CRAM DOWN II1(1)

by

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I. INTRODUCTION

1. The contours of the fair and equitable rule,2(3) like those of the Bankruptcy Clause of the Constitution,3(4) "can best be fixed by the gradual process of historical and judicial 'inclusion and exclusion." 4(5) Although one commentator 5(6) has had the temerity to expound on "All You Ever Wanted to Know" about the rule, comprehension of the fair and equitable rule unquestionably involves investigation "into a field whose boundaries may not yet be fully revealed."6(7) This article explores a small, but quite important, part of that field -- the uncodified aspects of the fair and equitable rule.

2. The Bankruptcy Code7(8) codifies the fair and equitable rule in section 1129(b).8(9) The codification is divided into two parts. Paragraph 1 sets forth the general rule that the plan must be "fair and equitable" with respect to an impaired dissenting class of claims or ownership interests.9(10) Paragraph 2 provides requirements that are included within the fair and equitable rule as applied to such a dissenting class.10(11)

3. The requirements of section 1129(b)(2) are a necessary part of the fair and equitable rule; but these requirements may not be sufficient to define the rule completely.11(12) The preamble to paragraph (2) states that "the condition that a plan be fair and equitable with respect to a class includes the following requirements . . . ."12(13) As a matter of statutory construction, the term "includes" is "not limiting"13(14) but is open ended. The legislative history of the Bankruptcy Code14(15) as well as court opinions15(16) support this view. For example, the legislative history states that some factors which are "fundamental" to the fair and equitable rule were omitted from the statute "to avoid statutory complexity and because they would undoubtedly be found by a court to be fundamental to 'fair and equitable' treatment of a dissenting class."16(17) The identification and explication of these omitted fundamental factors is the focus of this article.17(18)

II. UNCODIFIED ASPECTS OF THE FAIR AND EQUITABLE RULE.

A. No Senior Class May be Compensated More Than in Full.

4. The legislative history of the Bankruptcy Code gives but one example18(19) of an uncodified aspect of the fair and equitable rule:

> [A] dissenting class should be assured that no senior class receives more than 100 percent of the amount of its claims.19(20)

5. At first glance, this 100% limitation appears obvious -- it is unfair and inequitable for a claim to be paid more than in full. Court opinions mention this standard without supporting authority20(21) precisely because they interpret the terms "fair" and "equitable" to have

literal meanings21(22) as well as to constitute terms of art.

6. It remains to be seen, however, whether literal application of the uncodified 100% requirement will pertain in all cases. Consider the example of a dissenting senior class and a dissenting junior class of claims. While application of the 100% limitation in a case concerning a dissenting junior class places a cap on what a senior class of claims may receive under a plan, the codified fair and equitable rule itself requires the dissenting senior class to receive, on a present value basis, consideration equal to22(23) or at least equal to23(24) the amount of allowed claims in the class. Taken together, the 100% limitation and the codified fair and equitable rule leave no leeway for value received by the senior class to vary above or below the allowed claims of the senior class. Such precision is impractical whenever the value of the consideration received involves deferred cash payments or otherwise is in doubt. Courts,24(25) commentators,25(26) and Congress26(27) have recognized the imprecision of valuation under the fair and equitable rule. To the extent valuation "requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made."27(28) Therefore, it would not be surprising for a court to reconcile the uncertainty of valuation with the 100% limitation recognizing a range of values for consideration distributed under a plan. Allowing a margin of uncertainty with respect to valuation could conceivably result in a senior class actually receiving more than full payment.

7. Another example where the 100% limitation might not be applied literally occurs when one senior class receives 105% of its claims with the extra 5% coming out of the consideration received by another accepting senior class. In this circumstance, a dissenting junior class should not be able to block confirmation on the basis of the 100% limitation because senior classes in the aggregate have not been compensated more than 100%.28(29)

8. These examples and others29(30) indicate that the 100% limitation should not apply across the board. To be sure, it may be stated generally that a senior class may not receive, on a present value basis, more than 100% of its allowed claims. But the 100% limitation should not be applied by the courts where to do so would defeat general notions of fairness and equity.

B. A Senior Dissenting Class Must be Compensated for its Loss of Priority Relative to a Junior Class.

9. Courts interpreting the fair and equitable rule under the Bankruptcy Act30(31) permitted a plan to give senior creditors inferior securities31(32) but fashioned an exception requiring compensation for loss of priority when a senior class received inferior securities under a plan identical to securities received by a junior class.32(33) Under the absolute priority rule, application of this step-up exception resulted in senior creditors receiving securities with a reorganization value in excess of the allowed amount of their claims.33(34) The notion was that the rule required compensation for the senior creditors' entire "bundle of rights" including the loss of relative priority over junior debt and the resulting increased risk of nonpayment.34(35) The amount of compensation varied depending upon the facts of each case requiring "practical adjustments" rather than a rigid formula.35(36)

10. Application of the step-up exception under the Bankruptcy Code requires analysis. Congress expressly intended that the step-up exception to the fair and equitable rule apply under the Bankruptcy Code.36(37) But, as previously stated, Congress intended that the 100%

limitation apply as well.37(38) This seems to create a conflict to the extent the 100% limitation appears to prohibit compensation in excess of 100% of the allowed amount of a claim but the step-up exception appears to require it.

