GENERAL GROWTH PROPERTIES AND ITS AFTERMATH
HOT TOPICS IN STRUCTURED FINANCE
NEW YORK CITY BAR

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The commercial real estate sector has long relied on organizational structures involving special purpose entities ("SPEs") to isolate and control financial risk. The SPE structure is intended to limit the scope of risks that a secured lender must consider and underwrite by isolating an individual project in a distinct legal entity. If this structure works as planned, a lender to an SPE can focus on project risks while being isolated from risks related to the parent's financial health and the financial health of the parent's other projects.[1]

In order to achieve this risk management objective, SPE governing documents typically have three fundamental characteristics: (1) they limit the SPE's objects and powers, (2) they create structural obstacles to the SPE filing for bankruptcy, and (3) they impose separateness covenants that limit bankruptcy risk by generally requiring the SPE to operate as a stand-alone entity and limiting its ability to incur obligations unrelated to the securitized financing.[2]

As evidenced by the many alerts issued by law firms discussing the case, developments in the bankruptcy cases of General Growth Properties, Inc. ("GGP") and its affiliates (the "GGP Group") caused substantial concerns about the effectiveness of the use of SPE structures to limit the lenders' exposure to non-project-related risk.[3] This article discusses the background of the case, the Court's decisions, and strategies that future lenders to SPEs can use to limit their exposure to risk related to the parent's financial condition in the post-GGP environment, and concludes that revisions to the parties' documents can substantially mitigate the risks highlighted by GGP.

I. Background

The GGP Group's structure and operations are described in its Form 10-K for the year ended December 31, 2008 and the Declaration of James A. Mesterharm Pursuant to Local Bankruptcy Rule 1007-2 in Support of First Day Motions dated April 16, 2009,[4] and are

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[1] Steven L. Schwarcz, *Structured Finance – A Guide to the Principles of Asset Securitization*, at §§ 1:1, 1:3 (3d ed. 2007) [hereinafter "Securitization Principles"]; Steven L. Schwarcz, Bruce A. Markell, and Lissa Lamkin Broome, *Securitization, Structured Finance, and Capital Markets*, at 6–8 (1st Ed. 2004); *Comm. on Bankr. & Corporate Reorganization of the Ass'n of the Bar of the City of N.Y., Structured Financing Techniques*, 50 Bus. Law. 527, 533, 595–606 (1995) [hereinafter "Structured Finance Techniques"]; *Comm. on Structured Fin. and Comm. on Bankr. & Corporate Reorganization of the Ass'n of the Bar of the City of N.Y., Special Report on the Preparation of Substantive Consolidation Opinions*, 64 Bus. Law. 411, 424–431 (2009) [hereinafter "Non-Consolidation Opinions"]; *see* Brian M. Resnick and Steven C. Krause, *Not So Bankruptcy-Remote SPEs and In re General Growth Properties Inc.*, 28 Am. Bankr. Inst. J. 8, at cover (October 2009).

[2] Securitization Principles, at §§ 1:1, 1:3, 3.1–3.4; Structured Finance Techniques, 50 Bus. Law. at 554–58; *Standard & Poor's Structured Finance Legal Criteria, Special Purpose Entities*, at 39–43 (April 2002); *Standard & Poor's Structured Finance Ratings, Real Estate Finance, Legal and Structured Finance Issues in Commercial Mortgage Securities*, at 1195 (undated); *see In re General Growth Properties, Inc.*, 409 B.R. 43, 49 (Bankr. S.D.N.Y. 2009) [Docket No. 1284] [hereinafter the "Bad Faith Filing Decision"].

[3] *See, e.g.* Brian M. Resnick and Steven C. Krause, *Not So Bankruptcy-Remote SPEs and In re General Growth Properties Inc.*, 28 Am. Bankr. Inst. J. 8, at cover, 60–62 (October 2009); Rick B. Antonoff, et al., *Pillsbury Winthrop Shaw Pittman LLP Client Alert – Recent Bankruptcy Court Ruling Has Major Implications for Structured Financing* (August 17, 2009).

[4] Docket No. 0013. Hereinafter the "Mesterharm Decl."

summarized in Bankruptcy Judge Gropper's August 11, 2009 decision denying the motions to dismiss several subsidiaries' chapter 11 cases. GGP was and is[5] a publicly-traded real estate investment trust, among the largest operators of regional shopping centers in the United States, with additional holdings in commercial office properties and master-planned communities. GGP and its affiliates owned or managed over 200 shopping centers in 44 states.[6] At the end of 2008, the GGP Group had $29.6 billion in assets and $27.3 billion in liabilities, with $2.45 billion of those liabilities attributable to joint ventures.[7] As is typical in the commercial real estate industry, GGP holds the bulk of its operating assets through SPE subsidiaries, with each SPE typically holding one asset. Organizational charts giving a general overview of the GGP Group's structure are attached as Exhibits 1 and 2.

The GGP Group obtained the bulk of its financing, $18.27 billion as of the end of 2008, from secured borrowing by its SPEs – each SPE would finance its operating asset with mortgage loans secured by that asset. These mortgages included both traditional loans funded by financial institutions and loans funded by the sale of commercial mortgage-backed securities. In either case, the mortgages typically had terms of three to seven years, with little amortization and a large balloon payment due at maturity. Some of the loans included a "hyper-amortization" feature triggered by passage of an anticipated repayment date, under which (1) the interest rate of the loan would increase substantially, (2) the SPE would have to allocate all of its excess cash flow to amortization of the loan, and (3) the lender would gain the right to approve certain expenses. While less drastic than default, hyper-amortization is nonetheless an undesirable condition because it absorbs all of an SPE's available cash, preventing the SPE from upstreaming any cash to its parent. GGP historically treated hyper-amortization as equivalent to default and always refinanced its SPEs' loans before their anticipated repayment dates.[8]

GGP subsidiaries also incurred so-called "mezzanine" debt advanced to SPEs that owned the equity in a property-owning subsidiary.[9]

GGP also carried $6.58 billion of generally short-term unsecured debt at the parent level. In order to continue in business, the GGP Group needed to refinance a significant proportion of its project-level and parent-level debt each year. This sort of capital structure was not uncommon in the commercial real estate industry, and GGP had successfully used it for some time. However, the GGP Group's debt structure became unsustainable as the credit markets tightened in the second half of 2008 and GGP lost its ability to refinance.[10]

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[5] GGP successfully proposed and confirmed a chapter 11 plan for certain of its affiliates that became effective on December 30, 2009 and January 8, 2010.

[6] Bad Faith Filing Decision, 409 B.R. at 47; Disclosure Statement for Plan Debtors' Joint Plan of Reorganization, at 14, *In re General Growth Properties, Inc.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. December 1, 2009) [Docket No. 3659] [hereinafter the "Disclosure Statement"].

[7] Bad Faith Filing Decision, 409 B.R. at 48.

[8] *Id.* at 48–53.

[9] *Id.* at 51.

[10] *Id.* at 51–53.

By early 2009, while GGP's balance sheet showed that its assets exceeded its liabilities,[11] it had failed to refinance various parent-level and project level debt as it matured and therefore depended on short-term forbearance agreements with creditors to operate.[12] Several mortgage loans to GGP Group SPEs had matured, several had entered hyper-amortization, and $18.4 billion in debt would mature by the end of 2012.[13] The GGP Group had little prospect of resolving this liquidity problem, because institutions were generally unwilling to make large loans secured by commercial real estate and the commercial mortgage-backed securities market was essentially closed.[14] On an operational level, at the time of the filing, the shopping centers were stable and generating positive cash flow. The malls were 92.5% rented for an average term of more than nine years.[15] Most of the GGP Group's SPE subsidiaries were current on their debt service obligations, and the GGP Group as a whole had positive net income in 2008.[16]

II. The GGP Bankruptcy Case

GGP's parent-level liquidity problem was untenable, and it filed a voluntary Chapter 11 bankruptcy petition on April 16, 2009.[17] GGP also caused 388 GGP Group SPEs to file voluntary Chapter 11 petitions,[18] and through motions to use cash collateral and to continue cash management practices sought authority to use the cash generated by the GGP Group SPEs to fund the reorganization.[19] The filings by the SPEs and the efforts to use the SPEs' cash conflicted with two key premises of the SPE structure: that an SPE would not be subject to bankruptcy case at the instance of its parent, and that an SPE's assets, in particular its cash flow, would not be affected or interrupted by the parent's financial condition or bankruptcy.[20]

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[11] General Growth Properties, Inc. Form 10-K, at F-7 (February 27, 2009, for the year ended December 31, 2008).

