is undeveloped, "raw" land, it meets the criteria of a "single asset real estate" case. For example, in *In re Pensignorkay, Inc.*, the debtor's only significant asset was a 275-acre tract of undeveloped real property.[13] The court, holding the debtor had a "single asset real estate," stated:

> First, the Property, a tract of undeveloped land consisting of two adjacent parcels of real property . . . that the Debtor acquired with the intention of creating subdivided parcels suitable for building and development . . . constitutes a "single property or project" within meaning of the statute. . . . Next, the fact that the real property is currently undeveloped and not generating any income for the Debtor is of little consequence for purposes of the inquiry here, since the [c]ourt is satisfied that Congress did not intend to excuse from compliance with the revised statute the class of debtors who hold undeveloped tracts of land for future development. . . . The third factor is also satisfied here since clearly the Debtor is not currently involved in any business activity on the Property other than its ownership of the realty.[14]

With respect to the application of the single asset real estate label to a debtor who owned only raw land, the court in *In re Oceanside Mission Associates* stated:

> If Congress intended to exclude raw land from the definition they would have done so specifically or at least explained in the comments that the definition was meant to exclude raw land. Without such an express exclusion this court does not believe that Congress meant for "single asset real estate" to mean less than it did before the sections were enacted. Although it requires a bit of a tortured reading, based upon the statutory purpose of the new sections, the limited legislative history, the usage of the term "single asset real estate" in prior case law and the fact that excluding raw land would simply not make sense, this [c]ourt concludes that "single asset real estate" includes undeveloped real property which generates no income.[15]

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12. *Id.* at 224-25 (citations omitted).

13. *In re* Pensignorkay, Inc., 204 B.R. 676 (Bankr. E.D. Pa. 1997).

14. *Id.* at 681-82 (citations ommitted).

15. Kraatz v. Oceanside Mission Assocs. (*In re* Oceanside Mission Assocs.), 192 B.R. 232, 236 (Bankr. S.D. Cal. 1996).

The extent of the activities extrinsic to the mere ownership and developing of the real estate becomes of vital importance in making the determination of whether the debtor is a "single asset real estate" debtor. For example, the court in *In re Kara Homes* stated:

> 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. In order to build and sell homes, it is often necessary to acquire the land on which to build the homes, and plan the community in which they lie; likewise, it is necessary to market those homes for sale and maintain the properties. All of the activities identified by the Debtors as reflective of "business operations" are merely incidental to the Affiliated Debtors [sic] efforts to sell the [sic] these homes or condominium units and do not constitute substantial business, as illustrated in *Kkemko*. Thus, the [c]ourt finds that the Affiliated Debtors fall within the definition of "single asset real estate" debtors and, as such, 11 USC § 362(d)(3) applies.
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> In reaching it's [sic] conclusion, the [c]ourt has taken a pragmatic approach to gauging the substantiality of the Debtors' business operations unrelated to the real estate. Simply put, the [c]ourt queries whether the nature of the activities are of such materiality, that a reasonable and prudent business person would expect to generate substantial revenues from the operation activities-separate and apart from the sale or lease of the underlying real estate. By way of example, with a country club or hotel, one could reasonably anticipate generating significant revenues from catering events, operating restaurants or casinos, providing services or selling merchandise-whether or not the operator was the owner of the real estate. In marked contrast, no one could reasonably expect to generate income from the activities undertaken by the Affiliated Debtors if the eventual sale of the real estate were not possible.[16]

On the other hand, if a debtor is involved in activities apart from mere ownership or development of the real estate, the debtor may be able to show these other sources of income are sufficient to take the debtor outside the scope of the moniker of "single asset real estate case," even if the other activities are seemingly related to the real estate. The court in *In re Prairie Hills Golf & Ski Club, Inc.* stated:

> Under the facts of this case, the single asset real estate definition is not applicable. The debtor has produced evidence establishing that Prairie Hills does not merely own income-producing buildings and raw land. Rather, it is involved in other significant income-producing activities: Prairie Hills develops and sells residential lots; constructs and maintains roads to the golf, ski, and residential areas; mows and removes snow from the golf course and residential areas; continues to develop the golf and ski areas; sells liquor in the club-

16. Kara Homes, Inc. v. Nat'l City Bank (*In re* Kara Homes, Inc.), 363 B.R. 399, 406 (Bankr. D. N.J. 2007).

> house; operates the farmland; and leases the golf and ski facilities to Blu-Sky Sports. Nearly half of the debtor's income for the years 1996 through 1999 was from the sale of residential lots. Slightly less than 35 percent of its income for that period was from rents paid by Blu-Sky Sports, while eight percent came from the sale of crops.[17]