11. One commentator has suggested resolving this inconsistency by suggesting the following:38(39)

> [T]he components of a claim include not only the amount of the claim, but also the quality of the claim, reflected in its priority. . . . Using this definition of a claim, one can conclude that a post-reorganization claim . . . greater in amount but lesser in rank and likelihood of payment than its pre-reorganization counterpart really constitutes no more than 100 percent of its pre-reorganization value.

This approach is questionable since the increased interest rate required to be paid on an inferior security is designed to compensate for the increased risk of nonpayment.

12. A different approach is to recognize that the fair and equitable rule continues to protect a creditor's entire bundle of rights including the right to priority (or to a less risky security).39(40) Hence compensation must be made based on the allowed amount of the creditor's claim plus an amount attributable to the loss of any priority right.

13. Thus, a plan that fails to compensate a dissenting senior class for loss of priority rights should not be confirmed.40(41) This approach resolves the conflict between the 100% limitation and the step-up exception by determining that the step-up exception deals with the allowed claim and an additional right whereas the 100% limitation deals with only the allowed claim.41(42)

C. It is Unclear Whether a Senior Dissenting Class is Entitled to be Compensated for Any Right it has to Receive Postpetition Interest Before Junior Classes May Participate Under a Plan.

14. As a matter of contract, a senior dissenting class may have bargained to receive postpetition interest in a bankruptcy case before junior classes may participate.42(43) Unless the debtor is solvent on a liquidation valuation43(44) or the senior dissenting class is oversecured,44(45) there is no express statutory right for the senior dissenting class to demand payment of postpetition, pre-effective date interest under a plan. Nevertheless, under Chapter X of the Bankruptcy Act,45(46) courts sometimes construed the fair and equitable rule to require the payment, under a properly drafted contract, of postpetition interest46(47) to a senior class before junior classes47(48) or shareholders48(49) were entitled to participate.

15. Under the Bankruptcy Code, as a general rule, postpetition interest is disallowed as part of an undersecured or unsecured creditor's claim.49(50) Thus, even though the codified elements50(51) of the fair and equitable rule require the allowed amount of claims in a senior dissenting class to be provided for in full if a junior class is to participate, no provision for postpetition interest appears to be required because the "allowed claim" does not include postpetition interest.51(52) Therefore, any entitlement to payment of postpetition interest in these circumstances must be found, if at all, in uncodified aspects of the fair and equitable rule under the Bankruptcy Code.

16. Case law under the Bankruptcy Code does not answer whether the fair and equitable rule requires the payment of postpetition interest to a senior dissenting class before junior classes may receive principal.52(53) Commentators who have addressed the issue are unsure whether the requirement exists or should exist under the Bankruptcy Code.53(54) Thus, the issue remains unresolved.

17. It is possible to contend that postpetition interest is one of the creditor's "bundle of rights" that must be protected, similar to the loss of priority under the step-up exception.54(55) This argument, however, may prove too much as many rights in a creditor's bundle are altered or destroyed in applying the fair and equitable rule.55(56) For example, a due on sale clause may be ignored or a prepayment penalty, default rate of interest, and late charges may be eliminated under application of the fair and equitable rule.56(57)

18. Perhaps the creditor's bargain to be compensated for postpetition interest can be abrogated as well. Certainly the Supreme Court has stated57(58):

> It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor. . . . In this case . . . we do not think that imposition of interest on . . . unpaid interest can be justified . . . .

19. At least one court applied this principle under Chapter X of the Bankruptcy Act to disallow postpetition interest.58(59)

20. It is the Bankruptcy Code's legal prohibition on pre-confirmation payment of principal59(60) coupled with the delay inherent in a reorganization case that causes postpetition interest to accrue. But if the senior creditor does not cause the delay, it is not clear that it should be denied postpetition interest under the fair and equitable rule.60(61)

21. Yet in a related context, the Supreme Court has construed the Bankruptcy Code to impose the risk of delay on an undersecured creditor who has not caused the delay.61(62) Moreover, when the debtor is insolvent on a liquidation valuation, this risk is borne by undersecured and unsecured creditors, each of which has no right to demand or receive postpetition interest as part of a consensual plan. It is doubtful that the fair and equitable rule will be interpreted in a manner to provide postpetition interest to and eliminate the cost of delay for a dissenting senior class. Such an interpretation would discourage consensual plans, and, in the case of undersecured creditors, would be difficult to reconcile with the Supreme Court's holding in Timbers. Perhaps if the dissenting class is to be entitled to receive compensation for postpetition interest under the fair and equitable rule it should bargain for a surplus of security or not be heard to complain.62(63) Only time will tell.

