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The National Bankruptcy Review Commission: Proposals for Single Asset Real Estate

Introduction

The National Bankruptcy Review Commission recently delivered its 1,300 page report to Congress on October 20, 1997. [1] This note deals specifically with the Small Business Working Group's Proposals regarding changes to the Bankruptcy Code requirements for single asset real estate cases. [2] Part II discusses the rise of the single asset real estate debtor. [3] Part III examines The Bankruptcy Reform Act of 1994 which was created to stop abuse of the bankruptcy process by single asset real estate debtors. [4] Part IV discusses the Working Group's Proposal and an Alternative Single Asset Proposal submitted to the Working Group by Professor Kenneth Klee ("Alternative Proposal"), which were included in the Commission's report. [5] Part V analyzes the strengths and weaknesses of the two proposals.

I. The History of the Single Asset Real Estate ("Sare") Bankruptcy

The Bankruptcy Reform Act of 1978 (the "Code") created a single chapter for all types of business reorganization. [6] Although chapter 11 was created to promote efficiency in business reorganization, problems arose due to abuse of the reorganization provision by single asset real estate filers. [7] In the early 1980s, buoyed by the booming real estate market, banks and institutional lenders happily lent money to real estate investors. [8] The typical single asset debtor was usually a limited partnership set up as an investment vehicle for tax purposes, to purchase a single piece of real estate. [9] The partnership usually had only one significant creditor, a secured lender, whose mortgage fully encumbered the real estate. [10] However, the real estate market suffered a collapse in the late 1980's, and, combined with the precipitous drop in real estate values, many single asset borrowers became unable to meet their mortgage obligations. [11] Because many of the mortgages granted to single asset debtors were non−recourse, the only means of loan repayment was the value of the real estate. [12]

One bankruptcy judge described what followed the downturn in the market as follows: "[l]awyers had quickly discovered how effective chapter 11 could be for handling the financial difficulties of single asset real estate ventures and . . . suddenly there were thousands of single asset real estate cases, not just dozens as there had been in years past." [13] Many single asset entities filed chapter 11 because the automatic stay provision of chapter 11 granted them protection from foreclosure by their secured lenders. [14] In these cases, the debtor had no prospect of a successful reorganization, rather, faced with the possibility of a lost investment and corresponding tax consequences, the debtor's only choice was to try and prevent foreclosure by filing for chapter 11 protection. [15] Many single asset real estate entities also filed chapter 11 in order to gain the benefits of the cramdown, [16] and renegotiate the financing of the property based on its current market value. [17]

Single asset real estate entities filing for chapter 11 have led to allegations that the entities are abusing the bankruptcy system. [18] Of concern to many secured lenders is that debtors, with a slim chance of reorganization, can avail themselves of the broad protection of the automatic stay and hold off foreclosure by secured lenders for lengthy periods of time. [19] One Judge has described the unfair advantage that the automatic stay provides debtors over their secured creditors in the following way: "[t]he plans proposed in most of these cases attempt to buy a few years' delay in foreclosure in the hope that the real estate market will improve, shifting the risk of failure to the secured creditor, while trying to preserve the up−side potential for the equity holders." [20]

Numerous bankruptcy scholars contend that single asset real estate filers should not be allowed to file chapter 11 because single asset filings do not meet the legitimate ends of chapter 11 reorganization. [21] Critics make this argument because single−asset real estate entities usually have few employees, [22] and are usually worth more in dissolution than they are in going concern value. [23] Traditionally, chapter 11 relief was sought by a company to prevent foreclosure by a secured lender, which usually led to liquidation by creditors looking for assets to offset their claims. [24] Single asset filings, however, usually involve a two party dispute between the debtor and the secured creditor. [25] By definition in a single asset case, only one asset is available for distribution to creditors, which is usually fully encumbered by the secured creditor's mortgage. [26] Still other critics argue that single asset cases do not belong in chapter 11 because chapter 11 does not maximize recovery to unsecured creditors. [27]

The problems created by single asset cases extend beyond increased litigation and misuse of court time. Often, in order to get a plan approved, a single asset debtor must use all of its available funds to pay down the debt on the property, and is thereby, unable to maintain the property adequately. [28]

The courts responded in several ways to the unnecessary litigation, cost, and delay created by abuse of chapter 11 by single asset filers. [29] Some courts expedited or "fast tracked" proceedings in these cases, in order to force single asset filers to either confirm a plan or lose the benefit of the automatic stay. [30] Other courts required that SARE debtors introduce new equity or "hard cash" in order to get their plan confirmed. [31] One method adopted by the courts for dealing with single asset cases, was the imposition of the good faith requirement on filers. [32] The good faith requirement became an effective tool against bankruptcy petitions that did not meet with traditional goals of the Code. [33] The good faith requirement was widely adopted by courts and used to strike down a wide variety of petitions. [34]

A debtor's petition filed in bad faith is not always grounds for dismissal. [35] Rather, dismissal is left to the court's discretion. [36] Even where bad faith was found, courts were sometimes reluctant to dismiss unless the circumstances were truly egregious. [37] For example, if bad faith was found, evidence of an apparent honest effort to reorganize could permit the case to survive dismissal. [38] Although the good faith filing requirement was the method most widely used by courts in dealing with single asset cases, it was not universally accepted. [39] Some critics say the good faith requirement deprived worthy chapter 11 filers of the opportunity for legitimate reorganization. [40]

II. The 1994 Amednments

Through the Bankruptcy Reform Act of 1994, Congress attempted to resolve the problems of cost, delay and abuse of chapter 11. [41] Congress enacted special protections for real estate lenders victimized in single asset real estate cases, [42] by providing for special handling of single asset cases. [43]

A. The Definition of Single Asset Real Estate:

The 1994 Amendments to the Code defined "single asset real estate" as:

> [R]eal 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 and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate, noncontingent, liquidated secured debts in an amount no more than $4,000,000. [44]

The debt limitation on the definition of "single asset real estate" is commonly referred to as the four million dollar cap. [45] Although the 1994 Bankruptcy Reform Act initially appeared to be victory for secured creditors with respect to chapter 11 single asset real estate entities, [46] many critics argue that the four million dollar cap diminished the effect of the amendment. [47] It is unclear why Congress, at the last minute, decided to place this limit on single asset filers. [48] The four million dollar cap is especially puzzling considering that most single asset, chapter 11 debtors have debt in excess of four million dollars. [49] There has been widespread criticism of the four million dollar cap. [50] Some scholars have noted that in the single asset real estate case the debtor attempts to refinance the asset since there is no business to undergo reorganization. Therefore, the complexity of plan confirmation is only marginally greater in a twenty

million dollar bankruptcy then it is in a four million dollar bankruptcy. [51] Furthermore, it is counterintuitive to give secured lenders greater protection in cases where there is four million dollars at stake and less protection where there is twenty million dollars at stake. [52]

B. The Automatic Stay Provision:

The Bankruptcy Reform Act of 1994 created a new provision in the Code to deal with abuses of the automatic stay provision by single asset real estate entities. [53] The new provision was created to preclude abusive chapter 11 filings by single asset debtors by enacting a ninety day statutory deadline for filing a reorganization plan. [54] Congress adopted section 362(d)(3) for the express purpose of reducing delay and potential abuse in SARE cases. [55] The effect of this new time constraint placed upon single asset entities was also diminished by the four million dollar cap. [56]

III. The Working Group's Proposal

The Bankruptcy Act of 1994 enacted legislation creating a National Bankruptcy Review Commission. [57] In its recently submitted report, the Commission's Small Business Working Group (the "Working Group"), a committee of academics and practitioners, recommended several changes to the Code definition of Single Asset Real Estate. [58] The proposed amendments to the Code, recommended by the Working Group, were voted on by the Commission and those receiving a majority of the commissioners' votes are contained in the Commission Report. The Working Group found that changes to the definition of single asset real estate were necessary because, "the incidence of abuse in the past and danger of additional abuse in the future from SARE cases was very significant and requires tightening up in the statute." [59]

The Working Group recommended that, in order to make the definition of single asset real estate more effective, the four million dollar cap be eliminated and active business debtors be excluded from the statutory definition. [60] The recommendations also included allowing debtors to make payments from the rents they collect on the property, the rate of interest at which debtors make payments under the plan−or payment provision be calculated at the non−default contract rate or pre−bankruptcy rate, and that the new value exception be adopted in the Code using the loan−to−value test for new value contributions. [61]

A. Four Million Dollar Cap Issues:

One of the most important changes proposed by the Working Group is the elimination of the four million dollar cap. [62] The Working Group argues that the cap should be eliminated because the reasons supporting the 90 day plan or payment deadline apply to both large and small SARE cases. [63] The Working Group states that "[t]he time needed to formulate a plan is similar in large and small SARE cases, because the basic task in each instance is usually financial restructuring rather than business restructuring." [64] The Working Group states that "[t]he debtor's failure promptly to file a plan or commence interest payments imposes the cost and risk of reorganization on the secured creditor to the same extent in SARE cases of all sizes." [65] Additionally, the Working Group argues that reorganization "provides limited social benefit in SARE cases of all sizes." [66] This is because the recognized goal of chapter 11, to maximize return to unsecured creditors, [67] rarely applies due to the limited involvement of unsecured creditors in SARE cases. [68]

The Working Group was not persuaded by arguments that preservation of jobs and going−concern value may be of concern in larger SARE cases. [69] The Working Group instead acknowledged that in the small minority of cases, "in which enforcement of the ninety−day deadline would cause injustice, the Bankruptcy Code affords sufficient flexibility to courts to extend the deadline as appropriate." [70]

The Working Group rejected raising the debt limit rather than eliminating it, because it found that "the amount of secured debt is not a reliable indicator of complexity and the need for more time." [71] Blanket removal of the automatic stay from all SARE cases over a certain amount, in order to protect debtors in the small minority of cases that need extra time, does not justify allowing abuse to continue in the majority of cases. [72] The Working Group's rational for eliminating the four million dollar cap, is essentially that the ninety day plan−or−payment rule is appropriate in the majority of cases. [73]

B. Active Business Issues:

One of the Commission's main goals is to clear up ambiguities where they exist in the Code. [74] One of the ambiguities that has arisen out of the Code definition of single asset real estate, [75] is whether or not the definition includes debtors who are the subsidiary of a larger corporation that operates an active business on the property. [76] The Working Group proposal seeks to clear up this ambiguity by unequivocally stating the type of business activities being operated on the property will or will not qualify a debtor for SARE treatment. [77] This is accomplished by basing the determination of which debtors qualify, not on form of ownership, but on economic substance. [78] The Working Group's proposal states, "where a debtor conducting an active business holds title to the real property used in that business through a separate entity, the entity holding the real property should not be considered a SARE debtor." [79] One of the reasons for exempting such entities is that, if subsidiary companies whose parent was operating a business on the property were subject to SARE treatment under the statute, lenders would require all borrowers to create subsidiary companies for this purpose. [80]

The Working Group's proposal offers several examples of what should be considered a subsidiary and what should be considered a stand alone entity in SARE cases. [81] However, the Working Group's stated intent "to define carefully the relationship the real estate debtor must have to the operating debtor to come within the operating business exception to the definition SARE" seems ambiguous. [82] Rather than using the term affiliate as defined in the Code, [83] the Working Group chose the phrase "group of commonly controlled group of entities substantially all of which are concurrently chapter 11 debtors." [84] This new definition of a debtor operating an active business seeks "to provide special treatment for stand−alone realty entities but not to impose that treatment on an entity which is only one part of a larger enterprise in bankruptcy." [85]

The Working Group's proposal also seeks to resolve other ambiguities, such as, which debtors qualify for SARE treatment. [86] The Working Group contends the phrase "which generates substantially all of the gross income of a debtor" includes raw land. [87] Another issue the Working Group attempts to resolve is whether the $4 million cap "refers to the face amount of the secured claim or to the lesser of the face amount or the value of the collateral." [88]

C. The Ninety Day Deadline:

The Working Group proposes the retention of the ninety day plan or payment deadline, with only minor changes, because in the typical SARE scenario, [89] "ninety days is generally sufficient time for the debtor to file a feasible plan of reorganization, regardless of the amount of mortgage debts involved." [90] The rationale for this proposition is that "the plan in an SARE case involves financial restructuring, not operational restructuring of the business." [91] The Working Group contends that the greater complexity of business restructuring does not exist in financial restructuring because financial restructuring involved in SARE cases is "generally accomplished by reducing creditors' claims and/or by infusing new capital to cover the difference between rental income and the amount needed to pay expenses and debt service." [92] The contention is that SARE cases are generally two party disputes between the mortgage holder and the debtor over the restructuring of the mortgage. [93] The Working Group notes that in the typical SARE cases, unlike manufacturing cases, there are usually not a large number of jobs at stake, or numerous secured and trade creditors. [94]

The Working Group notes that there is an alternative to the filing of a reorganization plan within the ninety day deadline. [95] They argue that providing the option for the debtor to make interest payments to the mortgage holder within 90 days, [96] "carefully balances the interest of the secured creditor for speedy resolution of the Chapter 11 proceeding and the SARE debtor's needs for adequate time to attempt to reorganize." [97] Furthermore, by requiring the debtor to make the requisite interest payments, the secured lender is saved from bearing all of the risks and costs of reorganization. [98] Absent this requirement, allowing a debtor to retain use of the subject property without making interest payments while the value of that property declines would ultimately diminish the return to the secured creditor. [99]

The Working Group argues that the ninety day deadline is necessary because there is little justification for continued exposure of the secured creditor to the costs and risks of reorganization beyond the ninety days, as "SARE cases often serve few recognized goals of Chapter 11." [100]

Additionally, the Working Group asserts that if a debtor fails to comply with the ninety day plan−or−pay deadline the automatic stay should be lifted and the secured lender should be allowed to foreclose. The Working Group argues that foreclosure may be of greater social utility, than allowing the debtor to remain in possession under the protection of the automatic stay. [101]

D. The New Value Exception: [102]

One of the most radical changes proposed by the Working Group is the incorporation of an 80/20 loan−to−value requirement for the confirmation of "new value exception" plans. [103] Although the Working Group asserts that this will further reduce cost and delay in single asset cases, [104] the applicability of the new value exception to SARE cases is one of the more controversial topics in bankruptcy. [105] The Working Group argues that clarification of the new value exception will reduce litigation by making it easier for debtors to confirm a reorganization plan. [106] In addition the Working Group asserts that the current case law regarding the new value exception is ambiguous [107] and clarification will prevent unnecessary litigation on the issue of confirmation of new value plans. [108] Furthermore, the Working Group states that "[w]hile court decisions provide reasonably precise definitions for the 'new' and 'money or money's worth' requirements, case law does not come close to providing clear rules for the other three requirements." [109] Because three of the five requirements of the new value exception have proven to be the predominant source of contention of new value plans, the Working Group focuses on their clarification. [110]

The new value proposal is described as ". . . a clear, objective standard for new−value plans in SARE cases." [111] The proposal further states that the proposed new value plan could only be confirmed if the secured portion of the loan is paid down to 80 percent of the property, thus allowing the debtor to reduce its liens to 80 percent of the amount of the current fair market value of the property, while retaining a valid security interest in the property for the secured lender. [112] The proposition concludes that the it would achieve a "balance of equities between debtors and secured creditors in SARE cases," [113] ultimately reducing litigation and controversy over the requirements of new value plans. [114]

The Working Group prefers the loan−to−value test to the current law because the test "more equitably balances the interests of debtors and secured creditors; it increases the likelihood of success of the reorganized debtor; and it reduces litigation." [115] It is argued that the loan−to−value test balances the interests of the debtor and the creditor, by allowing the debtor to reorganize and retain the property through new value contribution while providing "the secured creditor with a conventional layer of equity beneath its mortgage loan." [116] This reduces the risk to the lender in the event the property value declines further and allows the lender to classify the loan as "performing." [117]

The Working Group posits that requiring the debtor to pay down twenty percent of the value of the property increases the potential for a successful reorganization, [118] because the loan−to−value requirement of 80 percent decreases the amount of net income from the reorganized property that must be spent on debt service. [119] Furthermore, Working Group argues that requiring the debtor to pay twenty percent of the value of the property provides the debtor with an economic incentive to maintain and operate the property. [1]

FOOTNOTES:

[1] *See generally* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years, Final Report (1997) [hereinafter Commission Report]. The National Bankruptcy Review Commission is an independent commission established pursuant to the Bankruptcy Reform Act of 1994, Pub. L. No. 103−394, 108 Stat. 4106 (1994). The Commission was created to:

> (1) investigate and study issues relating to 11, United States Code (commonly known as the "Bankruptcy Code");
>
> (2) to evaluate the advisability of proposals and current arrangements with respect to such issues and problems;
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> (3) to prepare and submit to the Congress, the Chief Justice and the President a report in accordance with section 608; and
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> (4) to solicit divergent views of all parties concerned with the operation of the bankruptcy system;

Id. at 4147. "The report, which was due October 20, 1997, contained a detailed statement of the Commission's findings and conclusions together with recommendations for legislative or administrative action. The members of the commission were appointed by the President, Congress and the Chief Justice." Id. at 4148; *see also* Lloyd D. George, *From* Orphan to Maturity − The Development of the Bankruptcy System During L. Ralph Mecham's Tenure as Director of the Administrative Office of the United States Courts, 44 Am. U. L. Rev. 1491, 1498 (1995) (discussing revolution of modern bankruptcy system and establishment of National Bankruptcy Review Commission under Bankruptcy Reform Act of 1994); Judge James D. Gregg, Checklist for the Commission, 14 Am. Bankr. Inst. J. 35, 35 (May 1995) (discussing creation of National Bankruptcy Review Commission under color of §§ 601−610 of Bankruptcy Reform Act of 1994 and goals and functions of Commission Report). Back To Text

[2] *See* 11 U.S.C. § 362 (d)(3) (1994) (providing new and less burdensome method of lifting automatic stay so mortgage lender may foreclose); Jeff Bohm & David B. Young, *Small Business and Single Asset Real Estate Reorganizations and the Bankruptcy Reform Act of 1994*, 753 PLI/Comm 465, 507(1997) (defining single asset real estate under 11 U.S.C. § 363 (d)(3)); Hon. Leif M. Clark, *Chapter 11 — Does One Size Fit All?*, 4 Am. Bankr. Inst. L. Rev. 167, 176−78 (1996) (discussing small businesses, single asset real estate and 1994 Amendments to section 362).Back To Text