The operation of a full service hotel has been found to include facilities and activities not entirely linked to bare ownership of the real estate. The court in *In re CBJ Development, Inc.* stated:

> The use of the present tense by Congress in § 101(51B) suggests that only current activities may be considered in determining whether the debtor is conducting substantial business activities other than the operation of the property. Any other conclusion would allow all debtors with unrented commercial space to evade § 362(d)(3) by simply declaring an intention to start a business.
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> Nevertheless, in this case, although the Debtor is not currently operating the restaurant and bar, the Debtor operated these businesses shortly before filing its petition for relief. In addition, the restaurant and bar had been previously operating on the property prior to the Debtor's acquiring title to the Hotel. The business are [sic] only closed for renovations which are being carried out promptly and the Debtor's investors have put a substantial amount of money into the renovations. Under these circumstances, we conclude that the restaurant and bar may be considered in determining whether there was substantial other business activity on the property. Accordingly, we conclude that restaurant, bar and gift shop constitute significant other business, sufficient to remove the Hotel from the definition of "single asset real estate."[18]

The operation of a marina and providing all of the accompanying services was sufficient to prevent the Debtor from being a "single asset real estate debtor" in *In re Kkemko, Inc.*[19] There, the court determined:

> The evidence established that the business of the marina is something more than simply rental of moorings. It stores, repairs, and winterizes boats. The marina provides showers and a pool, as well as other activities for those boaters who use it to moor their boats. It sells gas, an activity which according to debtor's disclosure statement it intends to offer. Other amenities such as concessions also produce revenue for the debtor from the operation of the marina. For these reasons, as well, we hold that debtor's marina does not

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17. *In re* Prairie Hills Golf & Ski Club, Inc., 255 B.R. 228, 230 (Bankr. D. Neb. 2000).

18. Centofante v. CBJ Devel., Inc. (*In re* CBJ Devel., Inc.), 202 B.R. 467, 473 (B.A.P. 9th Cir. 1996); *see also In re* Whispering Pines Estate, Inc., 341 B.R. 134 (Bankr. D. N.H. 2006) (holding the operation of a hotel was sufficiently multi-faceted to constitute a business other than mere operation of property).

19. *In re* Kkemko, Inc., 181 B.R. 47 (Bankr. S.D. Ohio 1995).

> come within the definition of "single asset real estate" as that phrase is used in § 101(51B).[20]

In summary, courts have held a case was not a "single asset real estate" case when the debtor held the real estate not just as a passive investment, but as a means to produce income through activities extrinsic from mere ownership or development of the real estate. For example, *In re Club Golf Partners* held business activities of operating public golf course, driving range, tennis courts, and restaurant were sufficiently "variegated and multiple" to take the debtor outside scope of §101(51B).[21] The *In re CBJ Development Inc.* court held a hotel was not a single asset real estate case because the bar, gift shop, and restaurant constituted significant other business.[22] Additionally, *In re Whispering Pines Estate, Inc.* held the operation of a hotel was sufficiently multi-faceted to constitute a business other than mere operation of property.[23] Debtors building and selling residences; constructing roads to residences, golf areas, and ski areas; removing snow from golf and ski areas; selling liquor in the clubhouse; and leasing golf and ski areas to third parties was sufficiently outside the scope of a single real estate asset, as shown in *In re Prairie Hills Golf & Ski Club, Inc.*[24] The case of *In re Larry Goodwin Golf, Inc.* determined golf course revenues, golf cart rentals, pool revenues, concessions and undeveloped property for sale constituted "substantial business," rather than merely holding real property in question solely for income.[25] Finally, *In re CGE Shattuck, LLC* held substantially all of the debtor's gross income and a significant percentage of revenues were derived from pro shop, golf rentals, and golf-related services, and, therefore, real estate was not the sole source of income.[26]

From these cases, it is clear a "single asset real estate" case is one in which the debtor derives its income (if any) solely from performing functions intrinsic to owning and developing the real estate and is not one where the debtor generates income from other activities not incidental to merely owning or developing the real estate. Applying this easily stated principle to the multitude of fact patterns presented by real estate bankruptcy cases is another matter.

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20. *Id.* at 51.

21. *In re* Club Golf Partners, No. 07-40096-BTR-11, 2007 WL 1176010 (E.D. Tex. Apr. 20, 2007).

22. *In re* CBJ Development Inc., 202 B.R. 466 (Bankr. W.D. Tenn. 1997).

23. *In re* Whispering Pines Estate, Inc., 341 B.R. 134 (Bankr. D. N.H. 2006).