[12] *Id.* at 1, 7, 34–35.

[13] Bad Faith Filing Decision, 409 B.R. at 50–54.

[14] *See id.* at 54, 57. The First Day Declaration reported that the commercial mortgage-backed securitization market that had expanded from $52 billion in issuance in 2002 to $229 billion in 2008 had shrunk 97% to $6.4 billion in first three quarters on 2008 and that issuance in the fourth quarter was off 98% from the year earlier quarter. Mesterharm Decl. ¶ 41.

[15] Mesterharm Decl. ¶ 8.

[16] Bad Faith Filing Decision, 409 B.R. at 55; *see* General Growth Properties, Inc. Form 10-K (February 27, 2009, for the year ended December 31, 2008); Jesse Cook-Dubin, New York Bankruptcy Court Topples Contractual Barriers to Filing Chapter 11: Part I, 28 Am. Bankr. Inst. J. 9, at 28–29 (November 2009); Brian M. Resnick and Steven C. Krause, *Not So Bankruptcy-Remote SPEs and In re General Growth Properties Inc.*, 28 Am. Bankr. Inst. J. 8, at 60 (October 2009).

[17] *In re General Growth Properties, Inc.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. April 16, 2009).

[18] Bad Faith Filing Decision, 409 B.R. at 54. GGP had approximately 750 affiliates. *Id.* at 47; Mesterharm Decl. ¶ 1.

[19] *See* Debtors' Motion for Interim and Final Orders…for Authorization to Continue Using Centralized Cash Management System…, *In Re General Growth Properties, Inc.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. April 16, 2009) [Docket No. 0008] [hereinafter the "Cash Management Motion"]; Debtors Motion for Interim and Final Orders (1) Authorizing the Debtors' use of Cash Collateral…and a Final Order Authorizing Borrowing with Priority over Administrative Expenses…, *In re Growth Properties, Inc.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. April 16, 2009) [Docket No. 0009] [hereinafter the "Cash Collateral Motion"].

[20] Non-Consolidation Opinions, 64 Bus. Law. at 424–431; Structured Finance Techniques, 50 Bus. Law. at 595–606; Securitization Principles, at §§ 1:1, 3:1–3:4. Brian M. Resnick and Steven C. Krause, *Not So Bankruptcy-Remote SPEs and In re General Growth Properties Inc.*, 28 Am. Bankr. Inst. J. 8, at 60 (October 2009).

Therefore, in these two respects, the GGP Group SPEs' bankruptcy filings became a practical test of bankruptcy courts' willingness to respect the SPE structure.

As is typical and required by the Local Rules of the United States Bankruptcy Court for the Southern District of New York, GGP filed with the petitions a "First-Day" Declaration[21] describing the circumstances that led to the bankruptcy filings and the relief that was sought in the "First Day" motions seeking immediate court action that were filed with the petitions. The First-Day Declaration and the motions emphasized that GGP ran its business and that of its affiliates as an integrated enterprise with management centralized at GGP's Chicago headquarters. It purchased utilities, supplies, and insurance centrally and utilized a central leasing program.[22] Most significantly, it managed its cash through a centralized cash management system. Individual properties and subsidiaries did not have check writing capabilities; GGP functioned as paying and collecting agent and made payments for debt service, taxes and operating expenses for the properties. In the ordinary course of business, the Debtors used this centralized cash management system to collect and transfer funds generated by Debtor and non-debtor subsidiaries.[23] Funds were swept from lockbox receipts to lenders' depository accounts and upstreamed to the main operating account. Disbursements were made from the main operating account to various disbursement accounts for debt service, operating expenses, accounts payable and payroll.

(a) Cash Management System, Use of Cash Collateral and Debtor-In-Possession Financing

Among its other "First Day" motions, GGP filed two motions for the Court to approve its plans for financing its bankruptcy case. The first sought to continue the Debtors' centralized cash management system, under which GGP would collect and disburse the cash generated by the GGP Group SPEs (including cash collateral securing the SPEs' obligations under their mortgage loans);[24] the second sought authority to use the "cash collateral" of the Debtors' secured lenders and to incur $375 million in "Debtor in Possession" or "DIP" financing.[25] The Court issued an interim order permitting GGP to collect and use the cash generated by its SPEs pending a final hearing on the cash management system and DIP financing package scheduled for May 8, 2009, and directing GGP to continue paying interest on the GGP Group SPEs' loans at the pre-petition non-default rate but suspending payments for amortization of principal.[26]

In a typical parent/SPE structure, an SPE collects its income in its own separate bank account and pays its expenses from that account, only then upstreaming excess cash to its parent.

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[21] Mesterharm Decl.

[22] Mesterharm Decl. ¶¶ 16–22.

[23] Cash Management Motion ¶¶ 13, 17, 20.

[24] Cash Management Motion.

[25] Cash Collateral Motion.

[26] Interim Order Pursuant to Sections 361, 363, 503, and 507 of the Bankruptcy Code…Authorizing use of Cash Collateral…, *In re Growth Properties, Inc.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. April 16, 2009) [Docket No. 0044] [hereinafter the "Interim Cash Management Order"].

This emphasizes the SPE's separate identity, reducing the risk that a bankruptcy court will treat the SPE as though it is merely part of its parent ("substantive consolidation").[27]

As described above, the GGP Group did not follow that practice – prior to its bankruptcy filing, it used a centralized cash management system.[28] GGP swept income from its SPE subsidiaries into a common operating account, and then paid its SPE subsidiaries' obligations from that common account.[29] If an SPE subsidiary failed to generate enough income during a particular period to meet its obligations, GGP would nonetheless pay those obligations, effectively loaning money from healthier SPEs to the unhealthy SPE in exchange for an intercompany claim.[30] GGP did account for these intercompany claims.[31] While this arrangement was inconsistent with typical separateness covenants and the assumptions underlying most "non-consolidation" legal opinions,[32] GGP had nonetheless been able to obtain such opinions in light of case law acknowledging that it is common for large corporate groups to use cash management systems.[33]

GGP's centralized cash management system did have one significant limitation: certain mortgage lenders to GGP Group SPEs had deposit account control agreements under which they would assume control of an SPE's deposit account upon default or cross-default, preventing that SPE from upstreaming cash to GGP. These agreements created springing cash traps that would ensure that all of an SPE's income would be available for payment of the SPE's debt service obligations if the SPE or GGP encountered financial distress.[34]

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[27] Non-Consolidation Opinions, 64 Bus. Law. at 420–21; Structured Finance Techniques, 50 Bus. Law. at 552; Securitization Principles at §3:4; Patrick C. Sargent, Charles T. Marshall, and Peter K. McKee, Jr., *Andrews Kurth LLP Client Alert – Round 1 of General Growth Properties Bankruptcy: SPE Structure Survives* (June 24, 2009).

[28] Note 23 *supra* and accompanying text; *see* Bad Faith Filing Decision, 412 B.R. 609, 610–11 (Bankr. S.D.N.Y. 2009).

[29] Cash Management Motion ¶¶ 14–20.

[30] *See In re General Growth Properties, Inc.*, 412 B.R. 609, 610–11 (Bankr. S.D.N.Y. 2009) [Docket No. 0518] [hereinafter the "Cash Management Order"]; Patrick C. Sargent, Charles T. Marshall, and Peter K. McKee, Jr., *Andrews Kurth LLP Client Alert – Round 1 of General Growth Properties Bankruptcy: SPE Structure Survives* (June 24, 2009); Mark Ellenberg, Peter Dodson, and Michelle Raftery, *Cadwalader Clients & Friends Memo – General Growth Properties Bankruptcy Court Defers Final Ruling on Cash Collateral, Cash Management and DIP Financing Issues* (May 11, 2009).

[31] Cash Management Motion ¶ 54; Patrick C. Sargent, Charles T. Marshall, and Peter K. McKee, Jr., *Andrews Kurth LLP Client Alert – Round 1 of General Growth Properties Bankruptcy: SPE Structure Survives* (June 24, 2009).