[3] *See, e.g.*, Shannon C. Bogle, *Bonner Mall and Single−Asset Real Estate Cases in Chapter 11: Are the 1994 Amendments Enough?*, 69 S. Cal. L. Rev. 2163, 2184−85 (1996) (noting rising abuse of current system by single asset real estate debtor); Brian S. Katz, *Single Asset Real Estate Cases and the Good Faith Requirement: Why Reluctance to Ask Whether a Case Belongs in Bankruptcy May Lead to the Incorrect Result*, 9 Bankr. Devs. J. 77, 77−78 (1992) (demonstrating rise of strategic use of bankruptcy by single asset real estate debtor); *see also* H. Miles Cohn, Single Asset Chapter 11 Cases, 26 Tulsa L.J. 523, 524−27 (1991) (exploring historical perspective of single asset real estate cases).Back To Text

[4] *See, e.g.*, Neil Batson, *Real Estate Problems in the Bankruptcy Court − Selected Issues in Single Asset Real Estate Cases*, 753 PLI/Comm 401, 412 (1997) (discussing section 218 of 1994 Act, which added subsection 362(d)(3), making ground for tax relief only applicable in single asset real estate cases as defined in 1994 Act to limit abuse and exercise of bad faith); Karen Gross & Patricia Redmond, *In Defense of Debtor Exclusivity: Assessing Four of the 1994 Amendments to the* Bankruptcy Code, 69 Am. Bankr. L.J. 287, 287−289 (1995) (discussing significant changes to Bankruptcy Code designed to alleviate criticism of chapter 11, specifically section 218 of the amendments); Kathryn R. Heidt, The Effect of the 1994 Amendments on Commercial Secured Creditors, 69 Am. Bankr. L.J. 395, 415 (1995) (discussing how 1994 Amendments make it more difficult for single asset real estate debtors to abuse chapter 11). Back To Text

[5] *See* Commission Report, supra note 1, at 661 (discussing proposals affecting single asset real estate); Lynn M. LoPucki, Chapter 11: An Agenda For Basic Reform, 69 Am. Bankr. L.J. 573, 573−74 (1995) (acknowledging Professor Klee for making needed changes to system under 1994 Amendment). Back To Text

[6] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, 92 Stat. 2549, *reprinted in* 1978 U.S.C.C.A.N 5787−6573, (codified as amended at 11 U.S.C. §§ 101−1330 (1978)). The enactment is referred to as the "Bankruptcy Code," to distinguish it from the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978). The Bankruptcy Act was amended on a number of occasions after its enactment, the most significant being the Chandler Act of 1938, which created chapters X and XI. See Chandler Act of 1938, ch. 575, 52 Stat. 840 (repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, tit. IV, § 401(a), 92 Stat. 2549, 2682 (1978)). The Code entirely displaced the Bankruptcy Act. The Code has been amended numerous times. The most recent amendment in 1994 created a new bankruptcy commission (the "NBRC") to review and examine the Code and make recommendations regarding what, if any, changes should be made. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103−394, §§ 601−610, 108 Stat. 4106, 4147−50 (1994). The NBRC held its first meeting on November 1, 1995, and its final report was released October 20, 1997. *See also* Mark E. MacDonald, et al., *Confirmation by Cramdown Through the New Value Exception in* Single Asset Cases, 1 Am. Bankr. Inst. L. Rev. 65, 75−78 (1993) (stating Code in 1978 intended to create single, unified remedy, not only for chapter X and XI cases, but also for chapter XII cases involving real estate partnerships owning single asset); Eric A. Posner, The Political Economy of the Bankruptcy Reform Act of 1978, 96 Mich. L. Rev. 47, 63−64, 108 (1997) (discussing forms of business reorganization prior to and subsequent to 1978 Act); Charles

Jordan Tabb, The History of The Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. L. Rev. 5, 35 (1995) (explaining merger of reorganization chapters into single chapter under the 1978 Act); Charles Jordan Tabb, The Historical Evolution of Bankruptcy Discharge, 65 Am. Bankr. L.J. 325, 362 (1991) (discussing substantial changes in bankruptcy system, from revision by Chandler Act in 1938 to Bankruptcy Reform Act of 1978).Back To Text

[7] *See* Scott Carlisle, *Single Asset Real Estate in* Chapter 11: Secured Creditors' Perspective and the Need for Reform, 1 Am. Bankr. Inst. L. Rev. 133, 134 (1993) (describing typical situation for single asset real estate chapter 11 filing); Roger S. Cox, Annual Survey of Texas Law: Bankruptcy & Creditors' Rights, 48 SMU L. Rev. 875, 880 (1995) (noting single asset real estate debtors would often file chapter 11 on eve of foreclosure, for no purpose other than to delay or gain bargaining position over secured creditor, and rarely would there be any realistic chance of successful reorganization); John C. Murray, The Lenders Guide to Single Asset Real Estate Bankruptcies, 31 Real Prop. Prob. & Tr. J. 393, 395 (1996) (discussing common reasons for single asset real estate entity to file chapter 11).Back To Text

[8] *See* American Bar Association, How a Good Idea Went Wrong: Deregulation and the Savings and Loan Crisis, 47 Admin. L. Rev. 643, 649 (1995) (discussing legislation passed in 1982 allowing Savings and Loan Industry to invest in commercial real estate loans and to make increased number of unsecured real estate loans); Barbara J. Ellis, Note and Comment, *Commercial Real Estate Lending Standards Under FDICIA: Changing the Rhythm of Boom, Bust, Crunch?*, 13 Ann. Rev. Banking L. 499, 499 (1994) (stating that "[b]anks liberally extended credit in conjunction with the nation's real estate 'boom' in the 1980's"); Michael Frachioni, *Leveraging the Land: The Changing Loan to Value Ratio for Real Estate Lending by* National Banks, 112 Banking L.J. 41, 41−42 (1995) (discussing power of national banks to make real estate loans under specific grant of authority from Congress and growth of nation's economy at unprecedented rate causing real estate loans to become a significant part of bank portfolios); Murray, supra note 7, at 395 (discussing common reasons for single asset real estate entity to file chapter 11).Back To Text

[9] *See, e.g.,* Deborah D. Williamson, *Defining Single Asset Real Estate Bankruptcies, in* Single Asset Real Estate Bankruptcies 2, 2−3 (Alan J. Robin. ed., 1997) (explaining basis for single asset real estate tax shelters); Robert M. Zinman, *Foreword to,* Single Asset Real Estate Bankruptcies xvi nn.5−6 (Alan J. Robin ed., 1997) (explaining basis for SARE tax shelters); *see also* H. Miles Cohn, Good Faith and the Single−Asset Debtor, 62 Am. Bankr. L.J. 131, 131 (1988). The typical single asset debtor is usually a limited partnership set up to purchase a piece of real estate as an investment or tax shelter. *See* id.*; cf.* The Tax Reform Act of 1986, Pub. L. No. 99−514, 100 Stat. 2085 (1986) (recognizing typical single asset debtor is partnership that invested in commercial real estate to enjoy favorable depreciation tax benefits and eliminating many of these benefits); *see also* In re Prince Manor Apartments, Ltd., 104 B.R. 414, 416−17 (Bankr. N.D. Fla. 1989) (comparing tax benefits under old law with changes made in 1986); Bohm & Young, supra note 2, at 499 (noting single asset limited partnerships were set up for tax reasons); C. Daniel Motsinger, The Bankruptcy Reform Act of 1994: New Mines in the Minefield, 38 Res gestae 16 (Dec. 1994) (stating that single asset limited partnerships were tax driven).Back To Text

[10] *See, e.g.,* Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership), 2 F.3d 899, 907 (9th Cir. 1993) (involving single asset real estate where partnership owned single piece of real estate and mortgagor held senior and largest security interest); In re Pensignorkay, Inc., 204 B.R. 676, 678 (Bankr. E.D. Pa. 1997) (discussing "single asset real estate" case in classic sense and as defined under section 101(5)(1)(B)); In re Kkemko, Inc., 181 B.R. 47, 50 (Bankr. S.D. Ohio 1995) (providing summary of case law involving single asset real estate issues).Back To Text

[11] *See* Motsinger, supra note 9, at 16 (stating that "listless real estate market of the past few years has sent a steady stream of so−called single asset debtors−usually tax driven limited partnerships that owned apartment complexes or office buildings − into Chapter 11"); *see also* Bohm & Young, supra note 2, at 499−500 (discussing real estate downturn of 1980's forcing partnerships and corporations formed solely to own single development to seek refuge under chapter 11); Cohn, supra note 3, at 523 (discussing rapidly increasing number of single asset partnerships and corporations seeking protection in bankruptcy court).Back To Text

[12] *See, e.g.,* Albert J. Cardinali & David C. Miller, Tax Aspects of Non−Corporate Single Asset Bankruptcies and Workouts, 1 Am. Bankr. Inst. L. Rev. 87, 113−14 (1993) (stating effects of non−recourse mortgage debt with respect to single asset debtor); Frederick H. Robinson, Nonrecourse Indebtedness, 11 Va. Tax Rev. 1, 3−4 (1991) (discussing

effect of non−recourse mortgage on debtor in event of default).Back To Text

[13] *See* Clark, supra note 2, at 179 n.2 (stating that downturn in real estate market was reason for increase in single asset cases); *see also* Cox, supra note 7, at 880 (discussing downturn in real estate resulting in use of chapter 11 by single asset real estate debtors); Lisa Hill Fenning & Craig A. Hart, Measuring Chapter 11: The Real World of 500 Cases, 4 Am. Bankr. Inst. L. Rev. 119, 142 (1996) (discussing use of chapter 11 filing by single asset real estate debtor); Katz, supra note 3, at 77 n.1 (noting bankruptcy filings have increased every year since 1985); Jane Lee Vris, *Recent Development in Single Asset Cases*, 656 PLI/Comm 527, 529 (1993) (stating rise in bankruptcy filings reflects economic downturn when increasing numbers of single asset real estate debtors file petitions because of stagnant real estate industry).Back To Text

[14] *See* 11 U.S.C. § 362(a) (1994) (establishing automatic stay provision, which provides that all proceedings against debtor must be stayed upon filing of petition); D'Alfonso v. A.R.E.I. Inv. Corp. (In re D'Alfonso), 211 B.R. 508, 513 (Bankr. E.D. Pa. 1997) (discussing purpose of automatic stay provision to give debtor "breathing spell from creditors"); First Nat'l Bank v. L.H. & A. Realty Co. (In re L.H. & A. Realty Co.), 57 B.R. 265, 268 (Bankr. Vt. 1986) (discussing broad debtor protections provided by automatic stay provision, particularly stopping collection efforts and foreclosure actions); John C. Chabot, Some Bankruptcy Stay Metes and Bounds, 99 Com. L.J. 301, 307 (1994) (discussing expansive view of automatic stay and court interpretation of section 362(a)(3)); David G. Epstein, *Basics of Stay of Collection Activities*, 517 PLI/Comm 633, 640−42 (1989) (discussing scope of automatic stay provisions); Thomas J. Holthus, *A Debtor as a "Creditor" and the* Automatic Stay, 62 Am. Bankr. L.J. 377, 377−78 (1988) (discussing effects of automatic stay provision on secured creditors).Back To Text

[15] *See* Daniel B. Bogart, *Games Lawyers Play: Waivers of the Automatic Stay in* Bankruptcy and the Single Asset Loan Workout, 43 UCLA L. Rev. 1117, 1126 (1996) (discussing inevitability of foreclosure forcing debtors to seek refuge by filing chapter 11); Bohm & Young, supra note 2, at 500 (explaining, faced with no alternative to loss of property and risk of recapture of tax benefits of original transaction, single asset debtors often file chapter 11 on eve of foreclosure).Back To Text

[16] *See* 11 U.S.C. § 1129(b) (1994) (outlining limitations on this method of confirmation frequently called "cramdown"); *see also* Robert L. Lippert, *Determining the Appropriate Cramdown Rate in* Single−Asset Bankruptcies, 24 Real Est. L.J. 255, 255 (1996) (discussing debtor's use of section 1129(b) "cramdown" provision to avoid foreclosure and gain opportunity to reorganize); Robin E. Phelan & Mark X. Mullin, *From Dust to Dust: The Strategy of a Real Estate Organization*, 602 PLI/Comm 199, 230 (1992) (discussing purposes and effects of cramdown); Michael S. Polk, The Chapter 13 Cramdown: New Nightmare for the Lender, 19 Real Est. L.J. 279, 281 (1991) (explaining "cramdown" confirmation of debtor's plan over objection of class of impaired creditors); *cf.* Gregory K. Jones, *The Classification and Cramdown Controversy in* Single Asset Bankruptcy Cases: A Need for the Repeal of Bankruptcy Code Section 1129(A)(10), 42 UCLA L. Rev. 623, 641 (1994) (stating benefits of cramdown are outweighed by costs).Back To Text

[17] *See* John D. Ayer, *Bankruptcy as an* Essentially Contested Concept: The Case of the One Asset Case, 44 S.C. L. Rev. 863, 905 (1993) (discussing reorganization at current market value); Susan Jensen−Conklin, *Financial Reporting by* Chapter 11 Debtors: An Introduction to Statement of Position 90−7, 66 Am. Bankr. L.J. 1, 37 (1992) (discussing chapter 11 reorganization based on fair market value); Motsinger, supra note 9, at 16 (discussing how debtors have used chapter 11 to reorganize while retaining possession and paying creditors based on current market value); Raymond T. Nimmer, Negotiated Bankruptcy Reorganization Plans: Absolute Priority and New Value Contributions, 36 Emory L. J. 1009, 1044 (1987) (discussing valuation of debtor's assets after reorganization under chapter 11); William Norton, Jr., 6 Norton Bankr L. Prac., 2d §§ 129:1−129:23 (William J Norton, Jr., ed., 2d ed. 1996) (stating tax consequences of bankruptcy reorganization).Back To Text

[18] *See* Robert M. Zinman, *No Chapter 11 for Single Asset Real Estate, No "New Value" for Single Asset Real Estate*, Am. Bankr. Inst. Winter Leadership Conf. (Dec. 5−7, 1996) (unpublished article on file with American Bankruptcy Institute and National Bankruptcy Review Commission) (stating single asset cases do not serve traditional purposes of chapter 11, such as preservation of jobs and going concern value); *see also* Lumber Exch. Bldg. Ltd. Partnership v. Mutual Life Ins. Co. (In re Lumber Exch. Bldg. Ltd. Partnership), 968 F.2d 647, 650 (8th Cir. 1992) (agreeing with

bankruptcy court's conclusion that debtor real estate partnership did not belong in chapter 11 because it was "substantially a single liability case"); In re Mill Place Ltd. Partnership, 94 B.R. 139, 141−142 (Bankr. D. Minn. 1988) (stating proposition that single asset chapter 11 cases may be deemed in bad faith virtually as matter of law); In re Fry Road Assocs., Ltd. 66 B.R. 602, 607 (Bankr. W.D. Tex. 1986) (holding that single asset debtor abused bankruptcy process by filing chapter 11 where there was no evidence debtor could benefit from chapter 11 filing); Carlisle, supra note 7, at 137 (stating abuse of judicial process through single asset real estate debtor's use of chapter 11); W. Scott Carlisle, III, *Single Asset Real Estate in* Chapter 11 − Need for Reform, 25 Real Prop. Prob. & Tr. J. 673, 683−85 (1991) (commenting on common abuse by single asset debtor of chapter 11); Hon. Leif Clark et al., *What Constitutes Success in Chapter 11?* A Roundtable Discussion, 2 Am. Bankr. Inst. L. Rev. 229, 263 (1995) (suggesting single asset real estate cases require separate statute); Bogle, supra note 3, at 2184−85 (discussing claim that single asset entities abuse chapter 11 process and exploit remedies available to them after filing).Back To Text

[19] *See* Bogart, supra note 15, at 1258 (stating "purpose of Section 362(d)(3) is to keep those chapter 11 filings by single asset debtors that have no chance of success to a minimum"); Bogle, supra note 3, at 2180 (stating that filing of chapter 11 petition by single asset debtors often delays foreclosure by two years if plan fails); H. Miles Cohn, *Protecting Secured Creditors Against the Costs of Delay in* Bankruptcy: Timbers of Inwood Forest and Its Aftermath, 6 Bankr. Dev. J. 147, 147−48 (1989) (discussing secured creditors costs incurred because of delay of foreclosure by automatic stay); Paul H. Deutch, Note, Expanding The Automatic Stay: Protecting Nondebtors In Single Asset Bankruptcy, 2 Am. Bankr. Inst. L. Rev. 453, 470 (1994) (discussing automatic stay in single asset bankruptcies); Maria Lerman Hutkin, Note, Using Bankruptcy to Pay the Rent Via the Automatic Stay, 63 S. Cal. L. Rev. 181, 188−190 (1989) (discussing problems with broad language of automatic stay provision).Back To Text

[20] Hon. Lisa Hill Fenning, *The Future of Chapter 11: One View From the Bench,* 650 PLI/Comm 317, 331 (1993); *see also* James H. Barnhill, *The Conundrum of an* Inadequately Protected Secured Creditor, 97 Com. L.J. 367, 373−74 (1992) (discussing unfair effects that automatic stay has on secured creditors).Back To Text

[21] *See* supra note 18 and accompanying text.Back To Text

[22] *See* Michael H. Strub, Jr., *Competition, Bargaining, and Exclusivity Under the New Value Rule: Applying the Single−Asset Paradigm of Bonner Mall*, 111 Banking. J. 227, 229 (1994) (stating that because single asset entity is formed solely to operate property, it usually has few employees).Back To Text

[23] *See* Katz, *supra* note 3, at 84−85 (stating that there is little economic justification in saving single asset real estate entity, which is usually worth more in liquidation than as going concern). Back To Text

[24] *See* Robert K. Rasmussen, Debtor's Choice: A Menu Approach to Corporate Bankruptcy, 71 Tex. L. Rev. 51, 78 (1992) (explaining reason for chapter 11); Frederick Tung, Confirmation and Claims Trading, 90 Nw. U. L. Rev. 1684, 1689 (1996) (stating that chapter 11 seeks to maintain going concern value because otherwise firm dismemberment will occur).Back To Text

[25] *See* Douglas G. Baird & Thomas H. Jackson, Bargaining After the Fall and the Contours of the Absolute Priority Rule, 55 U. Chi. L. Rev. 738, 750 n.31 (1988) (stating that "[c]onventional bankruptcy doctrine suggests that cases that are simply two−party disputes are inappropriate for bankruptcy"); Cohn, supra note 9, at 144 (noting that "where the bankruptcy petition has been filed as an alternative to the lost injunction, with no intent to reorganize and pay the debt, the case involves nothing more than a 'two−party dispute'"); s*ee also* In re Roy Dawson Radio Corp., 70 B.R. 588, 591 (Bankr. M.D. Fla. 1987) (discussing two−party dispute over easement on debtor's sole asset, private airport); North Cent. Dev. Co. v. Landmark Capital Co. (In re Landmark Capital Co.), 27 B.R. 273, 279 (Bankr. D. Ariz. 1983) (explaining fraud action challenging secured creditors lien is two−party dispute). *But see*, Commission Report, supra note 1, at 680 (presenting Professor Kenneth Klee's alternative proposal which argues that single asset real estate cases are not two−party disputes).Back To Text

