AMERICAN BANKRUPTCY INSTITUTE

MARCH 2, 2007

ABI BATTLEGROUND WEST

"GEARING UP FOR REAL ESTATE BANKRUPTCIES"

LOS ANGELES, CALIFORNIA

Materials prepared by:*

Debra A. Riley
Edward G. Fates
Allen Matkins Leck Gamble Mallory & Natsis LLP
501 West Broadway, 15th Floor
San Diego, California 92101
(619) 233-1155

* © 2007 All rights reserved.

American Bankruptcy Institute
ABI Battleground West

March 2, 2007

The revisions to the Bankruptcy Code implemented by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") which became effective in October 2005, have had wide-ranging effects on nearly all aspects of business and consumer bankruptcies. The following discussion focuses on certain changes to the Bankruptcy Code which may impact bankruptcies involving commercial real estate in the years to come.

A. Amendments that Affect Non-Residential Real Property Leases

1. Section 365(d)(4)

Prior to the BAPCPA amendments, an initial period of 60 days for assumption or rejection of non-residential real property leases was provided for, and a bankruptcy court could extend that time "for cause" without any statutory limitation. In practice, such extensions were routinely granted through plan confirmation.

The BAPCPA amends section 365(d)(4) of the Bankruptcy Code, providing that the time within which a debtor in possession[1] may assume, assume and assign, or reject an unexpired lease of non-residential real property is the earlier of: "(i) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming the plan." 11 U.S.C. § 365(d)(4) (as amended). However, on a motion of the debtor in possession or lessor filed prior to the expiration of this period, the court may extend this period for 90 days for cause, for a maximum of 210 days. After the court grants that first 90-day extension, it cannot further extend the assumption/rejection period without the *prior written consent of the lessor* in each instance.

The extension of the initial assumption/rejection period from 60 to 120 days provides some welcome breathing room for debtors that, under the old rule, were barely into bankruptcy before they had to begin considering a request for an extension of time to assume or reject. However, the creation of the rather arbitrary cap of 210 days for assumption/rejection absent agreement from the lessor imposes a real and significant burden on debtors, especially in retail cases where numerous leases of non-residential real property must be analyzed and where the consequences of improvident assumption or rejection of what are likely significant assets of the estate may be catastrophic[2]. Moreover, in situations where a landlord's lease is at or above market, the changes add little, since the debtor in possession may use the threat of an early rejection as a means to persuade the landlord to consent to extensions beyond the maximum 210

[1] Most of the statutory grants, including in section 365, are to the trustee in bankruptcy; under section 1108 the debtor in possession has most of the rights, powers, and duties of a trustee.

[2] While Congress' intent may have been to protect the landlords by giving landlords more leverage in negotiating for an earlier assumption of nonresidential real property leases, the change to section 365(d)(4) may cause more problems for landlords.

Debra A. Riley
Edward G. Fates
Allen Matkins Leck Gamble Mallory & Natsis LLP

day period authorized by the BAPCPA. Nevertheless, the change in section 365(d)(4) significantly reduces the period of uncertainty for commercial landlords regarding the status of their leases and puts an end to the series of long-term extensions available under the prior law.

With respect to extensions for cause, the debtor in possession must obtain order approving the extension of the 120 day period for cause within the 120-day period verses merely filing a motion for such extension before the 120 days expires. In re Tubular Technologies, LLC, the court held that a lease for non-residential real property was deemed rejected because an order for extension was not entered within 120 day period. Excusable neglect was not available to extend what the court noted was essentially a statute of limitation preclusion for the debtor. In re Tubular Technologies, LLC, 2006 Bankr. LEXIS 1282 (June 21, 2006); Also see, In re Tubular Technologies, LLC, 348 B.R. 699 (Bankr. SC 2006) (On a motion for stay pending appeal, the court held that the debtor was unlikely to win on appeal). The amendment to 365(d)(4) eliminates the ambiguity in the language of section 365(d)(4) that existed prior to BAPCPA and should put an end to the split in circuits over this issue. This is extremely important to practitioners in the Ninth Circuit, because the Ninth Circuit had recognized that the filing of a motion to extend the period to assume or reject for cause prior to the deadline, tolled the 60-day period. See In re Southwest Aircraft Services, Inc. 831 Fd.2d 848, 854 (9th Cir. 1987), *cert. den'd* 487 U.S. 1206, 108 S.Ct. 2848, 101 L.Ed.2d 885 (1988).