24. 255 B.R. 228.

25. *In re* Larry Goodwin Golf, Inc., 219 B.R. 391 (Bankr. M.D.N.C. 1997).

26. Banc of America Comm. Fin. Corp. v. CGE Shattuck, LLC (*In re* CGE Shattuck, Inc.), Nos. 99-12287-JMD, CM 99-747, 1999 WL 33457789 (Bankr. D. N.H. Dec. 20, 1999).

IV. PROCEDURE

Once a court has determined a debtor is a single asset real estate debtor, the provisions of § 362(d)(3) become applicable. Section 362(d)(3) permits a secured creditor to obtain relief from the stay if there has been a failure to comply with the provisions of § 362(d)(3)(A) or (B). A motion for relief from stay pursuant to § 362(d)(3) may not be filed before the expiration of ninety days after petition for relief, presumably even if the hearing itself is more than ninety days after the petition for relief.[27]

Some courts have held that failure to file a plan of reorganization or commence interest payments prior to the expiration of the ninety-day period *requires* that the stay be terminated. For example, in *In re Land Preserve, LLC*, the court stated:

> The movant's argument that § 362(d)(3) mandates the granting of its motion, unanswered by the debtor, is persuasive. There is no dispute that (1) the debtor fits the description of a single asset real estate . . . and (2) that the debtor has failed to make interest payments or to file a plan within 90 days after it had filed its petition (or to date).[28]

Furthermore, the *In re Tad's Real Estate Co.* court stated:

> The stay of § 362(a) can be terminated under 11 U.S.C. § 362(d)(3) if no plan of reorganization is filed or the debtor has not commenced monthly payments to each secured creditor of the single asset real estate within 90 days of the case filing. Debtor failed to file a plan of reorganization within the 90 days and failed to commence monthly payments to Whitfield. Therefore, Whitfield is entitled to relief from stay.[29]

Finally, in *In re Kkemko, Inc.*, the court stated:

> The purpose that § 362(d)(3) serves is, where there is a single asset real estate Chapter 11 case, to impose an expedited time frame for filing a plan. The plan in such a case must be filed within 90 days after the filing of the case. This requirement is noteworthy in two respects. First, it sets a time for filing a plan in this species of Chapter 11 case. There is no time requirement in the Bankruptcy Code

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27. *See In re* Nat'l/Northway Ltd. P'ship, 279 B.R. 17 (Bankr. D. Mass. 2002). In that case, the court held:

> The passage of 90 days is a predicate to relief under this section. In the instant case the Debtor filed for bankruptcy on February 26, 2002. Two months later LaSalle filed its Motion for Relief. Therefore the Motion for Relief to the extent that it seeks a lifting of the automatic stay was premature.

Id. at 22.

28. Four J Funding, LLC v. Land Preserve, LLC (*In re* Land Preserve, LLC), No. 06-21016, 2007 WL 1964064, at *3 (Bankr. D. Conn. July 2, 2007) (citations omitted).

29. The Whitfield Co. v. Tad's Real Estate Co. (*In re* Tad's Real Estate Co.), No. 97-11999, 1998 WL 34066143, at *2 (Bankr. S.D. Ga. Mar. 23, 1998) (citation omitted).

> for the filing of a plan for any other kind of Chapter 11 case. Second, the consequence of not meeting that requirement is that the automatic stay of § 362 may be lifted without further ado.[30]

Many of the cases that found the stay was required to be terminated at the end of ninety days were decided under the pre-2005 amendment to §362(d)(3); that version of the statute did not include the phrase "or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later."[31]

Other courts have held that the expiration of the ninety-day period without the filing of a plan of reorganization or the commencement of interest payments does not necessarily require that the stay be terminated. In *In re Archway Apartments, Ltd.*, the court stated:

> Therefore, unless and until Congress limits this discretionary power of the [c]ourt to terminate, annul, modify or condition the stay, the court is free to fashion the relief appropriate for the creditor's failure to meet § 362(d)(3)(A) or (B). In this case, debtors' counsel admitted that it was simple, honest error that the plans were filed outside the 90 day period. There was no attempt by the debtors to deliberately inhibit, delay or abuse the rights of Condor One by filing the Plans late. To the contrary, the debtors thought they had complied with the requirements of § 362(d)(3). Further, the filing of the Plans were [sic] not precipitated by Condor One's Motions for Relief from Stay, but preceded it by a month.[32]

In *In re The Terraces Subdivision, LLC*, the court stated:

> Aalfs says termination of the stay is mandatory under these circumstances. I disagree with his absolute interpretation of §362(d)(3). A debtor's failure to satisfy the requirements of § 362(d)(3) "mandates a termination, annulment, modification, or conditioning of the stay." The court retains discretion, even under §362(d)(3), to fashion less than absolute stay relief.[33]

Additionally, the *In re LDN Corp.* court held relief is mandatory, but relief may be in the form of terminating, annulling, modifying, or conditioning such stay.[34]

A legitimate question is what happens if there has been no order determining the case to be a "single asset real estate" case and the ninety days has expired. Seemingly, from the terms of the amended statute, the period to either file a plan of reorganization or commence interest payments is the *later* of ninety days after the petition for relief

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30. *In re* Kkemko, Inc.,181 B.R. 47, 49 (Bankr. S.D. Ohio 1995).

31. *See* 140 CONG. REC. 27,695.

32. Condor One v. Archway Apartments, Ltd. (*In re* Archway Apartments, Ltd.), 206 B.R. 463, 465-66 (Bankr. M.D. Tenn. 1997) (footnote omitted).

33. *In re* The Terraces Subdivision, LLC, No. A07-00048-DMD, 2007 WL 2220448, at *3 (Bankr. D. Alaska Aug. 2, 2007) (footnote omitted).

34. Nationsbank v. LDN Corp. (*In re* LDN Corp.), 191 B.R. 320 (Bankr. E.D. Va. 1996).

or the date the court enters an order finding the case to be a "single asset real estate" case.[35] If the debtor, however, lists single asset real estate as the nature of its business on the first page of the voluntary petition, the court may well determine that the debtor is subject to § 362(d)(3) and begin the running of the thirty-day period.[36]

The uncertainty of the cases on this issue raises tactical questions. Should the party who seeks an extension of time to file a plan or commence required interest payments wait until after ninety days to see if anyone raises the issue of whether the debtor is a "single asset real estate" debtor? In so doing, the party seeking an extension takes the risk of running afoul of the requirement that any order extending the time to perform under § 362(c)(3)(A) or (B) be entered within ninety days after the filing of the petition. Should the party seeking an extension of time wait until a date when any motion filed would be heard within the ninety-day period and then file a motion seeking a determination as to whether the debtor is a single asset real estate debtor and, if it is a single asset real estate debtor, asking for an extension of the ninety-day period? In so doing, the party seeking the extension takes the risk of alerting parties who otherwise had not been involved and also ensures that if the court determines the debtor is a single asset real estate debtor, the thirty-day period for compliance will start upon the determination which the party itself sought.

Should a creditor file a motion for determination of the debtor's status as a single asset real estate debtor before the ninety-day period? In so doing, the moving creditor risks admonishment by the court that the motion was filed prematurely, unless the court rules that § 362(d)(3) only prohibits a motion for relief from the stay and not the mere determination the case is a single asset real estate case. If the court permits the filing of the motion for a determination of single asset real estate status before the end of ninety days, and the court finds the debtor to be a single asset real estate debtor, the time period for filing a plan of reorganization or commencing interest payments is clearly established at ninety days and is not extended due to the credi-

35. *See* Kara Homes, Inc. v. Nat'l City Bank (*In re* Kara Homes, Inc.), 363 B.R. 399, 407 (Bankr. D. N.J. 2007). There, the court noted:

> Pursuant to 11 USC § 362(d)(3), the Affiliated Debtors, as single asset real estate debtors, have thirty (30) days from the entry of the Order on the within motions to either file a plan of reorganization or commence making interest payments to the secured lenders, since the initial ninety (90) day period has long since expired.

Id.

36. *See* Four J Funding, LLC v. Land Preserve, LLC (*In re* Land Preserve, LLC), No. 06-21016, 2007 WL 1964064, at *1 (Bankr. D. Conn. July 2, 2007) ("Land Preserve, LLC ('the debtor'), on October 20, 2006, filed a Chapter 11 petition, identifying itself as a 'Single Asset Real Estate' business as defined in Bankruptcy Code § 101(51B).").

tor's inactivity. Should a creditor combine its motion for relief from the stay and its request for a determination that the debtor is a single asset real estate debtor in one pleading and file it on the ninety-first day? In so doing, the creditor risks delaying potential termination of the stay or commencement of payments by the time period which it takes for the combined motion to be heard but avoids allegations that the creditor jumped the gun by filing a pleading relating to § 362(d)(3) prior to the expiration of the ninety-day period.