[32] *See* Non-Consolidation Opinions, 64 Bus. Law. at 412–13 (2009).

[33] Patrick C. Sargent, Charles T. Marshall, and Peter K. McKee, Jr., *Andrews Kurth LLP Client Alert – Round 1 of General Growth Properties Bankruptcy: SPE Structure Survives* (June 24, 2009) (citing *In re Owens Corning*, 419 F.3d 195, 214–15 (3d Cir. 2005)). Note, however, that some commentators had suggested that centralized cash management systems and non-cash settlement of intercompany obligations increases bankruptcy risk. *See* Non-Consolidation Opinions, 64 Bus. Law. at 421–22. Centralized cash management was inconsistent with Standard & Poor's legal criteria for SPEs, *see Standard & Poor's Structured Finance Legal Criteria, Special Purpose Entities*, at 196–97 (April 2002), and other statements of good practices.

[34] *See* Bad Faith Filing Decision, 412 B.R. 609, 612–13 (Bankr. S.D.N.Y. 2009); Request for Clarification and Reservation of Rights of U.S. Bank National Association…, ¶¶ 1–3, *In re General Growth Properties*, Chapter 11 Case No. 09–11977 (ALG) (Bankr. S.D.N.Y. April 16, 2009) [Docket No. 0023].

GGP proposed to borrow $375 million in DIP financing.[35] The DIP lender was to have a first-priority administrative expense claim on the central account GGP used to collect cash pursuant to its cash management system. The GGP Group SPEs were to guarantee GGP's obligations under the DIP loan and secure those guarantees with second-priority liens on substantially all of their assets. The SPEs' mortgage lenders objected, because such guarantees and liens were prohibited by the SPE documents would have seriously impaired the SPEs' independence. The proposed guarantees were also troubling because the SPEs would receive almost no benefit from the DIP financing, the proceeds of which were to go to GGP and certain of its administrative-level subsidiaries.[36]

At the commencement of its bankruptcy case, GGP sought an order authorizing it to continue using its centralized cash management system.[37] This affected the GGP Group SPEs' secured creditors' liens on the cash generated by the project each financed. GGP proposed to replace those liens with administrative expense claims on the intercompany claims held by healthy GGP Group SPEs that had effectively made loans to unhealthy GGP Group SPEs. These administrative expense claims were to be junior to GGP's DIP lender's claim. Numerous secured creditors of GGP Group SPEs objected on the grounds that this would fail to adequately protect their liens on cash collateral and would override springing cash traps.[38]

The Court's May 14, 2009 orders granting GGP's motions included substantial additional protection for the GGP Group SPEs' secured creditors.[39] The Court permitted GGP to continue using its centralized cash management system, but it gave the GGP Group SPEs' secured creditors a first-priority administrative expense claim on GGP's centralized cash account.[40] In addition, several would-be DIP lenders had emerged while GGP's motions were pending, offering more favorable terms. Under the DIP financing package that the Court ultimately approved, GGP borrowed $400 million, the GGP Group SPEs did not guarantee GGP's obligations or grant liens on their assets, and the DIP lender's administrative expense claim on GGP's central cash account was junior to the GGP Group SPEs' secured creditors' claims. [41]

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[35] Cash Collateral Motion ¶ 2.

[36] *See* Mark Ellenberg, Peter Dodson, and Michelle Raftery, *Cadwalader Clients & Friends Memo – General Growth Properties Bankruptcy Court Defers Final Ruling on Cash Collateral, Cash Management and DIP Financing Issues* (May 11, 2009).

[37] Cash Management Motion ¶¶ 1–4.

[38]*See* Mark Ellenberg, Peter Dodson, and Michelle Raftery, *Cadwalader Clients & Friends Memo – General Growth Properties Bankruptcy Court Defers Final Ruling on Cash Collateral, Cash Management and DIP Financing Issues* (May 11, 2009).

[39] *See generally In re General Growth Properties, Inc.*, 412 B.R. 122 (Bankr. S.D.N.Y. 2009) [hereinafter the "Cash Collateral and DIP Financing Order"]; Cash Management System Order, 412 B.R. 609.

[40] Cash Management Order, 412 B.R. at 610–11; Cash Collateral and DIP Financing Order, 412 B.R. at 134–35; *see* Douglas R. Gooding and John F. Ventola, *Lessons from General Growth Properties*, Law360 (August 28, 2009); Mark Ellenberg, Peter Dodson, and Michelle Raftery, *Cadwalader Clients & Friends Memo – General Growth Properties Bankruptcy Court Enters Final Order on Cash Collateral, Cash Management, and DIP Financing Issues* (May 18, 2009).

[41] Cash Collateral and DIP Financing Order, 412 B.R. at 123, 127, 134–35; Patrick C. Sargent, Charles T. Marshall, and Peter K. McKee, Jr., *Andrews Kurth LLP Client Alert – Round 1 of General Growth Properties Bankruptcy: SPE Structure Survives* (June 24, 2009); Mark Ellenberg, Peter Dodson, and Michelle Raftery, *Cadwalader Clients*

This was a reasonably positive outcome for the GGP Group SPEs' secured creditors.[42] The Court's decision to permit the GGP Group to use a centralized cash management system was unsurprising, because the GGP Group had used such a system before filing for bankruptcy. The Court's ruling largely respected the separateness of the GGP Group SPEs, and offered the GGP Group SPEs' secured creditors significantly more protection than GGP's original proposal had. Notably, lenders obtained liens on all upstream cash transfers by GGP Group SPEs, whereas pre-petition upstream transfers of GGP Group SPEs' cash were typically income distributions that lenders would have no claim on. Lenders lost the benefit of hyper-amortization features, increased default interest rates, and springing cash traps.[43]

(b) Motions to Dismiss for Bad-Faith Filing

The focus of the GGP case then shifted to a more fundamental question: was it proper for the many solvent GGP Group SPEs to be in bankruptcy at all? Two conventional mortgage lenders to GGP Group SPEs and two special servicers acting on behalf of securitization trusts backed by mortgage loans to GGP Group SPEs filed motions to dismiss the bankruptcy cases of their respective SPE debtors on the grounds that the SPEs had filed those petitions in bad faith. The essence of the creditors' arguments was that the SPE debtors were not the proper subject of a Chapter 11 reorganization proceeding because they were not in sufficient financial distress: the overwhelming majority were paying their obligations when due, and their mortgages typically would not mature for another one to three years.[44]

In an August 11, 2009 decision[45] that will have significant implications for future single-asset lending transactions,[46] the Court denied the creditors' motions. Under the leading Second Circuit case dealing with dismissal of a Chapter 11 bankruptcy petition for bad-faith filing, courts should dismiss a petition only if it was "clear on the filing date that 'there was no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it

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& Friends Memo – General Growth Properties Bankruptcy Court Enters Final Order on Cash Collateral, Cash Management, and DIP Financing Issues (May 18, 2009).

[42] *See* Mark Ellenberg, Peter Dodson, and Michelle Raftery, *Cadwalader Clients & Friends Memo – General Growth Properties Bankruptcy Court Enters Final Order on Cash Collateral, Cash Management, and DIP Financing Issues* (May 18, 2009); Patrick C. Sargent, Charles T. Marshall, and Peter K. McKee, Jr., *Andrews Kurth LLP Client Alert – Round 2 of General Growth Properties Bankruptcy: Motions to Dismiss SPE Bankruptcies Denied, No Bad Faith, Corporate Group Considered* (August 27, 2009).

[43] *See* Mark Ellenberg, Peter Dodson, and Michelle Raftery, *Cadwalader Clients & Friends Memo – General Growth Properties Bankruptcy Court Enters Final Order on Cash Collateral, Cash Management, and DIP Financing Issues* (May 18, 2009).

[44] *See generally*, Motion of ING Clarion Capital Loan Services LLC … to Dismiss the Cases of [certain GGP Group SPEs], *In re General Growth Properties*, Chapter 11 Case No. 09–11977 (ALG) (Bankr. S.D.N.Y. April 16, 2009) [Docket No. 0334] [hereinafter the "Motion to Dismiss"]; Patrick C. Sargent, Charles T. Marshall, and Peter K. McKee, Jr., *Andrews Kurth LLP Client Alert – Round 2 of General Growth Properties Bankruptcy: Motions to Dismiss SPE Bankruptcies Denied, No Bad Faith, Corporate Group Considered* (August 27, 2009).