D. It is Unclear Whether a Senior Dissenting Class May be Forced to Take Inferior Securities If a Junior Class Receives Superior Securities or Cash.

22. As previously noted, the fair and equitable rule permits a plan to distribute inferior securities63(64) to a senior class on a par with securities received by junior classes as long as the senior class is compensated for its loss of relative priority.64(65) It is unclear, however, whether a plan may give a senior dissenting class inferior securities while giving junior classes superior securities or cash.

23. Under the Bankruptcy Act, the Court of Appeals for the Third Circuit held in a railroad reorganization case65(66) that under the fair and equitable rule Conrail Securities could not be forced on senior administrative claimants when junior creditors were receiving cash.66(67) The court recognized that "flexibility must be the hallmark of railroad reorganizations,"67(68) but the court nevertheless reasoned "that cash is plainly a superior consideration which, if it is to be distributed, must be distributed to claimants with the highest priorities."68(69)

24. If the court's holding is correct, the effect on application of the fair and equitable rule in chapter 11 cases can be profound because the flexibility in distribution of consideration under chapter 11 plans will be limited severely when a senior class dissents. The court's holding appears to be based on an extension of the Supreme Court's holding in a different context that a plan could not be confirmed "because it provides junior creditors with immediate partial payment, while making the United States with a prior claim accept delayed and therefore discounted payment of its claim with all the attendant risks."69(70) But the court overlooked that the reason the United States was entitled to be first paid was not based on the fair and equitable rule, but on a separate federal statute which provided at that time70(71) for all debts due the United States to be first paid in insolvency proceedings.71(72) It appears to be unwarranted to extend this reasoning to apply to senior creditors who do not have the benefit of a federal statute requiring them to be paid first in time before anyone else may be paid at all.

25. Contrary authority under the Bankruptcy Act permitted junior creditors to receive cash and senior creditors to receive securities reasoning that "it is not material out of what assets they are paid . . . [s]o long as they receive full compensatory treatment . . . ."72(73) This persuasive view probably will apply under the Bankruptcy Code when such a distribution is otherwise fair and equitable.

E. The Fair and Equitable Rule Precludes the Issuance of "Worthless Securities".

26. When the fair and equitable rule applies, confirmation of a plan generally73(74) requires valuation of the enterprise as a going concern.74(75) Traditionally, the Supreme Court generally75(76) has required this going concern value to be computed by using a capitalization of future earnings method.76(77) Under the Bankruptcy Act, once the going concern or reorganization value of the enterprise was computed, the value was applied to classes of creditors and shareholders in an order of absolute priority.77(78) Cash, reorganization securities, and other consideration to be distributed under the plan could not exceed the reorganization value. Thus, the issuance of "worthless securities"78(79) was prohibited.79(80) Stated another way, there was a recognition that the issuance of securities unsupported by reorganization value would dilute the value of the common stock distributed.80(81)

27. Under the Bankruptcy Code, at first glance it may appear that section 1129(b)(2) dispenses with the requirement of computing reorganization value. But such is not the case.81(82) Under a plan either the estate is liquidated piecemeal, the business is sold as a going concern, or equity securities in the reorganized company are allocated to classes. In each possibility the enterprise must be valued as a going concern either to make sure that the disposition of assets is fair or to value the equity securities distributed or retained under the plan. The legislative history of the Bankruptcy Code supports this conclusion.82(83)

28. The prohibition on the issuance of "worthless securities" likewise appears to have survived as part of the fair and equitable rule under the Bankruptcy Code. The Supreme Court has recognized that the retention of an apparently worthless proprietorship interest by a debtor would wrongfully deprive a senior class of part of the upside value to which it is entitled.83(84) Whether this principle is seen as enforcing the codified principle of section 1129(b)(2)84(85) or the uncodified aspects of the fair and equitable rule can be debated, but in either event the "worthless securities" prohibition survives enactment of the Bankruptcy Code.85(86)

F. The Fair and Equitable Rule Precludes the Gratis Issuance of Reorganization Securities to Preserve Continuity of Management.

29. Under the Bankruptcy Act, the fair and equitable rule precluded the issuance or retention of stock by management where the stock was unsupported by value or a contribution of fresh capital.86(87) That "those stockholders have 'financial standing and influence in the community' and can provide a 'continuity of management' constitute no legal justification for issuance of new common stock to them."87(88)

30. In the bankruptcy reform process, the management incentive prohibition was considered in depth. The Commission on Bankruptcy Laws advocated reversal of the prohibition so that owners could retain an interest under the plan, even when the debtor is insolvent on a going concern basis, if the owners will make "a contribution which is important to the operation of the reorganized debtor . . . ."88(89) Although this proposal89(90) and an identical proposal adopted by the National Conference of Bankruptcy Judges90(91) were introduced as part of bankruptcy reform legislation, ultimately Congress refused to codify the proposals.91(92) Congressional policy might have been influenced by the opposition to the proposal by the Securities and Exchange Commission which testified at congressional hearings that the proposal unfairly favored management shareholders over public shareholders.92(93) In any event, it would appear that based on congressional consideration and inaction, the management incentive prohibition applies under the Bankruptcy Code as an uncodified aspect of the fair and equitable rule.93(94)

