NEW YORK LAW SCHOOL

NYLS Law Review

Volume 33
Issue 1 *VOLUME XXXIII, NUMBER 1, 1988*

Article 2

January 1988

Lost Compensation Costs and The Undersecured Creditor: A Journey Into The Inwood Forest

Carlos J. Cuevas

NEW YORK LAW SCHOOL LAW REVIEW

VOLUME XXXIII NUMBER 1 1988

LOST COMPENSATION COSTS AND THE UNDERSECURED CREDITOR: A JOURNEY INTO THE INWOOD FOREST

*CARLOS J. CUEVAS**

I. INTRODUCTION

A. *Compensation for Lost Opportunity Costs*

Bankruptcy cases are an essential element of our economy.[1] Since the enactment of the new Bankruptcy Code in 1978,[2] there has been a

* B.A. 1979, New York University, J.D. 1982, Yale University. Member of the bars of the District of Columbia, New Jersey, and New York. Associated with the law firm of Whitman & Ransom, New York City.

1. This article is concerned with corporate reorganizations regulated by Chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 1101-74 (1982 & Supp. IV 1986). A corporate reorganization is the process by which the capital structure and other contracts of the company are transformed to enable the company to satisfy its debt obligations. *See* Blum, *The Law and Language of Corporate Reorganizations*, 17 U. CHI. L. REV. 565 (1950). The reorganization process allows a financially distressed company to continue operating to utilize its good will, and thus provide a greater return than its liquidation value. A. DEWING, THE FINANCIAL POLICY OF CORPORATIONS 1285 (4th ed. 1941).

There are no specific requirements as to financial condition when a company files a voluntary petition under Chapter 11. Consequently, some companies have filed petitions because of pending products liability litigation. *E.g., In re* Johns-Mansville Corp., 36 Bankr. 727 (Bankr. S.D.N.Y. 1984); Kaplan, *Bankruptcy as a Corporate Management Tool*, 73 A.B.A. J. 64 (Jan. 1987). In addition, Texaco filed a voluntary Chapter 11 petition in the face of an 11 billion dollar tort verdict awarded to Pennzoil for interference with Pennzoil's attempt to purchase Getty Oil. Texaco's action made it the largest company ever to file for Chapter 11. N.Y. Times, Apr. 13, 1987, at A1, col. 6.

2. Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 1101-74 (1982 & Supp. IV 1986)) (these sections cover corporate reorganization). The Bankrutcy Code repealed the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898), *repealed by* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1982 & Supp. IV 1986). For general discussions of the new Bankruptcy Code, see Kennedy, *A Brief History of the Bankruptcy Reform Act*, 58 N.C.L. REV. 667 (1980); Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941 (1979); Klee, *The New Bankruptcy Act of 1978*, 64 A.B.A. J. 1865 (1978); Trost, *Business Reorganizations Under Chapter 11 of the New Bankruptcy*

substantial amount of litigation concerning the concepts of adequate protection[3] and automatic stay.[4] This paper explores the issue of an

---

Code, 34 BUS. LAW. 1309 (1979).

3. The term "adequate protection" is not defined in the Bankruptcy Code. W. COLLIER, 2 COLLIER ON BANKRUPTCY ¶ 361.03 (L. King 15th ed. 1987); Comment, *Adequate Protection and the Automatic Stay Under The Bankruptcy Code: Easing Restraints on Debtor Reorganization*, 131 U. PA. L. REV. 423, 426-27 (1982). It is incumbent upon the bankruptcy court to determine whether the secured creditor's interest is adequately protected. *E.g., In re* Martin, 761 F. 2d 472 (8th Cir. 1985); *In re* Pacific Tuna Corp., 48 Bankr. 74 (Bankr. W.D. Tex. 1985); *In re* Jug End in the Berkshires, Inc., 46 Bankr. 892 (Bankr. D. Mass. 1985); *In re* La Jolla Mortgage Funds, 18 Bankr. 283 (Bankr. S.D. Cal. 1982); *In re* Riviera Inn of Wallingford, Inc., 7 Bankr. 725 (Bankr. D. Conn. 1980); *In re* Tucker, 5 Bankr. 180 (Bankr. S.D.N.Y. 1980); *In re* Terra Mar Assocs., 3 Bankr. 462 (Bankr. D. Conn. 1980); *In re* Pitts, 2 Bankr. 476 (Bankr. C.D. Cal. 1979); H.R. REP. No. 595, 95th Cong., 2d Sess. 338-39, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6295 ("[s]ections 362, 363 and 364 require, in certain circumstances, that the court determine whether the interest of a secured creditor or co-owner of property with the debtor is adequately protected").

Where it is determined under sections 362, 363 and 364 of the Act that the title of an interest of an entity in property requires protection, section 361 allows that protection may be provided by:

> (1) requiring the trustee to make a cash payment or periodic cash payments . . . to the extent that the stay under section 362 of this title, use, sale, or lease under 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
> (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
> (3) granting such other relief . . . as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 361 (1982).

4. When a voluntary petition under Chapter 11 is filed, an automatic stay is activated. 11 U.S.C. § 362(a) (1982 & Supp. IV 1986). The automatic stay prohibits debtor reclamation activity. *See* Kennedy, *Automatic Stays Under the New Bankruptcy Law*, 12 U. MICH. J.L. REF. 3 (1978). Section 362(a) states:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. § 78eee(a)(3)) operates as a stay, applicable to all entities, of-
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> (2) the enforcement, against a debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> (3) any act to obtain possession of property of the estate or property from the estate;
> (4) any act to create, perfect, or enforce any lien against property from the estate;
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the com-

undersecured creditor's[5] right to be compensated for lost opportunity costs.[6] This issue is important because its resolution entails many economic, social, political, legal, and policy questions at the core of most bankruptcy issues.[7] Since the issue of adequate protection is usually raised at the inception of reorganization,[8] a bankruptcy court's decision

---

mencement of the case under this title;

(6) an act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the set off of any debt owing to the debtor that arose before the United States Tax Court concerning the debtor.

Relief from these protections can be obtained by a creditor pursuant to section 362(d), which provides:

> 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 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(d) (1982 & Supp. IV 1986); *see also,* Bisbee, *Business Reorganization Practice Under the Bankruptcy Reform Act of 1978,* 28 EMORY L.J. 709, 724-28 (1979).

5. An undersecured creditor is a secured creditor whose collateral is insufficient to pay the creditor's entire claim. *See, e.g., In re* American Mariner Indus., 734 F.2d 426, 427 (9th Cir. 1984) (bank deemed "undersecured" when $370,000 debt was secured by collateral worth $100,000). Section 506(a) bifurcates an undersecured creditor's claim in the following manner: the secured creditor has an allowed secured claim to the extent of the value of the creditor's interest in the collateral, but is an undersecured creditor to the degree that amount of the secured claim is less than the amount of the claim. 11 U.S.C. § 506(a) (1982).

6. Lost opportunity costs represent the present value of collateral less the amount lost due to the creditor's inability to use that value through investment, lease, or sale. *See In re* Anchorage Boat Sales, Inc., 4 Bankr. 635, 643 (Bankr. E.D.N.Y. 1980) (the present value of collateral "is the value which a secured creditor would realize if he had in his hands today an amount equal to the value of the collateral and was able to reinvest this amount in a way which would produce a return on his investments."); *see also* Nimmer, *Secured Creditors and the Automatic Stay: Variable Bargain Models of Fairness,* 68 MINN. L. REV. 1 (1983); Jackson, *Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain,* 91 YALE L.J. 857 (1982).

7. The philosophical arguments concerning whether an undersecured creditor is entitled to lost opportunity costs can be examined vis-a-vis the purpose of a reorganization proceeding. Thus, the question is whether the proceeding should be viewed as an efficient means for the secured creditor to collect its debt, or whether the reorganization proceeding should be employed as a vehicle for rehabilitating a financially distressed company which has the capability of earning a profit. *See* Molbert, *Adequate Protection for the Undersecured Creditor in a Chapter 11 Reorganization: Compensation for the Delay in Enforcing Foreclosure Rights,* 60 N.D.L. REV. 515 (1984); Price, *Adequate Protection Under the Bankruptcy Act of 1978,* 71 KY. L.J. 727 (1983).

8. The motions for adequate protection are usually brought in the incipient stage of corporate reorganization, because the secured creditor is concerned that the collateral

can either facilitate or obstruct a debtor's rehabilitation efforts.[9]

B. *Secured Financing*

The American economy is based upon the availability of credit.[10] In the earlier part of this century, a myriad of security devices[11] made secured financing cumbersome and treacherous.[12] Consequently, Article Nine of the Uniform Commercial Code was enacted to simplify and consolidate all the methods of perfecting security interests in personal property.[13] When a debtor defaults on a loan, the creditor's security interest enables it to foreclose on the collateral, dispose of the collateral securing the loan, and thereby mitigate some or all of its losses.[14]

---

will depreciate in value and that the secured creditor will not be compensated for use of the collateral.

9. *See In re* W.S. Sheppley & Co., 45 Bankr. 473, 480-81 (Bankr. N.D. Iowa 1984). A court may use its discretion to foster or thwart a corporate reorganization:

> In review of the likelihood of reorganization this Court notes that the bankruptcy petition was filed on September 18, 1984. The hearing on the Motion to Lift the Stay was held on November 13, 1984, a time not even two months after the filing of the initial petition. The Debtor's exclusive period for filing its Plan of Reorganization without extension will not expire until January 16, 1985. Having reviewed the evidence and given the early stage of the proceedings at which the Motion to Lift the Stay has been filed, the Court concludes that the likelihood of reorganization is good although the form of reorganization at this time is not entirely clear. Therefore the Court concludes that its decision in this matter should facilitate reorganization rather than essentially eliminate any possibility of reorganization that the Debtor could have.

Id.

10. *See* C. HENNING, W. PIGOTT & R. SCOTT, FINANCIAL MARKETS AND THE ECONOMY 3-19 (2d ed. 1978).

11. There were various types of security devices including: mortgage, chattel mortgage, pledge and lien, equitable mortgage, deed of trust, field warehousing, conditional sale, and trust receipt. *See* 8 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE, § 9-101:1 (3d ed. 1985) (describing the history of Article 9); Storke, *An Introduction to Security*, 16 ROCKY MTN. L. REV. 27 (1943) (discussing general concepts of security interests before the advent of the Uniform Commercial Code).

12. Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333, 1335 (1963) (the use of security devices in the pre-Code era was left to the most expert attorneys).

13. One commentator observed that:

> The beauty of Article 9 is that it replaces this welter of formality with a single concept: the security interest. No longer does the mystical location of "title" determine whether the lender need record its interest to be protected against third parties; the line between "chattel mortgage" and "conditional sale" has been eliminated.

B. CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 1.2[1] (1980); *see also* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 23-1 (2d ed. 1980) (an introduction to the workings of Article 9).

14. *See* Jackson & Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979) (the status of a secured creditor provides some protection of one's interest against claims of other creditors).

A perfected security interest is paramount in a bankruptcy case because it usually ensures a creditor a greater payment of its claim than an unperfected security interest.[15]

C. *The Bankruptcy Power and the Due Process Clause*

Congress has been vested with broad authority to establish laws on bankruptcy.[16] The Supreme Court has repeatedly affirmed the right of Congress to enact bankruptcy legislation.[17] Nevertheless, the due process clause of the fifth amendment restricts this power.[18] The Court

---

15. Baird & Jackson, *Corporate Reorganization and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 106 (1984). For a further discussion on the subject of security interests and the rights of creditors, see *id.* at 106 n.31, 112 n.52.

16. Congress has the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4; *see* Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 517-18 (1938) (Congress may affect state property rights provided the fifth amendment demand for due process is recognized); Kuehner v. Irving Trust Co., 299 U.S. 445, 451 (1937) (Congress' bankruptcy powers are very broad when determining equitable distribution demands); Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry. Co., 294 U.S. 648, 668 (1935) (Congress' bankruptcy power is adaptable to change and related judicial interpretation is progressively more liberal); Beneficial Corp. v. Barker, 445 F. Supp. 101, 104 (W.D. Mo. 1977) (Congress' ability to legislate in the bankruptcy field is paramount (quoting 1 COLLIER ON BANKRUPTCY § 3.01(7) [sic])); *In re* Sapolin Paints, 5 Bankr. 412, 423 (Bankr. E.D.N.Y. 1980); *see also* Rogers, *The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973 (1983) (contrasting Congress' bankruptcy power with the limitations imposed by the fifth amendment); Note, *Takings and the Public Interest in Railroad Reorganization*, 82 YALE L. J. 1004 (1973) (stressing that the takings clause be applied to railroad creditors as it is applied to property owners).

17. *See, e.g.*, Regional Rail Reorganization Act Cases, 419 U.S. 102, 148-55 (1974) (upholding congressional bankruptcy act that included a "taking" per se, because of extraneous opportunity for compensation); New Haven Inclusion Cases, 399 U.S. 392, 489-94 (1970) (reorganization plan was within fifth amendment limitations because it allows compensation in the circumstances); *Continental Ill. Nat'l Bank*, 294 U.S. at 680-81 (rejection of a fifth amendment challenge because the effect of the bankruptcy powers on contracts must have been foreseen by the framers of the Constitution); Note, *Constitutional Limitation on the Bankruptcy Power: Chapter XII Real Property Arrangements*, 52 N.Y.U. L. REV. 362, 383-99 (discussing constitutionality of Chapter XII of the old Bankruptcy Act).

18. *See, e.g., Wright*, 304 U.S. at 518 (Court upheld challenge to Congress' bankruptcy power concerning limitations on state property rights); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935) (congressional act violating right to just compensation held void); *In re* Ross, 18 Bankr. 364, 367 (Bankr. N.D.N.Y. 1982) (destruction of the right to terminate a lease held to be a property right and hence a violation of due process); *In re* Bruntz, 10 Bankr. 444, 447 (Bankr. N.D. Iowa 1981) (Congress did not violate due process with a bankruptcy provision made retroactive from date of provision); *In re* Hammer, 9 Bankr. 343, 351 (Bankr. N.D. Iowa 1981) (Congress violated due process where the retroactive part of the bankruptcy provision attacked contracts made before enactment of that provision); *In re* Ambrose, 4 Bankr. 395, 398

addressed the applicability of the due process clause to bankruptcy proceedings in *Louisville Joint Stock Land Bank v. Radford.*[19] Prior to *Louisville Joint Stock Land Bank,* the Frazier-Lemke Act (the "Act") permitted a debtor to retain possession of his property for five years while remitting a reasonable rental payment to the mortgagee.[20] Additionally, during the five-year period, the debtor was allowed to purchase the property from the mortgagee at its appraised value.[21] The Court in *Louisville Joint Stock Land Bank* held the Act violated the due process clause of the fifth amendment.[22] The Court held that a mortgagee's interest in its collateral constituted a significant property right and that the Constitution did not allow the creditor to be deprived of this right without just compensation.[23] The Court emphasized that a mortgagee is entitled to either receive full payment of the debt or to repossess the collateral.[24]

The next case involving a constitutional challenge to the validity of the bankruptcy laws was *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke.*[25] As a consequence of *Louisville Joint Stock Land Bank,* the Frazier-Lemke Act was amended to reduce the stay foreclosure period from five to three years,[26] to permit the secured

---

(Bankr. N.D. Ohio 1980) (new provisions of the Bankruptcy Code may be applied retrospectively by debtors to avoid security interests on exempt property).