[26] *See* Jones, supra note 16, at 626 (stating that at time secured creditor begins foreclosure proceedings value of property is usually less than amount of secured claim). *See generally* Bogle, *supra* note 3, at 2166−72, 2184−90 (examining major problems presented by single−asset real estate cases and ability of amendments of Bankruptcy Code

to curb problems); Murray, supra note 7, at 424−31 (providing examination of secured creditor's option, strategies and remedies when faced with chapter 11 filing by single asset real estate debtor).Back To Text

[27] *See* Linda J. Rusch, *The New Value Exception to the Absolute Priority Rule in Chapter 11 Reorganizations: What Should the Rule Be?*, 19 Pepp. L. Rev. 1311, 1316 n.11, 1323 (1992) (stating that one goal of chapter 11 reorganization is to maximize recovery to creditors); *see also* Robert M. Zinman, *No "New Value Exception" For Single Asset Real Estate*, 4 Am. Bankr. Inst. L. Rev. 555, 555 (1996) (stating that application of new value exception by single asset debtors often results in no repayment to unsecured creditors). Back To Text

[28] *See* Nat'l Bankr. Rev. Comm'n, Small Business Working Group Business Proposal # 4: Repeal the $4 Million Cap on the Definition of Single Asset Real Estate, (1997) [hereinafter Working Group Proposal] (visited Jan. 11, 1998) <http://www.abiworld.org/legis/review/proposal/ propfont.html> (stating that "[d]uring the Chapter 11 proceeding it is not uncommon for single asset real estate properties to receive minimal repairs, capital improvements, and capital replacements"); Alan Robins & James Lipscomb, *Real Estate Bankruptcies and the Bankruptcy Process*, Am. Bankr. Inst. Winter Leadership Conf. (Dec 5−7) (unpublished article on file with the American Bankruptcy Institute and the National Bankruptcy Review Commission) (stating single asset real estate cases are often forced to use all of their funds to pay for debt service and as a result fail to make needed repairs or to continue routine maintenance, leading to further decline in the value of the property).Back To Text

[29] *See, e.g.*, California Mortgage Serv. v. Yukon Enters. (In re Yukon Enters.), 39 B.R. 919, 921 (Bankr. C.D. Cal. 1984) (examining certain recurring, but not exclusive factors, traditionally considered ‘badges of bad faith'); Meadowbrook Investors' Group v. Thirtieth Place, Inc. (In re Thirtieth Place, Inc.), 30 B.R. 503, 506 (B.A.P. 9th Cir. 1983) (dismissing on ground that petition initiating proceeding was not filed in good faith). *See generally* Katz, *supra* note 3, at 85−99 (discussing courts' reaction to single−asset debtor cases).Back To Text

[30] *See* Clark, *supra* note 2, at 179 n.74 (stating not abuse of discretion when court denies debtor's motion for continuance when purpose of filing was to delay proceedings) (citing Martwick v. Agribank, FCB (In re Martwick), 60 F.3d. 482, 483 (8th Cir. 1995)).Back To Text

[31] *See* Clark, *supra* note 2, at 180 (citing In re Investors Fla. Aggressive Growth Fund, Ltd., 168 B.R. 760, 765−66 (Bankr. N.D. Fla. 1994)); *see also* In re Longfellow Properties, Inc., 149 B.R. 12, 15−16 (Bankr. D. N.H. 1992) (sustaining objection to confirmation of proposed chapter 11 plan since debtor's proposal relied on uncertain real estate market).Back To Text

[32] The courts dismissed cases for bad faith under 11 U.S.C. § 1112(b), which allows for dismissal for cause. *See* Katz, supra note 3, at 87 (stating that courts began applying good faith requirement in filing of chapter 11 petitions). The court would look at certain factors it considered indicative of bad faith, and if they were present it would dismiss the petition because it was filed in bad faith. *See* id. at 86−88. *See generally* Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (In re Little Creek Dev. Co.), 779 F.2d. 1068, 1073 (5th Cir. 1986) (finding several factors establishing that debtor was not ongoing business which was evidence of bad faith); Phoenix Piccadilly, Ltd. v. Life Ins. Co. (In re Phoenix Piccadilly, Ltd.) 849 F.2d 1393, 1394−95 (11th Cir. 1988) (dismissing chapter 11 petition when only reason for filing petition was to avoid foreclosure).Back To Text

[33] *See* Humble Place Joint Venture v. Fory (In re Humble Place Joint Venture), 936 F.2d 814, 816 (5th Cir. 1991) (affirming lower courts dismissal of chapter 11 petition because debtors only sought to relieve their personal guarantees instead of protecting creditors); Little Creek Dev. Co., 779 F.2d at 1072 (noting good faith requirement prevents abuse by debtors and advances protection of creditors); Phoenix Piccadilly, Ltd. 849 F.2d at 1395 (stating bad faith dismissal will stand despite possibility of successful reorganization); Carolin Corp. v. Miller, 886 F.2d 693, 693 (4th Cir. 1989) (agreeing that bad faith filing warrants dismissal of chapter 11 petitions); Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.) 749 F.2d 670, 674 (11th Cir. 1984) (noting that dismissal of petition is appropriate when it was filed in bad faith).Back To Text

[34] *See* Bohm & Young, supra note 2, at 501.Back To Text

[35] *See* In re Victoria Ltd. Partnership, 187 B.R. 54, 60 (Bankr. D. Mass. 1995) (stating that good faith doctrine conflicted with Bankruptcy Code); In re James Wilson Assocs., 965 F.2d 160, 170−71 (7th Cir. 1992) (determining that clearest indication of bad faith is where debtor knows there is no chance of reorganization, but files chapter 11 petition anyway). Back To Text

[36] *See* Bohm & Young, supra note 2, at 501 (explaining that some courts choose not to dismiss even when bad faith is present).Back To Text

[37] *See* id. at 501; *see, e.g.*, PNC Bank Nat'l Ass'n v. Park Forset Dev. Corp. (In re Park Forest Dev. Corp.), 197 B.R. 388, 394 (Bankr. N.D. Ga. 1996) (stating that filing without intention to frustrate creditors' claims courts often deny dismissal for bad faith); In re Mill Place Ltd. Partnership, 94 B.R. 139, 141 (Bankr. D. Minn. 1988) (explaining that dismissal of chapter 11 petition for bad faith should be subject to clear and convincing proof).Back To Text

[38] *See* In re Quorum Ltd. Partnership, 198 B.R. 5, 8 (Bankr. D. N.H. 1996) (noting that although facts warranting dismissal were present, court does not always have to implement such drastic remedy).Back To Text

[39] *See* Victoria 187 B.R. at 55 (stating good faith doctrine not universally accepted); Wilson 965 F.2d. at 170 (recognizing good faith doctrine not universally accepted).Back To Text

[40] *See* Clark, supra note 2, at 180 (stating that good faith test was designed to assure that single asset filers would flunk test and that limiting chapter 11 curtailed some petitioners' legitimate reorganization attempts).Back To Text

[41] Pub. L. No. 103−394, 108 Stat. 4106; *see* 3 Collier on Bankruptcy ¶ 362.07[5][b] at 100 n.81 (Lawrence P. King et al. eds., 15th ed. 1997) (quoting S. Rep. No. 103 at 168 (1993)) ("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"); 140 Cong. Rec. 410752−01, H10764 (daily ed. October 4, 1994) (statement of Rep. Brooks) ("[W]ithout bankruptcy reform, companies, creditors, and debtors alike will continue to be placed on endless hold until their rights and obligations are adjudicated under the present system and that slows down new ventures, new extensions of credit and new investments"); *see also* H.R. Rep. No. 103−835, at 32−34 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3340−42 (identifying goals of proposed bill were to "increase efficiency of bankruptcy process and resolve some uncertainties regarding application of Code," and more specifically to expedite hearings concerning automatic stay).Back To Text

[42] *See* 3 Collier, supra note 41, at 100 (stating that "[t]he purpose of this provision is to address perceived abuses in single−asset real estate cases, in which debtors have attempted to delay mortgage foreclosures even when there is little chance that they can reorganize successfully").Back To Text

[43] *See* Clark, supra note 2, at 176 n.46 (1996) (noting that "[s]ection 218 of the Bankruptcy Reform Act of 1994 included provisions relating to single asset real estate cases codified in 11 U.S.C. §§ 101(51B), 362 (d)(3) (1994)). Section 101(51B) defines "single asset real estate" under the Code. Section 362(d)(3) provides certain guidelines for lift−stay proceedings against single asset real estate"). Back To Text

[44] 11 U.S.C. §§ 101 (51B) (1994).Back To Text

[45] *See* Commission Report, supra note 1, at 667 (referring to four million dollar limit in 11 U.S.C. §§ 101(51B) as four million dollar cap); *Commission Wraps Up Public Meetings*, 7 Am. Bankr. Inst. J. (Sept. 1997) 1, 6 (referring to cap).Back To Text

[46] *See* 11 U.S.C. § 362(d)(3) (1994) (including additional conditions for which automatic stay may be lifted); Centofante v CBJ Dev., Inc. (In re CBJ Dev., Inc.), 202 B.R. 467, 470 (B.A.P. 9th Cir. 1996) (stating exceptions granting automatic stay); In re Standard Mill Ltd. Partnership, No. Bky 4−96−2656, Sept. 12, 1996 WL 521190, at *2 (Bankr. D. Minn. 1996) (noting factors which allow for the lifting of automatic stay provision under 11 U.S.C. § 362(d)(3)); *see also* 2 Norton, supra note 17, § 36:35:3 (noting that single asset real estate debtors must make monthly payments with interest to undersecured creditors if debtors' plan is not filed within 90 days of when automatic stay is entered). Back To Text

[47] *See* Standard Mill Ltd. Partnership, 1996 WL 521190, at *3 (denying relief for creditor because debtor did not meet definition of single asset real estate debtor under 11 U.S.C. § 101(51B) having more than four million dollar limit); Baxter Dunaway, Effect of the Bankruptcy Reform Act of 1994 on Real Estate, 30 Real Prop. Prob. & Tr. J. 601, 635−36 (1996) (stating that amendment's effect is weakened by $4,000,000 limit); Bogle, supra note 3, at 2185 (noting that amendments' impact was less than expected on single asset real estate cases). Additionally, the author suggests that "[t]he limitation would seem more appropriately placed if it applied to cases where the debtor owed more than $4,000,000 because these are the cases where debtors are more desperate and willing to create delays and problems". Id. at 2186; *see also* Murray, supra note 8, at 396 (noting that the $4,000,000 cap resulted in diminished protection for bankruptcy debtors).Back To Text

[48] The four million dollar cap was added at the last minute by Congress. Congress refused to approve the changes to the Code without it and with no time to vote on the inclusion of the cap it was included. *See* Working Proposal, supra note 28, at 2. (stating there is no legislative history to explain monetary limit). The courts are forced to make assumptions as to the rationale of Congress for the limit finding no relevant legislative history. *See* In re Oceanside Mission Assocs., 192 B.R. 232, 236−37 (Bankr. S.D. Cal, 1996) (discussing interpretation of $4,000,000 limitation).Back To Text

[49] *See Proposed Amendments to the* United States Bankruptcy Code: Hearings Before the Subcomm. on Comm. and Admin. Law, 105th Cong., 1st Sess. 1997 WL 275308 (F.D.C.H.) (April 30, 1997) (testimony of Donald R. Ennis) (noting average commercial loan at risk in single asset context is ten million dollars); H.R. Rep. No. 105−324, § 2 (1997) (recognizing problem with four million dollar limit giving debtors ability to abuse automatic stay provision in commercial property bankruptcy filings); Bogle, supra note 3, at 2185 n.76 (citing numerous cases where debtors have filed for bankruptcy with secured debt over $4,000,000).Back To Text

[50] Rep. Knollenberg explains the problems with the definition of 11 U.S.C. § 101(51B), the causes of the legislation, and how it can be corrected. *See* 143 Cong. Rec. H10660−02, H10662 (Jan 7, 1997) (statement of Rep. Knollenberg) (stating that "[t]he injustice with Title XI stems from an eleventh hour action . . . that placed an arbitrary $4 million ceiling on single asset provision in the bill"); s*ee also* H.R. Rep. No. 105−324, § 2 (1997) (explaining need to increase single asset real estate's monetary ceiling); 143 Cong. Rec. H10660−02, H10661 (Jan. 7, 1997) (statement of Rep. Knollenberg) (attempting to rectify problem with $4 million limit by raising to $15 million limit).Back To Text

[51] *See* Commission Report, supra note 1, at 667 (stating that "[t]he time needed to formulate a plan is similar in large and small SARE cases, because the basic task in each instance is usually financial restructuring rather than business restructuring"); *see* Bogle, supra note 3, at 2185−86. (noting that debtors regardless of the amount of financing required face the same challenges in securing money from lenders).Back To Text

[52] If the intent of the 1994 Amendments was to give greater protection to secured lenders in single asset cases, why protect them in cases with less than four million dollars at stake and not protect them in cases when more of their money is at risk of being lost. *See* 143 Cong. Rec. H10660−02, H10662 (Jan. 7, 1997) (statement of Rep. Knollenberg) (finding arbitrary low ceiling punishing investors); *see, e.g.*, Standard Mill Ltd. Partnership, 1996 WL 521190, at *3 (finding that "because there is over $4 million in secured debt claims in the present case, this case falls outside the definition of a ‘single asset real estate case'"). Back To Text

[53] *See* 11 U.S.C. § 362(d)(3) (1994); In re Oceanside Mission Assocs., 192 B.R. 232, 235 (Bankr. S.D. Cal. 1996) (noting that section 362(d)(3) along with 11 U.S.C. section 101(51B) require single asset real estate debtors to act expedient when filing reorganization plans); *see also* 3 Collier, supra note 41, at ¶ 362.07[5][b] at n.81 (showing legislative history for protection of creditors from single asset real estate debtors abusing reorganizations to delay foreclosure); 2 Norton Bankr. L. & Prac. § 35:83 (William J. Norton, Jr. ed., 1996) (noting protection given to an undersecured creditor).Back To Text

[54] 11.U.S.C. § 362(d)(3) (requiring that debtor file plan "not later than the date that is 90 days after the entry of the order for relief); s*ee also* In re CBJ Dev., Inc. 202 B.R. 467, 470 (B.A.P. 9th Cir. 1996) (citing factors which will allow for relief from automatic stay); Norton, supra note 53, at § 9:54.5 (stating requirements of single asset real estate debtor filing). Back To Text

[55] *See* supra note 41 and accompanying text; 140 Cong. Rec. 764 (1994); *see also* Centofante v. CBJ Dev., Inc. (In re CBJ Dev. Inc.,), 202 B.R. 467, 470 (B.A.P. 9th Cir 1996) (finding section 363(d)(3) requires granting relief where single asset real estate debtors petition for reorganization unless certain factors exist); Nationsbank, N.A. v. LDN Corp. (In re LDN Corp.), 191 B.R. 320, 327 (Bankr. E.D. Va. 1996) (stating section 362(d)(3) was revised to provide greater protection for secured lenders).Back To Text

[56] Baxter Dunaway, Effect of the Bankruptcy Reform Act of 1994 on Real Estate, 30 Real Prop. Prob. & Tr. J. 601, 635−36 (1996) (stating that amendment's effect is weakened by four million limit); Bogle, *supra* note 3, at 2186 (noting that amendments' impact was less than expected on single asset real estate cases). Additionally, the author suggests that "[t]he limitation would seem more appropriately placed if it applied to cases where the debtor owed more than $4,000,000 because these are the cases where debtors are more desperate and willing to create delays and problems" Id; *see also* Murray, supra note 8, at 396 (noting that the $4 million cap resulted in diminished protection for bankruptcy debtor's).Back To Text

[57] *See* Pub. L. No. 103−394, 108 Stat. 4106.Back To Text

[58] *See* Commission Report, supra note 1, at 664−665.Back To Text

[59] *See* id. at 663.Back To Text

[60] *See* id.Back To Text

[61] *See* id. at 664−65. The Working Group proposal recommends that the statutory definition of single asset real estate be changed, removing the four million cap in favor of no cap, clearly excluding debtors participating in active business on the real estate, and installing a loan−to−value requirement on new value plans. Id.Back To Text

[62] *See* Commission Report, supra note 1, at 667; *see also* Commission Wraps Up Public Meetings, 7 Am. Bankr. Inst. J. 1, 6 (Sept. 1997) (summarizing removal of cap proposal by NBRC). Back To Text

[63] *See* Commission Report, supra note 1, at 667 (citing Proposed Amendments to the United States Bankruptcy Code: Hearings Before The Subcomm. On Comm. and Admin. Law, 105th Cong., 1st, Sess. (Apr. 30, 1997)) (testimony of Donald R. Ennis) (noting average commercial loan at risk in single asset context is ten million dollars).Back To Text

[64] *See* id. at 667.Back To Text

[65] Id. This may be true: however, the amount of debt involved clearly effects the amount of cost or risk which the secured creditor faces. *See* Scott Carlisle, *Single Asset Real Estate in Chapter 11 After the Bankruptcy Reform Act of 1994: A Secured Creditor's Perspective, in* Single Asset Real Estate Bankruptcies 375, 389−90 (Alan J. Robin ed., 1997) (noting losses sustained by both secured and unsecured creditors are greater for larger properties). Back To Text

[66] *See* Commission Report, supra note 1, at 667 (stating individuals who usually receive social benefits are rarely involved in SARE cases).Back To Text

[67] *See* 11 U.S.C. § 1129(a)(7)(ii) (1994) (requiring that creditors receive more under reorganization plan than they would under chapter 7); H.R. Rep. No. 95−595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6368 (noting that best interest of creditors must be taken into account during plan confirmation); 7 Collier On Bankruptcy ¶ 1100.01 at 1100−5 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (discussing substantial protection chapter 11 provides for creditors).Back To Text

[68] *See* Commission Report, supra note 1, at 667 (stating that "[u]nsecured trade creditors are typically a very small percentage of total debt in large SARE cases as well as small ones").Back To Text

[69] *See* id. (noting that "[a]lthough preservation of jobs and going−concern value may be an issue in some SARE cases, it is not *typically* an issue in either large or small SARE cases"). The reason these issues are not involved is

because the business will still be run as usual regardless of whether the debtor or the creditor owns the property. *See* id. at 662.Back To Text

[70] *See* id. at 667; *see also* 11 U.S.C. § 362(d)(3) (1994) (allowing court to set later deadline for cause); 11 U.S.C. § 362(e) (1994) (allowing for delay of hearing on lifting automatic stay under compelling circumstances); H.R. Rep. No. 103−835, at 36 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3344 (stating that compelling circumstances include illness or other occurrences outside the control of the parties).Back To Text

[71] Commission Report, supra note 1, at 667 (noting exception to debt limit in very large cases where debt is more than $50 million).Back To Text

[72] *See* id. (stating "[i]n other words, the general rule for large SARE cases (no plan or payment deadline) is derived from the needs of the usual case"). Back To Text

[73] *See* id. at 667−68, (stating that the $4 million cap should be eliminated because the 90−day−plan or−payment requirement is "an appropriate general rule for SARE cases of all sizes" and requirements of larger cases should be addressed by court).Back To Text

[74] *See* supra note 1 and accompanying text.Back To Text

[75] *See*, 11 U.S.C. § 101(51B) (1994); *see also* supra note 40 and accompanying text.Back To Text

[76] *See* Commission Report, supra note 1, at 668. *See generally* In re Philmont Dev. Co., 181 B.R. 220, 223 (Bankr. E.D. Pa. 1995) (discussing lack of cases and legislative history interpreting definition of SARE).Back To Text

[77] *See* Commision Report, supra note 1, at 668 (indicating active businesses such as wholly owned subsidiaries operating business on real estate owned by its parent would be excluded from proposed definition of SARE debtor). Back To Text

[78] *See* id. (proposing to clarify definition of SARE debtor).Back To Text

[79] Id.Back To Text

[80] *See* id. at 668. (explaining that allowing lenders to require borrowers to create such subsidiaries would be expensive and could result in loss of jobs and diminished going concern value).Back To Text

[81] For example, the proposal states:

> 1. Debtor is a limited liability company owned by a group of lawyers, doctors and dentists which owns an office building held for rental. Debtor is an [sic] SARE. This would be true even if debtor provides its own cleaning, maintenance, snow removal and landscape services, because these are activities incidental to the operation of the property.
>
> 2. Debtor is a wholly owned subsidiary of a Fortune 500 manufacturing company which owns a manufacturing facility operated by the parent. The debtor and it's parent are both Chapter 11 debtors. The debtor is not an [sic] SARE. This is because the debtor is a member of a commonly controlled group in Chapter 11 which conducts a substantial business on the debtor's property other than a business incidental to the operation of the property.
>
> 3. Debtor is a limited partnership owned by a group of business executives which owns a strip shopping center with twenty−three stores, none of which is operated by the debtor. Debtor is an [sic] SARE.