G. Survival and Evolution of the New Value Exception Under the Bankruptcy Code.

31. Under the Bankruptcy Act there existed a so-called "new value exception"94(95) to the fair and equitable rule whereby an owner could retain an ownership interest for a fresh contribution to the business even though creditors were not provided for in full.95(96) This New Value Exception required new money to be essential to the success of the reorganization, for the fresh contribution to be in money or money's worth, and for the securities received to be reasonably equivalent to the contribution made.96(97) Admittedly, no reported decision appears to exist under the Bankruptcy Act in which the exception applied,97(98) but there can be little doubt that the new value exception existed.98(99)

32. The new value exception was not codified as part of the Bankruptcy Code, but neither was there a legislative intent to eliminate the exception.99(100) Nevertheless, a controversy has erupted regarding the survival of the new value exception under the Bankruptcy Code.100(101)

33. Following enactment of the Bankruptcy Code, bankruptcy courts at first appeared to assume the survival of the new value exception, whether or not they applied it.101(102) The new value exception was later applied in chapter 11 cases that were affirmed by district courts and courts of appeals,102(103) and recognized in chapter 11 decisions that remained at the bankruptcy court level.103(104)

34. The survival of the new value exception was cast into doubt by the Supreme Court's opinion in Ahlers.104(105) Ahlers involved motions for relief from the automatic stay by undersecured creditors.105(106) It appears that the undersecured creditors alleged lack of adequate protection and pleaded alternatively that the debtors had no equity in the collateral and that the collateral was not necessary to an effective reorganization. In the context of considering the possibility of an effective reorganization, the issue arose whether the debtors might be able to propose a plan under which a dissenting class could be forced to accept less than payment in full even though the debtors retained their proprietorship interest in the family farm. The Court of Appeals for the Eighth Circuit held that such a plan was permissible if the debtors made new yearly contributions in future labor, experience, and expertise reasonably equivalent in value to the proprietorship interest.106(107)

35. The Supreme Court reversed.107(108) Justice White, writing for a unanimous Court,108(109) held that the absolute priority rule applies when the debtor retains property and a dissenting class of unsecured claims is provided for less than in full; the debtor's "promise of future labor warrants no exception to its operation."109(110) The holding was based on an analysis of dictum in Los Angeles Lumber, that permitted stockholders of an insolvent corporation to participate in a plan of reorganization "based on a contribution in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder."110(111) Justice White rejected the conclusion of the Court of Appeals for the Eighth Circuit that the debtors' "future contributions of 'labor, experience, and expertise' in running the farm -- because they have 'value' and are 'measurable' -- are 'money or money's worth' within the meaning of Los Angeles Lumber."111(112) He noted that Los Angeles Lumber itself had "rejected an analogous proposition, finding that the promise of the existing shareholders to pledge their 'financial standing and influence in the community' and their 'continuity of management' to the reorganized enterprise was '[in]adequate consideration' that could not possibly be deemed 'money's worth'." The same was found to be true of the debtors' pledge of future labor and management skills because "[u]nlike 'money or money's worth,' a promise of future services cannot be exchanged in any market for something of value to the creditors today."112(113) Moreover, the Court found that the Bankruptcy Code and its legislative history "clearly bar any expansion of any exception to the absolute priority rule beyond that recognized in our cases at the time Congress enacted the 1978 Bankruptcy Code."113(114)

36. Of greater significance, Ahlers was decided based on the assumption (without deciding) that the Los Angeles Lumber new value exception to the absolute priority rule survived enactment of the Bankruptcy Code.114(115) The Solicitor General, as amicus curiae, had argued that the Bankruptcy Code "dropped the infusion-of-new-capital exception to the absolute priority rule."115(116) Justice White was clear that the Ahlers decision "should not be taken as any comment on the continuing vitality of the Los Angeles Lumber exception -- a question which has divided lower courts since passage of the Code in 1978."116(117)

37. After the Supreme Court's opinion in Ahlers was reported, courts began equivocating on survival of the new value exception. For example, the Court of Appeals for the Seventh

Circuit noted that survival of the new value exception was an open question despite its affirmance of a case enforcing the rule pre-Ahlers.117(118) The rationale of the court of appeals was that it had previously assumed, without discussing, the survival of the new value exception and thus its previous opinion was not authoritative.118(119) Bankruptcy courts have split with some courts continuing to enforce the new value exception and others declaring it unenforceable under the Bankruptcy Code.119(120) Commentators also have jumped into the fray questioning whether the new value exception should apply under the Bankruptcy Code.120(121) The result is unrest in the case law and uncertainty about the viability of the new value exception.

