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The Asset Payment Plan: Satisfying the Indubitable Equivalent Requirement

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THE ASSET PAYMENT PLAN: SATISFYING THE INDUBITABLE EQUIVALENT REQUIREMENT†

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I. INTRODUCTION

The Bankruptcy Reform Act of 1978 (Code) provides three means for satisfying the claim of a secured creditor in a dissenting class.[1] First, the secured creditor can retain its lien and receive payments over time, with a present value at least equal to the value of the secured creditor's interest in its collateral.[2] Second, the Code also authorizes the sale of collateral with the secured creditor's lien attaching to the proceeds of the sale.[3] Third, the debtor can provide the secured creditor with the "realization" of the "indubitable equivalent" of its claim.[4]

The asset payment plan is a means for satisfying a secured claim. Generally, all or part of the secured creditor's collateral is distributed to the secured creditor through the asset

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1. 11 U.S.C. § 1129(b)(2)(A) (Supp. I 1978) [hereinafter all Code provisions cited refer to the Bankruptcy Reform Act of 1978].

2. 11 U.S.C. § 1129(b)(2)(A)(i) (Supp. I 1978).

3. 11 U.S.C. § 1129(b)(2)(A)(ii) (Supp. I 1978).

4. 11 U.S.C. § 1129(b)(2)(A)(iii) (Supp. I 1978).

payment plan in satisfaction of the secured claim or the entire debt.[5] The value of the collateral is determined by the bankruptcy court and constitutes the amount of the "payment." Debtors have increasingly found asset payment plans an attractive means for eliminating secured debt. Lenders have not reacted favorably to asset payment plans, arguing that the risk of error in a court-determined valuation is being shifted improperly to the lender.

The case law is divided on whether an asset payment plan can satisfy the indubitable equivalent requirement of section 1129(b)(2)(A)(iii) of the Code. The Fifth Circuit recently reversed a bankruptcy court decision and endorsed asset payment plans in the case of *In re Sandy Ridge Development Corp.*[6] Several courts that refused to confirm asset payment plans cited the bankruptcy court's decision. This article focuses on the asset payment plan in which payment is made by transfer of collateral[7] and the secured creditor is prohibited from seeking a deficiency claim after the collateral is liquidated. Both sides of the issue will be reviewed, and an attempt will be made to resolve the conflicting authorities by focusing on the legislative history of the Code and the practical problems associated with the asset payment plan.

II. CONFIRMATION AND THE INDUBITABLE EQUIVALENT REQUIREMENT

A Chapter 11 plan must classify claims properly and specify treatment for each separate class.[8] A claim is properly classified if it is "substantially similar to other claims or interests of such class."[9] Each secured claim is generally classified separately since the collateral securing each claim and its relative priority will differ.[10] A secured creditor will be permitted to vote whether to accept or reject a plan unless the plan leaves the secured claim

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5. The cases use a variety of terms to describe how the "payment" will occur. *See, e.g., In re* Sandy Ridge Dev. Corp., 881 F.2d 1346 (5th Cir. 1989) ("transfer"); *In re* Thornebrook Dev. Corp., 96 Bankr. 350, 352 (Bankr. N.D. Fla. 1989) ("forced transfer of property"); *In re* B.W. Alfa, Inc., 100 Bankr. 831, 833 (N.D. Tex. 1988) ("forced deed in lieu of foreclosure"); *In re* Arnold, 80 Bankr. 806, 808 (Bankr. M.D. La. 1987) ("abandonment and satisfaction of a claim"); *In re* Elijah, 41 Bankr. 348, 349 (Bankr. W.D. Mo. 1984) ("surrender part of the property to creditors to satisfy their secured positions in full"). The use of the term "abandonment" has led to confusion. One court has stated that the legislative history of section 1129 of the Code indicates that abandonment of property to a secured creditor is the indubitable equivalent of the creditor's claim since the creditor retains all of its state law remedies, including the right to seek a deficiency. *See In re* Thornebrook Dev. Corp., 96 Bankr. at 352. The concept of "abandonment in full satisfaction of a claim" appears contradictory.

6. 881 F.2d 1346, *reh'g denied*, 889 F.2d 663 (5th Cir. 1989).

7. *But see In re* Future Energy Corp., 83 Bankr. 470 (Bankr. S.D. Ohio 1988) (proposed transfer of stock to objecting creditors in satisfaction of their secured claims held insufficient to meet the indubitable equivalent requirement).

8. Waas, *Letting the Lender Have It: Satisfaction of Secured Claims By Abandoning A Portion of the Collateral*, 62 AM. BANKR. L.J. 97, 98 (1988). *See also* 11 U.S.C. § 1122 (Supp. I 1978). Bankruptcy Rule 3013 provides: "For the purposes of the plan and its acceptance, the court may, on motion after hearing on notice as the court may direct, determine classes of creditors and equity security holders pursuant to §§ 1122 and 1322(b)(1) of the Code." 11 U.S.C. app. § 3013 (Supp. I 1978).

9. 11 U.S.C. § 1122(a) (Supp. I 1978). This section provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

10. Waas, *supra* note 8, at 98 (citing 5 COLLIER ON BANKRUPTCY ¶ 1122.03[6] (15th ed. 1979)).

unimpaired.[11] A secured claim is unimpaired if the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim . . . entitles the holder of such claim" or pays the claim in cash.[12] If an impaired class consisting of a secured creditor rejects the plan, it may be confirmed only through the so-called "cram down" provisions of the Code.[13]

A plan may be confirmed over the objection of an impaired class through cram down if it "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."[14] The requirement that a plan not "discriminate unfairly" is generally interpreted to mean that no class is over-compensated.[15] The requirement that a plan be "fair and equitable" differs depending upon whether the class is comprised of secured creditors, unsecured creditors, or interests.[16] As for a secured creditor, "fair and equitable" is defined in section 1129(b)(2)(A) of

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11. 11 U.S.C. § 1126(a), (f) (Supp. I 1978). These subsections provide:

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

. . .