> 4. Debtor is the same limited partnership owned by the same group of business executives which owns the same strip shopping center with twenty−three stores. However, in this example, the smallest of the store spaces is operated as a frozen−yogurt stand by the debtor. Debtor is an [sic] SARE, even though it operates a business other than an activity incidental to real estate because the frozen−yogurt stand is not "substantial."
>
> 5. Debtor is a corporation owning a regional shopping mall. Debtor is majority owned by an enterprise which also operates a nationwide chain of 147 ladies−apparel stores, one of which is on the debtor's premises. The debtor is not an [sic] SARE, because the business being operated by the debtor's group is "substantial."

Id. at 669.

These examples fail to clarify the difference between a substantial and non substantial business. For instance where is the line between the two, and what about a business with 5 or 10 stores?Back To Text

[82] Commission Report, supra note 1, at 668.Back To Text

[83] *See* 11 U.S.C. § 101(2) (1994); s*ee also* Commission Report, supra note 1, at 668 (defining affiliate as any entity which controls 20 percent or more of the debtors outstanding securities).Back To Text

[84] Commission Report, supra note 1, at 664.Back To Text

[85] Id. at 668.Back To Text

[86] *See* id. at 669 (noting that present definition contains ambiguities). Back To Text

[87] *See* id. at 669 n.1684 (noting question of whether raw land fell under the phrase "substantially all of the gross income of a debtor," was at the center of a dispute over classification as an SARE debtor); *see also* In re Oceanside Mission Assocs., 192 B.R. 232, 234 (Bankr. S.D.Cal. 1996). Back To Text

[88] Commission Report, supra note 1, at 669−70 & n.1685; *cf.* In re Pensignorkay, Inc., 204 B.R. 676, 682−83 n.4 (Bankr. E.D. Pa. 1997) (stating that market value of property should be used in calculating cap). The court found that the amount of the secured claim for "cap" determination, is the market value of the property if it is less than the debt because any amount of the debt in excess of the property value can not be secured by the property. Therefore, it is not "secured debt" for purposes of the cap limit. *But see* Oceanside Mission Assocs., 192 B.R. at 236−38 (finding that amount of secured claim is not limited to market value of property). Back To Text

[89] Commission Report, supra note 1, at 671−72 (describing typical SARE scenario as instance where mortgage fully encumbers the debtors property, and rental value declines so that debtor is forced to file chapter 11).Back To Text

[90] Id.Back To Text

[91] Id. at 671−72. The working group states that this type of restructuring is much less complicated than operational restructuring because, "[t]he debtor whose case usually involves business restructuring may need to open or close a branch or division. The debtor may then need to operate the restructured business for some time, to see how profitable it will be, before the debtor can propose a plan." Id. Back To Text

[92] Id. at 671.Back To Text

[93] *See* Commission Report, supra note 1, at 671−72.Back To Text

[94] *See* id. at 671−72.Back To Text

[95] *See* id. (noting SARE debtors may instead make interest payments within ninety days or seek extension for cause).Back To Text

[96] *See* 11 U.S.C. § 362(a)(d)(3)(B) (1994).Back To Text

[97] Commission Report, supra note 1, at 672.Back To Text

[98] *See* id. at 673 (stating "imposing the risks of delay on the secured creditor for more than three months are not justified"). Back To Text

[99] *See* id. The Commission further supports its position by stating that "the secured creditor is deprived of the use of property in which only it has present economic interest without payment for that use." Id. at 672−73.Back To Text

[100] Id. at 673; *see also* John D. Ayer, *The Role of Finance Theory in* Spring Bankruptcy Policy, 3 Am. Bankr. Inst. L. Rev. 53, 71−73 (1995) (discussing purpose of chapter 11); Bogle, supra note 3, at 2182−84 (questioning allowance of "entities to file in chapter 11 solely to protect on investment rather than livelihood or business important to the economy").Back To Text

[101] *See* Commision Report, supra note 1, at 673−674.Back To Text

[102] *See* Case v. Los Angeles Lumber Products, 308 U.S. 106, 120 (1939) (discussing new value exception); *see also* Mark E. MacDonald et al., *Confirmation by Cramdown Through the New Value Exception in* Single Asset Cases, 1 Am. Bankr. Inst. L. Rev. 65, 69−74 (1993) (discussing evolution of new value exception as judicially created doctrine).Back To Text

[103] *See* Commission Report, *supra* note 1, at 674. The Working Group proposes the following requirements for new value exception plans:

> 2.6.3 Require Substantial Equity in order to Confirm a Lien Stripping Plan Using the New Value Exception
>
> In cases where the secured creditor has not made the election under section 1111(b)(1)(a)(i), a plan must satisfy the following requirements to be confirmed under the new−value exception following rejection by a class that includes the unsecured portion of a claim secured by real property: (1) The new value contribution must pay down the secured portion of the claim on the effective date of the plan so that, giving effect to the confirmation of the plan, sufficient cash payments on the secured portion of the claim shall have been made so that the principal amount of debt secured by the property is no more than 80 percent of the court determined fair market value of the property as of the confirmation date; (2) the payment terms for the secured portion of the claim must both (i) satisfy all applicable requirements of section 1129 of the Code, and (ii) satisfy then−prevailing market terms in the same locality regarding maturity date, amortization, interest rate, fixed−charge coverage and loan documentation; and (3) the new value contribution must be treated as an equity interest that is not convertible to or exchangeable for debt.

Id.Back To Text

[104] *See* id. (stating that requirements for confirmation of "new value exception" plans be clarified to reduce costs and delay). *Back To Text*

[105] *See* Northwest Bank Worthington v. Ahlers, 485 U.S. 197, 204−205 (1988) (finding that promise of future labor was not new value); *see also* In re Sovereign Group 1985−27, Ltd., 142 B.R. 702, 707 (E.D. Pa. 1992) (holding that new value exception exists under the Bankruptcy Code). *But see* In re A.V.B.I., Inc., 143 B.R. 738, 747 (Bankr. C.D. Cal. 1992) (holding that new value exception is no longer viable under Code). *See generally* Scott Carlisle, *Single Asset Real Estate in* Chapter 11: Secured Creditors' Perspective and the Need for Reform, 1 Am. Bankr. Inst. L. Rev.

133, 135 (1993) (discussing SARE and disadvantages of being unsecured). For additional discussion, see Marvin Krasny and Kevin J. Carey, *7th Circuit Recognized Value Exception*, The Legal Intelligencer, Nov. 7, 1997 at 9.Back To Text

[106] *See* Commission Report, *supra* note 1, at 676.Back To Text

[107] *See, e.g.*, In re Bonner Mall Partnership, 2 F.3d 899, 908 (9th. Cir. 1993), cert. granted, 510 U.S. 1039 (1994), *case dismissed as moot*, 513 U.S. 18 (1994) (stating under current case law, new value exception contains five requirements: (1) new; (2) in money or money's worth; (3) substantial; (4) necessary; and (5) reasonably equivalent to the interest retained).Back To Text

[108] S*ee* Commission Report, *supra* note 1, at 675. Back To Text

[109] Id. It is unclear who the original author of this quote was as it was adopted by the SARE Working Group, the Chapter 11 Working Group, and The Alternative Proposal.Back To Text

[110] *See id.* at 675−76. The Working Group seeks to clarify the requirements on the new value exception, in order to clear up ambiguities that have led to litigation. Courts in the past have come to differing conclusions on the requirements of the "new value exception." Specifically courts have differed over what constitutes a "substantial" new value contribution, what type of expenditures the "necessary" requirement allows and the requirement that the new value be "reasonably equivalent" has sparked debate over whether indirect benefits to equity holders should be considered new value. Back To Text

[111] *Id*. at 675.Back To Text

[112] *See id.* at 675 (stating how secured creditors are benefited by this proposal).Back To Text

[113] Commission Report, *supra* note 1, at 675. Back To Text

[114] *See* id. (listing several ways litigation can be simplified).Back To Text

[115] *Id.* at 676 (stating rationale for loan−to−value test).Back To Text

[116] *See* id. (stating that with conventional layer of equity, debtor would enjoy benefits and bear burdens of ownership).Back To Text

[117] *See id.* at 676 n.1701.Back To Text

[118] *See* Commission Report, *supra* note 1, at 677 (stating "[a] new−value plan in which the secured debt equals 100 percent of the value of the property is a virtual recipe for future default and poor maintenance . . . too much of the debtor's net income must be spent on mortgage debt service, leaving the debtor too little for maintenance and reserves"). Back To Text

[119] *See* id. The Commission states that this, in turn, increases the chances that the debtor will properly maintain the property and be able to meet its mortgage obligations.Back To Text

[120] *See id.* at 677 (noting that "[r]equiring the equity holders to make this down payment will also give those equity holders a greater incentive to put in additional new money as needed, because they will have a current economic interest in the property to protect").Back To Text

[121] *See* id. (footnotes omitted).Back To Text

[122] *See id.* at 677−678; The Commission compares the five elements of the new value exception under current case law with the elements of the proposed new value exception and concludes that the proposed new value exception is

not a departure from the elements of the current new value exception. *See* Commission Report, *supra* note 1, at 946. Rather, the new value exception is the same except that it has been modified to better handle SARE cases. *See* id. *See also* Memorandum from Honorable Thomas E. Carlson to the Small Business Working Group (June 5, 1997) (on file with author).Back To Text

[123] *See* Commission Report, *supra* note 1, at 678. The Report States:

> It would completely undermine the logic of the Proposal, for instance, to permit the debtor to treat the new contribution as senior lien on the real property. A more realistic danger is that the contribution might be treated as equity convertible to debt on par with unsecured claims to be paid under the plan. In that instance the new−value contribution might not have the hoped for effect of enhancing the capital structure of the debtor and the feasibility of the plan."

Id.Back To Text

[124] *See id.* at 679 (explaining "credit bid" approach, whereby property is put up for auction for the lender to bid value of its note to purchase property). The Commission rejected the "credit bid" approach out of concern that it might prevent a debtor from ever confirming a new value plan over the objection of a secured creditor. Id.Back To Text

[125] *See id*. at 664.Back To Text

[126] *See* Commission Report, *supra* note 1, at 670.Back To Text

[127] *See id.* at 680.Back To Text

[128] *See id.* at 680. (indicating that Small Working Group was responsible for submitting Single Asset Real Estate Proposals). Back To Text

[129] Id. Back To Text

[130] Id.Back To Text

[131] *See* Commission Report, *supra* note 1, at 680. Professor Klee argues that SARE debtors abuse the bankruptcy process by using the protection of the automatic stay to prevent foreclosure and resist making payments to the secured debtor, in order, to retain their interest in the overencumbered property. Id. In addition, Professor Klee states that although the court has become more adept at handling SARE cases, "nevertheless, in spite of some favorable trends, problems alleged to arise from SARE cases continue to demand the careful attention of judges and makers of public policy." *Id.* at 681.Back To Text

[132] *See* id. "They contend that reorganization is not generally necessary to preserve jobs and going concern value in SARE cases. Whether the debtor keeps the real property or the secured creditor takes it back, they believe that the property will be operated in the same manner, creating the same jobs and economic activity." Id.Back To Text

[133] *See* id. In support of this, the Alternative Proposal states "[a]necdotal evidence of foreclosing banks boarding−up buildings in Texas during the 1980s supports this view." Commission Report, *supra* note 1, at 681. Back To Text

[134] *See* id. The Alternative Proposal continues by stating that "[s]everal published articles and persons who appeared before the Working Group defended the availability of Chapter 11, as presently constituted, for SARE cases." *See id.* at 681. Stating that many of the bankruptcy professionals that the Commission heard from stated that no greater abuse of the bankruptcy system occurs in SARE cases then does in other cases. Id. The Bankruptcy Professionals agreed that the typical motivation for abuse in SARE cases tax shelter preservation was no longer prevalent in SARE cases as most of those tax shelters have been eliminated and Bankruptcy judges, trustees and administrators had become adept at controlling abuse in SARE. Id. Furthermore "[t]hese commentators repeatedly asserted that whatever the problems with SARE cases might or might not be, the SARE debtor did not deserve more restriction in how it could function in

Chapter 11 than any other debtor." Id. Back To Text

[135] *See* Commission Report, *supra* note 1, at 682 (stating that "[t]he effect of section 362(d)(3) is limited, however, by the fact that it does not apply to cases in which the secured debt exceeds $4 million").Back To Text

[136] *See* id. (stating that "[w]hether an SARE debtor can confirm a lien−stripping plan generally turns on whether an impaired class has accepted the plan . . . and whether the plan satisfies the new−value exception to the absolute priority rule the Court of Appeals have made it increasingly difficult for the debtor to create an impaired accepting class"). *See, e.g.*, In re Barakat, 99 F.3d 1520, 1526 (9th Cir. 1996), cert. denied, 117 S.Ct. 1312 (denying plan confirmation for lack of assent of impaired noninsider class of creditors); In re Lumber Exch. Bldg. Ltd. Partnership, 968 F.2d 647, 649 (8th Cir. 1992) (holding that when debtor cannot "propose confirmable plan without improperly classifying creditors" the court will use its discretion); In re Bryson Properties, XVIII, 961 F.2d 496, 502 (4th Cir. 1992) (holding plan for reorganization to be unfair and inequitable); In re Greystone III Joint Venture, 995 F.2d 1274, 1281 (5th Cir. 1991) (permitting classification for reasons independent of debtor's motivation); In re Boston Post Road Ltd. Partnership, 21 F.3d 477, 483 (2d Cir. 1994) (holding plan to be impermissible when separating claims for purpose of creating assenting class).Back To Text

[137] *See* Commission Report, supra note 1, at 683. The Alternative Proposal argues that requiring new value equal to 20% of the secured debt makes sense in some cases, but in many cases will force legitimate reorganization attempts into foreclosure. The Alternative Proposal argues that the fair and equitable rule should not be abandoned in favor of the rigid 20% requirement without any evidence that the rule will work. Back To Text

[138] Id. at 683. The Alternative Proposal which is a nice intermediate, differs from the Working Group in that:

> the proposals do not use the Working Group approach of employing objective standards into the single asset real estate cases, either in the definition or in the confirmation standards. While clear standards are generally to be applauded, they work well only when people generally agree that they are appropriate, both as a matter of principle and as an empirical matter. In SARE cases, there is no such consensus, which means that any recommendation incorporating objective standards is bound to be controversial. A controversial proposal will offer little guidance to Congress, setting up another round of contentious hearings that do little to forward the debate in the absence of empirical data.

Id.Back To Text

[139] *See* id. at 684−85. Professor Klee recommends that the statutory definition of 362(d)(3) be changed to include a $15 million cap and a more precise definition of active business. Back To Text

[140] *See* id. at 687. (stating that "[t]he $4 million cap should be raised to include other SARE cases in which the level of cash flow is likely to lead to deferred maintenance and non−payment of property taxes"). Back To Text

[141] Commission Report, supra note 1, at 687.Back To Text

[142] *See* id. The Alternative states that, in light of past experience, it would be a mistake to fast track large SARE debtors. Unlike small SARE debtors, large SARE debtors continue to maintain the property and pay taxes after filing, involve more complex restructuring as they usually have more than one secured creditor, involve larger amounts of trade debt. Furthermore failure of a large SARE debtors attempt to reorganize may result in a significant number of jobs being lost.Back To Text

[143] *See* Commission Report, supra note 1, at 687, 695 (commenting that "[i]n order to enable further study, the proposal raises the cap to $15 million as a measured first step"); The Alternative Proposal argues that it is unwise to adopt the radical changes recommended by the Working Group proposal considering the lack of evidence of what result the changes will have. Back To Text

[144] *See* id. at 688.Back To Text

[145] *See* id. (stating that the definition of affiliate should not include a 20% ownership requirement, because many affiliates that do not meet the requirement should be exempted from the definition of SARE based on affiliate relationship alone).Back To Text

[146] *See* id.Back To Text

[147] *See* id. at 688 (discussing Alternative Proposal recommendation that definition include "a group of commonly controlled entities of which the debtor is a member," and Working Group proposition that definition state "substantially all members of the commonly controlled group be Chapter 11 debtors"). Back To Text

[148] *See* Commission Report, supra note 1, at 688.Back To Text

[149] *See* id. at 683. The Alternative Proposal argues that under the Working Group definition lenders would require borrowers to create subsidiary companies, so that, upon default the borrower would receive SARE treatment.Back To Text

[150] *See* id. at 692; *see also* supra note 89 (describing typical SARE case).Back To Text

[151] *See* id. Arguing that SARE restructuring is not always simplistic, nor simply a two party dispute as the Working Group proposal suggests:

> By contrast, in larger real estate case where the mortgage debt exceeds $15 million, debtors are better equipped to keep current on tax and maintenance payments. At the same time, the debt structure in large cases is likely to be more complex. For example, the debtor and a third party lender might be parties to an interest rate swap, a device not likely to be used in smaller cases. Moreover, based on the dollar amounts at stake, all parties will require more time to perform a financial analysis of the project than in smaller cases. The $15 million cap will give Congress the opportunity to gather data to determine whether the cap should be adjusted up or down or eliminated.