19. 295 U.S. 555 (1935).

20. Act of June 28, 1934, ch. 869, 48 Stat. 1289, *as amended by* Act of August 28, 1935, ch. 792, § 6, 49 Stat. 942, *repealed by* The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, tit. IV, § 401, 92 Stat. 2682.

21. *Id.*

22. *Louisville Joint Stock Land Bank,* 295 U.S. at 601-02. For the precise language, see *infra* note 24.

23. The rights of the mortgagee were as follows: (1) the right to retain the lien until the debt had been repaid; (2) the right to realize the security interest upon the collateral at a public auction; (3) the right to determine when the foreclosure sale will be conducted; (4) the right to bid at the auction and have the proceeds applied against the debt; and (5) the right to control the property during the default period. *Id.* at 594-95.

24. Thus, Justice Brandeis declared:

> As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

Id. at 601-02.

25. 300 U.S. 440 (1937).

26. Act of Aug. 28, 1935, ch. 792, § 6, 49 Stat. 942 (1935) (amending Act of June 28, 1934, ch. 869, 48 Stat. 1289). Section 6 amends § 75 of the Frazier-Lemke Act by adding subsection (s). Subsection (s)(2) reduces the stay foreclosure period from five to three years. *Id.*

creditor to retain its lien during the stay period,[27] and to permit the mortgagee to bid his mortgage at a judicial sale.[28] The Court held that the amended Frazier-Lemke Act complied with the Constitution.[29] The Court reasoned that the bankruptcy power enables Congress to modify secured creditors' rights so long as the modification is reasonable.[30] Moreover, a creditor's state law rights in a bankruptcy proceeding must be protected to avoid violating the fifth amendment.[31]

A year later, in *Wright v. Union Central Life Ins. Co.*,[32] (*Wright I*), the Supreme Court declared that a secured creditor's rights were subject to the bankruptcy laws.[33] The bankruptcy laws may not eviscerate a secured creditor's property rights created by state law.[34] Subsequently, in *Wright II*,[35] the Court declared that a secured creditor was only entitled to protection for the value of its collateral.[36] Furthermore, the Court, in *Wright II*, reaffirmed the principle that the bankruptcy laws are to be construed liberally to effectuate their purposes.[37] The courts have recognized that the bankruptcy laws can alter secured creditors' state law rights.[38] When the secured creditor's state law rights are modified, it is essential that the bankruptcy laws promote federal interests in a manner reasonably related to the goal of the legislation.[39] If a bankruptcy law employs a drastic means to achieve its goal, the statute may be unconstitutional.[40] The Constitution grants

---

27. The new subsection (s)(3) permits the retention of the lien. *Id.*

28. *Id.; see also Wright*, 300 U.S. at 459.

29. *Wright*, 300 U.S. at 470.

30. *Id.*

31. Justice Brandeis commented: "The question which the objections raise is not whether the Act does more than modify remedial rights. It is whether the legislation modifies the secured creditor's rights, remedial or substantive, to such an extent as to deny the due process of law guaranteed by the Fifth Amendment." *Id.*

32. 304 U.S. 502 (1938).

33. *Id.* at 516.

34. *Id.* at 516-17.

35. 311 U.S. 273 (1940).

36. *Id.* at 278.

37. Justice Douglas wrote: "Rather, the Act must be liberally construed to give the debtor full measure of the relief afforded by Congress, lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and letter of the Act." *Id.* at 279 (citations omitted).

38. Melniker v. Lehman (*In re* Third Ave. Transit Corp.), 198 F.2d 703, 707 (2d Cir. 1952); Reconstruction Fin. Corp. v. Kaplan, 185 F.2d 791, 797-98 (1st Cir. 1951) (district court, in proceedings under the Bankruptcy Act, had power to authorize trustees to conduct business operations and interfere in creditor organizations remedy).

39. Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry. Co., 294 U.S. 648, 676 (1935) (bankruptcy courts are invested with authority in equity to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the [Bankruptcy Act]").

40. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) (section 75(s)

Congress the authority to establish uniform laws on bankruptcy.[41] Since the American economy needs a flexible and efficient bankruptcy system, the judiciary usually defers to Congress and holds the bankruptcy legislation in question constitutional.[42]

II. Automatic Stay and Adequate Protection

The commencement of a corporate reorganization activates an automatic stay.[43] The automatic stay prohibits a secured creditor from attempting to repossess its collateral,[44] and violation of the automatic stay can result in the assessment of punitive damages and attorneys' fees.[45] A secured creditor may make a motion pursuant to section 362(d)[46] to modify or dissolve the automatic stay. Section 362(d) states two grounds for relief from an automatic stay: 1) for cause, including lack of adequate protection;[47] and 2) because the debtor lacks equity in

---

of Frazier-Lemke Act is void when applied to deny creditors' lien on property mortgaged prior to passing of the Act).

41. *Id.* at 589.

42. *In re* Pillow, 8 Bankr. 404, 417-20 (Bankr. D. Utah 1981) (desirability of statutory experiments in the area of business legislation is generally a matter for Congress and not the judicial branch).

43. 11 U.S.C. § 362(a) (Supp. IV 1986). The automatic stay continues in effect until the case is closed, dismissed, or converted. 11 U.S.C. § 362(c)(2) (1982 & Supp. IV 1986).

44. 11 U.S.C. § 362(a) (1982 & Supp. IV 1986).

45. Section 362(h) declares that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h) (Supp. IV 1986).

46. 11 U.S.C. § 362(d) (Supp. IV 1986).

47. 11 U.S.C. § 362(d)(1) (1982); *see also In re* Martin, 761 F.2d 472 (8th Cir. 1985) (existence of adequate protection depends upon nature of collateral and debtor's proposed use of that collateral); *In re* Monnier Bros., 755 F.2d 1336 (8th Cir. 1985) (determination of adequate protection decided according to equities of particular case); *In re* George Ruggiere Chrysler-Plymouth, 727 F.2d 1017 (11th Cir. 1984) (court's finding of adequate protection should not be overturned absent clear error); *In re* Marchand, 61 Bankr. 81 (Bankr. E.D. Ark. 1986) (indebtedness on property significantly exceeding fair market value of property establishes prima facie basis for relief and shifts burden of proof to debtors to prove they can provide adequate protection); *In re* Lipply, 56 Bankr. 524 (Bankr. N.D. Ind. 1986) (the term "cause" in § 362(d)(1) is broader than "adequate protection": "cause" requires more than non-payment, it requires some form of malfeasance on the part of the debtor); *In re* Gellert, 55 Bankr. 970 (Bankr. D.N.H. 1985) (lack of offer of adequate protection by debtor is ground for lifting automatic stay); *In re* Topper, 52 Bankr. 94 (Bankr. W.D. Wis. 1985) (periodic payments in conjunction with value of secured property would adequately protect creditor); *In re* Lilyerd, 49 Bankr. 109 (Bankr. D. Minn. 1985) (lack of equity cushion and lack of a proposal to protect creditor's security interest entitles creditor to relief from stay due to lack of adequate protection); *In re* Mary Harpley Builder, Inc., 44 Bankr. 151 (Bankr. N.D. Ohio 1984) (when debtor has no available income and his property is subject to other liens, debtor's unsecured guarantee does not afford adequate protection to creditor); *In re* Toto, 29 Bankr. 947 (Bankr. E.D. Pa. 1983) (all encumbrances against subject properties are con-

the property and the property is unnecessary for an effective reorganization.[48] The secured creditor has the burden of showing the debtor's lack of equity in the property,[49] while the debtor has the burden of proof on all the other issues, including the existence of adequate protection.[50]

Congress was concerned with protecting a secured creditor's property interest in its collateral during the duration of a Chapter 11 proceeding.[51] The concept of adequate protection is based not only on public policy, but also on constitutional law.[52] Section 361 outlines three methods of providing adequate protection.[53]

In the first option prescribed by section 361(1), a debtor can provide adequate protection by furnishing the secured creditor with periodic cash payments.[54] The concept for making periodic cash payments

---

sidered when determining if adequate protection (equity cushion) exists); *In re* XB-1 Assocs., 27 Bankr. 827 (Bankr. S.D.N.Y. 1983) (debtor's inability to provide adequate protection entitles creditor to relief from automatic stay).

48. 11 U.S.C. § 362(d)(2) (1982); *see also* United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 108 S. Ct. 626, 632 (1988); *In re* Digby, 47 Bankr. 614 (Bankr. N.D. Ala. 1985) (although debtor does not have equity in property, it cannot be said that property is not necessary for an effective reorganization); *In re* W.S. Sheppley & Co., 45 Bankr. 473 (Bankr. N.D. Iowa 1984) (when property was the major asset of debtor in possession, court concluded it was essential to effective reorganization); *In re* Trina-Dee, Inc., 26 Bankr. 152 (Bankr. E.D. Pa. 1983) (creditor has burden of proof on issue of debtor's equity in the property, while debtor has burden of proof on issue of whether the property is necessary for an effective reorganization); *In re* Mikole Developers, Inc., 14 Bankr. 524 (Bankr. E.D. Pa. 1981) (debtor must show that property is essential to an effective reorganization and that reasonable prospect of successful reorganization exists); *In re* Penn York Mfg., Inc., 14 Bankr. 51 (Bankr. M.D. Pa. 1981) (plaintiff entitled to relief from stay since there was no equity in subject property and subject property was not necessary to an effective reorganization).

49. 11 U.S.C. § 362(g)(1) (1982).

50. 11 U.S.C. § 362(g)(2) (1982).

51. H.R. REP. No. 595, *supra* note 3, at 339-40.

52. The House Report observes: "The concept is derived from the fifth amendment protection of property interests. It is not intended to be confined strictly to the constitutional protection required, however. The section, and the concept of adequate protection, is based as much on policy grounds as on constitutional grounds." *Id.* (citations omitted).

53. 11 U.S.C. § 361 (1982 & Supp. IV 1986).

54. Section 361(1) states:

> When adequate protection is required under section 362, 363 or 364 of this title of an interest of an entity in property, such adequate protection may be provided by-
>
> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, or sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property . . . .

11 U.S.C. § 361(1) (Supp. IV 1986).

to a secured creditor is derived from *In re Bermec Corp.*[55] In *Bermec*, the debtor was engaged in leasing trucks and tractor-trailers throughout the United States. Some of the debtor's secured creditors objected to the debtor's Chapter X petition. The Second Circuit found that the Chapter X petition was filed in good faith and held the periodic cash payments proposed by the Trustees sufficient to protect the secured creditors' interests.[56] Accordingly, the Second Circuit stated:

> We are conscious of the deep concern of the manufacturing secured creditors lest their security depreciate beyond adequate salvage, but we must balance that with the Congressional mandate to encourage attempts at corporate reorganization where there is a reasonable possibility of success. Nor can we find clearly erroneous the finding that the Trustees will be able to pay the "economic depreciation" on the secured creditors' equipment so as approximately to preserve the *status quo*.[57]

The second option for providing adequate protection is to grant a secured creditor additional or replacement liens to compensate it for a decrease in the value of its collateral.[58] This method is useful when a debtor has unencumbered assets.[59]

Finally, the third method for providing adequate protection is to grant: "such other relief, other than entitling such entity to compensation allowable under Section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property."[60]

The phrase "indubitable equivalent" was first employed in Judge Learned Hand's decision in *In re Murel Holding Corp.*[61] In *Murel*, the mortgagee objected to a reorganization which would have forced it to wait ten years to receive amortization payments on its debt.[62] In discussing the mortagee's rights, the court observed:

> 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

55. 445 F.2d 367 (2d Cir. 1971). *Bermec* was decided under the Bankrutcy Act. For a discussion of the statutory history of the bankruptcy laws, see *supra* note 2.

56. *Id.* at 369.

57. *Id.*

58. Section 361(2) provides: "[S]uch adequate protection may be provided by- (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property." 11 U.S.C. § 361(2) (1982).

59. 2 COLLIER, *supra* note 3, ¶ 361.01(3).

60. 11 U.S.C. § 361(3) (1982).

61. 75 F.2d 941 (2d Cir. 1935).

62. *Id.* at 942.

> 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.[63]

Section 361(3) is amorphous and the bankruptcy courts have been creative in fashioning adequate protection remedies to meet the demands of the particular situation.[64] Congress never specified the property interests that adequate protection was intended to safeguard.[65] Nevertheless, in discussing section 361, House Report 595 does provide some insight into the property interests that are to be protected:

> Secured creditors should not be deprived of the benefit of their bargain. There may be situations in bankruptcy where giving a secured creditor an absolute right to his bargain may be impossible or seriously detrimental to the bankruptcy laws. Thus, this section recognizes the availability of alternate means of protecting a secured creditor's interest. Though the creditor may not receive his bargain in kind, the purpose of the section is to insure that the secured creditor receives in value essentially what he bargained for.[66]

Several courts have relied on the language of section 361(3) in deciding that an undersecured creditor is entitled to receive compensation for lost opportunity costs for its inability to foreclose on its collateral.[67] Numerous other courts, however, have declined to employ

---

63. *Id.*

64. 2 COLLIER, *supra* note 3, ¶ 361.01(1).

65. *See, e.g., In re* American Mariner Indus., Inc., 734 F.2d 426, 429 (9th Cir. 1984); *In re* Alyucan Interstate Corp., 12 Bankr. 803, 807-09 (Bankr. D. Utah 1981).