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

12. 11 U.S.C. § 1124 (Supp. I 1978). This section states:

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest;

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; and

(D) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(3) provides that, on the effective date of the plan, the holder of such claim or interest receives, on account of such claim or interest, cash equal to—

(A) with respect to a claim, the allowed amount of such claim; or

(B) with respect to an interest, if applicable, the greater of—

(i) any fixed liquidation preference to which the terms of any security representing such interest entitle the holder of such interest; or

(ii) any fixed price at which the debtor, under the terms of such security, may redeem such security from such holder.

13. Waas, *supra* note 8, at 98. *See also* 11 U.S.C. § 1129(b)(1) (Supp. I 1978). Section 1129(b)(1) provides:

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Under § 1129(b) the court may force confirmation of a plan upon a dissenting impaired class of creditors. When the court confirms a plan against the vote of a dissenting impaired class, this class is considered to have received a "cramdown." *See generally* Booth, *The Cramdown on Secured Creditors: An Impetus Towards Settlement*, 60 AM. BANKR. L.J. 69 (1986); Broude, *Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative*, 39 BUS. LAW. 441 (1984); Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133 (1979).

14. 11 U.S.C. § 1129(b)(1) (Supp. I 1978), *supra* note 13.

15. Waas, *supra* note 8, at 99 (citing *In re* Winston Mills, Inc., 1 Collier Bankr. Cas. 2d (MB) 121 (Bankr. S.D.N.Y. 1979)).

16. Waas, *supra* note 8, at 99.

the Code as follows:

> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides—
>
> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or (iii) for the realization by such holders of the indubitable equivalent of such claims.

The asset payment plan is neither a cash payment nor sale of assets. Therefore, sections 1129(b)(2)(A)(i) and (ii) of the Code are not relevant. Accordingly, the analysis must focus on section 1129(b)(2)(A)(iii) and on whether the secured creditor will realize the "indubitable equivalent" of its claim by the debtor's transfer of all or part of the collateral.

III. Origin of Indubitable Equivalent Requirement

The term "indubitable equivalence" finds its origin[17] in Judge Learned Hand's opinion in *In re Murel Holding Corp.*[18] In *Murel* the secured creditor held a mortgage on an apartment house.[19] After the debtors defaulted on the mortgage, the creditor attempted to foreclose.[20] The debtors obtained a stay of foreclosure after filing a petition for reorganization under section 77B of the Bankruptcy Act of 1898.[21] The debtors then proposed a plan of reorganization to pay the creditor interest over ten years, with full payment of the principal due at the end of that time period.[22] The plan, however, made no provision for amortization of principal over the ten-year period.[23] The creditor rejected the plan and moved to vacate the stay, which was denied.[24] On appeal the creditor claimed that its interests were not adequately protected.[25]

Judge Hand, writing for the court, refused to confirm the "wholly speculative" plan, since the creditor would receive neither money, the property, nor an equivalent substitute.[26] The court found that the treatment of the secured claim was insufficient to justify

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17. *In re* Fursman Ranch, 38 Bankr. 907, 908 (Bankr. W.D. Mo. 1984).
18. 75 F.2d 941 (2d Cir. 1935).
19. *Id.* at 941.
20. *Id.*
21. *Id.*
22. *Id.* at 942.
23. *Id.*
24. *Id.* at 941.
25. *Id.* at 942.
26. *Id.*

the stay of the foreclosure action in state court.[27] In explaining the concept of adequate protection, Judge Hand wrote:

> In construing so vague a grant, we are to remember not only the underlying purposes of the section, but the constitutional limitations to which it must conform. It is plain that "adequate protection" must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most *indubitable equivalence.*[28]

The legislative history of the Code indicates that Congress derived the term "indubitable equivalent" contained in section 1129(b)(2)(A)(iii) of the Code from *Murel.*[29] This term first appeared in the Senate version of section 1129(b) as part of the cram down provisions.[30] Without the use of the term "indubitable equivalent," it was not clear whether section 1129(b) required present value compensation.[31] The final form of section 1129(b)(2)(A)(i)(II) requires deferred cash payments under a reorganization plan to equal the present value of the allowed claim.[32] "The 'indubitable equivalent' requirement appears in section 1129(b)(2)(A)(iii) as an alternative to deferred payments and carries with it, from its original context in *Murel,* the requirement of compensation for present value."[33]

IV. ASSET PAYMENT PLANS PRIOR TO *Sandy Ridge* DECISION

A number of courts addressed the viability of asset payment plans prior to the bankruptcy court's decision in *In re Sandy Ridge Development Corp.*[34] A review of these conflicting authorities demonstrates a lack of clarity on the issue of whether a forced transfer of property to a secured creditor results in the realization of the indubitable equivalent.

The case of *In re Wieberg*[35] involved an asset payment plan.[36] The debtors proposed to deed over to the secured creditor a combination of land subject to the secured creditor's deed of trust, land not subject to the secured creditor's deed of trust, and a cash payment.[37]

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27. *Id.*

28. *Id.* (emphasis added).

29. *Sandy Ridge,* 881 F.2d at 1350. *See also In re* Sun Country Dev., Inc., 764 F.2d 406, 409 (5th Cir. 1985); *In re* American Mariner Indus., Inc., 734 F.2d 426, 432 (9th Cir. 1984); *In re* Hollanger, 15 Bankr. 35, 45-46 (Bankr. W.D. La. 1981); 124 CONG. REC. H11089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards) (*reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6436, 6475); Haines, *When Is Returning the Collateral the Indubitable Equivalent?* 12 NORTON BANKR. L. ADVISER 4, 5 (1989); Waas, *supra* note 8, at 100. *See generally* 5 COLLIER ON BANKRUPTCY ¶ 1129.03 (15th ed. 1989).

30. *In re* American Mariner Indus., Inc., 734 F.2d at 433. The portions of *American Mariner* relating to adequate protection of the interests of undersecured creditors have been overruled by United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., 484 U.S. 365 (1988). *American Mariner* is cited herein solely for its discussion of the legislative history of § 1129(b) of the Code.

31. *In re* American Mariner Indus., Inc., 734 F.2d at 433.

32. *Id.*

33. *Id.* (citing 124 CONG. REC. H1104 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards approving present value analysis at H.R. REP. NO. 595 at 414-15, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 6436, 6470-71); S. REP. NO. 989 at 127, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 5787, 5913) ("The indubitable equivalent language is intended to follow the strict approach taken by Judge Learned Hand in *In re* Murel Holding Corp., 75 F.2d 941 (2d Cir. 1935)").