38. The issue should not be the survival of the new value exception but its application. One of the major purposes of bankruptcy reform was to shift the risk of valuation from the creditors to the debtor.121(122) The vice of the new value exception is that it enables the debtor's owners to purchase an ownership interest based on a court approved valuation without validation of the price in the market place. Valuation by the court is, of course, the norm for distribution of reorganization securities under the fair and equitable test.122(123) But when a reorganization security is to be sold, in effect, for a new contribution, rather than distributed in satisfaction of claims or interests to a class of creditors or owners under a plan, perhaps a market test should be applied as would be done with the sale of any other asset of the estate. At the very least, to maintain the balance of relative rights, chapter 11 creditors who argue that the proposed capital contribution is too low should have the opportunity to match or exceed the pending offer.123(124)

III. CONCLUSION

39. The first ten years following the enactment of the Bankruptcy Code have witnessed opinions construing the codified provisions of section 1129(b)(2). During the next ten years, courts should determine more fully the existence and implementation of the uncodified aspects of the fair and equitable rule. Only in this manner will the meaning of "fair and equitable" be better understood and its evolution as a legal concept continue to develop.

Endnotes

1 (Popup)

1 Mercifully, this article is not entitled "All You Ever Wanted to Know About Uncodified Aspects of the Fair and Equitable Rule Under the Bankruptcy Code"; but that is what it is about.

2 (Popup)

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3 (Popup)

2 The author assumes that readers are intimately familiar with the history of the fair and equitable rule and its modification as embodied in 11 U.S.C. § 1129(b) (1982). Readers who are not so familiar should first read the plethora of articles cited in <u>In re</u> Barrington Oaks Gen. Partnership, 15 Bankr. 952, 958 n.17 (Bankr. D. Utah 1981) or the excellent history of the rule in Ayer, <u>Rethinking Absolute Priority After</u> Ahlers, 87 Mich. L. Rev. 963, 968-99 (1989).

4 (Popup)

3 U.S. Const., art. I, § 8, cl. 4.

5 (Popup)

4 Continental Illinois Nat'l Bank & Trust Co. v. Chicago R.I. & P. Ry., 294 U.S. 648, 670 (1935).

6 (Popup)

5 Klee, <u>All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code</u>, 53 Am. Bankr. L.J. 133 (1979).

7 (Popup)

6 Continental Illinois, <u>supra</u> note 4, 294 U.S. at 671.

8 (Popup)

7 Title 11 of the United States Code is referred to herein as the "Bankruptcy Code."

9 (Popup)

8 Section 1129(b) reads as follows:

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

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides --

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of this indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims --

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests --

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

10 (Popup)

9 11 U.S.C. § 1129(b)(1) (1982).

11 (Popup)

10 11 U.S.C. § 1129(b)(2) (1982).

12 (Popup)

11 See Klee, supra note 5, at 142.

13 (Popup)

12 11 U.S.C. § 1129(b)(2) (1982) (emphasis added).

14 (Popup)

13 See 11 U.S.C. § 102(3) (1982).

15 (Popup)

14 124 Cong. Rec. 32407 (Sept. 28, 1978) (remarks of Rep. Don Edwards) [hereinafter House Record]; 124 Cong. Rec. 34006 (Oct. 5, 1978) (remarks of Sen. DeConcini) [hereinafter Senate Record]. The House Record and Senate Record constitute the nearly identical statements of floor leaders managing the bankruptcy reform legislation; the statements were made in lieu of a conference report as the bankruptcy reform legislation did not go through a formal conference. See Klee, Legislative History of the New Bankruptcy Code, 28 DePaul L. Rev. 941, 953-56 (1979), 54 Am. Bankr. L.J. 275, 289-94 (1980).

16 (Popup)

15 E.g., In re Sandy Ridge Dev. Corp., 881 F.2d 1346, 1352 (5th Cir. 1989); FSLIC v. D&F Constr. (In re D&F Constr.), 865 F.2d 673, 675 (5th Cir. 1989); In re Spanish Lake Assocs., 92 Bankr. 875, 878 (Bankr. E.D. Mo. 1988); In re Edgewater Motel, Inc., 85 Bankr. 989, 998 (Bankr. E.D. Tenn. 1988). See also American Surety Co. v. Marotta, 287 U.S. 513 (1933), on which 11 U.S.C. § 102(3) (1982) was based. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 315 (1977) [hereinafter House Report].

17 (Popup)

16 House Record, supra note 14, at 32407; Senate Record, supra note 14, at 34006.

18 (Popup)

17 Unfortunately, no representation can be made that all or even most of these factors have been identified.

19 (Popup)

18 See supra note 16.

20 (Popup)

19 Id. [Hereinafter the 100% limitation]. "While [this 100% limitation] was explicitly included in the House bill, the deletion is intended to be one of style and not one of substance." Id. See H.R. 7330, proposed 11 U.S.C. § 1129(b)(2)(A), 95th Cong., 1st Sess. 201 (1977) and House Report, supra note 15, at 414.