Id.Back To Text

[152] *See* Commission Report, supra note 1, at 694.Back To Text

[153] *See* id.; *see also* Douglas S. Neville, *The New Value Exception to the* Chapter 11 Absolute Priority Rule Bonner Mall Partnership v. United States Bancorp Mortgage, Co., (In re Bonner Mall Partnership), 60 Mo. L. Rev. 465, 470 (1995) (discussing elements of new value exception); J. Ronald Trost, et. al., *Survey of the New Value Exception to the Absolute Priority Rule*, C836 A.L.I.−A.B.A., 301, 318 (1993) (stating allocation of exception).Back To Text

[154] *See* Commission Report, supra note 1, at 693.Back To Text

[155] *See* id. at 694. The Commission's adoption of the loan−to−value test seems to disregard that the "new value collar has long been ensconced in our bankruptcy practice." In re 203 N. LaSalle St. Partnership, 190 B.R. 567, 576 (Bankr. N.D. Ill. 1995), aff'd, Bank of Am., Ill. v. 203 N. LaSalle St. Partnership, 195 B.R. 692 (N.D. Ill. 1996) (holding that new value corollary to absolute priority rule remained part of bankruptcy jurisprudence). *cf. The Commission Proposals that are Most Likely to Succeed*, BCD News and Comment, Nov. 11, 1997 at 1 (noting new value exception will succeed if applied correctly by courts).Back To Text

[156] *See* Commission Report, supra note 1, at 694 (arguing loan−to−value test will result in a lower number of new value plans being confirmed, because currently many lenders are willing to accept plans that pay down less that 20% of the first mortgage and are willing to accept less than 20% of the secured debt as new value). Back To Text

[157] *See* id. Back To Text

[158] Id. at 694−95 (noting that "[t]he typical SARE case has few assets other than the real property. Therefore, the lender can afford to ignore its unsecured deficiency claim and can bid its entire debt to get the property. Indeed, if the debt is nonrecourse, the lender would have no other option in an auction. The Alternative Proposals rely instead on the market place to determine the value of the property"); *see also* Lawrence K. Snider, Bankruptcy: *The National Bankruptcy Review Commission, in its Recently Released Report, Has Proposed Significant Changes Affecting Single−Asset Real Estate Debtors*, Nat'l L.J. Nov. 17, 1997, at B5, B6 (stating the "commission did not go far enough in addressing the issues of exclusivity and credit bidding by existing lenders.").Back To Text

[159] *See* Commission Report, supra note 1, at 693.Back To Text

[160] *See* id.Back To Text

The proposed restrictions on new value plans are justified by the Working Group's as a way to reduce litigation in SARE cases:

> First, by more precisely defining the requirements of the new−value exception, it should reduce litigation over whether those requirements have been met in a particular case. Second, the loan−to−value requirement would relieve courts from having to determine the market rate of interest on one hundred percent loan−to−value loans − loans which do not exist in the marketplace. Third, the proposal should reduce litigation over classification of claims and artificial impairment of classes in SARE cases. Fourth, clarifying the rules for debtors who seek to reorganize overencumbered real estate in Chapter 11 may increase the number of out−of−court workouts. [121]

In defense of its proposed adoption of the loan−to−value tests, the Working Group argues that the loan−to−value test is not a departure from the present new value exception, but rather, an application of the five elements of the existing new value exception to the unique circumstances of SARE cases. [122] The Working Group concludes its new value proposal with a warning regarding the dangers of misapplication of the proposal [123] and with a rejection of the credit−bid approach to the new−value exception. [124]

The Working Group proposed three additional minor changes to section 362(d)(3): [125]

> First, the statute should make clear that payments may be made from rents generated from the property. Second, the statute should be amended to provide that the interest rate from which the payments are calculated be the nondefault contract rate, rather that the "current fair market rate" as now specified. This change will provide greater certainty and reduce litigation. Third, the statute should be amended to provide that the payments must be commenced or a plan filed on the later of 90 days after the petition date or 30 days after the court determines that the debtor is subject to section 362(d)(3). If a debtor does not timely comply with section 362(d)(3) based on its contention that it is not an SARE debtor, and it is later determined that section 362(d)(3) does apply, relief from stay must be granted even if the debtor is ready to make payments or file a plan promptly. [126]

VI. The Alternative Proposal

Reported to Congress along with the Working Group's Proposal was an Alternative Proposal submitted by Professor Kenneth Klee of the University of California at Los Angeles School of Law. [127] The Alternative Proposal was received after the Commission formally voted on its recommendations, and as such, the commission did not take a formal vote on Professor Klee's Alternative Proposal. However, Professor Klee's proposal did subsequently receive the support of five commission members, which as noted in the Commission Report, were not members of the Small

Business Working Group. [128]

Professor Klee's proposal argues against the imposition of strict limitations on SARE entities in Chapter 11, because "although use of Chapter 11 in some of these cases is abusive and unjustified, in other cases, access to Chapter 11 serves legitimate reorganization objectives." [129] Professor Klee asserts that the "Commission's objective should be to fine−tune Chapter 11 to weed out the abusive cases without precluding reorganization of the non−abusive cases." [130]

The Alternative Proposal concurs with the Working Group that abuse of chapter 11 by single asset real estate filers continues to be a problem. [131] Likewise the Alternative Proposal recognizes that critics believe SARE cases fulfill few of the recognized goals of Chapter 11. [132] Professor Klee, however, contends that lenders do not always continue to operate properties after foreclosure. [133] The Alternative Proposal offers further justification for the continued availability of chapter 11 in light of the criticism of SARE cases. [134] Professor Klee asserts that part of the reason for the continued need for reform in the single asset real estate area stems from the four million cap which severely limited the effectiveness of 362(d)(3). [135] While the Alternative Proposal is critical of the current limitations on the application of the new value exception in single asset real estate cases, [136] the proposal is unwilling to adopt the type of "rigid standard recommended by the working group" for fear that it may result in a less equitable standard than that found in current case law. [137] The Working Group's attempt to employ objective standards in single asset cases is what Professor Klee finds most controversial and where the ideologies of the two proposals differ the most. [138]

Professor Klee's proposal recommends that Congress maintain a fifteen million dollar cap and, upon doing so, commission a study of the effects of the fifteen million dollar cap on the legitimate reorganization attempts of single asset debtors. The Alternative Proposal also suggests that certain debtors who operate active businesses on the premises be excluded from the statute, and further recommends that the ninety day plan or payment deadline be retained. Finally, the Alternative Proposal rejects the new value exception as proposed by the Working Group with an 80−20 loan−to−value requirement, in favor of the case law based requirements of the new value exception. [139]

A. Four Million Dollar Cap Issues:

The Alternative Proposal recommends that the four million cap be raised to fifteen million, rather than eliminated as the Working group proposal suggests. [140] The Alternative proposal states that raising the cap to fifteen million rather than removing it altogether is a better approach, because "the cap should not be eliminated or raised to a level where projects that can be rehabilitated will be liquidated in foreclosure sales and jobs will be lost." [141] The Alternative Proposal rejects the Working Group's proposed elimination of the cap, because of problems that would result if large SARE debtors were placed on a fast track. [142]

The Alternative Proposal suggests that it is arguably wiser to take a small step by raising the cap to fifteen million, study what effect raising the cap has and further refine the statute after collecting adequate data, rather than eliminating the cap which could result in risk adverse consequences. [143]

B. Active Business Issues:

The Alternative Proposal concurs with the Working Group proposal in that both suggest the relationship between the real estate debtor and the operating debtor must be carefully defined. [144] Likewise the Alternative Proposal agrees that the section 101 definition of affiliate is too loosely defined for this purpose. [145] While both proposals seek to include real estate investors, and to exclude debtors who use the real estate in an active business, they do not concur on how this goal should be achieved. [146] The Alternative Proposal rejects the Working Group's requirement that substantially all of members of the commonly controlled group be chapter 11 debtors. [147] The Alternative Proposal seeks to exclude groups from this definition where one member owns the real estate and another member operates a business on the real estate. The Working group proposal would include these members, unless substantially all of the members of the group are chapter 11 debtors. [148] The Alternative Proposal argues that, by excluding all debtors who are members of a "commonly controlled group" from the definition of SARE cases, it removes incentives for lenders to require real estate borrowers to form single purpose subsidiaries, whereas the Working Group proposal would encourage such single purpose subsidiaries. [149]

C. Rationale For The Ninety Day Deadline:

The Alternative Proposal asserts that "[I]n this typical SARE case, ninety days is generally sufficient time for the debtor to file a feasible plan of reorganization debtor to file a feasible plan of reorganization." [150] Although the Alternative Proposal argues that the ninety day limitation is appropriate, it recommends that the ninety day plan be used in conjunction with the $15 million cap, in order to preclude the fast track from applying to large SARE cases where it might wrongfully force debtors into foreclosure. [151]

D. The New Value Exception:

The Alternative Proposal rejects the Working Group's proposed amendment of the statute to include an 80−20 loan−to−value requirement in the new value exception "in favor of leaving the development of the new−value exception to court decisions." [152] The Alternative Proposal recommends that before Congress adopts the new value exception, Congress should determine if codification of all or part of the proposed loan−to−value new value exception is appropriate. [153] In addition, the Alternate Proposal finds the principal problem with the new−value exception is the definition of the elements. [154] Therefore, leaving the development of the new−value exception to the courts would provide a better basis in order to determine whether all or part of the new principle should be adopted. [155] The Alternative Proposal also rejects the Working Group's proposed adoption of the loan−to−value test for confirmation of new−value plans. [156] However, similar to the Working Group proposal, the Alternative Proposal rejects the credit bid approach. [157] The Alternative Proposal argues that the credit bid approach "does not accurately determine the value of the property; it deliberately deviates from the market value of the property and permits a bankruptcy−endorsed foreclosure." [158] The Alternative

Proposal instead recommends that when a debtor offers a new value plan, debtor exclusivity should be terminated. [159] The Alternative Proposal argues that by terminating debtor exclusivity and allowing other parties to offer plans more consensual workouts will be completed. [160]

Conclusion

First, regarding the four million dollar cap issue, Professor Klee's Alternative Proposal to retain a fifteen million dollar cap is clearly more appropriate for several reasons. The issues involved in SARE cases clearly differ depending on the size of the liquidated debt. In some large cases, restructuring involves not only obtaining financing but the operation of the property must be restructured in order to lower the costs of operation and make a plan confirmable. If large SARE debtors are forced down a fast track, legitimate bankruptcy debtors may be forced to offer a bogus plan in order to maintain automatic stay protection, while they attempt to negotiate with creditors. This results in greater costs and litigation as a result of the two parties attempting to confirm an incomplete or unconfirmable plan.

Second, judges and trustees are able to deal with SARE cases very effectively and can use their own discretion to "fast track" abusive cases above the fifteen million dollar cap. Furthermore, judges and trustees are better able to identify whether or not a reorganization attempt is legitimate. Leaving the decision to fast track with judges will undoubtedly lead to more equitable results for legitimate reorganization attempts. A hard and fast rule calling for fast tracking all SARE cases does not allow for consideration of outside factors.

Third, the new value exception should not include the 80−20 loan−to−value test. The imposition of a rigid standard like the twenty percent new value requirement will result in foreclosure if a debtor is unable to come up with the equity needed, even when a secured lender may have been willing to accept less then twenty percent new value. The requirements for a new value plan should be based on what the parties propose and what the court believes is "fair and equitable."

Furthermore, there is no justifiable reason for retaining exclusivity in SARE cases as opposed to regular chapter 11 cases where anyone can bid for equity in a new value plan. The value of the property should be determined by what the market will bear, or by what other plan proponents determine the value of the property to be, and not by the bankruptcy court. The Alternative Proposal is more appropriate because it provides for termination of the debtor's exclusive right to submit a plan upon the debtor's proposal of a cramdown. The competing plan process creates

incentive for debtors to offer reasonable plans and act quickly to have them confirmed.

Overall, the Alternative Proposal offers recommendations that are more conservative and less likely to create any of the unforseen problems that might result from the more radical Working Group proposal. At the same time the Alternative Proposal will likely result in a benefit for single asset debtors and their secured lenders.

Erich J. Stegich

FOOTNOTES:

[1] *See generally* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years, Final Report (1997) [hereinafter Commission Report]. The National Bankruptcy Review Commission is an independent commission established pursuant to the Bankruptcy Reform Act of 1994, Pub. L. No. 103−394, 108 Stat. 4106 (1994). The Commission was created to:

> (1) investigate and study issues relating to 11, United States Code (commonly known as the "Bankruptcy Code");
>
> (2) to evaluate the advisability of proposals and current arrangements with respect to such issues and problems;
>
> (3) to prepare and submit to the Congress, the Chief Justice and the President a report in accordance with section 608; and
>
> (4) to solicit divergent views of all parties concerned with the operation of the bankruptcy system;

Id. at 4147. "The report, which was due October 20, 1997, contained a detailed statement of the Commission's findings and conclusions together with recommendations for legislative or administrative action. The members of the commission were appointed by the President, Congress and the Chief Justice." Id. at 4148; *see also* Lloyd D. George, *From* Orphan to Maturity − The Development of the Bankruptcy System During L. Ralph Mecham's Tenure as Director of the Administrative Office of the United States Courts, 44 Am. U. L. Rev. 1491, 1498 (1995) (discussing revolution of modern bankruptcy system and establishment of National Bankruptcy Review Commission under Bankruptcy Reform Act of 1994); Judge James D. Gregg, Checklist for the Commission, 14 Am. Bankr. Inst. J. 35, 35 (May 1995) (discussing creation of National Bankruptcy Review Commission under color of §§ 601−610 of Bankruptcy Reform Act of 1994 and goals and functions of Commission Report). Back To Text

[2] *See* 11 U.S.C. § 362 (d)(3) (1994) (providing new and less burdensome method of lifting automatic stay so mortgage lender may foreclose); Jeff Bohm & David B. Young, *Small Business and Single Asset Real Estate Reorganizations and the Bankruptcy Reform Act of 1994*, 753 PLI/Comm 465, 507(1997) (defining single asset real estate under 11 U.S.C. § 363 (d)(3)); Hon. Leif M. Clark, *Chapter 11 — Does One Size Fit All?*, 4 Am. Bankr. Inst. L. Rev. 167, 176−78 (1996) (discussing small businesses, single asset real estate and 1994 Amendments to section 362).Back To Text

[3] *See, e.g.*, Shannon C. Bogle, *Bonner Mall and Single−Asset Real Estate Cases in Chapter 11: Are the 1994 Amendments Enough?*, 69 S. Cal. L. Rev. 2163, 2184−85 (1996) (noting rising abuse of current system by single asset real estate debtor); Brian S. Katz, *Single Asset Real Estate Cases and the Good Faith Requirement: Why Reluctance to Ask Whether a Case Belongs in Bankruptcy May Lead to the Incorrect Result*, 9 Bankr. Devs. J. 77, 77−78 (1992) (demonstrating rise of strategic use of bankruptcy by single asset real estate debtor); *see also* H. Miles Cohn, Single Asset Chapter 11 Cases, 26 Tulsa L.J. 523, 524−27 (1991) (exploring historical perspective of single asset real estate cases).Back To Text

[4] *See, e.g.*, Neil Batson, *Real Estate Problems in the Bankruptcy Court − Selected Issues in Single Asset Real Estate Cases*, 753 PLI/Comm 401, 412 (1997) (discussing section 218 of 1994 Act, which added subsection 362(d)(3), making ground for tax relief only applicable in single asset real estate cases as defined in 1994 Act to limit abuse and

exercise of bad faith); Karen Gross & Patricia Redmond, *In Defense of Debtor Exclusivity: Assessing Four of the 1994 Amendments to the* Bankruptcy Code, 69 Am. Bankr. L.J. 287, 287−289 (1995) (discussing significant changes to Bankruptcy Code designed to alleviate criticism of chapter 11, specifically section 218 of the amendments); Kathryn R. Heidt, The Effect of the 1994 Amendments on Commercial Secured Creditors, 69 Am. Bankr. L.J. 395, 415 (1995) (discussing how 1994 Amendments make it more difficult for single asset real estate debtors to abuse chapter 11). Back To Text

[5] *See* Commission Report, supra note 1, at 661 (discussing proposals affecting single asset real estate); Lynn M. LoPucki, Chapter 11: An Agenda For Basic Reform, 69 Am. Bankr. L.J. 573, 573−74 (1995) (acknowledging Professor Klee for making needed changes to system under 1994 Amendment). Back To Text

[6] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, 92 Stat. 2549, *reprinted in* 1978 U.S.C.C.A.N 5787−6573, (codified as amended at 11 U.S.C. §§ 101−1330 (1978)). The enactment is referred to as the "Bankruptcy Code," to distinguish it from the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978). The Bankruptcy Act was amended on a number of occasions after its enactment, the most significant being the Chandler Act of 1938, which created chapters X and XI. See Chandler Act of 1938, ch. 575, 52 Stat. 840 (repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, tit. IV, § 401(a), 92 Stat. 2549, 2682 (1978)). The Code entirely displaced the Bankruptcy Act. The Code has been amended numerous times. The most recent amendment in 1994 created a new bankruptcy commission (the "NBRC") to review and examine the Code and make recommendations regarding what, if any, changes should be made. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103−394, §§ 601−610, 108 Stat. 4106, 4147−50 (1994). The NBRC held its first meeting on November 1, 1995, and its final report was released October 20, 1997. *See also* Mark E. MacDonald, et al., *Confirmation by Cramdown Through the New Value Exception in* Single Asset Cases, 1 Am. Bankr. Inst. L. Rev. 65, 75−78 (1993) (stating Code in 1978 intended to create single, unified remedy, not only for chapter X and XI cases, but also for chapter XII cases involving real estate partnerships owning single asset); Eric A. Posner, The Political Economy of the Bankruptcy Reform Act of 1978, 96 Mich. L. Rev. 47, 63−64, 108 (1997) (discussing forms of business reorganization prior to and subsequent to 1978 Act); Charles Jordan Tabb, The History of The Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. L. Rev. 5, 35 (1995) (explaining merger of reorganization chapters into single chapter under the 1978 Act); Charles Jordan Tabb, The Historical Evolution of Bankruptcy Discharge, 65 Am. Bankr. L.J. 325, 362 (1991) (discussing substantial changes in bankruptcy system, from revision by Chandler Act in 1938 to Bankruptcy Reform Act of 1978).Back To Text