[45] Bad Faith Filing Decision, 409 B.R. 43 (Bankr. S.D.N.Y. 2009).

[46] *See* Brian M. Resnick and Steven C. Krause, *Not So Bankruptcy-Remote SPEs and In re General Growth Properties Inc.*, 28 Am. Bankr. Inst. J. 8, at cover, 60 (October 2009).

would eventually emerge from bankruptcy proceedings.'"[47] Subsequent courts have restated this test as requiring dismissal if "*both* objective futility of the reorganization process *and* subjective bad faith in filing the petition are found."[48]

(i) Subjective Bad Faith

The moving creditors argued that the GGP Group SPEs filed their petitions in subjective bad faith for two reasons. According to the moving creditors, (1) GGP fired and replaced the independent managers of several of the SPEs shortly before filing for bankruptcy, without notifying the creditors or the independent managers that it had done so until after it filed for bankruptcy, and (2) GGP failed to negotiate with the GGP Group SPEs' lenders before causing the SPEs to file for bankruptcy.[49]

The Court rejected the moving creditors' first argument that GGP's surreptitious dismissal of many of the GGP Group SPEs' independent managers showed subjective bad faith. Prior to GGP's bankruptcy filing, the GGP Group SPEs' independent managers had typically been functionaries supplied by Corporation Services Company ("CSC"), a national provider of ministerial corporate services. This conformed to typical SPE financing structures. When considering whether to cause the GGP Group SPEs to file for bankruptcy, GGP replaced those CSC-supplied independent managers with managers having real estate restructuring experience. GGP characterized this as a well-intentioned effort to ensure that the SPEs' independent managers were individuals capable of making a meaningful contribution to the restructuring process, and the Court accepted that explanation.[50]

According to the Court, the independent managers that GGP appointed met the test for independence set forth in the GGP Group SPEs' organizational documents, and GGP was therefore within its rights to appoint them. GGP acted reasonably, in the Court's view, and any expectation on the moving creditors' part that the independent managers would act as their representatives on the board or otherwise serve as an impenetrable roadblock to bankruptcy was illegitimate. The Court acknowledged that GGP had not notified the GGP Group SPEs' creditors that it was dismissing the incumbent independent managers and appointing replacements, but the Court held that the SPEs' governing documents did not require such notice.[51]

Interestingly, GGP may have been able to cause the GGP Group SPEs to file Chapter 11 petitions even without removing the incumbent CSC-supplied independent managers. In the immediate aftermath of GGP's Chapter 11 filing, CSC sought advice of counsel regarding (1) whether GGP's termination of the CSC supplied independent managers at many GGP Group SPEs was proper, and (2) whether the fiduciary duties of the CSC-supplied independent managers who remained at a few GGP Group SPEs required them to consider parent GGP's

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[47] Bad Faith Filing Decision, 409 B.R. at 56 (*quoting In re C-TC 9th Ave. P'ship*, 113 F.3d 1304, 1309–10 (2d Cir. 1997)).

[48] *In re Kingston Square Assocs.*, 214 B.R. 713, 725 (Bankr. S.D.N.Y. 1997) (emphasis in original).

[49] Bad Faith Filing Decision, 409 B.R. at 65–66.

[50] *Id.* at 67–69.

[51] *Id.*

interests when considering whether to authorize a bankruptcy filing. CSC's counsel's advised it that GGP had properly terminated CSC-supplied independent managers where it had done so, and that the remaining CSC-supplied independent managers' fiduciary duties required them to consider parent GGP's interests. Accordingly, the CSC-supplied independent managers at the GGP Group SPEs where they remained authorized those SPEs to file Chapter 11 petitions.[52]

The Court also rejected the moving creditors' second argument regarding GGP's failure to negotiate, holding that the Bankruptcy Code does not require commercial debtors to negotiate with their creditors before filing for bankruptcy. Moreover, according to the Court, there was no indication that it would have been worthwhile for GGP to try to negotiate. The Court noted that there was substantial evidence in the record that the moving creditors would not even discuss refinancing or extending the terms of the GGP Group's debt prior to GGP's Chapter 11 filing.[53]

The Court viewed the commercial mortgage-backed securities structure as inflexible and a formidable obstacle to a successful workout. The master servicers responsible for collecting payments from the GGP Group SPEs for so long as each respective SPE met its obligations lacked authority to alter loan terms. Special servicers, tasked with interacting with defaulting SPEs, had the authority to alter loan terms but could not exercise that authority until a loan actually went into default. Metlife, an institutional lender to GGP and one of the moving creditors, faced no such structural constraints but nonetheless was unwilling to extend further credit to GGP in light of GGP's current financial situation. In light of this, the Court concluded that GGP had little chance of successfully reorganizing outside of bankruptcy, and therefore that GGP's failure to negotiate before causing the GGP Group SPEs to file Chapter 11 petitions did not show subjective bad faith.[54]

(ii) Objective Futility

The cases finding objective futility of the reorganization process fall into two general lines. The first line of cases addresses situations where a hopelessly insolvent SPE debtor files for bankruptcy to delay inevitable foreclosure, perhaps to delay adverse tax consequences to its underwater equity owners. The debtor in such a situation is beyond salvage: the Chapter 11 process cannot realistically benefit the debtor or its creditors, and accordingly any Chapter 11 petition filed by the debtor is objectively in bad faith.[55]

The GGP Group SPEs were clearly not in such a situation, and the Court so held. Far from being hopelessly insolvent, the overwhelming majority of the GGP Group SPE debtors were comfortably solvent, generating significant excess cash. [56]

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[52] Sandra E. Mayerson, *Squire Sanders Assists Corporation Service Company in Addressing Novel Issues in General Growth Properties*, Squire Sanders Bankruptcy & Restructuring Update, Summer 2009, at 5–6.

[53] Bad Faith Filing Decision, 409 B.R. at 65–67.

[54] *Id.*

[55] *Id.* at 56 (*citing In Re C-TC 9th Ave. P'ship*, 113 F.3d at 1311; *In re Little Creek Dev. Co.*, 779 F.2d 1068 (5th Cir. 1986)).

[56] Bad Faith Filing Decision, 409 B.R. at 55–57 (discussing GGP's testimony that its shopping center business had generally positive cash flow, and that it had positive net income in 2008 exceeding its net income in 2007).

The second line of cases addresses situations where a debtor is generally healthy and able to pay its debts as they come due, but faces a large contingent liability, typically relating to pending litigation.[57] If a debtor files a Chapter 11 petition to gain a tactical advantage in other unresolved litigation, perhaps by using its bankrupt status to increase its leverage in settlement negotiations or by taking advantage of the automatic stay, then its petition is objectively in bad faith.[58]

The Court distinguished the GGP Group SPEs' situation on the grounds that their liabilities were neither contingent nor speculative: their mortgage loans would mature within 1–3 years merely by the passage of time.[59] The Court held that the Bankruptcy Code does not require that debtors be insolvent before they file Chapter 11 petitions, and the Court cited a number of cases in which courts have refused to dismiss the Chapter 11 petitions of debtors that could pay their current liabilities but faced unmanageably large future liabilities.[60] The Court then discussed the status of the credit markets, accepting GGP's evidence (including testimony of one of the moving creditors) that the commercial mortgage-backed securities market was essentially closed and institutional financing was very scarce. GGP had argued that in the current environment it had no realistic prospect of refinancing its SPEs' mortgage loans they matured, even several years in the future, and the Court agreed.[61]

The Court noted approvingly that GGP had applied a thorough analytical process to each SPE before deciding whether to cause that SPE to file a Chapter 11 petition, consulting with restructuring experts and considering a number of criteria related to each SPE's financial situation, including whether it was in default or cross-default or subject to a forbearance agreement on its mortgage loan, whether the loan-to-value ratio was excessive, whether its mortgage loan would mature within three to four years, and whether it had unencumbered assets. While GGP caused the overwhelming majority of its SPEs to file Chapter 11 petitions, it did not cause all of them to do so. The Court found that the moving creditors had failed to establish that GGP's assessment was unreasonable.[62]

The Court's language suggests that it may have found that the GGP Group SPEs filed their petitions in good faith even if it analyzed each SPE's circumstances in isolation.[63] Ultimately, however, the Court's analysis of the propriety of the GGP Group SPEs' bankruptcy filings when considered in isolation was not decisive, because the Court held that it was appropriate to consider the circumstances of the GGP Group as a whole when assessing whether the individual GGP Group SPEs filed their petitions in bad faith.[64]

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[57] *See* Bad Faith Filing Decision, 409 B.R. at 57.