66. H.R. REP. No. 595, *supra* note 3, at 339.

67. *See, e.g., In re* Briggs Transp. Co., 780 F.2d 1339, 1340 (8th Cir. 1985); Grundy Nat'l Bank v. Tandem Mining Corp., 754 F.2d 1436, 1441 (4th Cir. 1985); *In re* Monroe Park, 17 Bankr. 934, 940 (D. Del. 1982); *In re* Virginia Foundry Co., 9 Bankr. 493, 497-98 (W.D. Va. 1981); *In re* Byker, 64 Bankr. 640, 641 (Bankr. N.D. Iowa 1986); *In re* 12th & N Joint Venture, 63 Bankr. 36, 39 (Bankr. D.D.C. 1986); *In re* Peach St. State Distrib. Co., 58 Bankr. 873, 876 (Bankr. N.D. Ga. 1986); *In re* Pulliam, 54 Bankr. 624, 625 (Bankr. W.D. Mo. 1985); *In re* Wolsky, 53 Bankr. 751, 756 (Bankr. D.N.D. 1985); *In re* Deeter, 53 Bankr. 623, 627 (Bankr. N.D. Ind. 1985); *In re* Landsea Mktg. Inc., 53 Bankr. 436, 437 (Bankr. C.D. Cal. 1985); *In re* Independence Village, Inc., 52 Bankr. 715, 726-27 (Bankr. E.D. Mich. 1985); *In re* Polzin, 49 Bankr. 370, 372 (Bankr. D. Minn. 1985); *In re* Air Vermont, 45 Bankr. 931, 935 (Bankr. D. Ver. 1985); *In re* Mary Harpley Builder Inc., 44 Bankr. 151, 156 (Bankr. N.D. Ohio 1984); *In re* Anchorage Boat Sales Inc., 4 Bankr.

section 361(3) to compensate undersecured creditors for lost opportunity costs as a part of a secured creditor's adequate protection.[68]

III. Compensation for Lost Opportunity Costs

A. *Early Cases*

1. *In re Anchorage Boat Sales, Inc.*

In the case of *In re Anchorage Boat Sales, Inc.*,[69] a secured creditor who provided a debtor with floor plan financing filed a complaint to vacate the automatic stay.[70] The debt due to the secured creditor was $1,316,483.84 and the collateral securing the debt was worth $1,194,908.12, leaving a deficiency of $121,575.72.[71] The court held that because the prospects for a successful reorganization were minuscule, the secured creditor was entitled to relief from the automatic stay.[72] The court held that under section 361(3), an undersecured creditor must receive compensation for its lost opportunity costs.[73] The court relied on the language of section 361(3) in declaring:

> However, in the instant case, the plaintiff will not be compensated for the loss of the use of its money during the interim between the proceeding for relief from stay and the confirmation hearing. Accordingly, because of the time gap between the

---

635, 643 (Bankr. E.D.N.Y. 1980).

68. The aforementioned cases have effectively been overruled by the Court's decision in United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., 108 S. Ct. 626 (1988). For a discussion of *Timbers*, see *infra* notes 269-88 and accompanying text. *See, e.g., In re* Timbers of Inwood Forest Assocs., 793 F.2d 1380-82 (5th Cir. 1986), *aff'd on rehearing*, 808 F.2d 363 (5th Cir. 1987) (en banc), *aff'd sub nom.* United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., 108 S. Ct. 626 (1988); *In re* Mathis, 64 Bankr. 279, 285 (Bankr. N.D. Tex. 1986); *In re* Island Helicopter, 63 Bankr. 809, 818-19 (Bankr. E.D.N.Y. 1986); *In re* Smithfield Estates, 48 Bankr. 910, 914-15 (Bankr. D.R.I. 1985); *In re* Keller, 45 Bankr. 469, 472-73 (Bankr. N.D. Iowa 1984); *In re* Sun Valley Ranches, Inc., 38 Bankr. 595, 597-98 (Bankr. D. Idaho 1984); *In re* Aegean Fare, Inc., 34 Bankr. 965, 969 (Bankr. D. Mass. 1983); *In re* Shriver, 33 Bankr. 176, 182 (Bankr. N.D. Ohio 1983); *In re* Cantrup, 32 Bankr. 1004, 1005 (Bankr. D. Colo. 1983); *In re* Saypol, 31 Bankr. 796, 800 (Bankr. S.D.N.Y. 1983); *In re* Langley, 30 Bankr. 595, 605 (Bankr. N.D. Ind. 1983); *In re* South Village, Inc., 25 Bankr. 987, 996 (Bankr. D. Utah 1982); *In re* Pine Lake Village Apartment Co., 19 Bankr. 819, 827 (Bankr. S.D.N.Y. 1982).

69. 4 Bankr. 635 (Bankr. E.D.N.Y. 1980). *Anchorage Boat* is significant because it was the first case to hold that an undersecured creditor was entitled to compensation for lost opportunity costs under Bankruptcy Code section 361(3).

70. *Id.* at 636.

71. *Id.* at 640.

72. *Id.* at 641. The court found the record void of any indication that the debtor had hope of reorganizing. Accordingly, the court concluded that the debtor's encumbered property was "non-essential property." *Id.*

73. *Id.* at 643.

present hearing and the confirmation hearing, the plaintiff will not receive the "indubitable equivalent" of the value of the collateral unless relief from the stay is granted herein.[74]

2. *In re Monroe Park*

Another case which held that an undersecured creditor was entitled to be compensated for lost opportunity costs was *In re Monroe Park*.[75] In *Monroe Park*, a mortgagee made an application to terminate the automatic stay.[76] The bankruptcy court dissolved the automatic stay because the adequate protection offered by the debtor, in the form of an equity cushion and future appreciation, was insufficient.[77] On appeal, the district court affirmed the bankruptcy court's decision to dissolve the automatic stay.[78] The court held that the adequate protection provisions were intended to protect a secured creditor's rights, and hence, to ensure that a secured creditor's rights are not eviscerated during a corporate reorganization.[79] Moreover, the court declared:

> If Metropolitan had been allowed to foreclose on the mortgaged property at the time the bankruptcy petition was filed, it could have reinvested the money gained through foreclosure at current interest rates, after a judgment in its favor was entered and executed upon. This right of recourse to the collateral is an important part of the value of Metropolitan's interest in property which must be fully protected. Because Metropolitan would be delayed in realizing the value of its interest in collat-

---

74. *Anchorage Boat*, 4 Bankr. at 643 (citing *In re* Murel Holding Corp., 75 F.2d 941, 943 (2d Cir. 1935) ("indubitable equivalent" standard)). Bankruptcy Judge Radoyevich interpreted section 361(3) as entitling an undersecured creditor to receive full compensation for the time value of its money. The decision followed the proposition that the provisions of the Bankruptcy Code should not be employed to thwart a secured creditor's state law rights of foreclosure.

The issue of compensation for lost opportunity costs was first addressed by a district court in *In re* Virginia Foundry Co., 9 Bankr. 493 (W.D. Va. 1981). Chief Judge Turk emphasized that the concept of adequate protection was intended to afford the secured creditor the benefit of its bargain. *Id.* at 497. Thus, the court made the following comments about the secured creditor's bargain:

> Part of the value of a secured demand note lies in the ability of the secured creditor to receive payment on demand, with resort to his security if necessary. To deprive him of that right is to deprive him of value. Under the concept of adequate protection the bankruptcy court should require "such relief as will result in the realization of value."

Id. at 498.

75. 17 Bankr. 934 (D. Del. 1982).

76. *Id.* at 936.

77. *Id.* at 939-40. *Monroe Park* never established that the mortgaged property was appreciating enough to cover the ever increasing liens on the property.

78. *Id.* at 935-36.

79. *Id.* at 940.

eral by virtue of the automatic stay, it was incumbent upon Monroe Park to provide some form of relief which would compensate Metropolitan for the loss of use of its money or to supply some "indubitable equivalent" of the accruing interest of which Metropolitan was deprived.[80]

The court found it objectionable that the debtor took nine months to file a reorganization plan. Although the court acknowledged that adequate protection was a flexible concept, the debtor's failure to expedite a reorganization plan warranted granting the mortgagee compensation for lost opportunity costs.[81]

B. *Circuit Court Cases*

1. The Ninth Circuit and the *American Mariner* Litigation

Crocker National Bank ("Crocker"), a secured creditor of American Mariner Industries, Inc., commenced an adversary proceeding to terminate an automatic stay in *In re American Mariner Indus., Inc.*[82] Crocker contended it was not adequately protected and needed to be compensated for its inability to foreclose on its collateral.[83] The bankruptcy court rejected Crocker's position, holding that the Bankruptcy Code did not authorize payment to undersecured creditors for lost opportunity costs.[84] The court found unpersuasive the reasoning of *Anchorage Boat Sales*,[85] because the language employed in section 361(3) did not expressly authorize compensation to undersecured cred-

80. *Id.* (citations omitted).

81. *Id.* The court remarked:

> It may be that compensation for unpaid accruing interest charges during the pendency of bankruptcy proceedings is not necessary in all cases. Indeed, adequate protection is a flexible concept which requires a Court to make decisions on a case-by-case basis, after full consideration of the peculiar characteristics common to each proceeding. In this case, however, where a plan of reorganization was not even filed until nine months after the reorganization proceeding was first commenced, and interest charges were accruing at a minimum of $36,000 per month, it was not unreasonable to require Monroe Park to proffer some form of compensation for Metropolitan's loss of use of its money while the stay was imposed.

Id. (citations omitted).

82. *In re* American Mariner Indus., Inc., 10 Bankr. 711 (Bankr. C.D. Cal. 1981), *aff'd*, 27 Bankr. 1004 (Bankr. 9th Cir. 1983), *rev'd*, 734 F.2d 426 (9th Cir. 1984).

83. *Id.* at 713. Crocker sought the market prime interest rate on the present value of

itors for lost opportunity costs.[86] Further, the court emphasized that because *Murel*[87] involved the confirmation of a reorganization plan, the principles of *Murel* were applicable to a confirmation proceeding. The case at bar involved the issue of whether a secured creditor was adequately protected.[88] The court reasoned that section 506(b) only allows interest in reorganization proceedings for oversecured claims.[89] Significantly, the court stated that the adequate protection provisions were intended to safeguard a secured creditor only to the extent of its collateral.[90] Thus, if the possibility of a successful reorganization becomes bleak, the secured creditor has the option of converting the case to Chapter 7.[91]

Crocker appealed the bankruptcy court's decision, and the Bankruptcy Appellate Panel for the Ninth Circuit affirmed the bankruptcy court's decision.[92] The appellate panel stressed that adequate protection was designed to protect the value of a secured creditor's collateral during the progress of a reorganization case.[93] The court observed:

> A construction more consistent with the language and policy to be served would recognize that it is the value of the collateral which is the focus of protection. Thus, the trial court's decision requiring the debtor to maintain a level of value as security for the debt by providing, during the stay, compensation for depreciation was consistent with the policy and language of § 361(1).[94]

The appellate panel also held that the suspension of a secured creditor's rights to foreclose on its collateral during the period in which the automatic stay was in effect was only temporary.[95] Thus, the denial of lost opportunity costs was not a deprivation within the purview of the fifth amendment.[96] Disregarding the flexible nature of adequate

---

86. *Id.*

87. 75 F.2d 941 (2d Cir. 1935). For a discussion of *Murel Holding Corp.*, see *supra* notes 61-63 and accompanying text.

88. *American Mariner*, 10 Bankr. at 712.

89. *Id.* at 712-13.

90. *Id.* at 713.

91. *Id.* A case may be converted by a "party in interest." 11 U.S.C. § 1112(b) (1982 & Supp. IV 1986). For a discussion of § 1112(b), see *infra* notes 237 and 265.

92. *In re* American Mariner Indus., Inc., 27 Bankr. 1004 (Bankr. 9th Cir. 1983), *rev'd*, 734 F.2d 426 (9th Cir. 1984).

93. *Id.* at 1010.

94. *Id.*

95. *Id.*

96. *Id.* The court remarked:

> In the instant case none of the traditional property rights enumerated in *Radford* have been breached. At most they have been temporarily stayed. Justice Brandeis distinguished the impermissible taking of property rights which the

protection, the court expressed dissatisfication with those cases permitting an undersecured creditor to receive compensation for lost opportunity costs.[97] Finally, the appellate panel declared:

> The policy of the Code, in litigation involving the automatic stay, particularly, in a Chapter 11 or reorganization setting, is to place matters in a holding pattern so as to permit an opportunity, where there are prospects for survival, for time to allow the reorganization to develop for the benefit of the debtor and its creditors. A temporary balance is thereby struck which defers access of the secured creditor to the collateral but provides for maintenance of its value.[98]

The Ninth Circuit Court of Appeals reversed the appellate panel, holding that an undersecured creditor is entitled to be compensated for lost opportunity costs under section 361(3).[99] The Ninth Circuit adopted a rigid approach to adequate protection, stating:

> The secured creditor's right to take possession of and sell collateral on the debtor's default has substantial, measurable value. The secured creditor bargains for this right when it agrees to extend credit to the debtor and both parties consider the right part of the creditor's bargain. The right constitutes an "interest in property" that is "created and defined by state law," and we are aware of no federal interest that requires this right of the secured creditor to go unprotected "simply because an interested party is involved in a bankruptcy proceeding."[100]

The court of appeals reasoned that section 361(3) was intended to provide a secured creditor with complete compensation and protection of the entire claim.[101] Accordingly, if a court furnishes a secured credi-

---

> Frazier-Lemke Act appeared to sanction from laws which enabled bankruptcy courts to suspend or defer the enforcement of a lien by sale of collateral . . . .

Id.

97. *Id.* at 1013-14. The majority criticized such cases as *Anchorage Boat* and *Monroe Park*. For a discussion of these cases, see *supra* notes 69-74 and 75-81 and accompanying text.

98. *American Mariner*, 27 Bankr. at 1014.

99. 734 F.2d 426 (9th Cir. 1984).

100. *Id.* at 435.

101. *Id.* at 432. In discussing the insertion of the phrase "the indubitable equivalent" into section 361(3), the Ninth Circuit observed:

> In its context, Judge Hand's interpretation of adequate protection emphasizes two factors. First, it suggests that to be "completely compensatory" adequate protection must compensate for present value, "that payment ten years hence is not generally the equivalent of payment now." . . . Second, adequate protection must insure the safety of the principal.