Another result of the amendment to section 365(d)(4) is that the debtor-lessee may not have sufficient time to sell "designation rights," which may affect the value of the property. (The debtor's real estate often is worth more than its business.) The sale of designation rights (which is a relatively new concept and is becoming more common) involves the bankruptcy court's approval of the sale of the right to sell the assets (usually multiple leases) of the debtor. Designation rights are not specifically provided for or described in the Bankruptcy Code and have developed without a clear statutory underpinning. It is generally argued that the sale of such rights is permitted pursuant to section 365(a) (which provides that the trustee has the right to assume or reject unexpired leases), notwithstanding the existence of "ipso facto" or "anti-assignment" provisions in the leases, so long as the leases have first been assumed (see section 365(b)(2)). A bankruptcy court also may invoke section 105(a) (which permits a court to "issue any order, process, or judgment that is necessary to carry out the provisions of this title") to approve a sale of designation rights if the court deems such a sale to be in the best interests of the estate and its creditors. Recent case law has approved the concept of the sale of designation rights, and these transactions likely will continue. See, e.g., Weingarten Nostat, Inc. v. Service Merchandise Co., 396 F.23d 737, 743 (6th Cir. 2005) (two-step sale of designation rights approved by court); In re Ames Dept. Stores, Inc., 287 B.R. 112, 118-26 (Bankr. S.D.N.Y. 2002) (strongly endorsing sale of designation rights); In re Ernst Home Ctr., 209 B.R. 974, 985 (Bankr. W.D. Wash. 1997) (approving sale of designation rights as sale of "bonus value" of leases to estate, thus constituting property interest of estate pursuant to sections 363(b) and 541; court granted 14-month extension period under section 365(d)(4) during which buyer could direct debtor to assume or reject leases).

The sale of designation rights must be approved by the bankruptcy court after the provision of timely and adequate notice to all interested parties, with a reasonable opportunity to object. This requires full compliance with the procedural requirements of Bankruptcy Rule 6004 (Use, Sale, or Lease of Property). The court must approve the bidding procedures applicable to

the auction of such rights, including any termination payment or overbid protections. The court usually will issue an order confirming that all notice and procedural requirements were complied with; that the property was widely marketed and that the auction was properly conducted and produced the best price for the property; that the sale was in the best interests of the estate; that the purchaser was a non-insider; and that the purchaser has agreed to cure all monetary defaults under the leases and pay all costs and expenses on each of the properties from the closing date to the date of transfer. The court's order also may state a termination date for the right to designate properties, e.g., one year from the date of closing. The court may allow the successful purchaser to transfer properties to itself, to transfer properties to others or to require the debtor to retain certain properties.

The purchaser of the designation rights pays the bankruptcy estate for the right to direct which leases will be assumed (and assigned) or rejected, and pays all the carrying costs of the properties during the bankruptcy proceeding. Debtors and unsecured creditors committees generally favor the sale of designation rights because they can quickly and efficiently monetize a portfolio of leases and bring an immediate (and necessary) cash infusion to the debtor's estate. But when designation rights are sold (usually at auction) the process is lengthy and delays, postponements and extensions of time periods are common. As note above, the amendments to section 365(d)(4) will make it very difficult to consummate the sale of designation rights, and the required approval or rejection of leases, within the new time frame mandated by BAPCPA.

Continued potential issues:

- Must the debtor in possession obtain an order approving assumption within the 210 or merely file a motion for the same with the order being entered outside the 210 period?

- If consent to an extension beyond 210 days is conditioned (e.g., payment of outstanding "stub rent", land termination option) is such an agreement outside the "ordinary course of business" thus requiring Bankruptcy Court approval?

- Can the lessor withhold consent to additional extensions for any reason or is the withholding of consent subject to a reasonableness standard?