[58] *See, e.g.*; *In re SGL Carbon Corp.,* 200 F.3d 154, 164 (3d Cir. 1999); *In Re Schur Mgmt. Co.*, 323 B.R. 123 (Bankr. S.D.N.Y. 2005); *In re Johns-Manville Corp.,* 36 B.R. 727, 736–37 (Bankr. S.D.N.Y.1984).

[59] *See* Bad Faith Filing Decision, 409 B.R. at 57.

[60] *Id.* at 61 (*citing, e.g.*, *In re Century/ML Cable Venture*, 294 B.R. 9 (Bankr. S.D.N.Y. 2003)).

[61] *See* Bad Faith Filing Decision, 409 B.R. at 60–61.

[62] *Id.* at 59–60, 59 n.26.

[63] *See generally, id.* at 57–61.

[64] *Id.* at 61–65.

The moving creditors and the Commercial Mortgage Backed Securities Association acting as *amicus curiae* had strenuously argued that the purpose of the SPE structure was to insulate secured creditors of individual SPEs from credit risk related to the financial health of the larger corporate group.[65] GGP likely benefited from lower interest rates as a result of lenders' expectation that the SPE structure would limit their risk exposure.[66] GGP, by contrast, had emphasized the high level of functional integration within the GGP Group and the benefits of that integration to creditors. GGP argued that its centralized management and leasing operations promoted efficiency and increased its SPEs' income by attracting national chain tenants, and that its centralized cash management system permitted it to pay the obligations of its less healthy SPEs. Both of these integrated features, GGP argued, furthered creditors' interests.[67]

The Court agreed with GGP, finding that the moving creditors had benefited from the GGP Group's integrated structure.[68] The Court also placed significant weight on the fact that almost all of parent GGP's income came from its SPE subsidiaries. The Court found that this income would dry up over the next several years as one SPE after another failed to refinance its mortgage loan and defaulted. Therefore, according to the Court, it would be impractical to meaningfully reorganize parent GGP without simultaneously addressing the capital structure of its SPE subsidiaries.

The Court also considered the effect of the GGP Group SPEs' governing documents. Lenders had expected that these documents would make it more difficult for GGP to induce its SPEs to file for bankruptcy, but Court found that the documents actually supported its conclusion that the GGP Group SPEs had filed their petitions in good faith.[69]

The SPEs were Delaware LLCs with typical SPE provisions in their governing documents requiring them to have two independent managers satisfying specified criteria for independence from GGP. An SPE could not file a bankruptcy petition unless both of its independent managers consented, and the governing documents required the independent managers, to the extent permitted by applicable law, to consider only the interests of the SPE, including its creditors, when deciding whether to give that consent. The purpose of this provision was to force the independent managers to ignore parent GGP's interests when making their decision. However, the governing documents also provided that the independent managers would have "a fiduciary duty of loyalty and care similar to that of a director of a business corporation organized under the General Corporation Law of the State of Delaware."[70]

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[65] *See id.* at 61; Brief of Amicus Curiae, at 20–22, *In re General Growth Properties, Inc.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. May 1, 2009) [Docket No. 0233].

[66] Securitization Principles at § 1:3; *see* Brian M. Resnick and Steven C. Krause, *Not So Bankruptcy-Remote SPEs and In re General Growth Properties Inc.*, 28 Am. Bankr. Inst. J. 8, at cover (October 2009).

[67]*See* Debtors' Memorandum of Law in Opposition to the Motions of ING Clarion Capital Loan Services LLC and … to Dismiss the Cases of Certain Debtors and Debtors in Possession, at 4–8, *In re General Growth Properties, Inc.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. June 8, 2009). [Docket No. 0711]; Mesterharm Decl. ¶¶ 16–22.

[68] Bad Faith Filing Decision, 409 B.R. at 61–63.

[69] *Id.* at 63–65.

[70] *Id.*

The Court held that under Delaware law, the directors of a solvent Delaware corporation have a fiduciary duty to manage the corporation in the best interests of its shareholders, not its creditors, even if the corporation is approaching insolvency.[71] There was no question that the GGP Group SPEs in question were solvent when they filed their petitions. Therefore, according to the Court, not only was it proper for the SPEs' independent managers to consider parent GGP's interests when deciding whether to file a Chapter 11 petition, the independent managers had a fiduciary duty to do so.[72] As discussed above, CSC's counsel had reached that same conclusion.[73]

Finally, the Court considered the argument of one of the moving creditors that the GGP Group SPEs' petitions were objectively futile because GGP would be unable to confirm a plan of reorganization for the SPEs in question over that creditor's objection. The Court quickly rejected this argument as premature: ability to confirm a plan, the Court held, is not a precondition to filing a bankruptcy case. To the extent that courts dismiss Chapter 11 cases on this ground, the Court held, they do so at a much later stage.[74]

Having concluded that it was appropriate to consider the interests of the larger GGP Group when assessing whether each individual SPE filed its Chapter 11 petition in objective good faith, the Court held that the subject SPEs had filed their petitions in objective good faith.[75]

The Court further concluded that GGP had established that it included its SPE subsidiaries in its bankruptcy case as part of an overall plan to preserve the overall value of the GGP Group estate for the benefit of its creditors. The Court noted that a core purpose of bankruptcy law is to protect creditors' rights. While the Court acknowledged that including the GGP Group SPEs in GGP's bankruptcy case would inconvenience the moving creditors, it noted that they retained the right to adequate protection and post-petition interest and fees to the extent that they were oversecured. In the Court's view, the key purpose of the SPE structure was to protect creditors from substantive consolidation. With that, the Court emphasized that it was not substantively consolidating the GGP Group SPEs with GGP, and denied the moving creditors' motions.[76]

III. Strategies for the Future

(a) Helpful changes to SPE governing documents

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[71] *Id.* at 63–64 (*citing North Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007)). The *Gheewalla* court rejected earlier Delaware Court of Chancery cases suggesting that the directors of solvent corporations operating in the "zone of insolvency" had fiduciary duties running directly to creditors.

[72] Bad Faith Filing Decision, 409 B.R. at 63–65.

[73] Sandra E. Mayerson, *Squire Sanders Assists Corporation Service Company in Addressing Novel Issues in General Growth Properties*, Squire Sanders Bankruptcy & Restructuring Update, Summer 2009, at 5–6.

[74] Bad Faith Filing Decision, 409 B.R. at 65.

[75] *See id.*

[76] *Id.* at 69–70, 72.

GGP's tactics were the cause of much anguish in the commercial real estate lending industry, and the industry was disappointed when GGP Court's decided not to dismiss the GGP Group SPEs' bankruptcy cases. However, as described, that decision was the result of a reasonable application of existing case law to the facts of the GGP case.[77]

Commentators have proposed several changes that lenders can make to SPE organizational documents for future transactions that will make it will make it much harder for a parent to engineer a repeat of the GGP situation.[78] Lenders likely will find it most productive to undermine the basis for the GGP Court's decision by making these changes to SPE organizational documents, rather than arguing that the GGP Court's decision was incorrect on the facts of that case.[79]

First, lenders can strengthen the independent manager provisions of SPE governing documents.[80] The GGP Group SPEs' governing documents required that each SPE have two independent managers and further required that that the SPE could not file a bankruptcy petition unless those independent managers agreed. However, the GGP Group SPEs' governing documents had a glaring weakness from a lender's perspective: the documents went on to provide that the independent managers would have fiduciary duties equivalent to those owed by directors of a Delaware corporation.[81] As the GGP Court correctly held, the directors of a solvent Delaware corporation have a fiduciary duty to consider the interests of the corporation's equity owners – in the case of an SPE, the parent.[82]

Section 18-1101(c) of the Delaware Limited Liability Company Act provides that an LLC agreement may waive the fiduciary duties that a manager of the LLC would otherwise owe to the LLC or the LLC's members or managers at law or equity, provided that the LLC agreement may not eliminate the implied contractual covenant of good faith and fair dealing.[83] Therefore, lenders can improve the integrity of the SPE structure by (1) insisting that each SPE they lend to is a Delaware LLC and (2) including appropriate provisions in the SPE's LLC

[77] *See* Pamela S. Holleman, *General Growth Properties*, 9 Legal Opinion Newsletter 2, at 20–22 (January 2010); Eric Berman, *Trends in Securitization*, 1 Practical Law the Journal 2, at 59, 63–64 (December 2009/January 2010).