[7] *See* Scott Carlisle, *Single Asset Real Estate in* Chapter 11: Secured Creditors' Perspective and the Need for Reform, 1 Am. Bankr. Inst. L. Rev. 133, 134 (1993) (describing typical situation for single asset real estate chapter 11 filing); Roger S. Cox, Annual Survey of Texas Law: Bankruptcy & Creditors' Rights, 48 SMU L. Rev. 875, 880 (1995) (noting single asset real estate debtors would often file chapter 11 on eve of foreclosure, for no purpose other than to delay or gain bargaining position over secured creditor, and rarely would there be any realistic chance of successful reorganization); John C. Murray, The Lenders Guide to Single Asset Real Estate Bankruptcies, 31 Real Prop. Prob. & Tr. J. 393, 395 (1996) (discussing common reasons for single asset real estate entity to file chapter 11).Back To Text

[8] *See* American Bar Association, How a Good Idea Went Wrong: Deregulation and the Savings and Loan Crisis, 47 Admin. L. Rev. 643, 649 (1995) (discussing legislation passed in 1982 allowing Savings and Loan Industry to invest in commercial real estate loans and to make increased number of unsecured real estate loans); Barbara J. Ellis, Note and Comment, *Commercial Real Estate Lending Standards Under FDICIA: Changing the Rhythm of Boom, Bust, Crunch?,* 13 Ann. Rev. Banking L. 499, 499 (1994) (stating that "[b]anks liberally extended credit in conjunction with the nation's real estate 'boom' in the 1980's"); Michael Frachioni, *Leveraging the Land: The Changing Loan to Value Ratio for Real Estate Lending by* National Banks, 112 Banking L.J. 41, 41−42 (1995) (discussing power of national banks to make real estate loans under specific grant of authority from Congress and growth of nation's economy at unprecedented rate causing real estate loans to become a significant part of bank portfolios); Murray, supra note 7, at 395 (discussing common reasons for single asset real estate entity to file chapter 11).Back To Text

[9] *See, e.g.,* Deborah D. Williamson, *Defining Single Asset Real Estate Bankruptcies, in* Single Asset Real Estate Bankruptcies 2, 2−3 (Alan J. Robin. ed., 1997) (explaining basis for single asset real estate tax shelters); Robert M. Zinman, *Foreword to,* Single Asset Real Estate Bankruptcies xvi nn.5−6 (Alan J. Robin ed., 1997) (explaining basis for SARE tax shelters); *see also* H. Miles Cohn, Good Faith and the Single−Asset Debtor, 62 Am. Bankr. L.J. 131,

131 (1988). The typical single asset debtor is usually a limited partnership set up to purchase a piece of real estate as an investment or tax shelter. *See* id.*; cf.* The Tax Reform Act of 1986, Pub. L. No. 99−514, 100 Stat. 2085 (1986) (recognizing typical single asset debtor is partnership that invested in commercial real estate to enjoy favorable depreciation tax benefits and eliminating many of these benefits); *see also* In re Prince Manor Apartments, Ltd., 104 B.R. 414, 416−17 (Bankr. N.D. Fla. 1989) (comparing tax benefits under old law with changes made in 1986); Bohm & Young, supra note 2, at 499 (noting single asset limited partnerships were set up for tax reasons); C. Daniel Motsinger, The Bankruptcy Reform Act of 1994: New Mines in the Minefield, 38 Res gestae 16 (Dec. 1994) (stating that single asset limited partnerships were tax driven).Back To Text

[10] *See, e.g.,* Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership), 2 F.3d 899, 907 (9th Cir. 1993) (involving single asset real estate where partnership owned single piece of real estate and mortgagor held senior and largest security interest); In re Pensignorkay, Inc., 204 B.R. 676, 678 (Bankr. E.D. Pa. 1997) (discussing "single asset real estate" case in classic sense and as defined under section 101(5)(1)(B)); In re Kkemko, Inc., 181 B.R. 47, 50 (Bankr. S.D. Ohio 1995) (providing summary of case law involving single asset real estate issues).Back To Text

[11] *See* Motsinger, supra note 9, at 16 (stating that "listless real estate market of the past few years has sent a steady stream of so−called single asset debtors−usually tax driven limited partnerships that owned apartment complexes or office buildings − into Chapter 11"); *see also* Bohm & Young, supra note 2, at 499−500 (discussing real estate downturn of 1980's forcing partnerships and corporations formed solely to own single development to seek refuge under chapter 11); Cohn, supra note 3, at 523 (discussing rapidly increasing number of single asset partnerships and corporations seeking protection in bankruptcy court).Back To Text

[12] *See, e.g.,* Albert J. Cardinali & David C. Miller, Tax Aspects of Non−Corporate Single Asset Bankruptcies and Workouts, 1 Am. Bankr. Inst. L. Rev. 87, 113−14 (1993) (stating effects of non−recourse mortgage debt with respect to single asset debtor); Frederick H. Robinson, Nonrecourse Indebtedness, 11 Va. Tax Rev. 1, 3−4 (1991) (discussing effect of non−recourse mortgage on debtor in event of default).Back To Text

[13] *See* Clark, supra note 2, at 179 n.2 (stating that downturn in real estate market was reason for increase in single asset cases); *see also* Cox, supra note 7, at 880 (discussing downturn in real estate resulting in use of chapter 11 by single asset real estate debtors); Lisa Hill Fenning & Craig A. Hart, Measuring Chapter 11: The Real World of 500 Cases, 4 Am. Bankr. Inst. L. Rev. 119, 142 (1996) (discussing use of chapter 11 filing by single asset real estate debtor); Katz, supra note 3, at 77 n.1 (noting bankruptcy filings have increased every year since 1985); Jane Lee Vris, *Recent Development in Single Asset Cases*, 656 PLI/Comm 527, 529 (1993) (stating rise in bankruptcy filings reflects economic downturn when increasing numbers of single asset real estate debtors file petitions because of stagnant real estate industry).Back To Text

[14] *See* 11 U.S.C. § 362(a) (1994) (establishing automatic stay provision, which provides that all proceedings against debtor must be stayed upon filing of petition); D'Alfonso v. A.R.E.I. Inv. Corp. (In re D'Alfonso), 211 B.R. 508, 513 (Bankr. E.D. Pa. 1997) (discussing purpose of automatic stay provision to give debtor "breathing spell from creditors"); First Nat'l Bank v. L.H. & A. Realty Co. (In re L.H. & A. Realty Co.), 57 B.R. 265, 268 (Bankr. Vt. 1986) (discussing broad debtor protections provided by automatic stay provision, particularly stopping collection efforts and foreclosure actions); John C. Chabot, Some Bankruptcy Stay Metes and Bounds, 99 Com. L.J. 301, 307 (1994) (discussing expansive view of automatic stay and court interpretation of section 362(a)(3)); David G. Epstein, *Basics of Stay of Collection Activities*, 517 PLI/Comm 633, 640−42 (1989) (discussing scope of automatic stay provisions); Thomas J. Holthus, *A Debtor as a "Creditor" and the* Automatic Stay, 62 Am. Bankr. L.J. 377, 377−78 (1988) (discussing effects of automatic stay provision on secured creditors).Back To Text

[15] *See* Daniel B. Bogart, *Games Lawyers Play: Waivers of the Automatic Stay in* Bankruptcy and the Single Asset Loan Workout, 43 UCLA L. Rev. 1117, 1126 (1996) (discussing inevitability of foreclosure forcing debtors to seek refuge by filing chapter 11); Bohm & Young, supra note 2, at 500 (explaining, faced with no alternative to loss of property and risk of recapture of tax benefits of original transaction, single asset debtors often file chapter 11 on eve of foreclosure).Back To Text

[16] *See* 11 U.S.C. § 1129(b) (1994) (outlining limitations on this method of confirmation frequently called "cramdown"); *see also* Robert L. Lippert, *Determining the Appropriate Cramdown Rate in* Single−Asset Bankruptcies, 24 Real Est. L.J. 255, 255 (1996) (discussing debtor's use of section 1129(b) "cramdown" provision to avoid foreclosure and gain opportunity to reorganize); Robin E. Phelan & Mark X. Mullin, *From Dust to Dust: The Strategy of a Real Estate Organization*, 602 PLI/Comm 199, 230 (1992) (discussing purposes and effects of cramdown); Michael S. Polk, The Chapter 13 Cramdown: New Nightmare for the Lender, 19 Real Est. L.J. 279, 281 (1991) (explaining "cramdown" confirmation of debtor's plan over objection of class of impaired creditors); *cf.* Gregory K. Jones, *The Classification and Cramdown Controversy in* Single Asset Bankruptcy Cases: A Need for the Repeal of Bankruptcy Code Section 1129(A)(10), 42 UCLA L. Rev. 623, 641 (1994) (stating benefits of cramdown are outweighed by costs).Back To Text

[17] *See* John D. Ayer, *Bankruptcy as an* Essentially Contested Concept: The Case of the One Asset Case, 44 S.C. L. Rev. 863, 905 (1993) (discussing reorganization at current market value); Susan Jensen−Conklin, *Financial Reporting by* Chapter 11 Debtors: An Introduction to Statement of Position 90−7, 66 Am. Bankr. L.J. 1, 37 (1992) (discussing chapter 11 reorganization based on fair market value); Motsinger, supra note 9, at 16 (discussing how debtors have used chapter 11 to reorganize while retaining possession and paying creditors based on current market value); Raymond T. Nimmer, Negotiated Bankruptcy Reorganization Plans: Absolute Priority and New Value Contributions, 36 Emory L. J. 1009, 1044 (1987) (discussing valuation of debtor's assets after reorganization under chapter 11); William Norton, Jr., 6 Norton Bankr L. Prac., 2d §§ 129:1−129:23 (William J Norton, Jr., ed., 2d ed. 1996) (stating tax consequences of bankruptcy reorganization).Back To Text

[18] *See* Robert M. Zinman, *No Chapter 11 for Single Asset Real Estate, No "New Value" for Single Asset Real Estate*, Am. Bankr. Inst. Winter Leadership Conf. (Dec. 5−7, 1996) (unpublished article on file with American Bankruptcy Institute and National Bankruptcy Review Commission) (stating single asset cases do not serve traditional purposes of chapter 11, such as preservation of jobs and going concern value); *see also* Lumber Exch. Bldg. Ltd. Partnership v. Mutual Life Ins. Co. (In re Lumber Exch. Bldg. Ltd. Partnership), 968 F.2d 647, 650 (8th Cir. 1992) (agreeing with bankruptcy court's conclusion that debtor real estate partnership did not belong in chapter 11 because it was "substantially a single liability case"); In re Mill Place Ltd. Partnership, 94 B.R. 139, 141−142 (Bankr. D. Minn. 1988) (stating proposition that single asset chapter 11 cases may be deemed in bad faith virtually as matter of law); In re Fry Road Assocs., Ltd. 66 B.R. 602, 607 (Bankr. W.D. Tex. 1986) (holding that single asset debtor abused bankruptcy process by filing chapter 11 where there was no evidence debtor could benefit from chapter 11 filing); Carlisle, supra note 7, at 137 (stating abuse of judicial process through single asset real estate debtor's use of chapter 11); W. Scott Carlisle, III, *Single Asset Real Estate in* Chapter 11 − Need for Reform, 25 Real Prop. Prob. & Tr. J. 673, 683−85 (1991) (commenting on common abuse by single asset debtor of chapter 11); Hon. Leif Clark et al., *What Constitutes Success in Chapter 11?* A Roundtable Discussion, 2 Am. Bankr. Inst. L. Rev. 229, 263 (1995) (suggesting single asset real estate cases require separate statute); Bogle, supra note 3, at 2184−85 (discussing claim that single asset entities abuse chapter 11 process and exploit remedies available to them after filing).Back To Text

[19] *See* Bogart, supra note 15, at 1258 (stating "purpose of Section 362(d)(3) is to keep those chapter 11 filings by single asset debtors that have no chance of success to a minimum"); Bogle, supra note 3, at 2180 (stating that filing of chapter 11 petition by single asset debtors often delays foreclosure by two years if plan fails); H. Miles Cohn, *Protecting Secured Creditors Against the Costs of Delay in* Bankruptcy: Timbers of Inwood Forest and Its Aftermath, 6 Bankr. Dev. J. 147, 147−48 (1989) (discussing secured creditors costs incurred because of delay of foreclosure by automatic stay); Paul H. Deutch, Note, Expanding The Automatic Stay: Protecting Nondebtors In Single Asset Bankruptcy, 2 Am. Bankr. Inst. L. Rev. 453, 470 (1994) (discussing automatic stay in single asset bankruptcies); Maria Lerman Hutkin, Note, Using Bankruptcy to Pay the Rent Via the Automatic Stay, 63 S. Cal. L. Rev. 181, 188−190 (1989) (discussing problems with broad language of automatic stay provision).Back To Text

[20] Hon. Lisa Hill Fenning, *The Future of Chapter 11: One View From the Bench*, 650 PLI/Comm 317, 331 (1993); *see also* James H. Barnhill, *The Conundrum of an* Inadequately Protected Secured Creditor, 97 Com. L.J. 367, 373−74 (1992) (discussing unfair effects that automatic stay has on secured creditors).Back To Text

[21] *See* supra note 18 and accompanying text.Back To Text

[22] *See* Michael H. Strub, Jr., *Competition, Bargaining, and Exclusivity Under the New Value Rule: Applying the Single−Asset Paradigm of Bonner Mall*, 111 Banking. J. 227, 229 (1994) (stating that because single asset entity is formed solely to operate property, it usually has few employees).Back To Text

[23] *See* Katz, *supra* note 3, at 84−85 (stating that there is little economic justification in saving single asset real estate entity, which is usually worth more in liquidation than as going concern). Back To Text

[24] *See* Robert K. Rasmussen, Debtor's Choice: A Menu Approach to Corporate Bankruptcy, 71 Tex. L. Rev. 51, 78 (1992) (explaining reason for chapter 11); Frederick Tung, Confirmation and Claims Trading, 90 Nw. U. L. Rev. 1684, 1689 (1996) (stating that chapter 11 seeks to maintain going concern value because otherwise firm dismemberment will occur).Back To Text

[25] *See* Douglas G. Baird & Thomas H. Jackson, Bargaining After the Fall and the Contours of the Absolute Priority Rule, 55 U. Chi. L. Rev. 738, 750 n.31 (1988) (stating that "[c]onventional bankruptcy doctrine suggests that cases that are simply two−party disputes are inappropriate for bankruptcy"); Cohn, supra note 9, at 144 (noting that "where the bankruptcy petition has been filed as an alternative to the lost injunction, with no intent to reorganize and pay the debt, the case involves nothing more than a 'two−party dispute'"); s*ee also* In re Roy Dawson Radio Corp., 70 B.R. 588, 591 (Bankr. M.D. Fla. 1987) (discussing two−party dispute over easement on debtor's sole asset, private airport); North Cent. Dev. Co. v. Landmark Capital Co. (In re Landmark Capital Co.), 27 B.R. 273, 279 (Bankr. D. Ariz. 1983) (explaining fraud action challenging secured creditors lien is two−party dispute). *But see*, Commission Report, supra note 1, at 680 (presenting Professor Kenneth Klee's alternative proposal which argues that single asset real estate cases are not two−party disputes).Back To Text

[26] *See* Jones, supra note 16, at 626 (stating that at time secured creditor begins foreclosure proceedings value of property is usually less than amount of secured claim). *See generally* Bogle, *supra* note 3, at 2166−72, 2184−90 (examining major problems presented by single−asset real estate cases and ability of amendments of Bankruptcy Code to curb problems); Murray, supra note 7, at 424−31 (providing examination of secured creditor's option, strategies and remedies when faced with chapter 11 filing by single asset real estate debtor).Back To Text

[27] *See* Linda J. Rusch, *The New Value Exception to the Absolute Priority Rule in Chapter 11 Reorganizations: What Should the Rule Be?*, 19 Pepp. L. Rev. 1311, 1316 n.11, 1323 (1992) (stating that one goal of chapter 11 reorganization is to maximize recovery to creditors); *see also* Robert M. Zinman, *No "New Value Exception"* For Single Asset Real Estate, 4 Am. Bankr. Inst. L. Rev. 555, 555 (1996) (stating that application of new value exception by single asset debtors often results in no repayment to unsecured creditors). Back To Text

[28] *See* Nat'l Bankr. Rev. Comm'n, Small Business Working Group Business Proposal # 4: Repeal the $4 Million Cap on the Definition of Single Asset Real Estate, (1997) [hereinafter Working Group Proposal] (visited Jan. 11, 1998) <http://www.abiworld.org/legis/review/proposal/ propfont.html> (stating that "[d]uring the Chapter 11 proceeding it is not uncommon for single asset real estate properties to receive minimal repairs, capital improvements, and capital replacements"); Alan Robins & James Lipscomb, *Real Estate Bankruptcies and the Bankruptcy Process*, Am. Bankr. Inst. Winter Leadership Conf. (Dec 5−7) (unpublished article on file with the American Bankruptcy Institute and the National Bankruptcy Review Commission) (stating single asset real estate cases are often forced to use all of their funds to pay for debt service and as a result fail to make needed repairs or to continue routine maintenance, leading to further decline in the value of the property).Back To Text

[29] *See, e.g.*, California Mortgage Serv. v. Yukon Enters. (In re Yukon Enters.), 39 B.R. 919, 921 (Bankr. C.D. Cal. 1984) (examining certain recurring, but not exclusive factors, traditionally considered 'badges of bad faith'); Meadowbrook Investors' Group v. Thirtieth Place, Inc. (In re Thirtieth Place, Inc.), 30 B.R. 503, 506 (B.A.P. 9th Cir. 1983) (dismissing on ground that petition initiating proceeding was not filed in good faith). *See generally* Katz, *supra* note 3, at 85−99 (discussing courts' reaction to single−asset debtor cases).Back To Text

[30] *See* Clark, *supra* note 2, at 179 n.74 (stating not abuse of discretion when court denies debtor's motion for continuance when purpose of filing was to delay proceedings) (citing Martwick v. Agribank, FCB (In re Martwick), 60 F.3d. 482, 483 (8th Cir. 1995)).Back To Text