V. WHEN MUST A MOTION TO EXTEND THE NINETY-DAY PERIOD BE FILED?

While there is no deadline for the actual filing of a motion to extend the ninety-day period to file a plan or commence payments, § 362(d)(3) requires the order granting such an extension to be "entered within that 90-day period." It is therefore incumbent on the party seeking the extension of time to file the motion in sufficient time so a hearing may be held and an order entered within the original ninety-day period.[37] While obtaining an extension of time to comply with § 362(d)(3)(A) or (B) may be a forlorn hope, filing the motion so an order cannot be entered in the ninety-day period is hopeless.

VI. WHAT CONSTITUTES CAUSE FOR EXTENSION OF NINETY-DAY PERIOD

There is a dearth of case law on what constitutes the cause necessary for an extension of the time to file a plan of reorganization or commence making the necessary interest payments. One court addressed this issue, stating:

> At least in the context of bankruptcy, in the absence of an express definition or prescription, the courts should measure the existence of cause for excusing compliance, by referring to the purpose of the underlying statutory requirement. Cause then 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. If the requirement on its face protects a specific constituency, the cause should incorporate a viable alternative to address that constituency's specified entitlement. Where the structure of a particular requirement of the Code markedly reflects such an intent (or an intent to hamper the general latitude that another constituency

37. *See In re* Heather Apartments Ltd. P'ship, 366 B.R. 45, 50 & n.7 (Bankr. D. Minn. 2007) ("The *Planet 10* court addressed a very different procedural posture-after the expiration of the statute's 90-day period, and hence at a time when any consideration of deferring the estate's duty to pay interest was time-barred.").

> would enjoy under the Code's more free-ranging provisions), the party seeking a departure must directly respond to the legislative intent. In this light, for the establishment of cause, it is not sufficient to rely solely on the more global goals of bankruptcy relief, even if those might otherwise be served by excusing compliance with the requirement.[38]

Apparently, more than the proverbial buyer in the wings and the normal pressures of blanket requirements on debtors are necessary to obtain an extension of the ninety-day period.

VII. PAYMENTS REQUIRED UNDER § 362(D)(3)(B)

In explaining the statutory framework for compliance with § 362(d)(3) in a single asset real estate case, the court in *Heather Apartments* stated:

> This motion comes out of a statutory matrix, § 362(d)(3), in which a grant of relief from stay in favor of a mortgagee against single-asset real estate is presumptive, unless the debtor gives its lender very specific things. The scope of considerations under §§ 362(d)(1)-(2) is much more broad; there, the existence of substantial equity in pledged collateral is usually the main concern, and its proven existence is readily accepted as protection of a mortgagee's financial interests while the automatic stay prevents it from foreclosing. Under § 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.
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> In structuring its case for this motion, however, this Debtor focused on the alleged equity in the property, and sometimes more in an abstract. That simply does not respond to Congress's very specific concerns in enacting § 362(d)(3). Thus, the Debtor has not made out cause for a deferral of its obligation to commence making payments to Fannie Mae.[39]

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38. *Id.* at 47-48 (denying debtor's timely filed motion to defer commencement of interest payments, and holding debtor had not shown cause for relief by merely asserting blanket bankruptcy protections and by offering into evidence a "very thin" one page alleged "letter of intent" to purchase the property).

39. *Id.* at 51 (emphasis in the original); *see also In re* Larry Goodwin Golf, Inc., 219 B.R. 391 (Bankr. M.D.N.C. 1997). In *Larry Goodwin Golf*, the court noted:

> Inasmuch as this Court found that Uwharrie was not entitled to Relief from Stay, Uwharrie would be entitled to payments in an amount equal to interest at a current fair market rate *if* Debtor is deemed a single asset real estate case. If Debtor is not a single asset real estate case, § 362(d)(3) is not applicable and Debtor *would not* be required by the Code to make payments to Uwharrie in an amount equal to interest.

Id.

Inherent in most single asset real estate cases is the debtor's belief that with a little time, the real property would be able to be sold at a price sufficient to pay most, or all, of the claims. In light of this hope-springs-eternal attitude of real estate debtors, the promise of future payment upon sale in lieu of the statutorily required interest payments has been met with a less than enthusiastic reception from lien holders and courts.