34. 77 Bankr. 69 (Bankr. M.D. La. 1987).

35. 31 Bankr. 782 (Bankr. E.D. Mo. 1983).

36. *Id.*

37. *Id.* at 783.

The debtor would retain some land, free and clear of the lien of the secured creditor.[38] The court in *Wieberg* refused to confirm the plan and dismissed the bankruptcy case.[39] The court found that the fair and equitable requirements were not met since the property to be transferred was more than $300,000 less than the secured claim.[40] While it has been suggested that the *Wieberg* court did not object to asset payment plans per se,[41] the plan was not confirmed, and the broad issues surrounding asset payment plans were not addressed.[42]

The bankruptcy court in *In re Fursman Ranch*[43] confirmed a plan of reorganization which proposed to convey a portion of real property to certain creditors which held security interests in the property.[44] The creditors objected to the value assigned to the real property.[45] In confirming the plan, the court found that fair market value was the appropriate standard for valuation.[46] The creditors could dispose of the property in a commercially reasonable manner since the debtor was surrendering the property to the creditors, and, as a result, foreclosure was unnecessary.[47] The court further found that the creditors were provided an additional safeguard because the case was "ongoing."[48] If a commercially reasonable sale by the creditors did not result in payment approximating the value set by the court, the creditors could ask for reconsideration of their claims.[49] The court did not discuss the mechanics of such reconsideration. The provisions for sale of the real property by the creditors and potential liability by the debtors for the deficiency suggest that the court was not faced with a true asset payment plan.

An asset payment plan was considered in the case of *In re Elijah*.[50] In *Elijah* the plan proposed to surrender part of the collateral to satisfy the secured claims in full.[51] The debtor asserted that the creditors were oversecured and that the proposal left the claims unimpaired.[52] The creditors contested the debtor's characterization of their claims and contended that they could only be paid by surrender of all their collateral.[53] Some of the secured creditors made an election to have their claims treated as fully secured under sec-

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38. *Id.*

39. *Id.* at 785-86.

40. *Id.* at 785.

41. *In re* Walat Farms, 70 Bankr. 330, 336 (Bankr. E.D. Mich. 1987).

42. *Wieberg*, 31 Bankr. at 785.

43. 38 Bankr. 907 (Bankr. W.D. Mo. 1984).

44. *Id.* at 908. Confirmation was conditioned upon the debtor's amending the plan to conform to several court directives. *Id.* at 913.

45. *Id.* at 908.

46. *Id.* at 910.

47. *Id.*

48. *Id.*

49. *Id.* (comparing *In re* Crosthwait, 34 Bankr. 469 (Bankr. W.D. Mo. 1983)).

50. 41 Bankr. 348 (Bankr. W.D. Mo. 1984).

51. *Id.* at 349.

52. *Id.*

53. *Id.*

tion 1111(b) of the Code.[54] These creditors argued that this election prevented the debtor from returning less than all the collateral in which the creditors held an interest in satisfaction of their respective claims.[55] The *Elijah* court held that the debtor could propose in the plan the return of part of the collateral in which the creditor held an interest in full satisfaction of the debt.[56] But if the creditor sold the surrendered collateral and the sale price was less than the claim, the creditor, as a result of the election, could require the debtor to surrender more collateral or to pay the balance of the claim as secured.[57] The effect of the section 1111(b) election was to have the deficiency treated as a secured claim.[58]

The bankruptcy court did not confirm the plan in *Elijah* but only allowed the debtor time to amend.[59] The court noted that oversecured creditors were entitled to receive only the present value of the allowed amount of their claim in cash.[60] As a result, the proposal to surrender collateral in satisfaction of debt may have been defective in that no provision existed for recapture of funds if the sale proceeds exceeded the present value of the claim of the creditors.[61]

The Fifth Circuit confirmed an asset payment plan in *In re Sun Country Development, Inc.*[62] Although the "payment" was not made by a transfer of collateral, a discussion is in order since this case is often cited as an authority in support of asset payment plans gener-

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54. *Id.* at 351. Section 1111(b) provides:

(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless–

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) class of claims may not elect application of paragraph (2) of this subsection if–

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

11 U.S.C. § 1111(b) (1978).

Bankruptcy Rule 3014 provides:

An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a Chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.

11 U.S.C. app. § 3014 (1978).

Section 1111(b) of the Code permits a secured creditor to waive the unsecured portion of its claim and elect to have the entire claim treated as secured. *In re* Griffiths, 27 Bankr. 873, 875 (Bankr. Kan. 1983). The section 1111(b) election was intended to permit an undersecured creditor to avoid having the claim split into secured and unsecured portions as would normally occur under § 506(a) of the Code. The election enables the creditor to obtain the benefit of any appreciation in value of its collateral over time. *Elijah*, 41 Bankr. at 351.

55. *Id.*

56. *Id.* at 352.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. 764 F.2d 406 (5th Cir. 1985).

ally. In *Sun Country* the creditor had sold 500 acres of land to the debtor, retaining a first lien on the land.[63] At the time of the debtor's default, the secured creditor had released its first lien on 300 of the 500 acres under the partial release terms of the deed, leaving a first lien on the remaining 200 acres.[64] The plan proposed payment of the creditor's claim by assigning twenty-one third-party notes to the creditor in satisfaction of the claim.[65] Each note was secured by a separate lot.[66] The creditor objected to the plan and argued that the twenty-one notes from twenty-one obligors secured by twenty-one lots were not the indubitable equivalent of its first lien on 200 acres.[67]

The bankruptcy court in *Sun Country* confirmed the plan, and the district court and the Fifth Circuit affirmed.[68] The Fifth Circuit held that the notes were the indubitable equivalent of the first lien on the 200 acres.[69] The present value of the notes was $153,770, over $200 more than the debt.[70] The lots securing the notes were valued at $287,500.[71] The applicability of the *Sun Country* decision to cases in which the debtor proposes the return of tangible property in satisfaction of the secured claim or the entire debt is unclear. The "property" transferred in *Sun Country* was not tangible property involving imprecise or difficult valuation issues.[72]