Id. at 433.

tor with the indubitable equivalent, compensation for lost opportunity costs must be included to adequately protect an undersecured creditor.[102]

The circuit court rejected the reasoning of the Bankruptcy Appellate Panel, because the lower court extended adequate protection only to the value of the collateral.[103] The court held that if adequate protection is afforded solely to protect the value of the collateral, then the language of the statute and the intent of Congress to furnish the secured creditor with the benefit of its bargain would be ignored.[104]

2. The Fourth Circuit and *Grundy National Bank v. Tandem Mining Corp.*

The Fourth Circuit in, *Grundy National Bank v. Tandem Mining Corp.*[105] held that an undersecured creditor is entitled to be compensated for lost opportunity costs, declaring:

> *American Mariner,* correctly we think, concluded on something less than precise statutory language and precise legislative history that a secured creditor is entitled to the "benefit of its bargain." This is to say that the secured creditor is entitled to be compensated for the use of its money when it is precluded from liquidating its debt.[106]

The court concluded that a secured creditor was entitled to receive monthly payments at the prevailing interest rate,[107] and the computation of interest should commence when the creditor petitions for relief from the automatic stay.[108]

3. The Eighth Circuit and *In re Briggs Transportation Co.*

The Eighth Circuit has adopted a more flexible approach, ruling that lost opportunity costs are compensable under section 361(3).[109] The court determined that it was within the purview of the bankruptcy court's discretion to award lost opportunity costs on a case-by-case basis.[110]

---

102. *Id.* at 434-35.
103. *Id.*
104. *Id.*
105. 754 F.2d 1436 (4th Cir. 1985).
106. *Id.* at 1441 (citation omitted).
107. *Id.*
108. *Id.*
109. *In re* Briggs Transp. Co., 780 F.2d 1339 (8th Cir. 1985).
110. The court of appeals stated:

> After careful consideration of the Bankruptcy Code's language and legislative history and of underlying policy considerations, we cannot hold as a matter

In *Briggs Transportation,* two undersecured creditors had perfected security interests in the debtor's tractor-trailers.[111] The debtor did not assert that it had any equity in the collateral.[112] The secured creditors petitioned for relief from the automatic stay contending they were entitled to be compensated for lost opportunity costs.[113] The bankruptcy court held the secured creditors were not entitled to be reimbursed for lost opportunity costs as a component of adequate protection.[114] The district court followed *American Mariner,* concluding that the undersecured creditors may receive payments for lost opportunity costs as a matter of law.[115]

The Eighth Circuit reversed the district court, holding that a bankruptcy court may exercise its discretion to determine whether an undersecured creditor should receive reimbursement for lost opportunity costs.[116] An undersecured creditor is not entitled to receive payments for lost opportunity costs as a matter of law.[117] The Eighth Circuit reasoned that adequate protection entails the protection of a secured creditor's interest in its property from a decrease in the value of the property on account of the automatic stay.[118] The court refused

---

of law that a creditor is always entitled to compensation for the delay in enforcing its foreclosure rights during the interim period between filing of a petition and confirmation of a plan. Although the concept of adequate protection under sections 361 and 362 requires the court to protect the creditor's allowed secured claim by compensating for any loss of value of the collateral, what constitutes adequate protection in a particular case is a question whose resolution is best left to the knowledge and expertise of the bankruptcy court.

Id. at 1350-51.

111. *Id.* at 1341.

112. *Id.*

113. *Id.*

114. *In re* Briggs Transp. Co., 35 Bankr. 210 (Bankr. D. Minn. 1983) ("adequate protection" does not include opportunity costs, and the failure to pay opportunity costs, is not an unconstitutional taking), *rev'd,* No. 3-84-224 (D. Minn. Sept. 26, 1984), *rev'd,* 780 F.2d 1339 (8th Cir. 1985).

115. *Briggs,* 780 F.2d at 1341 (*American Mariner,* a Ninth Circuit opinion filed after the bankruptcy court's decision, allowed the undersecured creditor compensation for delay in enforcing its rights, citing the need to preclude the debtor and his unsecured creditors from receiving a windfall, and to ensure that the secured creditor received the benefit of its bargain).

116. *Id.* at 1349 ("final reconstruction of the creditor's bargain to determine just what interest of the creditor should be afforded protection during the pendency of the automatic stay is a balancing act best left to the discretion of the bankruptcy judge").

117. *Id.* at 1350.

118. The court declared:

[I]t is generally acknowledged that, as demonstrated by the non-exclusive examples of section 361, adequate protection is the protection of a secured creditor's "interest in property" from any decrease in "value" attributable [sic] to the stay. It also is generally accepted that the concept requires the debtor to propose some form of relief that will preserve a secured creditor's interest in the

to accept a rigid conception of adequate protection. However, it acknowledged that circumstances may exist where an undersecured creditor would be permitted to enforce all the rights in its contract: "Secured creditors should not be deprived of the benefit of their bargain. *There may be situations in bankruptcy where giving a secured creditor an absolute right to his bargain may be impossible or seriously detrimental to the bankruptcy laws.*"[119]

The Eighth Circuit rejected the proposition that the language of section 361(3) mandated that undersecured creditors be compensated for lost opportunity costs.[120] Rather, the court concluded that the phrase "indubitable equivalent" was intended to provide a bankruptcy court with flexibility in devising an adequate protection remedy.[121] Thus, it would be imprudent to adhere to an intractable policy of requiring payment for lost opportunity without taking into consideration the circumstances of the particular case.[122]

The court also held that sections 502 and 506 did not preclude awarding lost opportunity costs by negative implication.[123] Instead, the Eighth Circuit based its authority to award lost opportunity costs on the adequate protection provisions.[124]

Permeating the Eight Circuit's opinion is the belief that the basis

---

collateral.

Id. at 1344 (footnote and citation omitted).

119. *Id.* at 1345 (quoting *In re* American Mariner Indus., Inc., 734 F.2d 426, 431 (9th Cir. 1984)) (emphasis in original).

120. *Id.* at 1346.

121. Chief Judge Lay made the following comments concerning the flexibility intended by the employment of the "indubitable equivalent" phrase in section 361(3):

> However, in determining the exact scope of those bargained-for rights, the boundaries of the indubitable equivalence standard cannot be so rigidly defined as to mandate interest payments for the delay in foreclosing, liquidating, and reinvesting the collateral in every case. Rather, indubitable equivalence must be construed as an alternative means of calculating value in light of a particular case's facts. The bankruptcy code's design, the legislative compromises from which the statute was constructed, and the developing case law all indicate that the creditor rights to be afforded protection in a given situation depend on a variety of factors the exact character of which will vary from case to case and may, but will not always, include the payment of interest for opportunity costs.

Id. at 1346 (citations omitted).

122. *Id.*

123. The Eighth Circuit declared:

> Section 506(b) simply provides an alternative to the adequate protection provisions in sections 361 and 362 and does not serve as a limitation thereon. We also find that section 502(b)(2), which disallows claims for unmatured interest, does not preclude payment of interest as time value compensation to secured creditors.

Id. at 1347.

124. *Id.* at 1347-48.

of a bankruptcy case is compromise and flexibility.[125] The court was averse to adopting an inflexible position; hence, Chief Judge Lay wrote:

> Influenced by the clearly articulated policy in the statutory language, legislative history and relevant case law, we believe bankruptcy courts should retain a high degree of flexibility in arriving at adequate protection findings. This court is convinced that the most reasonable approach accommodating the greatest number of interests is to refrain from shaping a rigid rule that compensation for post-petition interest either must or cannot be required as a component of adequate protection in the context of an automatic stay.[126]

C. *Summary*

American Mariner and its progeny held that a secured creditor is entitled to enforce its contractual rights in a corporate reorganization.[127] Adequate protection was intended to protect the secured creditor's rights so that it may realize the indubitable equivalent of its contractual rights.[128] Therefore, a debtor may not employ the bankruptcy laws to subvert a secured creditor's state law rights.[129]

IV. Denial of Compensation for Lost Opportunity Costs

A. *Introduction*

Numerous decisions have held that an undersecured creditor may *not* receive compensation for lost opportunity costs.[130] The decisions

---

125. *Id.* at 1348 (legislative history and previous court decisions "recognize that adequate protection is a flexible concept which requires a court to make decisions on a case-by-case basis").

126. *Id.*

127. *In re* American Mariner, 734 F.2d 426 (9th Cir. 1984); *see also* Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982).

128. Grundy Nat'l Bank v. Tandem Mining Corp., 754 F.2d 1436, 1441 (4th Cir. 1985) (the secured creditor is entitled to the "benefit of its bargain" and to be compensated for the use of its money when it is precluded from liquidating its debt); *see also* Comment, *Automatic Stay Under the 1978 Bankruptcy Code: An Equitable Roadblock to Secured Creditor Relief*, 17 SAN DIEGO L. REV. 1113 (1980).

129. *In re* Virginia Foundry Co., 9 Bankr. 493, 498 (W.D. Va. 1981) ("Part of the value of a secured demand note lies in the ability of the secured creditor to receive payment on demand, with resort to his security if necessary [and] . . . [t]o deprive him of that right is to deprive him of value.").

130. *See, e.g., In re* Timbers of Inwood Forest Assocs., Ltd., 793 F.2d 1380 (5th Cir. 1986), *aff'd on rehearing*, 808 F.2d 363 (5th Cir. 1987) (en banc), *aff'd sub nom.* United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., 108 S. Ct. 626 (1988); *In re* Mathais, 64 Bankr. 279 (Bankr. N.D. Tex. 1986); *In re* Island Helicopter Corp., 63 Bankr. 809 (Bankr. E.D.N.Y. 1986); *In re* Smithfield Estates, 48 Bankr. 910 (Bankr.

by former Bankruptcy Judge Mabey have cogently articulated the reasons why undersecured creditors should not be allowed to receive payments for lost opportunity costs.[131] Moreover, only one circuit court of appeals, the Fifth Circuit, has held that undersecured creditors are not entitled to receive compensation for lost opportunity costs.[132]

B. *Early Bankruptcy Court Decisions*

1. *In re Pine Lake Village Apartment Co.*

One of the earlier bankruptcy court cases holding that an undersecured creditor was not entitled to lost opportunity costs was *In re Pine Lake Village Apartment Co.*[133] In *Pine Lake Village,* the mortgagee sought relief from the automatic stay contending that it was entitled to lost opportunity costs because, the imposition of the automatic stay precluded it from foreclosing its mortgage.[134] The court held that the Bankruptcy Code did not authorize granting lost opportunity costs to undersecured creditors.[135]

The court determined that adequate protection was intended to maintain the value of a secured creditor's collateral during the corporate reorganization,[136] remarking:

> The *Alyucan* court observed that adequate protection furnished to a creditor pursuant to § 361 assures the maintenance, and thus, recoverability of the lien value in the interim between the filing of the petition and acceptance of the plan of reorganization. Accordingly, a secured creditor has the right to receive adequate protection for any decline in value the collateral may suffer after the automatic stay is in effect, since but for the stay, the creditor could foreclose to prevent or mitigate any loss in the value of the security.[137]

D.R.I. 1985); *In re* Keller, 45 Bankr. 469 (Bankr. N.D. Iowa 1984); *In re* Sun Valley Ranches, Inc., 38 Bankr. 595 (Bankr. D. Mass. 1983); *In re* Shriver, 33 Bankr. 176 (Bankr. N.D. Ohio 1983); *In re* Cantrup, 32 Bankr. 1004 (Bankr. D. Colo. 1983); *In re* Saypol, 31 Bankr. 796 (Bankr. S.D.N.Y. 1983); *In re* South Village, Inc., 25 Bankr. 987 (Bankr. D. Utah 1982); *In re* Pine Lake Village Co., 19 Bankr. 819 (Bankr. S.D.N.Y. 1982).

131. *South Village,* 25 Bankr. 987; *In re* Alyucan Interstate Corp., 12 Bankr. 803 (Bankr. D. Utah 1981).

132. *Timbers,* 793 F.2d 1380.

133. 19 Bankr. 819 (Bankr. S.D.N.Y. 1982).

134. *See id.* at 821.

135. *Id.* at 827-28.

136. *Id.* at 824-25. The court analyzed the legislative history as well as the statutory provisions, concluding that adequate protection was devised to protect a secured creditor from a decrease in the value of the collateral attributable to the automatic stay.

137. *Id.* at 825.

In addition, the court rejected the reasoning of other courts' holdings that an undersecured creditor is entitled to receive compensation for lost opportunity costs, because these courts had misapprehended the function of adequate protection in a Chapter 11 proceeding.[138] Adequate protection was never intended to compensate an undersecured creditor for loss of a better business opportunity.[139]

The court reasoned that section 361(3) did not support the conclusion that the phrase "indubitable equivalent" was inserted in the statute to guarantee that a secured creditor receive the value of its collateral.[140] The court distinguished the facts in *Murel*,[141] which involved the confirmation of a reorganization plan denying the creditor any payments for ten years, from the typical case involving supplying an undersecured creditor with adequate protection while the automatic stay is in effect.[142]

The court denied the mortgagee's claim for lost opportunity costs on account of section 506(b).[143] Under section 506(b), only oversecured creditors are entitled to receive interest payments while a debtor is in Chapter 11; therefore, an undersecured creditor may not be reimbursed for lost opportunity costs.[144]

2. *In re South Village, Inc.*

The opinions of former Bankruptcy Judge Ralph R. Mabey have had a substantial impact in the development of the law of adequate protection.[145] In *In re South Village, Inc.*,[146] Judge Mabey addressed

---

138. *Id.* at 827. Judge Schwartzberg reasoned that the courts which granted lost opportunity costs to undersecured creditors misconstrued the adequate protection provisions and ignored the significance of the automatic stay.

139. The court remarked:

> However, as long as the collateral value remains stable the debtor cannot be called upon to compensate the mortgagee for the delay he must endure before parlaying his foreclosure proceeds into a better investment. Adequate protection relates to preservation of the collateral value, and not to compensation for the loss of a better business opportunity.

Id.

140. *Id.* at 827-28.

141. *In re* Murel Holding Corp., 75 F.2d 941 (2d Cir. 1935). For a discussion of *Murel*, see *supra* notes 61-63 and accompanying text.

142. *Pine Lake*, 19 Bankr. at 827-28.

143. *Id.* at 828.

144. *Id.*

145. Judge Mabey wrote one of the leading decisions discussing the concept of adequate protection. *In re* Alyucan Interstate Corp., 12 Bankr. 803 (Bankr. D. Utah 1981). Judge Mabey's scholarly analysis of what interest is entitled to adequate protection has served as the basis for many courts to deny undersecured creditors lost opportunity costs. *E.g.*, *Pine Lake*, 19 Bankr. at 825.

146. 25 Bankr. 987, 988 (Bankr. D. Utah 1982).

the issue of whether an undersecured creditor must be compensated for lost opportunity costs. The court commenced its analysis by stating that adequate protection was designed to protect a secured creditor from any decline in the value of its collateral attributable to the automatic stay.[147] Judge Mabey examined the methods by which adequate protection could be furnished, stressing that the adequate protection provisions of section 361(1) and (2) emphasize "the decrease in value of the property involved."[148] Hence, the court declared, "The authors of the Code thus explained that adequate protection was protection, not of the value of money, nor of any equity cushion, but against depreciation of the collateral when it erodes the allowed secured claim."[149]

The court thought that granting lost opportunity costs would be inconsistent with other provisions of the Bankruptcy Code.[150] Judge Mabey reasoned that section 506(b) authorizes the payment of interest to oversecured creditors, it would be contradictory to the express language of section 506(b) to allow undersecured creditors lost opportunity costs.[151] Further, the court reasoned that since section 1124(b) permits a debtor to reinstate the terms of a defaulted contract prior to confirmation of the plan, it would be cumbersome to require the payment at the prevailing market interest rate — a rate which could be higher than the contract rate.[152]

Judge Mabey also emphasized the other remedies available to undersecured creditors when a debtor's inaction jeopardizes the secured creditors' collateral.[153] For example, the Bankruptcy Code provides secured creditor's with expedited procedures for relief from the auto-

---

147. *Id.* at 989. The court thought that granting lost opportunity costs would be inconsistent with the legislative history and the language of section 361. *Id.* at 990. Judge Mabey's decision also was critical of reliance on *Murel* for the awarding of lost opportunity costs. *Id.* at 990 n.4. The issue in *Murel* was the tenuous margin of security and the ten-year period in which the creditor would have to wait to receive its first payment on the principal of the debt. *Id.* at 991 n.4. Adequate protection, however, was intended to be a temporary protective device until the reorganization plan was confirmed or the case was dismissed. *Id.* For a discussion of *Murel*, see *supra* notes 61-63 and accompanying text.