21 (Popup)

20 See, e.g., United Sav. Ass'n v. Timbers of Inwood Forest Assocs. (In re Timbers of Inwood Forest Assocs.), 793 F.2d 1380, 1410 (5th Cir. 1986), aff'd, 808 F.2d 363 (5th Cir. 1987) (en banc), aff'd, 484 U.S. 365 (1988); In re Barrington Oaks Gen. Partnership, 15 Bankr. 952, 964 n.30 (Bankr. D. Utah 1981).

22 (Popup)

21 E.g., In re 8th Street Village Ltd. Partnership, 88 Bankr. 853, 859 (Bankr. N.D. Ill. 1988); In re Cheatham, 78 Bankr. 104, 107-08 (Bankr. E.D.N.C. 1987).

23 (Popup)

22 11 U.S.C. § 1129(b)(2)(B)(i) (1982). See 11 U.S.C. § 1129(b)(2)(C)(i) (1982) respecting a class of interests.

24 (Popup)

23 11 U.S.C. § 1129(b)(2)(A)(i)(II) (1982).

25 (Popup)

24 E.g., Consolidated Rock Prods. Co. v. Du Bois, 312 U.S. 510, 526, (1941); Citibank v. Baer, 651 F.2d 1341, 1347 (10th Cir. 1980).

26 (Popup)

25 E.g., Fortgang & Mayer, Valuation in Bankruptcy, 32 UCLA L. Rev. 1061, 1125, 1131 (1985); Pachulski, Cram Down and Valuation Under Chapter 11 of the Bankruptcy Code, 58 N.C. L. Rev. 925, 943 n.84, 954-55 (1980).

27 (Popup)

26 House Report, supra note 15, at 225.

28 (Popup)
27 Consolidated Rock, supra note 24.

29 (Popup)

28 See Fortgang & Mayer, supra note 25, at 1114.

30 (Popup)

29 Application of the step-up exception, discussed infra at part II.B, constitutes another instance when the 100% limitation cannot be applied literally.

31 (Popup)

30 Act of July 1, 1898, c. 541, 30 Stat. 544-46 (repealed 1978).

32 (Popup)

31 See Consolidated Rock Prods. Co. v. Du Bois, 312 U.S. 510, 528 (1941); In re Penn Central Transp. Co., 596 F.2d 1127, 1144 (3d Cir. 1979).

33 (Popup)

32 Hereinafter referred to as the step-up exception. E.g., Consolidated Rock, supra note 31, 312 U.S. at 527-28; In re Inland Gas Corp., 211 F.2d 381, 385 (6th Cir.), cert. denied sub nom. Kern v. Williamson, 348 U.S. 840 (1954); Standard Gas & Elec. Co. v. Deep Rock Oil Corp., 117 F.2d 615, 617, cert. denied, 313 U.S. 564 (1941) (noteholders received consideration valued at $560,311 in excess of their claims); In re Imperial '400' Nat'l Inc., 374 F. Supp. 949, 976-77 (D.N.J. 1974).

34 (Popup)
33 Id.

35 (Popup)

34 Consolidated Rock, supra note 31, 312 U.S. at 528-29; Imperial '400', supra note 32, 374 F. Supp. at 976-77. See SEC v. United States Realty & Improvement Co., 310 U.S. 434, 452 (1940); Spitzer v. Stichman (In re Hudson & M.R.R.), 278 F.2d 402, 405 (2d Cir. 1960). See generally Pachulski, supra note 25, at 943-44.

36 (Popup)

35 E.g., Consolidated Rock, supra note 31, 312 U.S. at 529-30.

37 (Popup)

36 House Report, supra note 15, at 414.

38 (Popup)

37 See supra note 16 & part II.A.

39 (Popup)

38 Pachulski, supra note 25, at 945.

40 (Popup)

39 Fortgang & Mayer, supra note 25, at 1124.

41 (Popup)

40 While interest compensates the dissenting creditor for increased risk, it does not compensate the risk averse creditor for being forced to assume the risk. Cf. In re Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935) (L. Hand, J.) (recognizing that indubitable equivalence under a plan requires more than a higher interest rate to compensate for risk and delay).

42 (Popup)

41 Similar reasoning could be used in an attempt to justify the apparent conflict between the 100% limitation and a dissenting senior creditor's right to postpetition interest provided under an agreement. See infra Part II.C.

43 (Popup)

42 The contract may be the senior creditor's own contract or a subordination contract of junior creditors. See, e.g., Continental Ill. Nat'l Bank & Trust Co. v. First City Nat'l Bank (In re King Resources Co.), 528 F.2d 789, 791 (10th Cir. 1976); Bankers Life Co. v. Manufacturers Hanover Trust Co. (In re Kingsboro Mortg. Corp.), 514 F.2d 400, 401 (2d Cir. 1975); In re Time Sales Fin. Corp., 491 F.2d 841, 842 (3d Cir. 1974). But see In re Leeds Homes, Inc., 222 F. Supp. 20, 32-34 (E.D. Tenn.), aff'd on other grounds, 332 F.2d 648 (6th Cir.), cert. denied, 379 U.S. 836 (1964) (disallowing postpetition interest).