[78] *See, e.g. Kaye Scholer LLP Client Advisory – General Growth Properties Rulings Raise Concerns with Bankruptcy-Remote Structures* (August 26, 2009); *Gibson Dunn Update – In re: General Growth Properties, Inc. -- Court's Denial of Motion to Dismiss Will Affect Single Purpose Borrowers* (September 4, 2009); Douglas R. Gooding and John F. Ventola, *Lessons from General Growth Properties*, Law360 (August 28, 2009).

[79] As described below, nn. 98–105 and accompanying text, that is what was done with the GGP SPEs. The organic documents for the SPEs and the transaction documents for their loans were modified to implement many of the suggestions discussed here.

[80] *Kaye Scholer LLP Client Advisory – General Growth Properties Rulings Raise Concerns with Bankruptcy-Remote Structures* (August 26, 2009); *Gibson Dunn Update – In re: General Growth Properties, Inc. -- Court's Denial of Motion to Dismiss Will Affect Single Purpose Borrowers* (September 4, 2009).

[81] Bad Faith Filing Decision, 409 B.R. at 63–65.

[82] *See North Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007).

[83] *See also*, James G. Leyden, Jr. and Laura Dietrich, *Delaware Limited Liabilty Companies and Limited Partnerships*, Practising Law Institute, Corporate Law and Practice Course Handbook Series, PLI Order No. 23298, at 57–60 (January 27, 2010).

agreement specifying and limiting the independent managers' fiduciary duties.[84] The SPE's LLC agreement should provide that when the SPE's independent managers are voting on matters for which the LLC agreement requires their consent, including potential bankruptcy filings, the independent managers (a) must consider the interests of the SPE as a stand-alone entity, (b) need not and shall not consider the interests of the SPE's parent, and (c) shall consider the lender's interests (the agreement should provide that the lender is an intended third party beneficiary of this provision). If an LLC SPE has these provisions in its LLC agreement, a bankruptcy court analyzing the duties of the SPE's independent managers should hold that the independent managers are neither required nor permitted to consider the SPE's parent's interests when deciding whether to authorize a bankruptcy filing.[85]

Second, lenders can strengthen the provisions governing replacement of independent managers to prevent a parent from surreptitiously replacing an SPE's independent managers with managers who (in addition to whatever useful skills they might have) are likely to favor a bankruptcy filing, as happened in the GGP case.[86] Lenders have traditionally been wary of provisions giving them the right to approve prospective SPE independent manager candidates because of a concern that such provisions might expose them to lender liability claims.[87] However, lenders should consider provisions (1) requiring advance notice of the resignation or removal of an independent manager (unless CSC or its equivalent causes the independent manager to resign), and (2) requiring the lender's reasonable consent before the parent may appoint a replacement independent manager unless CSC or a similar nationally recognized corporate services company supplies the manager.[88] These provisions prevent the parent from appointing "independent" managers that the parent knows are sympathetic to its interests while keeping the level of control that the lender can exercise (and thus its lender liability exposure) to a minimum.[89]

Third, lenders should consider using springing guarantees (commonly known as "bad boy" guarantees) to make it less attractive for an SPE's parent to cause the SPE to file for bankruptcy. At a minimum, lenders should require the SPE's parent to guarantee the loan if the

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[84] *Kaye Scholer LLP Client Advisory – General Growth Properties Rulings Raise Concerns with Bankruptcy-Remote Structures* (August 26, 2009); *see Standard & Poor's Structured Finance Legal Criteria, Special Purpose Entities*, at 197 (April 2002).

[85] *See Kaye Scholer LLP Client Advisory – General Growth Properties Project-Level Lenders Fare Well in GGP Bankruptcy Plan* (January 4, 2010) (discussing changes to the GGP Group SPEs' governing documents under the GGP Group's Joint Plan of Reorganization); *Standard & Poor's Structured Finance Legal Criteria, Special Purpose Entities*, at 197, 199 (April 2002).

[86] *Kaye Scholer LLP Client Advisory – General Growth Properties Rulings Raise Concerns with Bankruptcy-Remote Structures* (August 26, 2009); *see Gibson Dunn Update – In re: General Growth Properties, Inc. -- Court's Denial of Motion to Dismiss Will Affect Single Purpose Borrowers* (September 4, 2009).

[87] *Gibson Dunn Update – In re: General Growth Properties, Inc. -- Court's Denial of Motion to Dismiss Will Affect Single Purpose Borrowers* (September 4, 2009).

[88] *See Kaye Scholer LLP Client Advisory – General Growth Properties Project-Level Lenders Fare Well in GGP Bankruptcy Plan* (January 4, 2010); *Kaye Scholer LLP Client Advisory – General Growth Properties Rulings Raise Concerns with Bankruptcy-Remote Structures* (August 26, 2009).

[89] *See Kaye Scholer LLP Client Advisory – General Growth Properties Project-Level Lenders Fare Well in GGP Bankruptcy Plan* (January 4, 2010).

SPE files a bankruptcy petition.[90] This will make it much less attractive for a parent to cause an SPE subsidiary to file a bankruptcy petition. In addition, lenders could require individual officers, directors, or owners of the parent to personally guarantee the SPE's obligations if the SPE files a bankruptcy petition. However, the effect of such a personal guarantee is arguably to induce the guarantor to breach his or her fiduciary duties to the parent and the parent's stakeholders. Therefore, while such a personal guarantee likely would be highly effective at preventing a parent from causing its SPE subsidiaries to file bankruptcy petitions, it is not clear whether courts will be willing to enforce it.[91]

Fourth, lenders can impose stricter separateness covenants on SPEs.[92] The GGP Group's centralized cash management system was a particularly glaring exception to separateness; lenders should require each SPE to pay its obligations out of its own income before upstreaming any excess cash to its parent. Lenders may also wish to consider imposing non-contingent cash traps that prevent SPEs from upstreaming any cash at all to their parents during the term of the loan. This would undermine any reasonable reliance by the parent on the SPE's excess cash, making it harder for a bankruptcy court to justify making that cash available to the parent to further the parent's reorganization. However, such extreme cash trap provisions will understandably be very unpopular with borrowers.[93] Moreover, lenders do benefit when a parent has some ability to use excess cash from its stronger SPEs to prop up its weaker ones.[94]

Finally, a lender might require provisions in an SPE's organizational documents waiving the automatic stay if the SPE files for bankruptcy. This would substantially reduce the impact of the SPE's bankruptcy on the lender's rights. However, the extent to which bankruptcy courts will enforce such prospective waivers is unclear.[95]

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[90] *See* Douglas R. Gooding and John F. Ventola, *Lessons from General Growth Properties*, Law360 (August 28, 2009); *Kaye Scholer LLP Client Advisory – General Growth Properties Project-Level Lenders Fare Well in GGP Bankruptcy Plan* (January 4, 2010); Arthur J. Steinberg and Scott I. Davidson, *Bankruptcy Remote Entities: Not as Remote as You May Think*, New York Law Journal (November 18, 2009).

[91] *See* Douglas R. Gooding and John F. Ventola, *Lessons from General Growth Properties*, Law360 (August 28, 2009); Arthur J. Steinberg and Scott I. Davidson, *Bankruptcy Remote Entities: Not as Remote as You May Think*, New York Law Journal (November 18, 2009).

[92] In some commentators' view, this was a prudent practice even before the GGP bankruptcy case. *See* Non-Consolidation Opinions, 64 Bus. Law. at 420–21; *Standard & Poor's Structured Finance Legal Criteria, Special Purpose Entities*, at 196–97 (April 2002).