148. *South Village*, 25 Bankr. at 993 (*citing* H.R. REP. No. 95-595, *supra* note 3). The court examined the legislative history, the prior drafts of the legislation, and the comments by the witnesses at the various hearings, which all indicated that adequate protection was designed to guard against a decrease in the value of the collateral during the automatic stay. *Id.* at 992-93 n.5.

149. *Id.* at 994 (footnote omitted).

150. *Id.* at 997.

151. *Id.*

152. *Id.*

153. *Id.* at 1000-02. Examples of available remedies include liquidation plans, power of dismissal or conversion under section 305(c) of the Bankruptcy Code, and creditor plans administered by creditor committees. *Id.*

matic stay.[154] Moreover, the undersecured creditor may move to dismiss or convert the petition to a liquidation case.[155] Finally, under certain circumstances, a creditor may propose its own reorganization plan, which may compel a debtor to act expeditiously.[156]

C. *The Fifth Circuit and In re Timbers of Inwood Forest Associates, Ltd.*

1. The Panel Opinion

The Fifth Circuit was the first circuit to hold that an undersecured creditor may not receive compensation for lost opportunity costs under the adequate protection provisions of the Bankruptcy Code.[157] The debtor, in *Timbers*,[158] appealed from a district court ruling affirming the bankruptcy court's decision to grant an undersecured creditor compensation for lost opportunity costs.[159] The Fifth Circuit framed the issue before it in the following manner:

> However, as judges, we must be governed by congressional intent as set forth in the Bankruptcy Code. "The relevant question is not whether, as an abstract matter, the rule advocated . . . accords with good policy. The question we must consider is whether the policy [advocated] is that which Congress effectuated by its enactment of" the statute at issue.[160]

The court began its analysis by examining sections 502 and 506.[161] The court of appeals noted that a creditor has a secured claim to the extent of the value of the collateral securing its claim, and an unsecured claim for the amount of the deficiency in the collateral.[162] Judge Randall emphasized the established rule that interest on debts

---

154. *Cf. id.* at 1000. "Creditor relief, during the course of a case, receives priority. Hearings for relief from stay are accelerated under Section 362(e)." *Id.*

155. *Id.* at 1002.

156. *Id.*

157. *In re* Timbers of Inwood Forest Assocs., 793 F.2d 1380 (5th Cir. 1986), *aff'd on rehearing*, 808 F.2d 363 (5th Cir. 1987) (en banc), *aff'd sub nom.* United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., 108 S. Ct. 626 (1988). Debtor appealed a district court ruling that required debtor to make monthly payments for adequate protection of foreclosure rights. *Id.* at 1382. The court held that undersecured creditors are not entitled to postpetition interest payments as compensation for delays in reorganization proceedings during "pendency of the automatic stay." *Id.* at 1416.

158. *Id.*

159. *Id.* at 1382.

160. *Id.* at 1384 (quoting Badaracco v. Commissioner, 464 U.S. 386, 398 (1984)).

161. *Id.* at 1385.

162. *Id.*

does not accrue after a debtor has filed a bankruptcy petition.[163] Moreover, the Bankruptcy Code codified the rule that an undersecured creditor is not entitled to receive interest after the commencement of a corporate reorganization.[164] Accordingly, the court held that not only statutory construction, but also equitable principles warranted the denial of lost opportunity costs to undersecured creditors.[165]

The court then examined section 361 and the methods for supplying a secured creditor with adequate protection:[166]

> The issue presented in this case is whether subsection (3) was intended by Congress to permit the periodic payment to an undersecured creditor of postpetition interest on the value of its collateral when that creditor would not have a claim for postpetition interest at the conclusion of the proceeding, or whether Congress simply intended subsection (3) to permit a bankruptcy judge to fashion methods of protection against a decline in value of collateral alternative to those set forth in subsections (1) (cash payments) and (2) (replacement liens).[167]

The Fifth Circuit doubted that by using the phrase "indubitable equivalent," Congress intended to provide undersecured creditors with lost opportunity costs as a form of adequate protection.[168] The court observed that the phrase "indubitable equivalent" was originally used in *Murel*,[169] which dealt with the confirmation of a reorganization plan.[170] The Fifth Circuit reasoned that the adequate protection provisions were devised to protect a secured creditor against a decrease in value of its collateral during the imposition of the automatic stay.[171] Judge Randall commented,

> [I]n using the "indubitable equivalent" language in § 361(3),

---

163. Judge Randall stated that "[a]s a general rule, creditors are not allowed a claim for interest accruing on their debts during bankruptcy proceedings. Since the middle of the 18th century, bankruptcy law has provided that interest on debts does not accrue after a bankruptcy petition is filed." *Id.* at 1385 (citation omitted).

164. *Id.* at 1386-87.

165. *Id.* at 1387. The court thought the prohibition against paying an undersecured creditor was premised on sound policy considerations that the unencumbered assets should not be employed to benefit one class of creditors to the detriment of another class of creditors. *Id.*

166. *Id.* at 1387-89.

167. *Id.* at 1388.

168. *Id.* at 1388-89.

169. *In re* Murel Holding Corp., 75 F.2d 941 (2d Cir. 1935).

170. *Timbers*, 793 F.2d at 1388.

171. Id. at 1389. The court stated that its examination of the language of section 361 suggested the adequate protection provisions "were intended to protect a secured creditor against a decrease in the value of its collateral" during the imposition of the automatic stay. *Id.*

> Congress conceivably intended to protect the *present value* of a secured creditor's collateral during the stay, rather than simply its *value*. Accordingly, we must conclude that § 361 is not only ambiguous on its face but also when considered in light of the interest provisions of the Code.[172]

Next, the Fifth Circuit directed its inquiry to the legislative history of section 361. The court stressed that during the Congressional hearings none of the witnesses testifying on behalf of financial institutions mentioned compensation for lost opportunity costs as a method of providing adequate protection.[173] Judge Randall further observed that the House version of section 361(3) empowers a bankruptcy court to grant other means of protecting a creditor's allowed secured claim.[174] The court found that the remarks of the legislators responsible for the enactment of the Bankruptcy Code indicated that adequate protection was only intended to protect a secured creditor from misuse or depreciation of its collateral.[175] Finally, the court found the remarks of Representative Don Edwards persuasive, because he stated that an allowed secured claim prohibited the inclusion of unmatured interest.[176] Consequently, the court was skeptical that section 361(3) was intended to provide postpetition interest in the form of lost opportunity cost payments when the allowed secured claim excluded unmatured interest.[177]

---

172. *Id.* (emphasis in original).

173. *Id.* at 1395-96. The Fifth Circuit observed:

> Not one of the many witnesses for secured creditors even mentioned the award of postpetition interest payments or sought compensation for the delay required by the stay. Viewed in this context, it seems unlikely that Congress intended the adequate protection provisions to require periodic payment of postpetition interest to an undersecured creditor.

Id.

174. *Id.* at 1399. "It [§ 361(3)] would have permitted adequate protection to be provided by giving the secured party an administrative expense regarding any decrease in the value of such party's collateral." *Id.*

175. *Id.* The court found persuasive the remarks of Representative Butler, who stated that adequate protection would be required: " '*If a creditor is concerned that property is being misused or depreciating,* the creditor can demand adequate protection or relief from the automatic stay.' " *Id.* (emphasis in original).

176. *Id.* at 1399-1400. The observations of Representative Edwards were significant because of the vital role he played in the enactment of the Bankruptcy Code in the House of Representatives.

177. Judge Randall commented:

> Therefore, the remarks of Rep. Edwards strongly suggest that what was intended to be adequately protected by § 361 is the creditor's allowed secured claim—the value of its collateral. It seems unlikely that § 361(3) was intended to require periodic postpetition interest payments when the very interest to be protected—the allowed secured claim—cannot itself include postpetition interest.

Id. at 1400 (footnotes omitted).

The court found the implementation of *American Mariner* problematic,[178] because it left a series of issues unresolved: 1) when a secured creditor actually becomes entitled to its lost opportunity cost;[179] 2) whether the problems entailed in a state foreclosure proceeding should be considered;[180] 3) whether the proceeds are to be reinvested at the contract or prevailing market interest rate;[181] and 4) whether to apply lost opportunity costs payments to the principal amount of the debt.[182]

The court noted that Congress had created expedited procedures for relief from the automatic stay, because one of the principal complaints of secured creditors revolved around the delay entailed in reorganization proceedings.[183] In addition, Congress had inserted various provisions into the Bankruptcy Code to provide secured creditors with greater leverage in reorganization proceedings.[184]

The court also focused its attention on *American Mariner*, evaluating both its reasoning and its impact on reorganization proceedings.[185] Judge Randall commented that *American Mariner* was responsible for a number of motions to dissolve the automatic stay and, therefore, had disrupted the reorganization process.[186] The Fifth Circuit declared that a major weakness of *American Mariner* was that it

---

178. *Id.* at 1403. For a discussion of *American Mariner*, see *supra* notes 82-104 and accompanying text.

179. *Id.* Courts had reached different conclusions concerning when the lost opportunity cost payments should commence, for instance, the date of petition, the date of motion for relief, or the date of ruling on a motion.

180. *Id.* (Such problems include a delay in the closing process or a delay in selling the property in the hopes of realizing a sale price higher that the forced-sale price.).

181. *Id. American Mariner* indicated that the lost opportunity cost payments should be the lower of the contract or prevailing market rate. *In re* American Mariner, 734 F.2d 426, 435 n.12 (9th Cir. 1984). Nevertheless, if the secured creditor were to be completely compensated, adequate protection would require that the lost opportunity costs compensate the secured creditor at the prevailing interest rate, because the secured creditor would reinvest the proceeds of the foreclosure at the prevailing market rate instead of the contract rate. *In re* Timbers of Inwood Forest Assocs., Ltd., 793 F.2d 1380 (5th Cir. 1986), *aff'd on rehearing*, 808 F.2d 363 (5th Cir. 1987) (en banc), *aff'd sub nom.*, United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 108 S. Ct. 626 (1988).

182. *Id.* at 1403.

183. *Id.* The court stated:

> Most important, Congress provided that motions for relief from the stay are entitled to priority: if the court does not act on a motion for relief from the stay within thirty days, the stay automatically lifts. The 30-day rule is the "most direct attack on the problem of delay and dilatoriness in dealing with requests for relief from the stay."

Id. at 1406 (footnotes omitted).

184. *Id.* at 1405-06.

185. *Id.* at 1411.

186. *Id.* at 1413.

ignored the legislative history of the Bankruptcy Code.[187] Moreover, the Ninth Circuit neglected the Bankruptcy Code provisions and the Supreme Court decisions concerning the payment of postpetition interest to undersecured creditors.[188] The court found the Ninth Circuit's reliance on the phrase "indubitable equivalent" unwarranted.[189] The court further criticized the implicit assumption in *American Mariner* that when a debtor and creditor enter into a transaction the Bankruptcy Code automatically becomes a part of the bargain.[190]

The court declared the *American Mariner* decision flawed because it failed to establish coherent criteria by which the lost opportunity payments were to be governed.[191] Furthermore, the court preferred the rule enunciated by the Eighth Circuit in *Briggs Transportation*,[192] because it afforded a bankruptcy court greater flexibility.[193] Nevertheless, Judge Randall found that language of the statute did not provide for lost opportunity costs.[194] Thus, the imprecise guidelines of *Briggs Transportation* would require substantial litigation to clarify the parameters of the rule.[195]

---

187. *Id.* The Fifth Circuit found the Ninth Circuit's reasoning to be remiss, because *American Mariner* failed to address the remarks of the various sponsors of the legislation which stated that adequate protection was intended to protect a secured creditor against depreciation or misuse of the collateral. *Id.*

188. *Id.* at 1413-14.

189. *Id.* at 1414.

190. *Id.* at 1414-15.

191. *Id.* at 1416.

192. *Id.* For a discussion of *In re* Briggs Transp. Co., see *supra* notes 109-26 and accompanying text.

193. *Timbers*, 793 F.2d at 1416.

194. *See id.* Judge Randall stated, however, that: the "flexibility [in the statute] is difficult to reconcile with the language 'indubitable equivalent' and with the inflexible requirement of complete compensation of *Murel* and the cram-down provision on which *American Mariner* is based." *Id.*

195. *Id.* Judge Randall gave a cogent explanation why the Fifth Circuit was adopting a different rule than the other circuits:

> [W]e are not persuaded that Congress intended in 1978 to make fundamental changes in the adequate protection rules as they had developed before 1978, or to alter, through adequate protection provisions, the settled rules regarding the accrual and payment of interest during the pendency of a bankruptcy proceeding. Further, a rule requiring periodic postpetition interest payments to undersecured creditors would often have a substantial adverse impact on the orderly procedures for the distribution of a debtor's estate upon liquidation or reorganization; would frequently result in a permanent reallocation of the unencumbered assets of an estate from unsecured to undersecured creditors; and would materially alter the rule that all creditors generally share some of the risk in a reorganization proceeding that a successful reorganization will not be feasible. We think it unlikely that Congress would have adopted such a rule—entailing, as it does, major changes in the way in which a reorganization proceeding is conducted—without clear, unequivocal statements to that effect in the bankruptcy statute or, at the least, in its legislative history. No such statements appear. To

2. The En Banc Opinion

On its own motion, the Fifth Circuit withdrew the panel opinion.[196] Subsequently, after a hearing en banc, the panel opinion was restored.[197] The majority found it significant that subsequent to the panel opinion the Family Farmer Bankruptcy Act[198]—which included new adequate protection provisions applicable to farm reorganizations—was enacted.[199] Several witnesses testified to the deleterious impact of *American Mariner* on farm reorganizations because few debtors were able to afford the mandatory opportunity cost payments.[200] Consequently, the court interpreted the omission of the requirement for payment of lost opportunity cost as a disavowal of *American Mariner*.[201] The majority reasoned that the Bankruptcy Code vested a secured creditor with various remedies by which it could enforce its rights against a recalcitrant debtor.[202] The court stated that the best method for protecting all parties in a corporate reorganization is to have the bankruptcy judge play an active and meaningful role in the case.[203]

The dissenting opinion, written by Judge Jones, argued that

> the contrary, the statute and its legislative history strongly suggest, and we hold, that Congress did not intend to provide undersecured creditors with periodic postpetition interest payments on the value of their collateral as an element of adequate protection.