2. Section 503(b)(7)

In Nostas Assoc. v. Costich (In re Klein Sleep Products, Inc.), 78 F.3d 18 (2d Cir. 1996), the debtor in possession assumed a lease of nonresidential real property. A chapter 11 trustee was appointed when the debtor's reorganization efforts failed. The chapter 11 trustee promptly rejected the lease and the lessor sought recovery of future rent under the lease. The trustee argued that the rejection of a previously-assumed lease should be treated as a breach entitling the lessor to a general unsecured claim. The Second Circuit disagreed and held that the lessor's claim for future rent gave rise to an administrative expense claim entitled to priority under Bankruptcy Code section 503(b). Id. at 30. The Second Circuit further held that the section 502(b)(6) cap did not apply to the lessor's claim. Id. at 33. (This decision was consistent with the generally prevailing understanding.)

To ameliorate the effect of premature assumption under amended section 365(d)(4), Congress added section 503(b)(7) of the Bankruptcy Code. Essentially section 503(b)(7) overrules that portion of Klein that held that the lessor was entitled to assert its administrative expense claim without being subject to the cap imposed by section 502(b)(6). Under BAPCPA, a lessor with respect to a lease that was previously assumed and then rejected will have an administrative expense claim for future rent "for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises[.]" 11 U.S.C. § 503(b)(7) (as amended). Damages for going dark (breaching a continuous-operations clause) and penalties are expressly excluded from the administrative claim under section 503(b)(7) of the Bankruptcy Code. Mitigation principles will apply only to the extent that the lessor actually receives rent from a nondebtor.

3. Section 365(b)(1)(A) and (b)(2)(D)

In Worthington v. General Motors Corp. (In re Claremont Acquisition Corp , Inc.), 113 F.3d 1029 (9th Cir. 1997), the Ninth Circuit prohibited a chapter 11 debtor from assuming and assigning its franchise agreements due to its inability to cure certain nonmonetary defaults arising from its failure to operate the franchise in accordance with the agreement's "going dark" clause. Id. at 1035. The Ninth Circuit began with the proposition that Bankruptcy Code section 365(b)(1) requires the debtor to cure all monetary and nonmonetary defaults before it can assume or assign an executory contract or unexpired lease. The Ninth Circuit noted that although section 365(b)(2) contains a list of items that need not be cured before assumption and assignment, a nonmonetary default was not one of those items. Id. at 1033. The dispute in that case was over the construction of the language of former section 365(b)(2)(D):

> (2) Paragraph (1) of this section [365(b)] does not apply to a default that is a breach of a provision relating to—
>
> > (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

11 U.S.C. § 365(b)(2)(D) (former section) (emphasis added).

The debtors and proposed assignees took the position that the phrase "penalty rate or provision" meant "penalty rate or other provision" relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease. Claremont Acquisition, 113 F.3d at 1033. The franchisor took the position that the phrase meant "penalty rate or penalty provision" relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease. Id. The Ninth Circuit agreed with the franchisor. Id. at 1034. Finding that the nonmonetary default was a "historical fact" that could not be cured, the Ninth Circuit would not allow the debtor to assign the franchise agreement. Id. at 1033-34.

BAPCPA amendments codify, in part, and reverse, in part, the holding in Claremont Acquisition. Amended section 365(b)(2)(D) now provides that the cure requirement does not apply to the satisfaction of any "penalty rate or penalty provision relating to a default arising

from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease." 11 U.S.C. § 365(b)(2)(D).

However, Claremont Acquisition is no longer good law with respect to unexpired real property leases. Under amended section 365(b)(1)(A), the debtor need not cure defaults that relate to a breach of a nonmonetary obligation under an unexpired lease of real property, if it is impossible for the debtor to cure such default by performing nonmonetary acts at and after the time of assumption. The revised language does not except every nonmonetary obligation, rather it applies only to those that are "impossible" to cure, an imprecise term that likely will trigger considerable debate in the years to come. Moreover, the debtor (or assignee) must begin performing all nonmonetary obligations under the lease at or after the time of assumption. If a lessor of nonresidential real property suffers any pecuniary losses as a result of the debtor's failure to perform its nonmonetary obligations under the lease, those losses must be compensated as part of the cure. Accordingly, the debtor's or successor's prospective compliance with all operational terms in commercial leases following the assumption, and , if applicable, assignment of such lease, is required.