With respect to whether the prospective sale of real estate would obviate the need for interest payments under § 362(d)(3), the court in *Heather Apartments* stated:

> This is not to say that a prospective sale of single-asset real estate could never qualify as a concrete substitution for the ongoing realization in money via payments of interest. However, 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. At minimum, it seems, there should be a binding purchase agreement executed before the presentation of the motion under § 362(d)(3); a binding lending commitment in favor of the prospective purchaser; and demonstrated substantial progress in satisfying the ministerial minutiae for closing. Only then could a court feel assured that the protected mortgagee would receive a substantial equivalent of its expectancy under § 362(d)(3), so as to merit holding it off from foreclosing after the first 90 days of the case.[40]

VIII. SOURCE OF PAYMENTS REQUIRED UNDER § 362(D)(3)(B)

Section 362(d)(3)(B)(i) states that the monthly payments "may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after date of the commencement of the case by or from the property."[41] The use of the word "may" seems to permit, but not require, the payments to be made from income generated from the property, seemingly making allowance for payments to be made from loans to the debtor or trustee or other income, if a "single asset real estate" debtor has other income. The determination of the source of the payments seems to be left to the "sole discretion" of the debtor; whether a Chapter 7 trustee has the same authority is a matter which must be decided by the courts. This use of the pre-petition and post-petition income or rents from the property seems to supersede the limitations placed on the use of "cash collateral" by § 363(c)(2), thus giving rise to the possibil-

40. *Heather Apartments Ltd. P'ship*, 366 B.R. at 50.

41. 11 U.S.C. § 362(d)(3)(B)(i) (2000 and Supp. 2005).

ity that one secured creditor's cash collateral may be used to pay interest on a junior lien holder's debt.

IX. AMOUNT OF PAYMENTS REQUIRED UNDER § 362(D)(3)(B)

With respect to determining the amount of the payments required to be made, § 362(d)(3)(B)(ii) states the payments should be "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."[42]

The phrase "creditor's interest in the real estate" is reminiscent of the language on valuing secured claims in § 506(a) and would seem to mean the *lesser* of the amount of the claim *or* the amount of equity in the real estate available for application to secure the creditor's claim. It, therefore, appears as if interest need only be paid on the amount of the lien which is actually secured by equity in the real estate. Of course, by arguing that certain secured claims are really not fully secured, the debtor is admitting there is no equity in the property, thereby admitting one of the elements of relief from the stay pursuant to § 362(d)(2)[43] and satisfying the burden of proof of any creditor seeking relief under § 362(d) in general.[44]

The term applicable "nondefault contract rate of interest" is confusing since the language in § 362(d)(3)(B)(ii) excludes from parties entitled to payment "a claim secured by a judgment lien or by an unmatured statutory lien." The exclusion of an "unmatured statutory lien" would seem to require payment to a "matured" statutory lien (however that term is defined by case law). The definition of "statutory lien" in § 101(53)[45] excludes a "security interest" which, accord-

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42. § 362(d)(3)(B)(ii).

43. Section 362(d)(2) states:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay— . . . (2) with respect to a stay of an act against property under subsection (a) of this section, if— (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization . . . .

§ 362(d)(2).

44. Section 362(g)(1) states as follows: "In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section . . . the party requesting such relief has the burden of proof of the debtor's equity in the property . . . ." § 362(g)(1).

45. Section 101(53) states:

> The term "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is

ing to § 101(51),[46] means "a lien created by an agreement." Since a contractual rate could only be one made by agreement, it appears as if the phrase "applicable nondefault contract rate of interest" may be inconsistent with the term "statutory lien."

Once again there is a dearth of cases on calculating the amount of the interest payment required under § 362(d)(3)(B)(ii). With respect to the amount of the interest payment due on a mortgage debt of approximately $3,300,000.00, without much analysis, one court stated:

> Debtor filed for relief under Chapter 11 of the Bankruptcy Code on August 22, 2002. Debtor did not file a plan of reorganization within 90 days since the entry of the order for relief (the petition date). Debtor, however, has been making monthly cash collateral payments in the amount of Nineteen Thousand Two Hundred Fifty Dollars ($19,250.00) per month. Section 362(d)(3) does not provide that the debtor must make interest payments but payments that "are in an amount equal to interest at a current fair market rate . . . ." 11 U.S.C. § 362(d)(3)(B). This [c]ourt considers Debtor's adequate protection payments in the amount of Nineteen Thousand Two Hundred Fifty Dollars ($19,250.00) to be payments in an amount equal to interest at a current fair market value rate of Old West's interest in Woodbridge. Accordingly, Old West is not entitled to relief under § 362(d)(3).[47]

An interesting question arises in a situation when the holder of a "matured" statutory lien does not have a contractual rate of interest, nondefault or otherwise. Seemingly, from the language of the statute, such a creditor would not be entitled to receive interest payments under § 362(d)(3)(B)(ii).