Id. at 1382. The last paragraph reflects the various reasons adopted by the court to support its holding that undersecured creditors are not entitled to lost opportunity costs. The Fifth Circuit analysis is persuasive, because its conclusion is supported by case law, statutory construction, and policy.

196. *In re* Timbers of Inwood Forest Assocs., 802 F.2d 777 (5th Cir. 1986).

197. *In re* Timbers of Inwood Forest Assocs., 808 F.2d 363 (5th Cir. 1987) (en banc), *aff'd sub nom.* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 108 S. Ct. 626 (1988) (Judge Randall wrote the majority opinion, which was joined by Circuit Judges Goldberg, Rubin, Reavley, Politz, Johnson, Williams, Garwood, and Hill. Chief Judge Clark wrote a concurring opinion.).

198. Family Farmer Act of 1986, Pub. L. No. 99-554, tit. III, 100 Stat. 3124 (codified as amended at 11 U.S.C. §§ 1201-31 (Supp. IV 1986)).

199. *Timbers*, 808 F.2d at 364.

200. *Id.* at 364-65.

201. *Id.* at 368-69.

202. *Id.* at 370-72. Other remedies mentioned by the court included relief from an automatic stay, the ability to move for conversion or dismissal and, after 120 days, the right to file a plan of reorganization. *Id.*

203. *Id.* at 373. The court declared:

> Early and ongoing judicial management of Chapter 11 cases is essential if the Chapter 11 process is to survive and if the goals of reorganizability on the one hand, and creditor protection, on the other, are to be achieved. In almost all cases the key to avoiding excessive administrative costs, which are borne by the unsecured creditors, as well as excessive interest expense, which is borne by all creditors, is early and stringent judicial management of the case.

Id. (footnotes omitted).

American Mariner should have been followed, because a proper construction of section 361(3) requires that adequate protection be extended to lost opportunity costs.[204] The dissent reasoned that a secured creditor's rights established pursuant to state law should not be emasculated by a federal bankruptcy law proceeding.[205] In discussing the effect of the automatic stay, Judge Jones stated:

> Put differently, the secured creditor is not so much deprived of a particular piece of property as he is deprived of the use of that property to obtain a certain amount of money at a certain time. The delay resulting from bankruptcy thus imposes a lost opportunity cost, measured upon the nominal value of the collateral, which would not beset the secured creditor under state law. An interpretation of § 361 that effectuates the adequate protection of the "value of the entity's interest in the debtor's property" must recognize the time-value of the secured creditor's rights.[206]

The dissent reasoned that the phrase "indubitable equivalent" included compensation for lost opportunity costs.[207] Further, the dissent was not persuaded that Congress intended to overrule *American Mariner* because of the omission of lost opportunity costs from the new adequate protection provisions in the Family Farmer Bankruptcy Act.[208] In addition, the dissent found that the adequate protection provisions were a sufficient basis to grant an undersecured creditor lost opportunity costs, even though an undersecured creditor was prohibited from receiving postpetition interest pursuant to sections 502 and 506.[209] Finally, the dissent found it consistent with the administrative expense provision of the Bankruptcy Code to grant undersecured creditors lost opportunity costs because of the losses incurred on account of the delay caused by the bankruptcy proceeding.[210]

---

204. *Id.* at 375 (Circuit Judges Gee, Jolly, Higginbotham, and Davis joined in the dissenting opinion.).

205. *Id.* 376-77. Judge Jones, concerned that debtors should not be able to exploit the bankruptcy laws to deprive creditors of their state law rights to foreclose on the collateral, adopted the analysis employed in *American Mariner*. *Id.* at 377.

206. *Id.* at 377.

207. *Id.* at 377-78.

208. *Id.* at 378-79. For a discussion of the Family Farmer Act, see *supra* note 198.

209. *Id.* at 380.

210. *Id.* at 381. Judge Jones observed:

> Compensating the secured creditor for its lost opportunity cost due to bankruptcy delay is consistent with the treatment of all other "administrative" costs of the bankruptcy proceeding. The costs of doing business as a debtor are paid currently and in full during the proceeding, and, whether they are incurred for attorneys and accountants, for the purchase of goods, or for payment of a postpetition tort claim, are borne by the debtor and its unsecured creditors.

V. ARGUMENTS FOR GRANTING LOST OPPORTUNITY COSTS

Secured financing is a vital element of the economy.[211] A secured creditor with a perfected security interest may repossess and liquidate its collateral if a debtor defaults on the loan.[212] A secured creditor in a bankruptcy proceeding has priority over an unsecured creditor or the trustee as a hypothetical lien creditor in a bankruptcy proceeding.[213] Some commentators have contended that secured financing is more efficient because, a secured creditor only has to monitor its collateral, as opposed to an unsecured creditor who must monitor the debtor's entire enterprise.[214]

A secured creditor's rights are established pursuant to state law and are an essential element of the transaction between the secured creditor and the debtor.[215] The debtor should not be permitted to utilize a bankruptcy proceeding to destroy a secured creditor's state law rights.[216] Congress sought to protect a secured creditor's interest in a bankruptcy proceeding. As a result, it required that a secured creditor be adequately protected,[217] and thus Congress remarked:

> The section, and the concept of adequate protection, is based as much on policy grounds as on constitutional grounds. Secured creditors should not be deprived of the benefit of their bargain. There may be situations in bankruptcy where giving a secured creditor an absolute right to his bargain may be impossible or seriously detrimental to the bankruptcy laws. Thus, this section recognizes the availability of alternate means of protecting a secured creditor's interest. Though the creditor

---

Id. Since Congress rejected granting administrative claims to creditors as a form of adequate protection, Judge Jones' analysis is deficient. *See* 2 COLLIER, *supra* note 3, ¶ 362.07.

211. *See* Jackson & Kronman, *supra* note 14, at 1143.

212. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 23-1, at 902 (2d ed. 1980) Professors White and Summers have made the following comments concerning a secured creditor's rights: "If the debtor defaults, the secured creditor can foreclose or otherwise realize on the collateral to satisfy his claim. Second, the security interest becomes 'enforceable against . . . third parties.' " *Id.* (footnote omitted).

213. *See generally,* Jackson & Kronman, *supra* note 14.

214. *Id.* at 1152-53.

215. Comment, *Compensation for Time Value as Part of Adequate Protection During the Automatic Stay in Bankruptcy,* 50 U. CHI. L. REV. 305 (1983).

216. *See* Butner v. United States, 440 U.S. 48, 54-55 (1979) (in resolution of conflicts between circuits, the Court held that since property interests were created and defined by state law, absent a showing of some federal interest which would require a different result, the determination of such interests should be no different in bankruptcy); *In re* American Mariner Indus., 734 F.2d 426, 435 (9th Cir. 1984).

217. H.R. REP. No. 595, *supra* note 3, at 338-40. The adequate protection provisions are based on policy grounds that a secured creditor's property interest in his collateral must be protected during the duration of a reorganization proceeding. *Id.*

> might not receive his bargain in kind, the purpose of this section is to insure that the secured creditor receives in value essentially what he bargained for.[218]

Section 361(3) authorizes a bankruptcy court to grant a secured creditor such relief "as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property."[219] The phrase "indubitable equivalent" was originated by Judge Learned Hand in *Murel,*[220] which concerned the confirmation of a reorganization plan over a dissenting mortgagee. Judge Hand discussed the concept of adequate protection as it related to the time value of money:

> 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 [lien] holders, unless by a substitute of the most indubitable equivalence.[221]

The most important component of a secured transaction is the contract right to repossess the collateral if the debtor defaults and to reinvest the proceeds of the collateral.[222] Awarding lost opportunity costs permits a secured creditor to receive the indubitable equivalent of its bargain, because the creditor receives the interest it could have earned had it been allowed to foreclose on the loan.[223] Although the Bankruptcy Code only authorizes the payment of postpetition interest

---

218. *Id.* at 339.

219. 11 U.S.C. § 361(3) (1982).

220. *In re* Murel Holding Corp., 75 F.2d 941, 941-42 (2d Cir. 1935). For a discussion of *Murel,* see *supra* notes 61-63 and accompanying text.

221. *Id.* at 942.

222. Without the ability to foreclose and realize upon the proceeds of a sale, a secured creditor is in essence an unsecured creditor.

223. If a debtor is abusing the protection of the bankruptcy laws, a secured creditor could be substantially harmed. By compelling a debtor to compensate a secured creditor by making lost opportunity cost payments, the court is forcing the debtor to expedite the reorganization proceeding. This will have a salutary effect on bankruptcy proceedings because debtors will be impelled to file a reorgainzation plan in an expeditious manner. One of the problems in *In re* Monroe Park, 17 Bankr. 934 (D. Del. 1982), was that the debtor had been in default for over a year, and the debtor had also failed to file a reorganization plan within the first five months of the proceeding. Therefore, the circumstances warranted granting the secured creditor lost opportunity cost payments. For a discussion of *Monroe Park,* see *supra* notes 75-81 and accompanying text.

to oversecured creditors,[224] it is consistent with the policies underlying the adequate protection provisions of the Bankruptcy Code to furnish secured creditors with lost opportunity costs.[225] It must be borne in mind that adequate protection was intended to be a flexible concept.[226] Consequently, in some situations, the only manner to provide a secured creditor with the indubitable equivalent of its bargain is to provide it with lost opportunity costs.[227]

The principal flaw with *American Mariner* is that the legislative history of the Bankruptcy Code does not support the conclusion that section 361(3) requires that all undersecured creditors receive compensation for lost opportunity costs.[228] The Eighth Circuit's analysis of the issue is intellectually appealing because it adheres to the proposition that adequate protection relief must be structured to meet the different demands of each case.[229] Nonetheless, the Eighth Circuit failed to enunciate sufficient guidelines for the bankruptcy courts; thus, there will be further litigation concerning what criteria are to be considered in granting lost opportunity costs.[230]

---

224. 11 U.S.C. § 506(a)-(b) (1982 & Supp. IV 1986).

225. *In re* American Mariner Indus., Inc., 734 F.2d 426, 432-34 (9th Cir. 1984).

226. H.R. REP. No. 595, *supra* note 3, at 339 ("[S]ection [361] specifies four means of providing adequate protection. They are neither exclusive nor exhaustive . . . . Th[is] flexibility [of section 361] is important to permit the courts to adapt to varying circumstances and changing modes of financing.").

227. *In re* Briggs Transp. Co., 780 F.2d 1339, 1350-51 (8th Cir. 1985), held that a bankruptcy court has discretion to award lost opportunity costs. For a discussion of *Briggs Transp.*, see *supra* notes 109-26 and accompanying text. *American Mariner*, 734 F.2d at 434, held that an undersecured creditor is always entitled to receive lost opportunity costs. For a discussion of *American Mariner*, see *supra* notes 82-104 and accompanying text. It is significant that the Eighth Circuit emphasized that discretion was to be employed in awarding lost opportunity costs; this approach will enable a bankruptcy court to balance the respective equities in determining whether there is adequate protection.

228. The legislative history is devoid of a definitive statement that adequate protection is intended to protect the value of the claim. Rather, the legislative history discusses the necessity of safeguarding the value of the secured creditor's lien during the pendency of the corporate reorganization. H.R. REP. No. 595, *supra* note 3, at 339. The first two subsections of section 361 are concerned with maintaining the value of the secured creditor's property; thus, they compensate the secured creditor for depreciation of that property.

229. Adequate protection must be tailored to meet the needs and equities of each case. Indeed, the phrase "indubitable equivalent" could be interpreted to mean that in some instances the only manner by which adequate protection could be furnished to a secured creditor would be by providing compensation for lost opportunity costs. For example, when a debtor files on the eve of a foreclosure sale to thwart a secured creditor from realizing on its collateral, a bankruptcy court should consider granting lost opportunity costs because the secured creditor has done everything possible to realize the value of the collateral.

230. The Eighth Circuit has deferred to the discretion of the bankruptcy courts to determine whether to grant lost opportunity costs; consequently, there will be substan-

Companies usually file for protection under the Bankruptcy Code because they are unable to pay their debts.[231] The automatic stay was designed to provide financially distressed companies with temporary relief from the pressures that accompany financial difficulties.[232] If a financially distressed company is compelled to continue making postpetition interest payments to secured creditors, then numerous companies will be unable to conduct successful corporate reorganizations, because the interest payments will engulf their working capital.[233] Hence, the policy favoring corporate reorganizations will be thwarted.[234]

Federal law is found throughout commercial transactions which are created pursuant to state law.[235] Bankruptcy law requires uniformity; therefore, the Constitution empowers Congress to enact laws pertaining to bankruptcy.[236] Congress has inserted several provisions into

---

tial litigation until specific criteria are established concerning the awarding of lost opportunity costs.

231. Companies usually file to take advantage of the automatic stay, which precludes debtor collection activity after the filing of a voluntary petition. 11 U.S.C. § 362 (1982).

232. *See, e.g., In re* Alyucan Interstate Corp., 12 Bankr. 803 (Bankr. D. Utah 1981). The following comments have been written about the importance of the automatic stay:

> The automatic stay, within this framework, is designed "to prevent a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." It grants a "breathing spell" for debtors to regroup. It shields creditors from one another by replacing "race" and other preferential systems of debt collections with a more equitable and orderly distribution of assets. It encourages rehabilitation: debtors may seek its asylum while recovery is possible rather than coasting to the point of no return; creditors, realizing that foreclosure is useless, may rechannel energies toward more therapeutic ends.

Id. at 806 (citations omitted).

233. A company files for protection because it is usually unable to pay its debts. Therefore, if a debtor is compelled to continue to make payments on its obligations during the pendency of the proceeding, the debtor's cash flow crisis will be exacerbated. *In re* Timbers of Inwood Forest Assocs., 808 F.2d 363, 364 (5th Cir. 1987), *aff'd sub nom.* United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., 108 S. Ct. 626 (1988).

234. *See In re* Timbers of Inwood Forest Assocs., 793 F.2d 1380, 1382 (5th Cir. 1986), *aff'd on rehearing,* 808 F.2d 363 (5th Cir. 1987) (en banc), *aff'd sub nom.* United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., 108 S. Ct. 626 (1988).

235. When a transaction is structured as a real estate, commercial, or corporate transaction, attorneys often request an opinion from bankruptcy counsel for the bankruptcy consequences of arranging a transaction in different manners. In this regard, bankruptcy law is similar to tax law in that it influences how business is transacted. *See* Harter & Klee, *The Impact of the New Bankruptcy Code on the "Bankruptcy Out" in Legal Opinions,* 48 FORDHAM L. REV. 277 (1979).