B. Amendments to the Automatic Stay

There were fourteen amendments to section 362 to the Bankruptcy Code. Most of the amendments were consumer related and intended to discourage bad-faith repeat filings, and therefore, they will not be discussed below. The amendments to section 362, however, that may be relevant in real estate bankruptcies are as follows:

Section 362(b)(18) is amended to broaden the types of property taxes and assessments that are excepted from the automatic stay's prohibition of the creation of post-petition liens. The Second Circuit in Lincoln Sav. Bank, et al v. Suffolk County Treasurer (In re Parr Meadows Racing Ass'n, Inc.), 880 F.2d 1540, 1542 (2d Cir. 1989) held that the automatic stay prohibited "[t]he creation of a local tax lien upon real property unless the county has a prepetition interest in the real property[.]" The 1994 amendments to the Bankruptcy Code overruled Parr Meadows by creating an additional exception to the automatic stay for "[t]he creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia or a political subdivision of the State, if such tax comes due after the filing of the petition." 11 U.S.C. § 362(b)(18) (former). Amended section 362(b)(18) expands the overruling of Parr Meadows by clarifying that the exception to the stay applies to all special taxes and assessments on real estate, whether or not ad valorem, imposed by a governmental unit. This is extremely important as it relates to Mello-Roos and special assessment taxes of special assessment districts.

New subsection 362(b)(22), provides that a lessor under a residential lease may continue an eviction or unlawful detainer proceeding against the debtor-lessee if a judgment for possession has been obtained pre-petition. In connection therewith, section 362(1) provides that the provisions of section 362(b)(22) will apply on the date that is 30 days after the filing date unless, within such 30-day period, the debtor-lessee files with the court and serves on the lessor a certification that it has a right under applicable state law to cure the default, that it has cured the entire monetary default, and that it has deposited with the court any rent that would become due during the 30-day period after the filing date, in which case the court may order that the rights of the lessor under section 362(b)(22) will not apply.

Another new subsection, section 362(b)(24), provides that the stay will not operate with respect to any transfer that is not avoidable under section 544 (Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers) and that is not avoidable under section 549 (Post-Petition Transactions). This amendment clarifies that a post-petition transfer of an interest in real property (including the granting of a security interest in real property), which is not subject to attack under section 549(c) if the transfer is to a good faith purchaser for present fair equivalent value and without knowledge of the commencement of the debtor's bankruptcy case, cannot be set aside by the trustee or debtor in possession and will not be considered a violation of the automatic stay. Under section 544(a), the trustee or debtor in possession has the power, as of the commencement of the bankruptcy case, to avoid transfers and obligations of the debtor to the same extent as certain hypothetical creditors, i.e., the trustee or debtor in possession has the same avoidance powers as (i) a judicial lien creditor; (ii) a creditor holding an execution returned unsatisfied; or (iii) a bona fide purchaser of real property, whether or not such creditors or purchaser exist on the date of the bankruptcy filing. Section 544(b)(1) incorporates state law into the bankruptcy process and enables the trustee or debtor in possession to exercise the rights of creditors under state fraudulent transfer law to void any transfer of an interest of the debtor in property that is avoidable under applicable state law. New section 362(b)(24) clarifies that if the avoidance powers set forth above are not available to the trustee or debtor in possession with respect to a transfer under section 544, the automatic stay will not operate with respect to that transfer.

Section 362(d)(3) of the Bankruptcy Code regarding the payment of interest was amended to provide that a lender with a claim secured by single-asset real estate (see the discussion of SARE cases below) may obtain relief from the stay unless, before the later of 90 days after bankruptcy filing or 30 days after the court determines that the case involves single-asset real estate, the debtor has filed a reorganization plan with a reasonable possibility of being confirmed within a reasonable time or has commenced monthly payments (which may be made from rents generated from the property) at the non-default contract interest rate on the value of the creditor's interest in the real estate (prior to this amendment, interest was payable at the current fair market value rate, which often involved an evidentiary hearing and disputed testimony).

Although consumer oriented, new section 362(d)(4) provides relief from the stay to a creditor with a claim secured by an interest in real property if the court finds the petition was part of a scheme to delay, hinder, and defraud creditors and involved either a non-consensual transfer of all or part of the debtor's interest in the property or involved multiple bankruptcy filings affecting the property. Secured creditor may use this new provision coupled with the case law regarding "bad faith" filings[3], to argue that single-assets real estate case should be dismissed or, in the alternative, relief from stay granted.