An asset payment plan was also confirmed in *In re Bernard*.[73] The plan in *Bernard* proposed to pay a portion of the secured claim by transferring part of the secured creditor's collateral for a credit of $225 per acre.[74] The secured creditor's appraiser had estimated that the property was worth $200 per acre.[75] The court found substantial agreement as to value but accepted the $200 per acre credit.[76] As for the real property retained by the debtor, in order to constitute the indubitable equivalent of the secured creditor's claim, the debtors had to execute a new first lien in favor of the creditor and execute a new note for the remaining balance on substantially the same terms as the original note.[77] It has been argued that the opinion is unclear about whether the new lien was intended to secure only the remaining balance owed to the creditor or was also intended to secure any deficiency resulting from the transfer to the creditor.[78]

In *In re Walat Farms, Inc.*,[79] the bankruptcy court denied confirmation of an asset payment plan.[80] The plan in *Walat* proposed to deed 400 acres to one secured creditor and 360

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63. *Id.* at 408.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 409.
68. *Id.* at 407.
69. *Id.* at 409.
70. *Id.*
71. *Id.*
72. The discussion of *Sun Country* by the court in *Walat*, *infra* at note 90, indicates that the notes secured by lots proved to be of questionable value.
73. 70 Bankr. 181 (Bankr. E.D. Ark. 1986).
74. *Id.* at 185.
75. *Id.*
76. *Id.* at 186.
77. *Id.*
78. *Asset Payment Plans Difficult to Confirm*, 1 BANKR. COUNS. 1, 4 (Jan. 4, 1988).
79. 70 Bankr. 330 (Bankr. E.D. Mich. 1987).
80. *Id.* at 331.

acres to another.[81] The secured creditor receiving the 400 acres under the plan held a first mortgage on the entire 760 acres and voted to reject the plan.[82] The court determined that if the land being conveyed under the plan was worth the amount of the claim, the indubitable equivalent test would be met.[83] The court, however, found this to be more a practical than a theoretical problem.[84] The cause of the problem was the inherent difficulty in establishing a value for real estate.[85] In *Walat* the range of values was between $750,000 and $1,222,000.[86]

The court in *Walat* questioned its "ability" to fix the value of the real property.[87] The court recognized that while certain real property that can be conveyed in an asset payment plan would satisfy the indubitable equivalent requirement, farm real estate at that time would not satisfy the requirement.[88] The dictionary defines "indubitable" to mean "too evident to be doubted."[89] The court found doubts existed in the case.[90]

The court determined that if the secured creditor in *Walat* received the real property in satisfaction of the entire claim, selling it would take from one to two years.[91] In the meantime, interest would accrue.[92] Additionally, a real estate commission and carrying costs such as property taxes would reduce the amount of the sale.[93] Since the court found that there was a deflationary market environment, it would be less likely that the surrender of the new property would be the equivalent of the claim because it would take longer to sell the property.[94] While the *Walat* court did not hold that asset payment plans are improper per se, a factual context in which the court would be faced with a plan involving the forced transfer of real property that would satisfy the court's criteria is difficult to imagine. As a practical matter, if the real property were liquid enough to satisfy the court in *Walat,* the debtor would agree to sell the property and pay the secured creditor in cash, or the secured creditor would not object to the transfer.

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81. *Id.* at 332.

82. *Id.* at 331.

83. *Id.* at 333.

84. *Id.*

85. *Id.* The court in *Walat* noted that real property has been recognized as a unique commodity. *Id.* at 334. Purchasers of land may waive damages and seek specific performance. *Id.* The basis for such a remedy, according to the *Walat* court, was that the value of real property "is difficult (some say 'impossible') to fix." *Id.* at 334 (citing 71 AM. JUR. 2D *Specific Performance* § 112 (1973)).

86. *Id.* at 333 n.2.

87. *Id.* at 334.

88. *Id.* at 337 n.8.

89. *Id.* at 334 (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1985)).

90. *Walat,* 70 Bankr. at 337. The subsequent history of *Sun Country* supported the *Walat* court's fear. In *Sun Country* the Fifth Circuit found sufficient evidence to support the bankruptcy court's findings that the package of notes was the indubitable equivalent of the creditor's claim. 764 F.2d at 409. More than three years after confirmation, the *Walat* court determined from parties' counsel in Sun Country that the road had not been put in, nine of the twenty-one deeds had to be separately foreclosed, and the value of the property was significantly less than the amount established by the bankruptcy court. 70 Bankr. at 336 n.7.

91. *Id.* at 337 n.8.

92. *Id.*

93. *Id.*

94. *Id.*

V. *In Re Sandy Ridge Development Corp.*

A. Bankruptcy Court's Decision

The bankruptcy court in *Sandy Ridge* was confronted with an asset payment plan that proposed the transfer of real property to creditors through the cram down provisions of section 1129(b)(2)(A)(iii) of the Code.[95] Louisiana National Bank (LNB) was to receive the real property on which it held the sole lien.[96] To the extent LNB was owed additional monies, the debtor would transfer part of a second piece of property on which LNB had a third lien up to $100,000, for a fair market value credit on the indebtedness to the extent of $100,000.[97] Livingston Bank, another creditor, would also receive a sufficient amount of the second property "in full satisfaction of the indebtedness."[98]

The asset payment plan proposed to "transfer in satisfaction of claim."[99] The court found it unclear as to whether the debtor proposed the transfers in satisfaction of the entire claim or, as the debtor argued, in satisfaction of the secured claim.[100] Apparently the court determined transfers would be in full satisfaction of the entire claim.[101]

In *Sandy Ridge* the bankruptcy court reviewed the legislative history of section 1129 of the Code.[102] The evolution of the bill, according to the bankruptcy court, showed a lack of complete agreement between the House and Senate over the use of property to pay secured creditors.[103] The original House Bill, H.R. 8200, provided that a plan could be crammed down "if with respect to each class of secured claims . . . each holder of a claim of such class will receive or return under the plan . . . *property* of a value . . . equal to the allowed amount of such claim . . . ."[104]

> The report of the House Judiciary Committee explained the concept for payment of secured claims with tangible property: Specifically, the court may confirm a plan over the objection of a class of secured claims if the members of that class are unimpaired or if they are to receive under the plan property of a value equal to the allowed amount of their secured claims, as determined under proposed 11 U.S.C. § 506(a). The property is to be valued as of the effective date of the plan, thus recognizing the time-value of money. As used throughout this subsection, 'property' includes both tangible and intangible property, such as security of the debtor or a successor to the debtor under a reorganization plan.[105]

The bankruptcy court in *Sandy Ridge* noted that the language about payment of secured creditors with property was not enacted.[106] Instead, section 1129(b)(2)(A) of the Code

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95. 77 Bankr. 69 (Bankr. M.D. La. 1987).