236. U.S. CONST. art. I, § 8, cl. 4. The Bankruptcy and Commerce Clauses of the Constitution are vital to the operation of our national economy. The Commerce Clause enables Congress to establish laws regulating interstate commerce. *See* U.S. CONST. art. I, § 8, cl. 3; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2 (1978). The Bankruptcy Clause authorizes Congress to enact legislation concerning bankruptcy. U.S. CONST. art. I, § 8, cl.

the Bankruptcy Code to protect a secured creditor from a debtor who abuses the safeguards of a corporate reorganization.[237] Adequate pro-

---

4. Therefore, a flaw in the reasoning of *American Mariner* is that it neglects the importance of federal regulation of the economy. *American Mariner* adopts a state's rights approach to commercial law, and it maintains that a creditor's state law rights should be enforced even though the state law rights may conflict with federal law. *In re* American Mariner Indus. Inc., 734 F.2d 426, 435 (1984).

237. The Bankruptcy Code has furnished a creditor with various options to combat debtor misbehavior or nonfeasance. First, if there is debtor misconduct a creditor may make a motion for the appointment of a trustee. 11 U.S.C. § 1104(a) (1982 & Supp. IV 1986). Section 1104(a) states:

> At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—
>
> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
>
> (2) if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of assets or liabilities of the debtor.

Id. The appointment of a trustee is an extraordinary remedy. Official Creditors' Comm. v. Liberal Mkt. Inc., 13 Bankr. 748, 751 (Bankr. S.D. Ohio 1981); Midlantic Nat'l Bank v. Anchorage Boat Sales, Inc., 4 Bankr. 635, 644 (Bankr. E.D.N.Y. 1980).

Second, a creditor can also petition the court for the appointment of an examiner. 11 U.S.C. § 1104(b) (Supp. IV 1986). An examiner investigates the debtor to determine whether there has been fraud, dishonesty, incompetence, misconduct or mismanagement. *Id.*

Bankruptcy Code section 1112(b) permits a debtor to make a motion to convert a corporate reorganization to a liquidation. 11 U.S.C. § 1112(b) (1982 & Supp. IV 1986). Section 1112(b) states:

> Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including—
>
> (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
>
> (2) inability to effectuate a plan;
>
> (3) unreasonable delay by the debtor that is prejudicial to creditors;
>
> (4) failure to propose a plan under section 1121 of this title within any time fixed by the court;
>
> (5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or modification of a plan;
>
> (6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;
>
> (7) inability to effectuate substantial consummation of a confirmed plan;
>
> (8) material default by the debtor with respect to a confirmed plan;
>
> (9) termination of a plan by reason of the occurrence of a condition speci-

tection provisions protect secured creditors, because they protect the value of the collateral.[238] Moreover, the procedures for relief are on an expedited basis.[239] The Bankruptcy Code attempts to provide a secured creditor with a minimum standard of protection of its interest in a bankruptcy proceeding.[240]

VI. Arguments for Denying Lost Opportunity Costs

The automatic stay is an indispensable element of a corporate reorganization proceeding; it was intended to allow the debtor sufficient time to restructure its affairs.[241] The following observations have been made concerning the function of the automatic stay:

> By affording a breathing period in which the estate may be reorganized or liquidated, the stay contemplates that the creditors will be treated in an organized and equitable fashion and to that end, prevents creditors from racing to the courthouse seeking to obtain payment of their claims in preference and to the detriment of other creditors. The imposition of the stay is not to be taken lightly nor to be dismissed cavalierly (citations

---

fied in the plan; or

(10) nonpayment of any fees or charges required under chapter 123 of title 28.

Id.

Third, a creditor also has the remedy of proposing a reorganization plan after the 120 day exclusive period has expired. 11 U.S.C. § 1121(c) (1982 & Supp. IV 1986). The threat of a creditor's plan may force a slothful debtor to expedite the filing of a plan. For a discussion of section 1121, see Rosen & Ruiz-Rodriguez, *Section and Non-Debtor Plans of Reorganization,* 56 Am. Bankr. L. J. 317 (1982).

238. *In re* Alyucan Interstate Corp., 12 Bankr. 803, 808-09 (Bankr. D. Utah 1981).

239. 11 U.S.C. § 362(e) (1982 & Supp. III 1985). Section 362(e) requires that thirty days after a motion for relief from the automatic stay the stay be terminated, unless after notice and hearing the bankruptcy court orders that the stay continue pending the determination of a final hearing. *Id.* Further, the bankruptcy court must commence a final hearing within thirty days after the conclusion of the preliminary hearing. *Id.* At the end of the final hearing, the bankruptcy court may order that the stay be continued if there is a reasonable likelihood that the debtor will prevail at the final hearing. *Id.* Significantly, bankruptcy rule 4001(a)(2) provides that the automatic stay expires thirty days after a final hearing. Fed. R. Bankr. P. 4001(a)(2).

240. *In re* Pine Lake Village Apartment Co., 19 Bankr. 819, 828 (Bankr. S.D.N.Y. 1982) (the threat of conversion to Chapter 7 is an effective remedy).

241. H.R. Rep. No. 595, *supra* note 3, at 340. The following comments have been made about the automatic stay:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

Id.

omitted).[242]

Adequate protection was intended to protect a secured creditor's collateral from any decrease in value resulting from the imposition of an automatic stay.[243] The provisions of section 361(1) and (2) are designed to compensate a secured creditor for any decline in the value of its collateral by either granting the secured creditor periodic cash payments[244] or by granting the secured creditor a replacement lien.[245] Section 361(3) therefore must be interpreted as authorizing the court to furnish adequate protection in a different manner than the previous subsections of section 361.[246] Nevertheless a court, in devising an adequate protection package under section 361(3), must bear in mind that a secured creditor is only entitled to adequate protection of the value of its lien.[247]

The phrase "indubitable equivalent" is an insufficient basis to justify the payment of postpetition interest to undersecured creditors.[248] Not only is the statute devoid of any conclusive statement concerning the authorization of lost opportunity costs, but the legislative history is also bereft of any statement granting undersecured creditors lost opportunity costs.[249] *In re Murel Holding Corp.* concerned the confirmation of a reorganization plan which required a mortgagee to wait ten years to receive payments on its principal.[250] Although *Murel* may be

---

242. *In re* Saypol, 31 Bankr. 796, 799 (Bankr. S.D.N.Y. 1983).

243. *In re* Keller, 45 Bankr. 469, 472 (Bankr. N.D. Iowa 1984); *In re* Sun Valley Ranches, Inc., 38 Bankr. 595, 597 (Bankr. D. Idaho 1984).

244. 11 U.S.C. § 361(1)-(2) (1982 & Supp. III 1985).

245. *Id.*

246. Bankruptcy Code section 361(3) provides a bankruptcy court with the flexibility to authorize adequate protection proposals that are consistent with the other subsections of section 361. General Elec. Mortgage Corp. v. South Village, Inc., 25 Bankr. 987, 990 n.4 (Bankr. D. Utah 1982).

247. *Id.*

248. *In re* Timbers of Inwood Forest Assocs., 793 F.2d 1380, 1388-89 (5th Cir. 1986) (since " 'indubitable equivalent' in § 361(3) refers to a substitute for a particular interest [and] it does not define the interest . . . it is certainly possible that subsection (3) simply gives the court means of providing adequate protection that are alternatives to those set forth in (1) and (2), periodic cash payments and replacement liens . . ." and does not expand the range of substantive creditor interests protected to include postpetition interest to undersecured creditors), *aff'd on rehearing*, 808 F.2d 363 (5th Cir. 1987) (en banc), *aff'd sub nom.* United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., 108 S. Ct. 626 (1988). *But see In re* Deeter, 53 Bankr. 623, 626 (Bankr. N.D. Ind. 1985) (Congress' use of the indubitable equivalent language in section 361 is indicative of an intent to include compensation for the delay in exercising foreclosure rights as a part of adequate protection).

249. *In re* Saypol, 31 Bankr. 796, 800-02 (Bankr. S.D.N.Y. 1983) (analysis of the legislative history of section 361 uncovers no intention to grant undersecured creditors lost opportunity costs).

250. 75 F.2d 941 (2d Cir. 1935). For a discussion of *Murel*, see *supra* notes 61-63 and

germane to a confirmation hearing, it is doubtful that this case is applicable to a motion for adequate protection where the suspension of property rights is temporary.[251] Consequently, an undersecured creditor is not entitled to compensation for lost opportunity costs as a form of adequate protection pursuant to section 361(3).

In denying lost opportunity costs, another argument often advanced is that the Bankruptcy Code prohibits interest payments to undersecured creditors.[252] Section 502 bifurcates an undersecured creditor's claim, because it grants a creditor a secured claim to the extent of the value of its collateral while granting an undersecured creditor an unsecured claim for the balance of its claim.[253] Section 506(b) precludes the payment of postpetition interest to undersecured creditors; however, oversecured creditors are entitled to receive postpetition interest.[254] Principles of statutory construction require that each provision be construed in accordance with the provisions of the entire statute.[255] Accordingly, a proper construction requires the denial of lost

---

accompanying text.

251. Former Judge Mabey made the following distinctions between the standards for confirmation under the Bankruptcy Act and the standards for adequate protection under the Bankruptcy Code section 361:

> This approach, reflecting a coincidence of short and long term remedies for secured creditors in the Act, may be unreliable under the Code. Adequate protection, after all, "is interim protection, designed not as a purgative of all creditor ailments, but as a palliative of the worst: reorganization, dismissal, or liquidation will provide the final relief."

In re South Village, Inc., 25 Bankr. 987, 991 n.4 (Bankr. D. Utah 1982) (quoting *In re* Alyucan Interstate Corp., 12 Bankr. 803, 806 (Bankr. D. Utah 1981)).

252. *In re* Island Helicopter Corp., 63 Bankr. 809, 818 (Bankr. E.D.N.Y. 1986) ("Unmatured post-petition interest on claims that are not oversecured is specifically not allowed under Section 502(b)(2)."); *In re* Keller, 45 Bankr. 469, 472 (Bankr. N.D. Iowa 1984) (refusing to construe section 506 as providing interest payments to undersecured creditors because "to do so would in essence eviscerate the Bankruptcy Code and make Chapter 11 reorganization virtually impossible to accomplish").

253. 11 U.S.C. § 502 (1982 & Supp. IV 1986). Section 506(a) states:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (1982).

254. 11 U.S.C. § 502(b)(2) (Supp. IV 1986). Bankruptcy Code section 502(b)(2) continues the rule that there is a suspension of the accrual of postpetition interest when a bankruptcy petition is filed. 3 COLLIER, *supra* note 3, ¶ 502.02.

255. 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (N. Singer 4th ed. 1984). "A statute is passed as a whole and not in parts or sections and is animated by one general

opportunity costs to undersecured creditors.[256]

A strong tradition prohibits the accrual of postpetition interest in bankruptcy proceedings.[257] The Supreme Court has stated:

> Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment — a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of *all* interests involved . . . . "[T]he delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate."[258]

Indeed, the prohibition of postpetition interest is intended to benefit unsecured creditors on the equitable premise that unencumbered as-

---

purpose and intent. Consequently, each part or section should be construed so as to produce a harmonious whole." *Id.* (footnote omitted); *see also* United States v. Allen, 605 F. Supp. 864, 871 (W.D. Pa. 1985) (citing SUTHERLAND).

Judge Buschman employed a strict statutory analysis to buttress his conclusion that an undersecured creditor is not entitled to lost opportunity costs:

> Turning as we must to the statutory language of not only the section expressly involved but also other integrated provisions, it is clear from the language employed in §§ 361(1) and (2) that "adequate protection" contemplates protecting the secured creditor only from "a decrease in the value of such entity's interest" in the collateral due to the imposition of the stay. This emphasis by Congress on a decline in the value of the collateral, as shown by the repetition of the term when expressly referring to the automatic stay, is fairly conclusive.

In re Saypol, 31 Bankr. 796, 799-800 (Bankr. S.D.N.Y. 1983) (footnotes omitted).

A strict construction of the Bankruptcy Code is consistent with the Supreme Court's interpretation of the securities laws. *See* Cuevas, *Rule 10b-5 and Burdens of Persuasion: A Preponderance is Enough*, 12 CAP. U.L. REV. 495 (1983). The Court's holdings in both Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), and Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), employed strict statutory construction to limit the applicability of the securities laws, The Supreme Court scrutinized the language of the securities laws to reach its holdings.

256. *In re* South Village, Inc., 25 Bankr. 987, 997 (Bankr. D. Utah 1982) ("Opportunity cost, if required as an element of adequate protection, may be incongruent with the Code.").

257. Sexton v. Dreyfus, 219 U.S. 339, 344 (1911) (the United States follows the English bankruptcy system which has, for over a century and a half, not computed postpetition interest); *In re* Boston and Marine Corp., 719 F.2d 493, 495 (1st Cir. 1983) ("It is a well-established principle that in bankruptcy and other insolvency proceedings interest upon claims ceases to accrue at the initiation of the proceedings."), *cert. denied*, 466 U.S. 983 (1984); Fortgang & King, *The 1978 Bankruptcy Code: Some Wrong Policy Decisions*, 56 N.Y.U. L. REV. 1148, 1149 (1981) (routine principle of construing Bankruptcy Act of 1898 is that interest on unsecured claims ceases to accrue as of filing date of bankruptcy petitions).

258. Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 163 (1946) (quoting Thomas v. Western Car Co., 149 U.S. 95, 116-17 (1893)) (emphasis added).

sets will not be utilized to benefit one class of creditors to the detriment of another class.[259] Therefore, when all these factors are considered, the provisions of the Bankruptcy Code prohibit the payment of lost opportunity costs.[260]

Allowing undersecured creditors lost opportunity costs would have an adverse consequence on corporate reorganizations.[261] Numerous companies commence corporate reorganization proceedings, because they have encountered a cash flow crisis which prevents them from paying their debts on a regular basis.[262] Companies lacking sufficient cash flow to make lost opportunity payments will be forced into liquidation.[263] Consequently, Congress omitted lost opportunity payments as a form of adequate protection in the Family Farmer Bankruptcy Act.[264] Accordingly, granting undersecured creditors lost opportunity costs would be poor public policy.

Finally, the Bankruptcy Code furnishes an undersecured creditor with various options in a corporate reorganization. First of all, the secured creditor may dismiss or convert the case.[265] Moreover, if the debtor fails to act, the secured creditor may propose its own plan.[266] Furthermore, relief from the automatic stay is on an expedited basis.[267]

---

259. Nicholas v. United States, 384 U.S. 678, 683-84 (1966).

260. The Fifth Circuit has commented:

> In summary, the interest provisions of the Code and its predecessors, as interpreted by the Supreme Court for almost a century, are premised on the equitable principle that the unencumbered assets of a debtor's estate will not be used to benefit one class of creditors at the expense of another class. Such would be the case if unencumbered assets, otherwise available for the payment of unsecured claims, were used to pay postpetition interest on unsecured debt.

In re Timbers of Inwood Forest Assocs., 793 F.2d 1380, 1387 (5th Cir. 1986), *aff'd on rehearing*, 808 F.2d 363 (5th Cir. 1987), *aff'd sub nom.* United Sav. Ass'n. of Texas v. Timbers of Inwood Forest Assocs., 108 S. Ct. 626 (1988).