---

[3] If there is little equity in the real estate, it may difficult as a general matter for single-asset real estate debtors to avail themselves of the Bankruptcy Code protections at all (notwithstanding section 101(51B) of the Bankruptcy Code) because, although such cases are not bad-faith filings *per se*, courts often dismiss filings by such entities based on bad faith, following the factors set forth in In re Phoenix Piccadilly, Ltd., 849 F.2d 1393 (11th Cir. 1998). These factors include the following: (1) the debtor has only one asset (the property); (2) the debtor has relatively few unsecured creditors whose claims are small compared to those of secured creditors; (3) the debtor has few employees; (4) the property is the subject of a pending foreclosure and primarily involve a dispute between the debtor and its secured creditor(s); and (5) the debtor's filing was timed to frustrate the legitimate rights and remedies

C. Amendments that Effect Single-asset Real Estate Cases

The highly touted debate regarding the bubble in real estate values has led to speculation as to how the rules relating to single-asset real estate debtors may be applied in the future. As a result of BAPCPA, more debtors will qualify as single-asset real estate debtors, thereby affording secured creditors with some additional protections.

Under amended section 101(51B), "single-asset real estate" means:

> "[R]eal property constituting a single property or project, other than residential real property with fewer than 4 residential units, that generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental"

Under BAPCPA, the $ 4 million amount cap[4] has been eliminated from the definition because the cap resulted in the exclusion of most commercial property reorganization cases from the special protections afforded to lenders in single-asset real estate cases. As a result, single-asset real estate provisions will apply in all bankruptcy cases that otherwise meet the definition of a single-asset real estate case, regardless of the amount of secured debt. The removal of the $4 million cap certainly will make the Bankruptcy Code's single-asset real estate provisions applicable to many more cases.

To qualify as single-asset real estate, income must not be derived primarily from business operations at the property. Thus, the definition excludes, e.g., hospitals, hotels, casinos, manufacturing facilities, ranches, and marinas. See, e.g., Centofante v. CBJ Debt, Inc., (In re CBJ Dev., Inc.), 202 B.R. 467, 471 (Bankr. 9th Cir. BAP 1996) (holding that full-service hotel does not constitute single-asset real estate under section 101(51B), and stating that, "the courts consider not only whether the debtor has only one asset but also whether the debtor has employees other than its principals"); In re CGE Shattuck, LLC, 1999 BNH 46 (Bankr. D.N.H., 1999), at *26 ("the operation of the Debtor's golf course does not meet the statutory definition provided by § 101(51 B)"); In re Kkemko, Inc., 181 B.R.. 47, 51 (Bankr. S.D. Ohio 1995) (a marina is not within the traditional usage of the term single-asset real estate); In re Mayer

---

of the secured creditor(s). See State St. Houses, Inc. v. N. Y. State Urban Dev. Corp. (In re State St. Houses, Inc.), 356 F.3d 1345 (11th Cir. 2004) (applying Piccadilly factors); In re Balboa St. Beach Club, Inc., 319 B.R. 736 (Bankr. N.D.N.Y. 2005) (same); Robert N.H. Christmas, Eleventh Circuit Decision Reaffirms Bad-Faith Precedent in Single Asset Cases, 24-1 ABIJ 32 (2005).

[4] Although the Bankruptcy Reform Act of 1994 (Pub. L. No. 103-394, § 202, 108 Stat. 4106, 4121) was widely heralded by Congress and commentators as a victory for secured creditors in connection with single-asset Chapter 11 real estate bankruptcy cases, it actually did little to protect secured creditors from single asset filings. This lack of protection resulted, in part, because the definition of single-asset real estate encompassed only a real estate business operation having less than $4 million in secured debt. The Bankruptcy Reform Act of 1994 provided for the creation of the National Review Commission ("Commission"), to provide input from independent experts regarding possible future amendments to the Code. The Commission consisted of several "working groups," including one on single-asset real estate. In October 1997, the Commission issued a formal report of more than 1300 pages, including recommendations regarding single-asset real estate. One of the specific recommendations of the Commission was that the $4 million cap be removed. See 1 Report of the National Bankruptcy Commission, at 664 (Oct 20, 1997), available at http://govinfo.library.unt.edu/nbrc/.