44 (Popup)

43 See 11 U.S.C. §§ 726(a)(5) & 1129(a)(7) (1982). The methodology of a liquidation valuation is discussed in Fortgang & Mayer, supra note 25, at 1108-10 and in Pachulski, supra note 25, at 953-57.

45 (Popup)

44 See 11 U.S.C. § 506(b) (1982). Under this standard both consensual and nonconsensual oversecured creditors are entitled to accrue postpetition interest. United States v. Ron Pair Enters., ___ U.S. ___, 109 S. Ct. 1026 (1989).

46 (Popup)

45 Supra note 30, §§ 501-676.

47 (Popup)

46 Based on equitable reasons, interest on interest might not be paid under the fair and equitable rule. Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1946).

48 (Popup)

47 See supra note 42 for cases in which three courts of appeals recognized the rule but refused to find the agreement having the requisite specificity to subordinate junior

principal to postpetition interest in a bankruptcy case, and one district court denied payment of postpetition interest entirely.

49 (Popup)

48 See Consolidated Rock Prods. Co. v. Du Bois, 312 U.S. 510, 527 (1941); In re Imperial '400' Nat'l, Inc., 374 F. Supp. 949, 953-54 (D.N.J. 1974) (applying rule to solvent debtor).

50 (Popup)

49 See 11 U.S.C. § 502(b)(2) (1982). See also House Report supra note 15, at 352; S. Rep. No. 989, 95th Cong., 2d Sess. 62 (1978) [hereinafter Senate Report]. See generally Fortgang & King, The 1978 Bankruptcy Code: Some Wrong Policy Decisions, 56 N.Y.U. L. Rev. 1148, 1149-51 (1981). Some courts view this rule of disallowance as a rule of "administrative convenience and fairness to all creditors. . . . [W]hen concerns for administrative convenience and fairness are not present, postpetition interest will be 'allowed.'" Hanna v. United States (In re Hanna), 872 F.2d 829, 830 (8th Cir. 1989) (holding that postpetition interest on unpaid taxes is nondischargeable).

51 (Popup)

50 Supra notes 22-23.

52 (Popup)

51 See Fortgang & King, supra note 49, at 1150, 1157-58. Of course if the creditor's claim were oversecured or the debtor were solvent on a liquidation valuation, postpetition interest would be required to be paid. See supra notes 43-44.

53 (Popup)

52 No cases could be found addressing this issue.

54 (Popup)

53 See Fortgang & King, supra note 49, at 1159-60 (speculating that the Bankruptcy Code requires the payment of postpetition interest as part of the fair and equitable rule but urging statutory amendments); Fortgang & Mayer, supra note 25, at 1124-25 (conjecturing that the step-up exception might require compensation of postpetition interest as part of the creditor's bundle of rights).

55 (Popup)

54 See Fortgang & Mayer, supra note 25, at 1124-25.

56 (Popup)

55 Admittedly, if these rights are altered or destroyed, however, the interest rate should be adjusted to compensate for any increased risk.

57 (Popup)

56 In re Coastal Equities, Inc., 33 Bankr. 898, 905 (Bankr. S.D. Cal. 1983) ("a due-on-sale clause is not something so sacrosanct that it is immune from modification in a bankruptcy setting"). Cf. In re Western Real Estate Fund, Inc., 75 Bankr. 580, 586-87 (Bankr. W.D. Okla. 1987) (plan notes given in substitution for existing secured notes did not violate

fifth amendment by deleting prepayment penalties, default interest, or late charge provisions impliedly contained in original secured notes).

58 (Popup)

57 Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 165 (1946).

59 (Popup)

58 See In re Leeds Homes, Inc., 222 F. Supp. 20, 32-34 (E.D. Tenn. 1963), aff'd on other grounds, 332 F.2d 648 (6th Cir.), cert. denied, 379 U.S. 836 (1964).

60 (Popup)

59 See 11 U.S.C. § 549 (1982).

61 (Popup)

60 See Ruskin v. Griffiths, 269 F.2d 827, 832 (2d Cir. 1959) (enforcing default rate of interest where delay not caused by the creditor).

62 (Popup)

61 United Sav. Assn. v. Timbers of Inwood Forest Assocs. (In re Timbers of Inwood Forest Assocs.), 484 U.S. 365, 108 S. Ct. 626, 634 (1988) ("it was also pre-Code law that undersecured creditors were not entitled to postpetition interest as compensation for the delay of reorganization"). This principle can be traced back to equity receiverships. See Thomas v. Western Car Co., 149 U.S. 95, 116-17 (1893) ("The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate.").