X. TO WHOM MUST PAYMENTS BE MADE

As discussed above, the language in § 362(d)(3)(B)(ii) excludes from parties entitled to payment "a claim secured by a judgment lien or by an unmatured statutory lien."[48] The exclusion of an "unmatured statutory lien" would seem to require payment to a "matured" statutory lien. It would indeed be rare if a "statutory lien," which, by its very definition in § 101(53), excludes a consensual lien, had a contractual rate because a contractual rate could only be one made by agree-

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provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

§ 101(53).

46. Section 101(51) states: "The term 'security interest' means lien created by an agreement." § 101(51).

47. *In re* Cambridge Woodbridge Apartments, L.L.C., 292 B.R. 832, 840 (Bankr. N.D. Ohio 2003).

48. § 362(d)(3)(B)(ii).

ment and, as such, could not be a "statutory lien." Furthermore, a creditor who held a "statutory lien," but later reduced it to judgment, would arguably be the holder of a "judgment lien" and, as such, not entitled to payment.[49] But in *In re 652 West 160th LLC*, the court held New York City taxes on which a judgment of foreclosure had been entered were matured statutory lien and stated:

> The Debtor makes a series of arguments to cover its default. First, it argues that § 362(d)(3)(B) is applicable and benefits only consensual secured creditors. The words of the statute are to the contrary. The subsection excepts from the requirement of commencement of interest payments secured creditors whose debt is secured by a judgment lien or an unmatured statutory lien. But the Debtor's own position is that the City does not have a judgment lien because its foreclosure is not complete; whether it actually has a judgment lien as well, it appears from the record that the City does have a matured statutory lien.[50]

The *652 West 160th* case was filed prior to the 2005 amendment to § 362(d)(3), which, at the time, required payment to:

> [E]ach creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.[51]

The addition of language in the 2005 amendment to § 362(d)(3) requiring interest at the "then applicable nondefault contract rate of interest" raises a legitimate question as to whether creditors such as holders of tax liens or mechanics' liens without a contractual interest rate are entitled to interest at all under § 362(d)(3)(B)(ii).

It is possible that courts may find that a contractual creditor who later uses a statutory lien, such as a mechanic's lien, to further enforcement of his or her contract has cumulative rights and is, thereby, entitled to use the underlying contractual nondefault rate of interest as a basis for payments under § 362(d)(3)(B)(ii) even though the creditor also holds a statutory lien.

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49. The legislative history for the term statutory lien states:

> The definition [of a statutory lien] excludes judicial liens and security interests, whether or not they are provided for or are dependent on a statute, and whether or not they are made fully effective by statute. A statutory lien is only one that arises automatically, and is not based on an agreement to give a lien or on judicial action. Mechanics', materialmen's, and warehousemen's liens are examples.

S. REP. NO. 95-989, at 27 (1978); H.R. REP. NO. 595, at 314 (1977).

50. *In re* 652 West 160th LLC, 330 B.R. 455, 462 (Bankr. S.D.N.Y. 2005) (citation omitted).

51. 11 U.S.C. § 362(d)(3) (2000) (prior to amendment effective October 17, 2005).

XI. FILING OF A PLAN OF REORGANIZATION

The requirement that the debtor file "a plan of reorganization that has a reasonable possibility of being confirmed in a reasonable time" raises questions as to what constitutes reasonable possibility of being confirmed and what constitutes a reasonable time for confirmation. The language in § 362(d)(3)(A) is similar to the case law interpreting the "necessary to an effective reorganization" requirement of § 362(d)(2)(B).[52] At least two courts have adopted a similar view: the court in *In re The Terraces Subdivision, LLC*[53] and the court in *In re Heather Apartments Limited Partnership*.[54]

An arguably confirmable plan, however is not a cure all, and even a single asset real estate debtor filing a plan is subject to greater scrutiny; as the court in *Terraces Subdivision* stated:

> In this case, Terraces presented persuasive expert testimony early on which showed that it had the capability of presenting a feasible and workable chapter 11 plan. It was on this basis that I reached my initial finding that the debtor's liquidating plan had a reasonable possibility of confirmation within a reasonable time. Closer inspection has revealed that the current projected plan payments to Aalfs will not pass confirmation muster. However, based on the numbers in the Richter appraisal, there is still the promise that Terraces can propose a plan that would not only pay Aalfs in full but provide substantial payments to its other creditors. I feel the debtor should be allowed a chance to proceed to confirmation. Terraces will be given a short fuse, however. The debtor must obtain confirmation of a plan by October 26, 2007. Failure to do so will result in termina-