[31] *See* Clark, *supra* note 2, at 180 (citing In re Investors Fla. Aggressive Growth Fund, Ltd., 168 B.R. 760, 765−66 (Bankr. N.D. Fla. 1994)); *see also* In re Longfellow Properties, Inc., 149 B.R. 12, 15−16 (Bankr. D. N.H. 1992) (sustaining objection to confirmation of proposed chapter 11 plan since debtor's proposal relied on uncertain real estate market).Back To Text

[32] The courts dismissed cases for bad faith under 11 U.S.C. § 1112(b), which allows for dismissal for cause. *See* Katz, supra note 3, at 87 (stating that courts began applying good faith requirement in filing of chapter 11 petitions). The court would look at certain factors it considered indicative of bad faith, and if they were present it would dismiss the petition because it was filed in bad faith. *See* id. at 86−88. *See generally* Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (In re Little Creek Dev. Co.), 779 F.2d. 1068, 1073 (5th Cir. 1986) (finding several factors establishing that debtor was not ongoing business which was evidence of bad faith); Phoenix Piccadilly, Ltd. v. Life Ins. Co. (In re Phoenix Piccadilly, Ltd.) 849 F.2d 1393, 1394−95 (11th Cir. 1988) (dismissing chapter 11 petition when only reason for filing petition was to avoid foreclosure).Back To Text

[33] *See* Humble Place Joint Venture v. Fory (In re Humble Place Joint Venture), 936 F.2d 814, 816 (5th Cir. 1991) (affirming lower courts dismissal of chapter 11 petition because debtors only sought to relieve their personal guarantees instead of protecting creditors); Little Creek Dev. Co., 779 F.2d at 1072 (noting good faith requirement prevents abuse by debtors and advances protection of creditors); Phoenix Piccadilly, Ltd. 849 F.2d at 1395 (stating bad faith dismissal will stand despite possibility of successful reorganization); Carolin Corp. v. Miller, 886 F.2d 693, 693 (4th Cir. 1989) (agreeing that bad faith filing warrants dismissal of chapter 11 petitions); Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.) 749 F.2d 670, 674 (11th Cir. 1984) (noting that dismissal of petition is appropriate when it was filed in bad faith).Back To Text

[34] *See* Bohm & Young, supra note 2, at 501.Back To Text

[35] *See* In re Victoria Ltd. Partnership, 187 B.R. 54, 60 (Bankr. D. Mass. 1995) (stating that good faith doctrine conflicted with Bankruptcy Code); In re James Wilson Assocs., 965 F.2d 160, 170−71 (7th Cir. 1992) (determining that clearest indication of bad faith is where debtor knows there is no chance of reorganization, but files chapter 11 petition anyway). Back To Text

[36] *See* Bohm & Young, supra note 2, at 501 (explaining that some courts choose not to dismiss even when bad faith is present).Back To Text

[37] *See* id. at 501; *see, e.g.*, PNC Bank Nat'l Ass'n v. Park Forset Dev. Corp. (In re Park Forest Dev. Corp.), 197 B.R. 388, 394 (Bankr. N.D. Ga. 1996) (stating that filing without intention to frustrate creditors' claims courts often deny dismissal for bad faith); In re Mill Place Ltd. Partnership, 94 B.R. 139, 141 (Bankr. D. Minn. 1988) (explaining that dismissal of chapter 11 petition for bad faith should be subject to clear and convincing proof).Back To Text

[38] *See* In re Quorum Ltd. Partnership, 198 B.R. 5, 8 (Bankr. D. N.H. 1996) (noting that although facts warranting dismissal were present, court does not always have to implement such drastic remedy).Back To Text

[39] *See* Victoria 187 B.R. at 55 (stating good faith doctrine not universally accepted); Wilson 965 F.2d. at 170 (recognizing good faith doctrine not universally accepted).Back To Text

[40] *See* Clark, supra note 2, at 180 (stating that good faith test was designed to assure that single asset filers would flunk test and that limiting chapter 11 curtailed some petitioners' legitimate reorganization attempts).Back To Text

[41] Pub. L. No. 103−394, 108 Stat. 4106; *see* 3 Collier on Bankruptcy ¶ 362.07[5][b] at 100 n.81 (Lawrence P. King et al. eds., 15th ed. 1997) (quoting S. Rep. No. 103 at 168 (1993)) ("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"); 140 Cong. Rec. 410752−01, H10764 (daily ed. October 4, 1994) (statement of Rep. Brooks) ("[W]ithout bankruptcy reform, companies, creditors, and debtors alike will continue to be placed on endless hold until their rights and obligations are adjudicated under the present system and that slows down new ventures, new extensions of credit and new investments"); *see also* H.R. Rep. No. 103−835, at 32−34 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3340−42

(identifying goals of proposed bill were to "increase efficiency of bankruptcy process and resolve some uncertainties regarding application of Code," and more specifically to expedite hearings concerning automatic stay).Back To Text

[42] *See* 3 Collier, supra note 41, at 100 (stating that "[t]he purpose of this provision is to address perceived abuses in single−asset real estate cases, in which debtors have attempted to delay mortgage foreclosures even when there is little chance that they can reorganize successfully").Back To Text

[43] *See* Clark, supra note 2, at 176 n.46 (1996) (noting that "[s]ection 218 of the Bankruptcy Reform Act of 1994 included provisions relating to single asset real estate cases codified in 11 U.S.C. §§ 101(51B), 362 (d)(3) (1994)). Section 101(51B) defines "single asset real estate" under the Code. Section 362(d)(3) provides certain guidelines for lift−stay proceedings against single asset real estate"). Back To Text

[44] 11 U.S.C. §§ 101 (51B) (1994).Back To Text

[45] *See* Commission Report, supra note 1, at 667 (referring to four million dollar limit in 11 U.S.C. §§ 101(51B) as four million dollar cap); *Commission Wraps Up Public Meetings*, 7 Am. Bankr. Inst. J. (Sept. 1997) 1, 6 (referring to cap).Back To Text

[46] *See* 11 U.S.C. § 362(d)(3) (1994) (including additional conditions for which automatic stay may be lifted); Centofante v CBJ Dev., Inc. (In re CBJ Dev., Inc.), 202 B.R. 467, 470 (B.A.P. 9th Cir. 1996) (stating exceptions granting automatic stay); In re Standard Mill Ltd. Partnership, No. Bky 4−96−2656, Sept. 12, 1996 WL 521190, at *2 (Bankr. D. Minn. 1996) (noting factors which allow for the lifting of automatic stay provision under 11 U.S.C. § 362(d)(3)); *see also* 2 Norton, supra note 17, § 36:35:3 (noting that single asset real estate debtors must make monthly payments with interest to undersecured creditors if debtors' plan is not filed within 90 days of when automatic stay is entered). Back To Text

[47] *See* Standard Mill Ltd. Partnership, 1996 WL 521190, at *3 (denying relief for creditor because debtor did not meet definition of single asset real estate debtor under 11 U.S.C. § 101(51B) having more than four million dollar limit); Baxter Dunaway, Effect of the Bankruptcy Reform Act of 1994 on Real Estate, 30 Real Prop. Prob. & Tr. J. 601, 635−36 (1996) (stating that amendment's effect is weakened by $4,000,000 limit); Bogle, supra note 3, at 2185 (noting that amendments' impact was less than expected on single asset real estate cases). Additionally, the author suggests that "[t]he limitation would seem more appropriately placed if it applied to cases where the debtor owed more than $4,000,000 because these are the cases where debtors are more desperate and willing to create delays and problems". Id. at 2186; *see also* Murray, supra note 8, at 396 (noting that the $4,000,000 cap resulted in diminished protection for bankruptcy debtors).Back To Text

[48] The four million dollar cap was added at the last minute by Congress. Congress refused to approve the changes to the Code without it and with no time to vote on the inclusion of the cap it was included. *See* Working Proposal, supra note 28, at 2. (stating there is no legislative history to explain monetary limit). The courts are forced to make assumptions as to the rationale of Congress for the limit finding no relevant legislative history. *See* In re Oceanside Mission Assocs., 192 B.R. 232, 236−37 (Bankr. S.D. Cal, 1996) (discussing interpretation of $4,000,000 limitation).Back To Text

[49] *See Proposed Amendments to the* United States Bankruptcy Code: Hearings Before the Subcomm. on Comm. and Admin. Law, 105th Cong., 1st Sess. 1997 WL 275308 (F.D.C.H.) (April 30, 1997) (testimony of Donald R. Ennis) (noting average commercial loan at risk in single asset context is ten million dollars); H.R. Rep. No. 105−324, § 2 (1997) (recognizing problem with four million dollar limit giving debtors ability to abuse automatic stay provision in commercial property bankruptcy filings); Bogle, supra note 3, at 2185 n.76 (citing numerous cases where debtors have filed for bankruptcy with secured debt over $4,000,000).Back To Text

[50] Rep. Knollenberg explains the problems with the definition of 11 U.S.C. § 101(51B), the causes of the legislation, and how it can be corrected. *See* 143 Cong. Rec. H10660−02, H10662 (Jan 7, 1997) (statement of Rep. Knollenberg) (stating that "[t]he injustice with Title XI stems from an eleventh hour action . . . that placed an arbitrary $4 million ceiling on single asset provision in the bill"); s*ee also* H.R. Rep. No. 105−324, § 2 (1997) (explaining need to increase

single asset real estate's monetary ceiling); 143 Cong. Rec. H10660−02, H10661 (Jan. 7, 1997) (statement of Rep. Knollenberg) (attempting to rectify problem with $4 million limit by raising to $15 million limit).Back To Text

[51] *See* Commission Report, supra note 1, at 667 (stating that "[t]he time needed to formulate a plan is similar in large and small SARE cases, because the basic task in each instance is usually financial restructuring rather than business restructuring"); *see* Bogle, supra note 3, at 2185−86. (noting that debtors regardless of the amount of financing required face the same challenges in securing money from lenders).Back To Text

[52] If the intent of the 1994 Amendments was to give greater protection to secured lenders in single asset cases, why protect them in cases with less than four million dollars at stake and not protect them in cases when more of their money is at risk of being lost. *See* 143 Cong. Rec. H10660−02, H10662 (Jan. 7, 1997) (statement of Rep. Knollenberg) (finding arbitrary low ceiling punishing investors); *see, e.g.*, Standard Mill Ltd. Partnership, 1996 WL 521190, at *3 (finding that "because there is over $4 million in secured debt claims in the present case, this case falls outside the definition of a ‘single asset real estate case'"). Back To Text

[53] *See* 11 U.S.C. § 362(d)(3) (1994); In re Oceanside Mission Assocs., 192 B.R. 232, 235 (Bankr. S.D. Cal. 1996) (noting that section 362(d)(3) along with 11 U.S.C. section 101(51B) require single asset real estate debtors to act expedient when filing reorganization plans); *see also* 3 Collier, supra note 41, at ¶ 362.07[5][b] at n.81 (showing legislative history for protection of creditors from single asset real estate debtors abusing reorganizations to delay foreclosure); 2 Norton Bankr. L. & Prac. § 35:83 (William J. Norton, Jr. ed., 1996) (noting protection given to an undersecured creditor).Back To Text

[54] 11.U.S.C. § 362(d)(3) (requiring that debtor file plan "not later than the date that is 90 days after the entry of the order for relief); s*ee also* In re CBJ Dev., Inc. 202 B.R. 467, 470 (B.A.P. 9th Cir. 1996) (citing factors which will allow for relief from automatic stay); Norton, supra note 53, at § 9:54.5 (stating requirements of single asset real estate debtor filing). Back To Text

[55] *See* supra note 41 and accompanying text; 140 Cong. Rec. 764 (1994); *see also* Centofante v. CBJ Dev., Inc. (In re CBJ Dev. Inc.,), 202 B.R. 467, 470 (B.A.P. 9th Cir 1996) (finding section 363(d)(3) requires granting relief where single asset real estate debtors petition for reorganization unless certain factors exist); Nationsbank, N.A. v. LDN Corp. (In re LDN Corp.), 191 B.R. 320, 327 (Bankr. E.D. Va. 1996) (stating section 362(d)(3) was revised to provide greater protection for secured lenders).Back To Text

[56] Baxter Dunaway, Effect of the Bankruptcy Reform Act of 1994 on Real Estate, 30 Real Prop. Prob. & Tr. J. 601, 635−36 (1996) (stating that amendment's effect is weakened by four million limit); Bogle, *supra* note 3, at 2186 (noting that amendments' impact was less than expected on single asset real estate cases). Additionally, the author suggests that "[t]he limitation would seem more appropriately placed if it applied to cases where the debtor owed more than $4,000,000 because these are the cases where debtors are more desperate and willing to create delays and problems" Id; *see also* Murray, supra note 8, at 396 (noting that the $4 million cap resulted in diminished protection for bankruptcy debtor's).Back To Text

[57] *See* Pub. L. No. 103−394, 108 Stat. 4106.Back To Text

[58] *See* Commission Report, supra note 1, at 664−665.Back To Text

[59] *See* id. at 663.Back To Text

[60] *See* id.Back To Text

[61] *See* id. at 664−65. The Working Group proposal recommends that the statutory definition of single asset real estate be changed, removing the four million cap in favor of no cap, clearly excluding debtors participating in active business on the real estate, and installing a loan−to−value requirement on new value plans. Id.Back To Text

[62] *See* Commission Report, supra note 1, at 667; *see also* Commission Wraps Up Public Meetings, 7 Am. Bankr. Inst. J. 1, 6 (Sept. 1997) (summarizing removal of cap proposal by NBRC). Back To Text

[63] *See* Commission Report, supra note 1, at 667 (citing Proposed Amendments to the United States Bankruptcy Code: Hearings Before The Subcomm. On Comm. and Admin. Law, 105th Cong., 1st, Sess. (Apr. 30, 1997)) (testimony of Donald R. Ennis) (noting average commercial loan at risk in single asset context is ten million dollars).Back To Text

[64] *See* id. at 667.Back To Text

[65] Id. This may be true: however, the amount of debt involved clearly effects the amount of cost or risk which the secured creditor faces. *See* Scott Carlisle, *Single Asset Real Estate in Chapter 11 After the Bankruptcy Reform Act of 1994: A Secured Creditor's Perspective, in* Single Asset Real Estate Bankruptcies 375, 389−90 (Alan J. Robin ed., 1997) (noting losses sustained by both secured and unsecured creditors are greater for larger properties). Back To Text

[66] *See* Commission Report, supra note 1, at 667 (stating individuals who usually receive social benefits are rarely involved in SARE cases).Back To Text

[67] *See* 11 U.S.C. § 1129(a)(7)(ii) (1994) (requiring that creditors receive more under reorganization plan than they would under chapter 7); H.R. Rep. No. 95−595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6368 (noting that best interest of creditors must be taken into account during plan confirmation); 7 Collier On Bankruptcy ¶ 1100.01 at 1100−5 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (discussing substantial protection chapter 11 provides for creditors).Back To Text

[68] *See* Commission Report, supra note 1, at 667 (stating that "[u]nsecured trade creditors are typically a very small percentage of total debt in large SARE cases as well as small ones").Back To Text

[69] *See* id. (noting that "[a]lthough preservation of jobs and going−concern value may be an issue in some SARE cases, it is not *typically* an issue in either large or small SARE cases"). The reason these issues are not involved is because the business will still be run as usual regardless of whether the debtor or the creditor owns the property. *See* id. at 662.Back To Text

[70] *See* id. at 667; *see also* 11 U.S.C. § 362(d)(3) (1994) (allowing court to set later deadline for cause); 11 U.S.C. § 362(e) (1994) (allowing for delay of hearing on lifting automatic stay under compelling circumstances); H.R. Rep. No. 103−835, at 36 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3344 (stating that compelling circumstances include illness or other occurrences outside the control of the parties).Back To Text

[71] Commission Report, supra note 1, at 667 (noting exception to debt limit in very large cases where debt is more than $50 million).Back To Text

[72] *See* id. (stating "[i]n other words, the general rule for large SARE cases (no plan or payment deadline) is derived from the needs of the usual case"). Back To Text

[73] *See* id. at 667−68, (stating that the $4 million cap should be eliminated because the 90−day−plan or−payment requirement is "an appropriate general rule for SARE cases of all sizes" and requirements of larger cases should be addressed by court).Back To Text

[74] *See* supra note 1 and accompanying text.Back To Text

[75] *See*, 11 U.S.C. § 101(51B) (1994); *see also* supra note 40 and accompanying text.Back To Text

[76] *See* Commission Report, supra note 1, at 668. *See generally* In re Philmont Dev. Co., 181 B.R. 220, 223 (Bankr. E.D. Pa. 1995) (discussing lack of cases and legislative history interpreting definition of SARE).Back To Text

[77] *See* Commision Report, supra note 1, at 668 (indicating active businesses such as wholly owned subsidiaries operating business on real estate owned by its parent would be excluded from proposed definition of SARE debtor). Back To Text

[78] *See* id. (proposing to clarify definition of SARE debtor).Back To Text

[79] Id.Back To Text

[80] *See* id. at 668. (explaining that allowing lenders to require borrowers to create such subsidiaries would be expensive and could result in loss of jobs and diminished going concern value).Back To Text

[81] For example, the proposal states:

> 1. Debtor is a limited liability company owned by a group of lawyers, doctors and dentists which owns an office building held for rental. Debtor is an [sic] SARE. This would be true even if debtor provides its own cleaning, maintenance, snow removal and landscape services, because these are activities incidental to the operation of the property.
>
> 2. Debtor is a wholly owned subsidiary of a Fortune 500 manufacturing company which owns a manufacturing facility operated by the parent. The debtor and it's parent are both Chapter 11 debtors. The debtor is not an [sic] SARE. This is because the debtor is a member of a commonly controlled group in Chapter 11 which conducts a substantial business on the debtor's property other than a business incidental to the operation of the property.
>
> 3. Debtor is a limited partnership owned by a group of business executives which owns a strip shopping center with twenty−three stores, none of which is operated by the debtor. Debtor is an [sic] SARE.
>
> 4. Debtor is the same limited partnership owned by the same group of business executives which owns the same strip shopping center with twenty−three stores. However, in this example, the smallest of the store spaces is operated as a frozen−yogurt stand by the debtor. Debtor is an [sic] SARE, even though it operates a business other than an activity incidental to real estate because the frozen−yogurt stand is not "substantial."
>
> 5. Debtor is a corporation owning a regional shopping mall. Debtor is majority owned by an enterprise which also operates a nationwide chain of 147 ladies−apparel stores, one of which is on the debtor's premises. The debtor is not an [sic] SARE, because the business being operated by the debtor's group is "substantial."

Id. at 669.