96. *Id.* at 70.

97. *Id.*

98. *Id.*

99. *Id.* at 70 n.8.

100. *Id.*

101. *Id.* at 76. The Fifth Circuit found that the bankruptcy court misconstrued the debtor's plan and the transfers were to be made only to satisfy the secured claims. 881 F.2d at 1349.

102. *Sandy Ridge*, 77 Bankr. at 71-72.

103. *Id.* at 72.

104. *Id.* (quoting § 1129(b)(1)(B)(iii), H.R. 8200, 95th Cong., 1st Sess., as reported by the House Committee of Judiciary, Sept. 8, 1977).

105. *Sandy Ridge*, 77 Bankr. at 72 (quoting H.R. REP. No. 595, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6369).

106. 77 Bankr. at 72.

contains three provisions for payment of secured creditors: Two involve payments in cash, and the third calls for realization of the "indubitable equivalent."[107] The court found that the only explanation in the legislative history about indubitable equivalence is a reference to abandonment of collateral.[108] According to the bankruptcy court, there is "no explicit statement in the statute *as enacted* for cramdown of a plan on secured creditors calling for payment in property."[109]

The deletion of the H.R. 8200 language and the enactment of language calling for payment in cash or the indubitable equivalent was significant to the bankruptcy court in *Sandy Ridge*.[110] If Congress had wanted to provide for payment of secured creditors in property, the court concluded, Congress could have left H.R. 8200 in its original form.[111] Accordingly, the bankruptcy court held that "payment in property is permissible in cramdown only if that transaction is the indubitable equivalence of cash paid on sale or in installments secured by a lien."[112]

In analyzing the burden of showing that a payment in property allowed the secured creditor to realize the indubitable equivalent of its claim, the *Sandy Ridge* court found that the burden exceeded proof by a preponderance of the evidence and proof beyond a reasonable doubt.[113] If reasonable people could differ on the value of property, the value might be proved by a preponderance of the evidence, but the result would not be "indubitable."[114] An appraisal that was "indubitable" was hard for the bankruptcy court to imagine.[115] The provision requiring indubitable equivalence would be meaningless, according to the court, if cram down could be achieved by a "battle of the appraisers" at the confirmation hearing.[116]

According to the bankruptcy court in *Sandy Ridge*, the *Sun Country*[117] case did not provide authority for the proposition that tangible property can be transferred in satisfaction of secured debt merely by producing appraisal testimony that the property has value equal to the amount of the claim.[118] The property in *Sun Country* was not tangible property involving highly imprecise and difficult valuation.[119]

The bankruptcy court also addressed the problem of providing substantial margins for valuation error by a transfer of more collateral to the creditor than necessary to satisfy the secured claim.[120] While such a plan might be confirmed with the consent of junior classes, overpayment of senior creditors apparently cannot be crammed down over the dissent of junior creditors.[121]

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107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 73.
114. *Id.*
115. *Id.*
116. *Id.*
117. 764 F.2d 406 (5th Cir. 1985).
118. *Sandy Ridge*, 77 Bankr. at 73.
119. *Id.*
120. *Id.* at 74.
121. *Id.* at 74 (citing Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133, 142 (1979)).

After denying confirmation of the asset payment plan in *Sandy Ridge*, the bankruptcy court concluded that the plan was not filed in good faith.[122] The court determined that the debtor prepared its plan in disregard of its own interests and for the principal purpose of eliminating the legal liability of non-debtor insider guarantors, not to reorganize.[123]

B. Mixed Reaction to Bankruptcy Court's Decision

The bankruptcy judge in *Sandy Ridge* revisited asset payment plans in *In re Arnold.*[124] The debtor in *Arnold* proposed to abandon collateral to the creditor in satisfaction of part of the indebtedness and to pay the remainder either in installments or in a lump sum.[125] The court again found that an "involuntary satisfaction of secured indebtedness and the elimination of rights against guarantors or other collateral to the extent of a 'deemed payment' based on a court valuation of property depending on appraisal testimony is not the indubitable equivalent of a creditor's claim."[126]

The bankruptcy court in *In re B.W. Alpha, Inc.*[127] denied confirmation of a plan that sought to convey a hotel and the related personal property to the secured creditor in full satisfaction of the debt.[128] While the plan was not approved, the *B.W. Alpha* court found the bankruptcy court's decision in *Sandy Ridge* too restrictive.[129] In order for property to be the indubitable equivalent of a creditor's claim so that the Chapter 11 plan could be crammed down over the objection of an impaired secured creditor, the court held that the property must produce a cash flow or be capable of being sold within a reasonable time so that the secured creditor can realize cash.[130] The proposed transfer of the debtor's sole asset to the secured creditor in full satisfaction of the secured creditor's claim could not be confirmed since it did not provide the creditor with the indubitable equivalent of its claim.[131] The debtor had been unable to sell the hotel for several years.[132] Shifting the burden of sale to the secured creditor could not be considered the indubitable equivalent.[133] The district court affirmed the denial of confirmation in *B.W. Alpha* and held that the Chapter 11 plan did not give the secured creditor the indubitable equivalent of a cash payment since there was evidence that the secured creditor would need five years to realize the value of the hotel.[134]

In the case of *In re Elm Creek Joint Venture*,[135] the bankruptcy court confirmed an asset payment plan which provided for a transfer of certain property upon which a secured creditor had a pre-petition lien with a credit against the debt based upon a valuation made by the

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122. *Sandy Ridge*, 77 Bankr. at 80.

123. *Id.* According to the bankruptcy court in *Sandy Ridge*, the guaranty is arguably extinguished if the plan provides for full satisfaction of the debt upon the transfer of the property since the debt is judicially determined to be paid. *Id.* at 77.

124. 80 Bankr. 806 (Bankr. M.D. La. 1987).