[93] *Gibson Dunn Update – In re: General Growth Properties, Inc. -- Court's Denial of Motion to Dismiss Will Affect Single Purpose Borrowers* (September 4, 2009); *Gibson Dunn Update – Bankruptcy Judge Approves General Growth Properties' Reorganization Plan* (January 4, 2010).

[94] *See* Bad Faith Filing Decision, 409 B.R. at 61.

[95] *See, e.g. In re Frye*, 320 B.R. 786 (Bankr. D. Vt. 2005) (summarizing cases reaching a variety of conclusions regarding the enforceability of pre-petition waivers of the automatic stay, applying a ten-factor balancing test, and scheduling an evidentiary hearing to develop additional facts relevant to those ten factors); s*ee* Matthew W. Kavanaugh, Donald Lee Rome, and Randye B. Soref, *Business Workouts Manual*, §§ 21:1, 21:4–5 (2d Ed. 2008);. *Bankruptcy Remote Entities: Not as Remote as You May Think*, New York Law Journal (November 18, 2009); *Kaye Scholer LLP Client Advisory – General Growth Properties Project-Level Lenders Fare Well in GGP Bankruptcy Plan* (January 4, 2010).

These changes will not make it entirely impossible for an SPE to file a bankruptcy petition – if they did, they likely would be void as against the public policy favoring reorganization.[96] However, they will make it substantially more difficult and less attractive for an SPE's parent to cause the SPE to file for bankruptcy for strategic reasons when the SPE itself is not in serious distress. This should prevent a repeat of the GGP case under similar circumstances and ensure that the SPE structure remains a useful tool to limit the scope of the risks faced by an asset-backed lender.[97]

(b) Plan of Reorganization for the GGP Group SPEs

GGP negotiated with the GGP Group SPEs' creditors during the fall of 2009 regarding adjustments to the terms of the GGP Group SPEs' mortgage loans, and on December 15, 2009 the Court confirmed a Joint Plan of Reorganization (the "Plan") for 195 of the SPEs subject to $10.25 billion in secured debt.[98] Under the Plan, creditors agreed to extend the maturity dates of all of the GGP Group SPEs' mortgage loans – the weighted average extension is 5.2 years, and none of these loans will now mature before 2014. GGP will continue using its centralized cash management system. Creditors also agreed to waive claims for default interest, late fees, increased interest due under hyper-amortization provisions, and immediate repayment of accelerated principal balances. Certain creditors agreed to waive certain pre-petition defaults. In exchange, GGP will pay a restructuring fee of at least 100 basis points on the outstanding principal balance of each loan, reimburse its creditors for their reasonable costs incurred as a result of the SPEs' bankruptcy, increase reserves under all loans, pay all past due amortization, and pay increased amortization on many loans after January 1, 2013.[99]

The Plan also addresses many of the weaknesses in the GGP Group SPEs' organizational documents. All of the GGP Group SPEs will now be Delaware LLCs,[100] and their organizational documents will provide (as permitted by §18-1101(c) of the Delaware Limited Liability Company Act) that their directors shall consider only the interests of the respective SPE and its creditors when considering whether to file a bankruptcy petition.[101] Lenders must receive at

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[96] Securitization Principles, § 3:2 n.3; *see Andrews Kurth LLP Client Alert – Round 1 of General Growth Properties Bankruptcy: SPE Structure Survives* (June 24, 2009).

[97] *See Kaye Scholer LLP Client Advisory – General Growth Properties Rulings Raise Concerns with Bankruptcy-Remote Structures* (August 26, 2009); *Gibson Dunn Update – Bankruptcy Judge Approves General Growth Properties' Reorganization Plan* (January 4, 2010).

[98] Findings of Fact, Conclusions of Law, and Order Confirming the Plan Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, *In re General Growth Properties, Inc.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. December 15, 2009) [Docket No. 3915]; *General Growth Properties Announces Bankruptcy Court Confirmation of Plans of Reorganization for approximately $10.25 Billion of Secured Mortgage Loans*, General Growth Properties, Inc. Press Release (December 15, 2009).

[99] Disclosure Statement, at 3, Schedule A; *Gibson Dunn Update – Bankruptcy Judge Approves General Growth Properties' Reorganization Plan* (January 4, 2010); *Kaye Scholer LLP Client Advisory – General Growth Properties Project-Level Lenders Fare Well in GGP Bankruptcy Plan* (January 4, 2010).

[100] Disclosure Statement, Exhibit B, at 7; *Gibson Dunn Update – Bankruptcy Judge Approves General Growth Properties' Reorganization Plan* (January 4, 2010).

[101] Disclosure Statement, Exhibit B, at 10; *Gibson Dunn Update – Bankruptcy Judge Approves General Growth Properties' Reorganization Plan* (January 4, 2010).

least 15 days advance notice of any replacement of an independent director, and their reasonable consent is required before a replacement director may be appointed, unless a recognized corporate services provider (e.g. CSC) supplies the new director.[102]

If a GGP Group SPE covered by the Plan files for bankruptcy in the future, its lenders will have full recourse against parent GGP, the maturity date of the SPE's mortgage loan will revert to the original non-extended date, and the SPEs have agreed in advance to waive the automatic stay.[103] These changes are a significant improvement, and they undermine most of the bases of the GGP Court's decision to permit the SPEs to remain in bankruptcy.[104] The GGP Group's centralized cash management system, however, remains as a significant weakness: this is one of the features that the GGP Court relied on in holding that it was appropriate to consider the interests of the GGP Group as a whole.[105]

IV. Conclusion

The GGP bankruptcy case caused great agitation for commercial real estate lenders, and it may encourage other debtors to challenge the bankruptcy-remoteness of their SPEs.[106] While the secured creditors of many of the GGP Group SPEs have emerged from the bankruptcy process with their rights largely intact under the Plan, they nonetheless had to suffer the delays, expense and uncertainty of a bankruptcy case despite the fact that their debtors generally were meeting their obligations.[107]

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[102] Disclosure Statement, Exhibit B, at 8–9; *Kaye Scholer LLP Client Advisory – General Growth Properties Project-Level Lenders Fare Well in GGP Bankruptcy Plan* (January 4, 2010).

[103] Plan Debtors' Joint Plan of Reorganization, at 3, and at Schedule A, *In re General Growth Properties, Inc.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. December 1, 2009) [Docket No. 3660]; *Gibson Dunn Update – Bankruptcy Judge Approves General Growth Properties' Reorganization Plan* (January 4, 2010).

[104] *See Kaye Scholer LLP Client Advisory – General Growth Properties Project-Level Lenders Fare Well in GGP Bankruptcy Plan* (January 4, 2010); *Gibson Dunn Update – Bankruptcy Judge Approves General Growth Properties' Reorganization Plan* (January 4, 2010).

[105] *Gibson Dunn Update – Bankruptcy Judge Approves General Growth Properties' Reorganization Plan* (January 4, 2010).

[106] *See* Brian M. Resnick and Steven C. Krause, *Not So Bankruptcy-Remote SPEs and In re General Growth Properties Inc.*, 28 Am. Bankr. Inst. J. 8, at 62 (October 2009).

[107] *Gibson Dunn Update – Bankruptcy Judge Approves General Growth Properties' Reorganization Plan* (January 4, 2010).

The GGP Court's decision was largely a product of the choices made by the parties involved in structuring the GGP Group SPEs.[108] Transactional planners therefore will likely be able to mitigate the impact of the GGP case by making the targeted changes to SPE organizational documents discussed above. While it will not be possible to ensure that an SPE can never become part of a bankruptcy case, it likely will be possible to sufficiently insulate SPEs from their parents' financial problems to preserve the SPE structure as a valuable risk management tool for asset-backed lenders.

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[108] *See* Eric Berman, *Trends in Securitization*, 1 Practical Law the Journal 2, at 59, 63–64 (December 2009/January 2010).

[109] The assistance of Bryan J. Hall, Cornell Law School 2009, an associate at Carter Ledyard & Milburn LLP, in the preparation of this presentation is gratefully acknowledged.