Pollock Steel Corp., 174 B.R. 414, 423 (Bankr. E.D. Pa. 1994) (steel processing plant provides jobs, produces assets for the national economy, and has an oversecured lender and other creditors, all of which distinguish it from single-asset realty cases); In re Prairie Hills Golf & Ski Club, Inc., 255 B.R. 228, 230 (Bankr. D. Neb., 2000) (active development and sale of residential lots "does not fit the mold of the single-asset real estate cases"); In re Larry Goodwin Golf Inc., 219 B.R. 391, 393 (Bankr. D.N.C., 1997) (holding that golf course, golf cart rentals, pool, concessions, and undeveloped property for sale are part of the business operated on the property, distinct from simply holding the property solely for income, but stating that "apartment buildings are clearly within the definition of single-asset cases"). *Cf.* Riggs Bank, N.A. v. Planet 10, L.C. (In re Planet 10, L.C.), 213 B.R. 478, 479 (Bankr. E.D. Va. 1997) (single-asset definition applied to undeveloped land); In re Philmont Development Co., 181 B.R. 220, 223-224 (Bankr. E.D. Pa. 1995) (holding section 101(51B) to be satisfied where debtor merely owned group of semi-detached houses, and stating that, "[t]he terms single-asset case, or single-asset real estate case, are well-known and often used colloquialisms which essentially refer to real estate entities attempting to cling to ownership of real property in a depressed market . . . rather than businesses involving manufacturing, sales or services"). See generally Kenneth N Klee, One Size Fits Some: Single Asset Real Estate Cases, 87 Cornell L. Rev. 1285 (2002).

Since the enactment of BAPCPA, one of the most recent cases considering the qualifications adopted the reasoning from CBJ Development, Inc. In In re Whispering Pines Estate, Inc., the bankruptcy court considered whether a hotel qualified as a single-asset real estate debtor when it provided room-cleaning and towel-laundering services, served continental breakfast, offered a swimming pool, and provided telephone and high-speed Internet service. In re Whispering Pines Estate, 341 B.R. 134 (Bankr. D. N.H. 2006). The debtor in Whispering Pines Estates, unlike debtors in earlier cases, did not have other revenue-generating operations other than the rental of hotel rooms. Notwithstanding the lack of other revenue-generating operations, the bankruptcy court determined that the operation of the hotel was "sufficiently active in nature to constitute a business other than the mere operation of property." Id. at 136. In reaching its decision, the court held that the existence of revenue-producing activities set forth in the CBJ Development, Inc. opinion were not determinative of the outcome in that case. Rather, the court held that "the Debtor's hotel operations, even without those [revenue producing] services, constitute more than the 'business of operating real property.'" Id. at 136. While declining to hold that a hotel or motel could never be a single-asset real estate, the court indicated that any such finding by a future court must be based on a finding that the business was a "hotel" or "motel" in name only, and did not constitute anything more than the operation of property.

As stated earlier, the BAPCPA also amended the relief from stay provisions relating to single-asset real estate debtors. In a single-asset real estate case, a creditor with a loan secured by a lien on single-asset real estate is entitled to relief from the automatic stay unless, not later than 90-days after the entry of the order for relief (or 30 days after the court determines that the debtor is subject to the rules governing single-asset real estate cases, if later than 90 days), the debtor has either (i) filed a plan that has "a reasonable possibility of being confirmed within a reasonable period of time" or (ii) commenced making monthly payments to each secured creditor based on the then applicable non-default rate of interest. The effect of section 362(d)(3) on a debtor is substantial. Hence, debtors which may qualify as a single real estate debtor should spend a significant amount of time planning its bankruptcy case. On the other hand, real estate lenders need to understand the advantages available to them if a bankruptcy court determines that

a case is a single-asset real estate case. Lenders also will need to be prepared to establish the value of their interest in the debtor's property in order to enforce their rights to contract rate interest payments. Undoubtedly, there will be significant litigation over the value of the property.

TABLE OF CONTENTS

Page

A. Amendments that Affect Non-Residential Real Property Leases 1

1. Section 365(d)(4) 1

2. Section 503(b)(7) 7

3. Section 365(b)(1)(A) and (b)(2)(D) 8

B. Amendments to the Automatic Stay 11

C. Amendments that Effect Single-Asset Real Estate Cases.. 15