125. *Id.* at 808.

126. *Id.*

127. 89 Bankr. 592 (Bankr. N.D. Tex. 1988).

128. *Id.* at 594.

129. *Id.* at 596.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. 100 Bankr. 831, 833 (Bankr. N.D. Tex. 1988).

135. 93 Bankr. 105 (Bankr. W.D. Tex. 1988).

court at the confirmation hearing.[136] The *Elm Creek* court criticized the opinion of the bankruptcy court in *Sandy Ridge,* finding that it "makes the phrase [indubitable equivalence] . . . almost a talisman, almost an occult formula demanding payment of the secured lender in the exact amount due and owing or in an exact amount measured by an exact valuation of collateral."[137] The concept of indubitable equivalence in the Code, according to the court in *Elm Creek,* allows the bankruptcy judge to make a determination of value necessary to confirm an asset payment plan.[138]

The bankruptcy court in *In re Thornebrook Development Corp.*[139] relied upon the bankruptcy court's decision in *Sandy Ridge* in denying the confirmation of an asset payment plan.[140] The plan proposed to deed real property to the secured creditor in full satisfaction of its claim.[141] As a result, the creditor could not seek any deficiency against guarantors.[142] Such a plan did not provide the creditor with the indubitable equivalent within the meaning of the cram down provisions according to the *Thornebrook* court, even though the collateral had a stipulated value in excess of the creditor's claim.[143] In denying confirmation, the bankruptcy court referred to the legislative history of section 1129 of the Code which states that "[a]bandonment of the collateral to the creditor would clearly satisfy indubitable equivalent, as would a lien on similar collateral."[144] The court suggested that abandonment of property to a secured creditor satisfies the indubitable equivalent requirement where the creditor retains all of its state law remedies, including the right to seek payment of any deficiency.[145]

C. Ultimate Reversal by Fifth Circuit

The district court affirmed the bankruptcy court's rejection of the Chapter 11 plan in *Sandy Ridge.*[146] In an unpublished opinion, the Fifth Circuit initially affirmed the decision as well.[147] Although this opinion was withdrawn, a review of the opinion is instructive.

In the unpublished opinion, the original panel did not find *Sun Country* to be supporting authority for the debtor's plan.[148] The third-party notes in *Sun Country* were deemed the equivalent of cash because payment was assured.[149] If the real property was worth the value as attested to by experts for one of the secured creditors, that secured creditor would not be paid.[150] If forced to accept payment in full from the transfer of the real property, the secured creditor would have forfeited its rights to proceed against the three guarantors for

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136. *Id.* at 107.

137. *Id.* at 111.

138. *Id.* at 112.

139. 96 Bankr. 350 (Bankr. N.D. Fla. 1989).

140. *Id.* at 351-52.

141. *Id.* at 351.

142. *Id.* at 352.

143. *Id.*

144. *Id.* at 352 n.3. (quoting 124 CONG. REC. H11104 (daily ed. Sept. 28, 1978) and 124 CONG. REC. S17421 (daily ed. Oct. 6, 1978)).

145. 96 Bankr. at 352.

146. Sandy Ridge Dev. Corp. v. Louisiana Nat'l Bank, No. 87-578-B (M.D. La. Jan. 13, 1988) (judgment affirming the opinion of the bankruptcy court).

147. Sandy Ridge Dev. Corp. v. Louisiana Nat'l Bank, No. 88-3072 (5th Cir. July 5, 1988) (opinion affirming district court and responding to the district court for the consideration of the imposition of sanctions).

148. *Id.* at 5-6.

149. *Id.* at 6.

150. *Id.*

its losses.[151] The court held that such a change in position for the secured creditor was "not even a rough approximation of the indubitable equivalence which Section 1129(b)(2)(A)(iii) of the Code mandates."[152] The original panel determined that the plan was not filed in good faith because its apparent purpose was not "the salvaging of a business" but was instead an attempt to discharge non-debtor guarantors.[153] Accordingly, the Fifth Circuit initially remanded the imposition of sanctions to the district court.[154] The original opinion of the Fifth Circuit was later withdrawn,[155] and the case was reheard by a different panel.[156] After rehearing, the Fifth Circuit reversed and remanded.[157]

An essential point in understanding the final opinion of the Fifth Circuit is the court's interpretation of the actual terms of the debtor's plan.[158] The Fifth Circuit found that the bankruptcy court misinterpreted the debtor's plan to propose transfer of real estate to LNB in full satisfaction of the entire claim.[159] Instead, the Fifth Circuit found that the plan provided for transfer of the real property "for a credit on the indebtedness to the extent of the value" of the property.[160]

The Fifth Circuit then analyzed LNB's claim and determined that LNB was an undersecured creditor.[161] An undersecured creditor is one whose collateral has a value insufficient to cover the entire debt.[162] Section 506(a) of the Code bifurcates an undersecured creditor's total claim into secured and unsecured claims.[163] The difference between the collateral's value and the debt becomes an unsecured claim.[164] In *Sandy Ridge,* LNB's secured claim was equal to the value of the real property securing the first mortgage.[165]

The plan provisions in *Sandy Ridge* were then analyzed in light of the characterization of LNB as an undersecured creditor. The Fifth Circuit agreed that the indubitable equivalent language was the "heart" of the issue.[166] The key determination was the precise meaning of the phrase "such claims" in section 1129(b)(2)(A)(iii) of the Code.[167] The court concluded that "such claims" could only mean secured claims.[168] Section 1129(b)(2) is divided into subsections including section 1129(b)(2)(A), which deals with secured claims,

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151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. 18 Bankr. Ct. Dec. (CRR) 13 (5th Cir. 1988).

156. 881 F.2d 1346 (5th Cir. 1989).

157. *Id.*

158. *Id.* at 1348-49.

159. *Id.* at 1349.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* Section 506(a) of the Code states in relevant part: "[a]n allowed claim of a creditor secured by a lien on property . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . ." 11 U.S.C. § 506(a) (Supp. I 1978).

164. 881 F.2d at 1349.

165. *Id.*

166. *Id.* at 1350.