These examples fail to clarify the difference between a substantial and non substantial business. For instance where is the line between the two, and what about a business with 5 or 10 stores?Back To Text

[82] Commission Report, supra note 1, at 668.Back To Text

[83] *See* 11 U.S.C. § 101(2) (1994); s*ee also* Commission Report, supra note 1, at 668 (defining affiliate as any entity which controls 20 percent or more of the debtors outstanding securities).Back To Text

[84] Commission Report, supra note 1, at 664.Back To Text

[85] Id. at 668.Back To Text

[86] *See* id. at 669 (noting that present definition contains ambiguities). Back To Text

[87] *See* id. at 669 n.1684 (noting question of whether raw land fell under the phrase "substantially all of the gross income of a debtor," was at the center of a dispute over classification as an SARE debtor); *see also* In re Oceanside Mission Assocs., 192 B.R. 232, 234 (Bankr. S.D.Cal. 1996). Back To Text

[88] Commission Report, supra note 1, at 669−70 & n.1685; *cf.* In re Pensignorkay, Inc., 204 B.R. 676, 682−83 n.4 (Bankr. E.D. Pa. 1997) (stating that market value of property should be used in calculating cap). The court found that the amount of the secured claim for "cap" determination, is the market value of the property if it is less than the debt because any amount of the debt in excess of the property value can not be secured by the property. Therefore, it is not "secured debt" for purposes of the cap limit. *But see* Oceanside Mission Assocs., 192 B.R. at 236−38 (finding that amount of secured claim is not limited to market value of property). Back To Text

[89] Commission Report, supra note 1, at 671−72 (describing typical SARE scenario as instance where mortgage fully encumbers the debtors property, and rental value declines so that debtor is forced to file chapter 11).Back To Text

[90] Id.Back To Text

[91] Id. at 671−72. The working group states that this type of restructuring is much less complicated than operational restructuring because, "[t]he debtor whose case usually involves business restructuring may need to open or close a branch or division. The debtor may then need to operate the restructured business for some time, to see how profitable it will be, before the debtor can propose a plan." Id. Back To Text

[92] Id. at 671.Back To Text

[93] *See* Commission Report, supra note 1, at 671−72.Back To Text

[94] *See* id. at 671−72.Back To Text

[95] *See* id. (noting SARE debtors may instead make interest payments within ninety days or seek extension for cause).Back To Text

[96] *See* 11 U.S.C. § 362(a)(d)(3)(B) (1994).Back To Text

[97] Commission Report, supra note 1, at 672.Back To Text

[98] *See* id. at 673 (stating "imposing the risks of delay on the secured creditor for more than three months are not justified"). Back To Text

[99] *See* id. The Commission further supports its position by stating that "the secured creditor is deprived of the use of property in which only it has present economic interest without payment for that use." Id. at 672−73.Back To Text

[100] Id. at 673; *see also* John D. Ayer, *The Role of Finance Theory in* Spring Bankruptcy Policy, 3 Am. Bankr. Inst. L. Rev. 53, 71−73 (1995) (discussing purpose of chapter 11); Bogle, supra note 3, at 2182−84 (questioning allowance of "entities to file in chapter 11 solely to protect on investment rather than livelihood or business important to the economy").Back To Text

[101] *See* Commision Report, supra note 1, at 673−674.Back To Text

[102] *See* Case v. Los Angeles Lumber Products, 308 U.S. 106, 120 (1939) (discussing new value exception); *see also* Mark E. MacDonald et al., *Confirmation by Cramdown Through the New Value Exception in* Single Asset Cases, 1 Am. Bankr. Inst. L. Rev. 65, 69−74 (1993) (discussing evolution of new value exception as judicially created doctrine).Back To Text

[103] *See* Commission Report, *supra* note 1, at 674. The Working Group proposes the following requirements for new value exception plans:

2.6.3 Require Substantial Equity in order to Confirm a Lien Stripping Plan Using the New Value Exception

In cases where the secured creditor has not made the election under section 1111(b)(1)(a)(i), a plan must satisfy the following requirements to be confirmed under the new−value exception following rejection by a class that includes the unsecured portion of a claim secured by real property: (1) The new value contribution must pay down the secured portion of the claim on the effective date of the plan so that, giving effect to the confirmation of the plan, sufficient cash payments on the secured portion of the claim shall have been made so that the principal amount of debt secured by the property is no more than 80 percent of the court determined fair market value of the property as of the confirmation date; (2) the payment terms for the secured portion of the claim must both (i) satisfy all applicable requirements of section 1129 of the Code, and (ii) satisfy then−prevailing market terms in the same locality regarding maturity date, amortization, interest rate, fixed−charge coverage and loan documentation; and (3) the new value contribution must be treated as an equity interest that is not convertible to or exchangeable for debt.

Id.Back To Text

[104] *See* id. (stating that requirements for confirmation of "new value exception" plans be clarified to reduce costs and delay). *Back To Text*

[105] *See* Northwest Bank Worthington v. Ahlers, 485 U.S. 197, 204−205 (1988) (finding that promise of future labor was not new value); *see also* In re Sovereign Group 1985−27, Ltd., 142 B.R. 702, 707 (E.D. Pa. 1992) (holding that new value exception exists under the Bankruptcy Code). *But see* In re A.V.B.I., Inc., 143 B.R. 738, 747 (Bankr. C.D. Cal. 1992) (holding that new value exception is no longer viable under Code). *See generally* Scott Carlisle, *Single Asset Real Estate in* Chapter 11: Secured Creditors' Perspective and the Need for Reform, 1 Am. Bankr. Inst. L. Rev. 133, 135 (1993) (discussing SARE and disadvantages of being unsecured). For additional discussion, see Marvin Krasny and Kevin J. Carey, *7th Circuit Recognized Value Exception*, The Legal Intelligencer, Nov. 7, 1997 at 9.Back To Text

[106] *See* Commission Report, *supra* note 1, at 676.Back To Text

[107] *See, e.g.*, In re Bonner Mall Partnership, 2 F.3d 899, 908 (9th. Cir. 1993), cert. granted, 510 U.S. 1039 (1994), *case dismissed as moot*, 513 U.S. 18 (1994) (stating under current case law, new value exception contains five requirements: (1) new; (2) in money or money's worth; (3) substantial; (4) necessary; and (5) reasonably equivalent to the interest retained).Back To Text

[108] S*ee* Commission Report, *supra* note 1, at 675. Back To Text

[109] Id. It is unclear who the original author of this quote was as it was adopted by the SARE Working Group, the Chapter 11 Working Group, and The Alternative Proposal.Back To Text

[110] *See id.* at 675−76. The Working Group seeks to clarify the requirements on the new value exception, in order to clear up ambiguities that have led to litigation. Courts in the past have come to differing conclusions on the requirements of the "new value exception." Specifically courts have differed over what constitutes a "substantial" new value contribution, what type of expenditures the "necessary" requirement allows and the requirement that the new value be "reasonably equivalent" has sparked debate over whether indirect benefits to equity holders should be considered new value. Back To Text

[111] *Id*. at 675.Back To Text

[112] *See id.* at 675 (stating how secured creditors are benefited by this proposal).Back To Text

[113] Commission Report, *supra* note 1, at 675. Back To Text

[114] *See* id. (listing several ways litigation can be simplified).Back To Text

[115] *Id.* at 676 (stating rationale for loan−to−value test).Back To Text

[116] *See* id. (stating that with conventional layer of equity, debtor would enjoy benefits and bear burdens of ownership).Back To Text

[117] *See id.* at 676 n.1701.Back To Text

[118] *See* Commission Report, *supra* note 1, at 677 (stating "[a] new−value plan in which the secured debt equals 100 percent of the value of the property is a virtual recipe for future default and poor maintenance
. . . too much of the debtor's net income must be spent on mortgage debt service, leaving the debtor too little for maintenance and reserves"). Back To Text

[119] *See* id. The Commission states that this, in turn, increases the chances that the debtor will properly maintain the property and be able to meet its mortgage obligations.Back To Text

[120] *See id.* at 677 (noting that "[r]equiring the equity holders to make this down payment will also give those equity holders a greater incentive to put in additional new money as needed, because they will have a current economic interest in the property to protect").Back To Text

[121] *See* id. (footnotes omitted).Back To Text

[122] *See id.* at 677−678; The Commission compares the five elements of the new value exception under current case law with the elements of the proposed new value exception and concludes that the proposed new value exception is not a departure from the elements of the current new value exception. *See* Commission Report, *supra* note 1, at 946. Rather, the new value exception is the same except that it has been modified to better handle SARE cases. *See* id. *See also* Memorandum from Honorable Thomas E. Carlson to the Small Business Working Group (June 5, 1997) (on file with author).Back To Text

[123] *See* Commission Report, *supra* note 1, at 678. The Report States:

> It would completely undermine the logic of the Proposal, for instance, to permit the debtor to treat the new contribution as senior lien on the real property. A more realistic danger is that the contribution might be treated as equity convertible to debt on par with unsecured claims to be paid under the plan. In that instance the new−value contribution might not have the hoped for effect of enhancing the capital structure of the debtor and the feasibility of the plan."

Id.Back To Text

[124] *See id.* at 679 (explaining "credit bid" approach, whereby property is put up for auction for the lender to bid value of its note to purchase property). The Commission rejected the "credit bid" approach out of concern that it might prevent a debtor from ever confirming a new value plan over the objection of a secured creditor. Id.Back To Text

[125] *See id*. at 664.Back To Text

[126] *See* Commission Report, *supra* note 1, at 670.Back To Text

[127] *See id.* at 680.Back To Text

[128] *See id.* at 680. (indicating that Small Working Group was responsible for submitting Single Asset Real Estate Proposals). Back To Text

[129] Id. Back To Text

[130] Id.Back To Text

[131] *See* Commission Report, *supra* note 1, at 680. Professor Klee argues that SARE debtors abuse the bankruptcy process by using the protection of the automatic stay to prevent foreclosure and resist making payments to the secured debtor, in order, to retain their interest in the overencumbered property. Id. In addition, Professor Klee states that although the court has become more adept at handling SARE cases, "nevertheless, in spite of some favorable trends, problems alleged to arise from SARE cases continue to demand the careful attention of judges and makers of public policy." *Id.* at 681.Back To Text

[132] *See* id. "They contend that reorganization is not generally necessary to preserve jobs and going concern value in SARE cases. Whether the debtor keeps the real property or the secured creditor takes it back, they believe that the property will be operated in the same manner, creating the same jobs and economic activity." Id.Back To Text

[133] *See* id. In support of this, the Alternative Proposal states "[a]necdotal evidence of foreclosing banks boarding−up buildings in Texas during the 1980s supports this view." Commission Report, *supra* note 1, at 681. Back To Text

[134] *See* id. The Alternative Proposal continues by stating that "[s]everal published articles and persons who appeared before the Working Group defended the availability of Chapter 11, as presently constituted, for SARE cases." *See id.* at 681. Stating that many of the bankruptcy professionals that the Commission heard from stated that no greater abuse of the bankruptcy system occurs in SARE cases then does in other cases. Id. The Bankruptcy Professionals agreed that the typical motivation for abuse in SARE cases tax shelter preservation was no longer prevalent in SARE cases as most of those tax shelters have been eliminated and Bankruptcy judges, trustees and administrators had become adept at controlling abuse in SARE. Id. Furthermore "[t]hese commentators repeatedly asserted that whatever the problems with SARE cases might or might not be, the SARE debtor did not deserve more restriction in how it could function in Chapter 11 than any other debtor." Id. Back To Text

[135] *See* Commission Report, *supra* note 1, at 682 (stating that "[t]he effect of section 362(d)(3) is limited, however, by the fact that it does not apply to cases in which the secured debt exceeds $4 million").Back To Text

[136] *See* id. (stating that "[w]hether an SARE debtor can confirm a lien−stripping plan generally turns on whether an impaired class has accepted the plan . . . and whether the plan satisfies the new−value exception to the absolute priority rule the Court of Appeals have made it increasingly difficult for the debtor to create an impaired accepting class"). *See, e.g.*, In re Barakat, 99 F.3d 1520, 1526 (9th Cir. 1996), cert. denied, 117 S.Ct. 1312 (denying plan confirmation for lack of assent of impaired noninsider class of creditors); In re Lumber Exch. Bldg. Ltd. Partnership, 968 F.2d 647, 649 (8th Cir. 1992) (holding that when debtor cannot "propose confirmable plan without improperly classifying creditors" the court will use its discretion); In re Bryson Properties, XVIII, 961 F.2d 496, 502 (4th Cir. 1992) (holding plan for reorganization to be unfair and inequitable); In re Greystone III Joint Venture, 995 F.2d 1274, 1281 (5th Cir. 1991) (permitting classification for reasons independent of debtor's motivation); In re Boston Post Road Ltd. Partnership, 21 F.3d 477, 483 (2d Cir. 1994) (holding plan to be impermissible when separating claims for purpose of creating assenting class).Back To Text

[137] *See* Commission Report, supra note 1, at 683. The Alternative Proposal argues that requiring new value equal to 20% of the secured debt makes sense in some cases, but in many cases will force legitimate reorganization attempts into foreclosure. The Alternative Proposal argues that the fair and equitable rule should not be abandoned in favor of the rigid 20% requirement without any evidence that the rule will work. Back To Text

[138] Id. at 683. The Alternative Proposal which is a nice intermediate, differs from the Working Group in that:

> the proposals do not use the Working Group approach of employing objective standards into the single asset real estate cases, either in the definition or in the confirmation standards. While clear standards are generally to be applauded, they work well only when people generally agree that they are appropriate, both as a matter of principle and as an empirical matter. In SARE cases, there is no such consensus, which means that any recommendation incorporating objective standards is bound to be controversial. A controversial proposal will offer little guidance to Congress, setting up another

round of contentious hearings that do little to forward the debate in the absence of empirical data.

Id.Back To Text

[139] *See* id. at 684−85. Professor Klee recommends that the statutory definition of 362(d)(3) be changed to include a $15 million cap and a more precise definition of active business. Back To Text

[140] *See* id. at 687. (stating that "[t]he $4 million cap should be raised to include other SARE cases in which the level of cash flow is likely to lead to deferred maintenance and non−payment of property taxes"). Back To Text

[141] Commission Report, supra note 1, at 687.Back To Text

[142] *See* id. The Alternative states that, in light of past experience, it would be a mistake to fast track large SARE debtors. Unlike small SARE debtors, large SARE debtors continue to maintain the property and pay taxes after filing, involve more complex restructuring as they usually have more than one secured creditor, involve larger amounts of trade debt. Furthermore failure of a large SARE debtors attempt to reorganize may result in a significant number of jobs being lost.Back To Text

[143] *See* Commission Report, supra note 1, at 687, 695 (commenting that "[i]n order to enable further study, the proposal raises the cap to $15 million as a measured first step"); The Alternative Proposal argues that it is unwise to adopt the radical changes recommended by the Working Group proposal considering the lack of evidence of what result the changes will have. Back To Text

[144] *See* id. at 688.Back To Text

[145] *See* id. (stating that the definition of affiliate should not include a 20% ownership requirement, because many affiliates that do not meet the requirement should be exempted from the definition of SARE based on affiliate relationship alone).Back To Text

[146] *See* id.Back To Text

[147] *See* id. at 688 (discussing Alternative Proposal recommendation that definition include "a group of commonly controlled entities of which the debtor is a member," and Working Group proposition that definition state "substantially all members of the commonly controlled group be Chapter 11 debtors"). Back To Text

[148] *See* Commission Report, supra note 1, at 688.Back To Text

[149] *See* id. at 683. The Alternative Proposal argues that under the Working Group definition lenders would require borrowers to create subsidiary companies, so that, upon default the borrower would receive SARE treatment.Back To Text

[150] *See* id. at 692; *see also* supra note 89 (describing typical SARE case).Back To Text

[151] *See* id. Arguing that SARE restructuring is not always simplistic, nor simply a two party dispute as the Working Group proposal suggests:

> By contrast, in larger real estate case where the mortgage debt exceeds $15 million, debtors are better equipped to keep current on tax and maintenance payments. At the same time, the debt structure in large cases is likely to be more complex. For example, the debtor and a third party lender might be parties to an interest rate swap, a device not likely to be used in smaller cases. Moreover, based on the dollar amounts at stake, all parties will require more time to perform a financial analysis of the project than in smaller cases. The $15 million cap will give Congress the opportunity to gather data to determine whether the cap should be adjusted up or down or eliminated.

Id.Back To Text

[152] *See* Commission Report, supra note 1, at 694.Back To Text

[153] *See* id.; *see also* Douglas S. Neville, *The New Value Exception to the* Chapter 11 Absolute Priority Rule Bonner Mall Partnership v. United States Bancorp Mortgage, Co., (In re Bonner Mall Partnership), 60 Mo. L. Rev. 465, 470 (1995) (discussing elements of new value exception); J. Ronald Trost, et. al., *Survey of the New Value Exception to the Absolute Priority Rule*, C836 A.L.I.−A.B.A., 301, 318 (1993) (stating allocation of exception).Back To Text

[154] *See* Commission Report, supra note 1, at 693.Back To Text

[155] *See* id. at 694. The Commission's adoption of the loan−to−value test seems to disregard that the "new value collar has long been ensconced in our bankruptcy practice." In re 203 N. LaSalle St. Partnership, 190 B.R. 567, 576 (Bankr. N.D. Ill. 1995), aff'd, Bank of Am., Ill. v. 203 N. LaSalle St. Partnership, 195 B.R. 692 (N.D. Ill. 1996) (holding that new value corollary to absolute priority rule remained part of bankruptcy jurisprudence). *cf. The Commission Proposals that are Most Likely to Succeed*, BCD News and Comment, Nov. 11, 1997 at 1 (noting new value exception will succeed if applied correctly by courts).Back To Text

[156] *See* Commission Report, supra note 1, at 694 (arguing loan−to−value test will result in a lower number of new value plans being confirmed, because currently many lenders are willing to accept plans that pay down less that 20% of the first mortgage and are willing to accept less than 20% of the secured debt as new value). Back To Text

[157] *See* id. Back To Text

[158] Id. at 694−95 (noting that "[t]he typical SARE case has few assets other than the real property. Therefore, the lender can afford to ignore its unsecured deficiency claim and can bid its entire debt to get the property. Indeed, if the debt is nonrecourse, the lender would have no other option in an auction. The Alternative Proposals rely instead on the market place to determine the value of the property"); *see also* Lawrence K. Snider, Bankruptcy: *The National Bankruptcy Review Commission, in its Recently Released Report, Has Proposed Significant Changes Affecting Single−Asset Real Estate Debtors*, Nat'l L.J. Nov. 17, 1997, at B5, B6 (stating the "commission did not go far enough in addressing the issues of exclusivity and credit bidding by existing lenders.").Back To Text

[159] *See* Commission Report, supra note 1, at 693.Back To Text

[160] *See* id.Back To Text