52. *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 376 (1988) ("This means, as many lower courts, including the en banc court in this case, have properly said, that there must be 'a reasonable possibility of a successful reorganization within a reasonable time.'"); Bank One, Colo., N.A. v. Steffens (*In re* Steffens), 275 B.R. 570, 576 (Bankr. D. Colo. 2002) (holding debtors had not met their burden of demonstrating that the property at issue was necessary to an "effective reorganization that is in prospect"); *In re* Rye, 54 B.R. 180 (Bankr. D. S.C. 1985); U.S. v. Hollie (*In re* Hollie), 42 B.R. 111, 117 (Bankr. M.D. Ga. 1984) ("In the early stages of a bankruptcy case, a court should balance the interest of the secured creditor against the congressional policy favoring reorganization. The court should be hesitant to find no reasonable possibility of reorganization, especially where the debtor has not had sufficient time to formulate a plan.").

53. *In re* The Terraces Subdivision, LLC, No. A07-00048-DMD, 2007 WL 2220448, at *3 (Bankr. D. Alaska Aug. 2, 2007) ("In the context of § 362(d)(3), the standard for evaluating a plan is that it has a reasonable possibility of being confirmed within a reasonable time. While a full blown confirmation hearing is not required to make this determination, the debtor must propose a plan that is 'arguably confirmable.'").

54. *In re* Heather Apartments Ltd. P'ship, 366 B.R. 45, 49 (Bankr. D. Minn. 2007) ("The only specific alternative available to the debtor-owner is to get the reorganization case pushed forward substantially by filing an arguably-confirmable plan within that first 90 days.").

> tion of the stay without further action on the part of Aalfs or the court.[55]

In an interesting twist on the requirement to file a plan, one court held the entry of a form order setting the time period for the Debtor to file its disclosure and plan beyond the ninety-day period after the filing of the case resulted in the extension (albeit unintentionally) of the ninety-day period under § 362(d)(3)(A) since no party objected or appealed the order.[56]

XII. APPLICATION IN CHAPTER 7

The legislative history behind § 362(d)(3) appears to assume it will apply mostly in Chapter 11 situations; this assumption is clear from the language of § 362(d)(3), which lends itself to Chapter 11 cases, but is applied with more difficulty in Chapter 7 cases. In denying a motion to terminate the stay by the first lien holder but conditioning the continuance of the stay on a further hearing in which the Chapter 7 Trustee would be required to give evidence on the progress of the trustee's sale previously approved by the court, the *In re Planet 10, L.C.* court recognized this problem and discussed it as follows:

> "This 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); . . . In fact, the wording of § 362(d)(3)(A) refers directly to the filing of a plan of reorganization. However, the alternative provision in § 362(d)(3)(B) provides for lifting of the stay when a debtor has not paid interest payments to the secured creditor within 90 days of the order for relief. This passage could be read to apply to Chapter 11 *or* Chapter 7 bankruptcies.
>
> Contradicting any implications that § 362(d)(3) applies only in Chapter 11 cases is the applicability section of the bankruptcy code, 11 U.S.C. § 103(a), which states that "chapter[ ] . . . 3 . . . appl[ies] in a case under chapter 7, 11, 12 or 13 of this title." Thus, the plain language of § 103(a) seems to be conclusive of the question.
>
> The problem created by § 362(d)(3) in this Chapter 7 case is that the section conflicts with the trustee's ability to sell property of the estate under 11 U.S.C. § 363(b). Under that provision, the trustee in a Chapter 7 *or* a Chapter 11 case, acting in the best interest of creditors, may sell property of the estate other than in the ordinary course of business. [citation omitted] In this case, the trustee has represented that the sale of debtor's property approved by the court is in the best interests of all creditors of the estate since the sale proceeds will result in a surplus to the estate. Also, a creditor of the

55. 2007 WL 2220448, at *4.

56. Lincoln Nat'l Life Ins. Co. v. Bouy, Hall & Howard & Assocs. (*In re* Bouy, Hall & Howard & Assocs.), No. 95-40676, 1995 WL 17006338, at *4 (Bankr. S.D. Ga. 1995).

> estate who filed an opposition to Riggs' motion for relief argues that all other creditors but Riggs would be irreparably harmed if Riggs' motion for relief is granted. The court agrees that the granting of Riggs' motion to lift the stay would undermine the trustee's position representing the interests of all creditors.[57]

XIII. CONCLUSION

Like many other provisions of the patchwork 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, § 362(d)(3) is fraught with interpretational challenges. Hopefully this Article provides useful fodder for litigants and judges as the parameters of this important provision are determined in the coming years.

57. Riggs Bank v. Planet 10, L.C. (*In re* Planet 10, L.C.), 213 B.R. 478, 480-81 (Bankr. E.D. Va. 1997).