261. *Timbers*, 808 F.2d at 364.

262. A. DEWING, THE FINANCIAL POLICY OF CORPORATIONS 1285 (4th ed. 1941).

263. O'Toole, *Adequate Protection and Postpetition Interest in Chapter 11 Proceedings*, 56 AM. BANKR. L.J. 251, 274 (1982).

264. *Timbers*, 808 F.2d at 369. For a discussion of the Family Farmer Act, see *supra* note 198.

265. 11 U.S.C. § 1112(b) (1982 & Supp. III 1985). The moving party bears a heavy burden since the court will be reluctant to convert the proceeding on mere speculation. Consequently, although conversion is available as a remedy, it is a drastic remedy which must be granted cautiously. *Id.* For the statutory language of § 1112(b), see *supra* note 237.

266. 11 U.S.C. § 1121(c) (1982 & Supp. III 1985).

267. 11 U.S.C. § 362(d)-(f) (Supp. III 1985); 11 U.S.C. § 362(g) (1982). These provisions were designed to furnish expedited relief for an aggrieved secured creditor. Nevertheless, the provisions for expedited relief will only work if the judges enforce these provisions. If a secured creditor encounters a bankruptcy judge who is averse to rendering a decision within the period authorized by the Bankruptcy Code and Rules, then the secured creditor will be compelled to mandamus the bankruptcy judge. Mandamus is sel-

These provisions help to protect a secured creditor from a debtor who is misusing the protection of the Bankruptcy Code.[268]

VII. The Supreme Court's Decision

The Supreme Court granted certiorari to resolve the conflict among the circuits regarding whether an undersecured creditor was entitled to receive lost opportunity costs under section 362(d)(1).[269] The Court, in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*[270] unanimously held that an undersecured creditor is not entitled to receive compensation for lost opportunity costs.[271] In an opinion written by Justice Scalia, the Supreme Court rejected the petitioner's contention that an undersecured creditor's interest in property under Bankruptcy Code section 362(d)(1) extends to the secured creditor's right to take immediate possession of the collateral and apply it towards the debt.[272] The Court analyzed the phrase "interest in property" in relation to the other sections of the Bankruptcy Code defining secured creditor's rights.[273] Justice Scalia emphasized that granting postpetition interest to undersecured creditors was in contravention of section 506(b), which only authorizes the payment of postpetition interest to oversecured creditors.[274] The Court also held

---

dom employed because the consequences can be severe. A bankruptcy attorney will be reluctant to alienate a bankruptcy judge since the attorney's livelihood is somewhat dependent on the judge's good will.

268. 11 U.S.C. § 1104(b) (1982). For the statutory language of § 1104(b), see *supra* note 236. Other Bankruptcy Code provisions enable creditors to maintain control of a recalcitrant debtor. *See supra* notes 237-40 and accompanying text.

The United States can also play a vital role in creating a successful reorganization. 28 U.S.C. § 581 (Supp. IV 1986) and 28 U.S.C. § 586 (1982 & Supp. IV 1986). The United States Trustee conducts the section 341 meetings, 11 U.S.C. § 341 (1982 & Supp. IV 1986), and monitors the debtor's activities to insure that the debtor is complying with the applicable provisions of the Bankruptcy Code.

269. United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., 107 S. Ct. 2459 (1987).

270. 108 S. Ct. 626 (1988).

271. *Id.*

272. *Id.* at 630.

273. *Id.* The Court observed:

> Nonetheless, viewed in the isolated context of § 362(d)(1), the phrase could reasonably be given the meaning the petitioner asserts. Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

Id. (citations omitted).

274. *Id.* at 630-31 (This section of Justice Scalia's opinion is another example of the Court's strict construction of statutes. The Court places great emphasis on the language

that the petitioner's argument was inconsistent with section 552,[275] because awarding postpetition interest would enable the undersecured creditor to acquire the postpetition assets of the estate without an after-acquired property clause.[276] Finally, the Supreme Court reasoned that the petitioner's contentions were inconsistent with section 362(d)(2).[277] An undersecured creditor who seeks relief pursuant to section 362(d)(2) must establish that he is undersecured and that the property is not necessary for an effective reorganization.[278]

The petitioner, however, advocated that the inability of an undersecured creditor to take immediate possession of the collateral is sufficient cause to terminate the automatic stay under section 362(d)(1).[279] This interpretation of section 362(d)(1) would have rendered section 362(d)(2) inoperative.[280] The Court also stated that despite petitioner's argument, the phrase "indubitable equivalent" in section 361(3) was an insufficient basis for granting undersecured creditors lost opportunity costs.[281] Justice Scalia therefore found that the petitioner's reliance on *Murel*[282] was misplaced, because the respective standards for granting adequate protection and confirming a reorganization plan are different.[283]

Justice Scalia rejected the argument that the legislative history supported granting an undersecured creditor lost opportunity costs.[284] The Court reasoned that the express language of the Bankruptcy Code prohibits an undersecured creditor from receiving postpetition interest.[285] Finally, the petitioner asserted that under the Bankruptcy Act, an undersecured creditor was entitled to relief from the automatic stay by foreclosing on the collateral.[286] The thrust of the petitioner's argument was that "Congress would not have withdrawn this entitlement

---

employed by Congress, and thus, without a clear mandate, the Court is averse to expanding the purview of a statute.).

275. 11 U.S.C. § 552 (1982 & Supp. IV 1986).

276. *Timbers*, 108 S. Ct. at 631-32.

277. *Id.* at 632.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 633-34.

282. *In re* Murel Holding Corp., 75 F.2d 941 (2d Cir. 1935). For a discussion of Murel, see *supra* notes 61-63 and accompanying text.

283. *Timbers*, 108 S. Ct. at 633-34.

284. *Id.* at 635.

285. *Id.* at 634. In responding to petitioner's argument that the legislative history suggests secured creditors should "not be deprived of the benefit of their bargain," *id.*, the Court made the following comment: "Such generalizations are inadequate to overcome the plain textual indication in §§ 506 and 362(d)(2) of the Code that Congress did not wish the undersecured creditor to receive interest on his collateral during the term of the stay." *Id.* (citation omitted).

286. *Id.* at 634-35.

without . . . providing . . . interest on the collateral during the stay."[287] Justice Scalia declined to accept the petitioner's argument. Instead, the Court noted that under Chapter X or XII, an undersecured creditor did not have a right to foreclose if there was a reasonable prospect for a reorganization.[288]

VIII. CONCLUSION

Some business organizations file for bankruptcy because they are unable to pay their debts due to their lack of cash flow. Troubled enterprises utilize the "breathing spell"[289] furnished by the automatic stay to restructure not only their capital structure, but also their business operations.[290] By permitting undersecured creditors to receive compensation for lost opportunity costs, the debtor must concern itself with automatic stay litigation and ponder how to make lost opportunity costs payments.[291] Many companies are unable to afford lost opportunity payments because they lack the cash flow sufficient to continue making payments on secured debt.[292] After recognizing the problem created by *American Mariner,* Congress adopted new adequate protection provisions in the Family Farmer Bankruptcy Act of 1986.[293] Paying lost opportunity costs may be acute for small businesses during periods of rampant inflation.[294] Furthermore, since *American Mariner* was decided, no rule has been established concerning the amount of interest to be paid, creating problems in periods of rapid inflation or deflation.[295]

Corporate reorganization plays a vital function in the American economy and this function should not be diluted by an over-emphasis of the rights of a secured creditor.[296] Due process clause litigation has

---

287. *Id.* at 635.

288. *Id.*

289. *Timbers,* 793 F.2d 1380, 1387 (5th Cir. 1986).

290. Prior to the filing of a bankruptcy petition, the debtor's affairs are in a state of disarray. The automatic stay enables a debtor to take sanctuary from its creditors. The period after the petition is filed is critical, because this is when the debtor has an opportunity to restructure its operations. *Id.* If undersecured creditors are granted lost opportunity costs, the debtor will be besieged by a battery of motions to dissolve the automatic stay. *Id.* at 1408-10. Consequently, the debtor will become preoccupied with bankruptcy court litigation instead of attempting to reorganize its business. *Id.*

291. *Id.* at 1413.

292. *In re* Keller, 45 Bankr. 469, 473 (Bankr. N.D. Iowa 1984).

293. *Id.* at 473-74. For a discussion of the Family Farmer Act, see *supra* note 198.

294. *See generally* Fortgang & Mayer, *Valuation in Bankruptcy,* 32 UCLA L. REV. 1061, 1076-81 (1985).

295. *Id.*

296. The Ninth Circuit, in *American Mariner,* ignored the significant role of the bankruptcy system in the American economy. The ability of a struggling enterprise to restructure itself while insulated from the demands of creditors is vital. Debtors are not

tolerated the mutation of property rights to advance significant public policy goals.[297] Similarly, the automatic stay alters a secured creditor's property rights, but the adequate protection provisions establish a minimum standard of protection for a secured creditor.[298] The automatic stay was intended to be a temporary remedy,[299] hence, if an at-

---

the only party to benefit from corporate reorganization under the bankruptcy system; numerous other parties, such as employees and general unsecured creditors also benefit. The employees benefit because they are able to retain their employment. General creditors gain because, if there were a liquidation, their interests would usually be decimated. Therefore, *American Mariner's* emphasis on the rights of a secured creditor, coupled with its de-emphasis on the rights of debtors and adversely affected third parties, disregards an important public policy.

The Eighth Circuit's analysis in *Briggs Transportation Co.*, 780 F.2d 1339 (1985), is significant because it adopted a case-by-case standard to determine whether an undersecured creditor is entitled to lost opportunity costs. *Id.* at 1350-51. The court in *Briggs*, however, failed to ascertain the weight to be accorded public policy factors when a bankruptcy court conducts its balancing test. Therefore, the public policy underlying corporate reorganization—that of encouraging the restructure of troubled enterprises leading to their long-term survival—has been disregarded in the cases granting lost opportunity costs.

297. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (landmarks preservation law preventing erection of building utilizing air rights above Grand Central Terminal does not constitute an unjust taking under the due process clause); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (town's prohibition of excavation below the water table was not an unjust taking of property of plaintiff who had been performing such excavations for over 30 years).

See also Rogers, *The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973, 1019-21 (1983) (discussing different results when government action "completely" destroys property value, as opposed to governmental action causing "partial" destruction); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 151-54 (1971) (contrasting a view of property rights that focuses on activities within the user's boundaries with a view focusing on the interrelationship between unrelated pieces of property); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1166-72 (1967) (examining the conflicting case law in light of the various policy goals).

Corporate reorganizations advance an important public policy goal: the rehabilitation of financially distressed enterprises. The commencement of a corporate reorganization brings the debtor and its creditors under the purview of the Federal Bankruptcy Code. Section 362(a) of the Code prevents a creditor from enforcing its state law right to foreclose on the collateral. 11 U.S.C. § 362(a) (1982 & Supp. IV 1986). The mutation of a secured creditor's state law right to foreclose is tolerated because: (1) it is only a temporary suspension of a creditor's state law rights; and (2) during the period in which the automatic stay is in effect, the secured creditor is entitled to receive adequate protection.

298. *See* 2 COLLIER, *supra* note 3, ¶ 361.01[1].

299. *See In re* BBT, 11 Bankr. 224, 232 (Bankr. D. Nev. 1981). The following comments are pertinent:

> It must be remembered that Section 362 is designed as a holding pattern for secured claims under the Code providing there is adequate protection until a plan takes hold. Should the case be dismissed, or confirmation denied, the secured claimant is entitled to the interim adequate protection. If a plan is con-

tempted corporate reorganization evolves into a quagmire, a secured creditor has various options to correct debtor misbehavior.[300] To allow the payment of lost opportunity costs is detrimental not only to the debtor, but also to the unsecured creditors.[301] Consequently, the payment of lost opportunity costs has pernicious effects on corporate reorganizations.

The Supreme Court's holding in *Timbers* is correct. Bankruptcy Code sections 502 and 506 make it evident that an undersecured creditor is not entitled to be compensated for lost opportunity costs.[302] A creditor has a secured claim to the extent of the value of its lien, and an unsecured claim for the remainder.[303] Moreover, a series of Supreme Court cases deny the payment of postpetition interest,[304] and granting lost opportunity costs is clearly a departure from established precedent.[305] In addition to these cases, the Bankruptcy Code does not explicitly provide for the payment of such costs.[306] Furthermore, the first two subsections of section 361 discuss compensation for the decreases in value of the collateral.[307] Therefore, the Bankruptcy Code does not authorize the payment of lost opportunity costs.[308]

The divergent holdings concerning the payment of lost opportunity costs demanded that the Supreme Court intervene and determine the issue. Although various intellectual arguments are made in support of granting lost opportunity costs to undersecured creditors, these ar-

---

firmed the secured claimant is entitled to the rights provided in 11 U.S.C. § 1129 and to election under 11 U.S.C. § 1111(b)(2).

Id. (footnote omitted).

One of the problems created by the courts in *American Mariner* and its progeny is that they dramatically shift the critical decision-making period of a reorganization from the confirmation of the reorganization plan to the motion to dissolve the automatic stay.

300. *See supra* notes 153-57, 202, 237, 265-68 and accompanying text.

301. Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 164, 166 (1946); Ticonic Nat'l Bank v. Sprague, 303 U.S. 406, 412 (1938).

302. *In re* Island Helicopter Corp., 63 Bankr. 809, 818 (Bankr. E.D.N.Y. 1986).

303. *In re* Saypol, 31 Bankr. 796, 800 (Bankr. S.D.N.Y. 1983).

304. *See, e.g.*, United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 108 S. Ct. 626, 631 (1988):

> It was considered unfair to allow an undersecured creditor to recover interest from the estate's unencumbered assets before unsecured creditors had recovered any principal. . . . [I]t is incomprehensible why Congress would want to favor undersecured creditors with interest if they move for it . . . at the inception of the reorganization process . . . but not if they forbear and seek it only at the completion of the reorganization.

Id.; *Vanston Bondholders*, 329 U.S. at 164, 166 (cited by the *Timbers* Court); *Ticonic*, 303 U.S. at 412 (cited by the *Timbers* Court).

305. *See supra* text accompanying notes 130-209.

306. *In re* Saypol, 31 Bankr. at 800.

307. 11 U.S.C. § 361(1)-(2) (1982 & Supp. IV 1986).

308. *Timbers*, 108 S. Ct. at 629-33 (a detailed analysis of several sections of the Code reaches this conclusion).

guments are not only contrary to the express provisions of the Bankruptcy Code, but also are contrary to established public policy. In resolving the conflict among the circuits, the Supreme Court's decision to deny lost opportunity costs was the correct approach. The Court's decision in *Timbers* recognizes the public policy elements of reorganization under Chapter 11, adopts a cogent interpretation of statutory construction, and incorporates the arguments of established precedent.