167. *Id.*

168. *Id.*

and section 1129(b)(2)(B),[169] which deals with unsecured claims. Since the indubitable equivalent language is part of section 1129(b)(2)(A), the court determined that it must deal with secured claims.[170] According to the Fifth Circuit, section 1129(b)(2)(A)(iii) could have been drafted to provide for "the realization of the holders of secured claims of the indubitable equivalent of *their secured* claims."[171] Since the value of the creditor's secured claim was equal to the value of the collateral, the Fifth Circuit held that a plan satisfies the requirements of section 1129(b)(2)(A)(iii) when it provides that the secured creditors would realize the indubitable equivalent of the real property.[172] The *Sandy Ridge* plan provided that the secured creditor would receive the actual real property itself, and "since common sense tells us that property is the indubitable equivalent of itself, this portion of the current plan satisfies the 'indubitable equivalent' requirement."[173]

The Fifth Circuit dismissed the bankruptcy court's concern that an involuntary cram down would release third-party guarantors from liability.[174] First, the Fifth Circuit found that the plan made no express provision for such a release.[175] Second, an analysis of both the Code and Louisiana law indicated to the Fifth Circuit that the concern was unfounded and that the bankruptcy petition of Sandy Ridge could not operate to release the non-debtor guarantors of the debt.[176]

The Fifth Circuit also dismissed the objection of the secured creditor on the valuation issue.[177] The secured creditor argued that the bankruptcy court could not "set the value of the property but must instead in all instances require the debtor to abandon the property and let the foreclosure sale determine market price."[178] No such requirement was in the

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169. Section 1129(b)(2)(B) provides:

> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
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> . . .
>
> (B) With respect to a class of unsecured claims—
>
> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

11 U.S.C. § 1129(b)(2)(B) (Supp. I 1978).

170. 881 F.2d at 1350.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 1350-52. The court also dismissed the concern of the bankruptcy court over the propriety of the liquidating plan in *Sandy Ridge*. *Id.* at 1352. The distribution of property to creditors under a liquidating plan, according to the court, is not per se improper under the Code. *Id.*

175. *Id.* at 1350-51. *But see* Republic Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987) (res judicata effect of order approving plan which expressly provides for release of third-party guarantor who was also a creditor).

176. *Sandy Ridge*, 881 F.2d at 1351-52. Even though the non-debtor guarantors could not be released from the debt as structured by the debtors in the plan, the Fifth Circuit still shared the bankruptcy court's concern over the debtor's apparent lack of good faith. *Id.* at 1353. Apparently certain classes of creditors were technically impaired in order to have them vote in favor of the plan and then satisfy the requirement of § 1129(a)(10) for cram down. *Id.* On remand the bankruptcy court was instructed to consider the requirement of good faith. *Id.*

177. *Id.* at 1353-54.

178. *Id.* at 1354.

Code according to the court.[179] The general market conditions are taken into consideration by the bankruptcy court when valuing collateral.[180] While the court recognized that "property valuation is not an exact science," it is an integral part of the bankruptcy process.[181]

The Fifth Circuit denied the petition for rehearing and the suggestion for rehearing en banc.[182] The court reiterated its earlier holding:

> [D]istribution of estate property, at values properly fixed by the bankruptcy court, to non-consenting creditors under a liquidating reorganization is not *per se* categorically prohibited as a matter of law under Chapter 11 of the Bankruptcy Code[,] . . . the plan in question meets the requirements of 11 U.S.C. § 1129(b)(2)(A)(iii) with respect to appellee LNB's secured claim . . . .[183]

On remand, the bankruptcy court was required to determine whether the plan was fair and equitable and did not discriminate unfairly for the purposes of cram down and whether it satisfied other requirements.[184]

VI. CREDITOR REMEDIES: AVOIDING RISKS OF ASSET PAYMENT PLANS

There may be avenues for the secured creditor to avoid receiving payment in a Chapter 11 plan through the transfer of property. The case of *In re Elijah* offers a possible remedy for the oversecured creditor faced with an asset payment plan.[185] In *Elijah* the court held that an oversecured creditor can preserve a guaranteed secured deficiency that may result after disposition of the collateral by making a section 1111(b) election, regardless of the value of the collateral on the date of confirmation.[186] The resulting secured claim would have to be paid in accordance with the cram down standards of section 1129(b) of the Code.[187] Consequently, the holding in *Elijah* may neutralize a debtor's effort to confirm a plan providing for a partial return of collateral.[188] At least one commentator has stated that the utilization of the section 1111(b) election by an oversecured creditor to avoid payment of its claim by a partial transfer of collateral securing its debt is highly questionable.[189] Until *Elijah* is overruled or controlling authority takes a contrary position, the section

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179. *Id.* Section 506(a) provides "[V]alue shall be determined in light of the purpose of the valuation and of the proposed disposition or use of the property, and in conjunction with any hearing on such deposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a) (Supp. I 1978).

Bankruptcy Rule 3012 states:

> The court may determine the value of a claim secured by a lien on property in which the estate has as interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.

11 U.S.C. app. § 3012 (Supp. I 1978).

The Fifth Circuit concluded that the valuation of the property transferred in an asset payment plan should be made by the bankruptcy court. *See In re* Texas Extrusion Corp., 844 F.2d 1142, 1165 (5th Cir. 1988) ("valuation of the assets of a debtor in bankruptcy . . . is an integral part of the confirmation process under Chapter 11"), *cert. denied*, 109 S. Ct. 311 (1988).

180. *Sandy Ridge*, 881 F.2d at 1354 (citing 3 COLLIER ON BANKRUPTCY ¶¶ 502-25 (1975)).

181. 881 F.2d at 1354.

182. 889 F.2d 663 (5th Cir. 1989).

183. *Id.*

184. *Id.* at 664.

185. 41 Bankr. 348 (Bankr. W.D. Mo. 1984).

186. *Id.* at 351. *See also* Waas, *supra* note 8, at 104.

187. Waas, *supra* note 8, at 104.

188. *Id.*

189. *Id.* at 106.

1111(b) election provides an option for the oversecured creditor seeking to avoid payment through a forced transfer of property.