GGP Chronology

April 16, 2009	Chapter 11 petitions by 360 Debtors
April 16, 2009	Motion to use existing cash management systems
April 16, 2009	Motion to use cash collateral and to incur DIP financing
April 16, 2009	Interim orders entered
April 22, 2009	Chapter 11 petitions for 22 additional Debtors
May 4, 2009	Motions to dismiss
May 8, 2009	Final hearing on cash management, cash collateral and DIP financing
May 14, 2009	Final DIP Financing and Cash Collateral Order (412 B.R. 122 (Bankr. S.D.N.Y. 2009))
May 14, 2009	Final Cash Management Order (412 B.R. 609 (Bankr. S.D.N.Y. 2009))
August 11, 2009	Decision denying motions to dismiss (409 B.R. 43 (Bankr. S.D.N.Y. 2009))
December 1, 2009	Order Preliminarily Approving the Disclosure Statement for the Plan Debtors' Plan of Reorganization under Chapter 11 of the Bankruptcy Code
December 15, 2009	Confirmation order for certain Plan Debtors
December 23, 2009	Confirmation order for additional Plan Debtors
December 30, 2009	Effective Date of the Plan for certain Plan Debtors
January 8, 2010	Effective Date of the Plan for certain Plan Debtors
January 12, 2010	Effective Date of the Plan for certain Plan Debtors
January 14, 2010	Effective Date of the Plan for certain Plan Debtors
January 20, 2010	Confirmation order for additional Plan Debtors, Effective Date of the Plan for certain Plan Debtors
January 21, 2010	Effective Date of the Plan for certain Plan Debtors
January 22, 2010	Effective Date of the Plan for certain Plan Debtors

Exhibit 1: GGP's high-level organizational chart. Disclosure Statement for Plan Debtors' Joint Plan of Reorganization, at D2, *In re General Growth Properties, Inc.*, Chapter 11 Case No. 09–11977 (ALG) (Bankr. S.D.N.Y. December 1, 2009).

General Growth Properties, Inc.
B+G – 2006 Credit Facility (u)
G – 2008 Credit Facility (s)

GGP Limited Partnership
B+G – 2006 Credit Facility (u) [2]
G – 2008 Credit Facility (s)

The Rouse Company LP
B - Rouse Notes (u)
See Chart K, N-1

GGPLP L.L.C.
B – 2006 Credit Facility (u)
G – 2008 Credit Facility (s)

Bucksbaum Family Interests and Others

Rouse LLC
G – 2006 Credit Facility (u)

GGPLP Entities
See Chart A

GGPI & GGPLP Entities
See Chart B

TRS JV HoldCo, LLC

GGP-TRS L.L.C. Entities
See Chart C

Teachers' Retirement System of the State of Illinois

GGP Ivanhoe, Inc. (REIT) Entities
See Chart C

Ivanhoe Equities V LP

118 Preferred Stockholders

GGP/Homart, Inc. Entities
See Charts D & E

GGP/Homart II L.L.C. Entities
See Charts E & F

New York State Common Retirement Fund

GGPLP L.L.C. & GGPI Entities
See Chart I

GGP Acquisition, L.L.C. Entities
See Charts J-1, J-2

GGPLP L.L.C. Entities
See Chart H

Victoria Ward, Limited
See Chart G

119 Preferred Stockholders

Outside Preferred Interests (DA Retail Investments, LLC)

GGP Holding II, Inc. (Private REIT)

GGP Holding, Inc. (Private REIT)
See Chart K

115 Preferred Stockholders

120 Preferred Stockholders

TRC Co-Issuer, Inc.
B-Rouse Notes (u)

HRD Remainder, Inc. (QRS) Entities
See Charts L-1 and L-2

United Health

Summerlin Hospital Medical Center, LP

The Rouse Company BT, LLC

The Rouse Company Operating Partnership LP
See Charts P1, P2, P3, P4, P5, P6

The Hughes Corporation (TRS 2)
See Charts N1-N3

The Howard Hughes Corporation (TRS)
See Chart M

Princeton Land East, LLC

Summerlin Corporation (TRS)

THC-HRE LLC

Hex Holding, LLC

Rouse-Fairwood Development Corporation (TRS 5)
See Chart L-2

Hexalon Real Estate, Inc. (REIT)

General Growth Management, Inc. (TRS)

= Third-party
B = Borrower
G = Guarantor
PLD = Project Level Debt (secured)
(u) = Unsecured Debt
(s) = Secured Debt
MB = Mezzanine Borrower
= Track 1 Debtor [1]
= Track 2 Debtor [1]
= Track 3 Debtor [1]
= Track 4 Debtor [1]
= Wholly Owned Non-Debtor
= Joint Venture Non-Debtor

[1] Debtor Track information is subject to change.

[2] The 2008 Credit Facility is secured by equity pledges given by (i) Caledonian Holding Company and GGP American Properties, Inc. of their respective membership interests in GGPLP L.L.C., (ii) GGP Limited Partnership, of its respective (a) membership interests in both GGPLP L.L.C. and Rouse LLC, and (b) partnership interest in The Rouse Company LP, and (iii) Rouse LLC, of its respective partnership interest in The Rouse Company LP.

D-1

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Exhibit 2: Low-level GGP organizational chart showing some of GGP's project-level SPEs. Disclosure Statement for Plan Debtors' Joint Plan of Reorganization, at D2, *In re General Growth Properties, Inc.*, Chapter 11 Case No. 09–11977 (ALG) (Bankr. S.D.N.Y. December 1, 2009).

GGP Limited Partnership
B+G – 2006 Credit Facility (u)
G – 2008 Credit Facility (s)

St. Cloud Mall Holding L.L.C. B-PLD
St. Cloud Land L.L.C.
St. Cloud Mall L.L.C. B-PLD
GGP 168th Street, LLC
Westwood Mall LLC B – 2008 Credit Facility (s)
GGP-Four Seasons L.L.C. B-PLD
Southlake Mall L.L.C. B-PLD
Sooner Fashion Mall L.L.C. B-PLD
River Hills Land, LLC
River Hills Mall, LLC B-PLD
Town East Mall, LLC B-PLD
Vista Ridge Mall, LLC B-PLD
Rio West L.L.C.
Fox River Shopping Center, LLC B-PLD
Fallbrook Square Partners L.L.C.
Fallbrook Square Partners Limited Partnership B-PLD
99.999% LP
0.01% GP
GGP Development, LLC
Columbia Mall L.L.C. B-PLD
Colony Square Mall L.L.C. B-2008 Credit Facility (s)
Champaign Market Place L.L.C. B-PLD
GGP Capital Trust I
GGP 125, LLC

GGP International, LLC
Coral Ridge Mall, LLC B-PLD
Natick Retail, LLC
GGP Village at Jordan Creek L.L.C.
GGP Jordan Creek L.L.C. B-PLD
Boise Town Square Anchor Acquisition, LLC
Parke West, LLC
Gateway Overlook Business Trust
Lakeland Square Mall, LLC B-PLD
Phase II Mall Subsidiary, LLC B-PLD
Fallen Timbers Shops, LLC B – 2008 Credit Facility (s)
Fallen Timbers Shops II, LLC
GGP Echelon Place, LLC
Lincolnshire Commons, LLC B-PLD
Cannery Chicago, LLC
GGP-Foothills L.L.C. B – 2008 Credit Facility (s)
AllenTowne Mall, LLC
GGP-Tucson Land L.L.C.
Tucson Anchor Acquisition, LLC
GGP-Tucson Mall L.L.C. B-PLD

Hunt Schwyhart Graham VI, LLC
GGP-Rogers Retail L.L.C.
Rogers Retail L.L.C.
Pinnacle Hills, LLC
Pinnacle South, LLC
Wilson Galleria, LLC
Hoover JV Holdco, LLC
Hoover Mall Holding, L.L.C.
Hoover Mall Limited, L.L.C.
Riverchase Anchor Acquisition, LLC
Gateway Overlook Borrower, LLC B-PLD
West Oaks Anchor Acquisition, LLC
West Oaks Mall Trust B-PLD
GGP-Newgate Mall, LLC B-PLD
Newgate Mall Land Acquisition, LLC
Wilson Macon
GGP Macon, LLC
Shoppes at River Crossing, LLC
Genesis Development Company
GGP Ventures Costa Rica, L.L.C.
GGP Genesis Costa Rica, LLC
GGP Ventures Brazil Holding L.L.C.
GGP Brazil II L.L.C.
GGP Brazil I L.L.C.
GGP Turkey Investco, LLC

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Docket:

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Court opinion denying the creditors motion to dismiss:

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