The undersecured creditor in *In re Griffiths*[190] was also able to block an asset payment plan by making an election under section 1111(b) of the Code.[191] The Chapter 11 debtor proposed to return a portion of its collateral to the undersecured creditor and to pay the value of the remaining collateral in cash.[192] The court required the debtor to pay the remaining amount owed and not simply the value of the remaining collateral.[193] Once the election had been made, the total amount owed was the allowed amount of the claim.[194] Consistent with the legislative objective of section 1111(b), the creditor preserved its right to realize the potential appreciation in its collateral.[195]

The Fifth Circuit in a footnote offers another possible strategy for the undersecured creditor.[196] The undersecured creditor's primary concern in *Sandy Ridge* was receiving the "cushion" it would have if it was able to foreclose on the real property and bid on the property at two-thirds of its appraised value as allowed under Louisiana law.[197] Given this concern, the Fifth Circuit suggested this creditor should have moved for relief from the automatic stay.[198] Section 362(d) of the Code provides that a bankruptcy court "shall" grant leave from the automatic stay if (a) the debtor does not have equity in the property and (b) such property is not necessary for an effective reorganization.[199] In *Sandy Ridge* it was conceded by the debtor that no equity was in the real property[200] and that the plan was one of liquidation.[201] Accordingly, if the debtor is proposing the forced transfer of property in satisfaction of a creditor's claim, an undersecured creditor should consider moving for relief from the automatic stay when the bankruptcy court's determination of value is or will likely be excessive.

VII. CONCLUSION

The rationale of the Fifth Circuit in the final opinion of *Sandy Ridge* is not without merit. The bankruptcy courts are called upon to determine the value of collateral in a number of different contexts. The problem arises when the valuation will determine the extent of payment on a secured claim. If asset payment plans are allowed, the oversecured credi-

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190. 27 Bankr. 873 (Bankr. Kan. 1983).

191. *Id.* at 876-77.

192. *Id.* at 875.

193. *Id.* at 876.

194. *Id.*

195. *See* Waas, *supra* note 8, at 105-06. *See also* Carlson, *Undersecured Claims Under Bankruptcy Code Sections 506(a) and 1111(b): Second Looks at Judicial Valuation of Collateral*, 6 BANKR. DEV. J. 253 (1989).

196. *Sandy Ridge*, 881 F.2d at 1354 n.19.

197. *Id.*

198. *Id.*

199. Section 362(d) provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay–
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if–
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362 (Supp. I 1978).

200. *Sandy Ridge*, 881 F.2d at 1354 n.19.

201. *Id.* (citing, *e.g.*, *In re* 6200 Ridge, Inc., 69 Bankr. 837, 844 (Bankr. E.D. Pa. 1987)).

tor may only receive part of its collateral in full satisfaction of the indebtedness. The undersecured creditor may receive its collateral in full satisfaction of its secured claim. The ultimate sale of the collateral may result in a deficiency. As part of the asset payment plan, the creditor may be denied the opportunity to seek payment of the deficiency. Thus, the asset payment plan shifts the risk of valuation to the secured creditor.

An equitable result could be reached if the court estimated the secured claim in a manner similar to the procedure provided in section 502(c) of the Code.[202] This procedure would allow the court to determine whether the claim is fully secured or undersecured for such purposes as voting, classification, and feasibility. Once the claim is estimated, the collateral could then be sold. After the sale, the creditor would have an opportunity to seek reconsideration of its claim for any resulting deficiency.[203] At that point, the parties could raise challenges to the commercial reasonableness of the sale.

This proposal avoids the problem of transferring excess collateral to the secured creditor to provide for a margin of error in valuation. If the collateral sells for more than the debt owed to the secured creditor, the excess net proceeds can be paid into the estate.

While this proposal does not have the finality of the asset payment plan, it provides for a more equitable resolution of the competing interests of the debtor and creditor. Since the bankruptcy court often retains jurisdiction over a number of post-confirmation matters, the reconsideration of the secured creditor's claim should not be burdensome to the court or to the parties.

The Code clearly authorizes abandonment of the collateral to the secured creditor and the filing of any resulting deficiency claim. Also, the Code authorizes the sale of the col-

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202. Section 502(c) provides:

> (c) There shall be estimated for purpose of allowance under this section –
>
> (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or
>
> (2) any right to payment arising from a right to an equitable remedy for breach of performance.

11 U.S.C. § 502(c) (Supp. I 1978).

"Congress intended that all claims, including unliquidated and contingent claims, be 'dealt with' in the bankruptcy proceeding." *In re* Brints Cotton Mktg., Inc., 737 F.2d 1338, 1340 (5th Cir. 1984) (citing S. REP. No. 989, 95th Cong., 2d Sess. 22, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5808). Further, it was intended that "all claims against the debtor be converted into dollar amounts." 737 F.2d at 1340 (citing S. REP. No. 989, 95th Cong., 2d Sess. 65, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5758, 5851). Therefore, "the Code provides that a claim which is contingent or unliquidated shall be estimated, if the fixing or liquidation of [the claim] . . . would unduly delay the closing of the estate." 737 F.2d at 1340-41 (citing section 502(c)(1) of the Code). *See generally* Weintraub & Resnick, *Treatment of Contingent and Unliquidated Claims Under the Bankruptcy Code*, 15 U.C.C. L.J. 373 (1983); Comment, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153 (1982); 3 COLLIER ON BANKRUPTCY ¶ 502.03 (15th ed. 1989). In estimating a claim the bankruptcy courts should use whatever method is best suited under the circumstances. Bittner v. Borne Chem. Co., 691 F.2d 134, 135 (3d Cir. 1982); 3 COLLIER ON BANKRUPTCY ¶ 502.03 (15th ed. 1989). The bankruptcy court is bound by the legal rules which govern the ultimate value of the claim. 3 COLLIER ON BANKRUPTCY ¶ 502.03 at 502-75 (15th ed. 1989).

203. Section 502(j) of the Code provides:

> (j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

11 U.S.C. § 502 (Supp. I 1978).

The protections provided in section 502(j) are supplemented by Bankruptcy Rule 3008: "A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order." 11 U.S.C. app. § 3008 (Supp. I 1978).

lateral by the debtor with the lien of the secured creditor attaching to the proceeds. Payment in property, with the amount of the payment based upon a court-fixed value of the property, is not expressly authorized in the Code or in the legislative history. The practical problems associated with asset payment plans require strict judicial scrutiny of such plans and possibly legislative reform.