63 (Popup)

62 See 11 U.S.C. § 506(b) (1982).

64 (Popup)
63 Supra note 31.

65 (Popup)
64 Supra part II.B.

66 (Popup)

65 Railroad Reorganization cases were decided under § 77 of the Bankruptcy Act, Act of August 11, 1939, 53 Stat. 1134-41, 11 U.S.C. § 205 (repealed 1978). The fair and equitable rule was found in § 77(e).

67 (Popup)

66 In re Central R.R., 579 F.2d 804, 812, 814 (3d Cir. 1978).

68 (Popup)
67 Id. at 812 n.19.

69 (Popup)

68 Id. at 812 n.18.

70 (Popup)

69 See id. at 811 quoting United States v. Key, 397 U.S. 322, 334 (1970).

71 (Popup)

70 R.S. § 3466, codified as amended in 31 U.S.C. § 3713 (1982). Prior to its amendment in Pub. L. No. 95-598, § 322(a), 92 Stat. 2678 (1978), R.S. § 3466 applied in bankruptcy cases.

72 (Popup)

71 Key, supra note 69, 397 U.S. at 332-33.

73 (Popup)

72 In re Duplan Corp., 9 Bankr. 921, 934 (S.D.N.Y. 1980) (Chapter X case quoting Consolidated Rock Prods. Co. v. Du Bois, 312 U.S. 510, 530 (1941)). See, e.g., Kansas City Terminal Ry. v. Central Union Trust Co., 271 U.S. 445, 455 (1926).

74 (Popup)

73 If liquidation value of an enterprise exceeds its going concern value, then liquidation value is used under the fair and equitable rule. See, e.g., In re Puerto Rican Am. Tobacco Co., 112 F.2d 655, 656-57 (2d Cir. 1940).

75 (Popup)

74 See Consolidated Rock, supra note 72, 312 U.S. at 526.

76 (Popup)

75 For certain enterprises a capitalization of future earnings is inappropriate. For example, an oil company with depleting resources has been valued using capitalization or discounting of future net cash flows. See, e.g., In re Jade Oil & Gas Co., SEC Corp. Reorg. Rel. No. 289 (Sept. 15, 1969), 44 S.E.C. 56, 62-65 (1969); In re Parker Petroleum Co., SEC Corp. Reorg. Rel. No. 128 (Dec. 7, 1959), 39 S.E.C. 548, 559-60 (1959).

77 (Popup)

76 See Consolidated Rock, supra note 72, 312 U.S. at 526. See generally Pachulski, supra note 25, at 938-41.

78 (Popup)

77 E.g., Consolidated Rock Prods. Co. v. Du Bois, 312 U.S. 510, 526 (1941); Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 119-21 (1939).

79 (Popup)

78 The term "worthless securities" is a misnomer. If equity securities are issued they will have some value and will, therefore, dilute the value of other equal or junior equity securities held by other parties in interest. See Norwest Bank Worthington v. Ahlers, 485

U.S. 197, 108 S. Ct. 963, 969-70 (1988) (rejecting the notion that a proprietorship interest could be "worthless").

80 (Popup)

79 Group of Institutional Investors v. Chicago, M., St. P. & P. R.R., 318 U.S. 523, 541-42 (1943). See generally, Frank, Epithetical Jurisprudence and the Work of the Securities and Exchange Commission in the Administration of Chapter X of the Bankruptcy Act, 18 N.Y.U. L.Q. Rev. 317, 344-45 (1941); Note, Streamlined Capital Readjustment Under Section 20b of the Interstate Commerce Act, 58 Yale L.J. 1291, 1312 n.108 (1949); L. King, 6A Collier on Bankruptcy, ¶ 11.06 at 219-20 (14th ed. 1986) ("The [fair and equitable] rule likewise reflects the prohibition in corporate law against watered stock.").

81 (Popup)

80 See SEC v. Canandaigua Enters. Corp., 339 F.2d 14, 21 (2d Cir. 1964). Cf. Northern Pac. Ry. v. Boyd, 228 U.S. 482, 508 (1913) (stock "was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever").

82 (Popup)

81 See generally Klee, supra note 5, at 145-46, 148-49.

83 (Popup)

82 Application of the fair and equitable rule will require "a full valuation of the debtor as the absolute priority rule does under current law." House Report, supra note 15, at 224. See also id. at 414.

84 (Popup)

83 Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S. Ct. 963, 969-70 (1988). See Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 120-21 (1939).

85 (Popup)

84 Section 1129(b)(2) requires a dissenting senior class to receive consideration of a present value equal or at least equal to the allowed amount of the claims or interests in the class. See supra notes 22-23. If equity securities of the reorganized company are distributed to a senior class with a purported value sufficient to constitute full compensation then distribution of so-called "worthless" securities to a junior class will dilute the value distributed to the senior class. In that event, the senior class is not satisfied in full and a junior class will receive or retain property under the plan contravening the express terms of the statute in section 1129(b)(2).

86 (Popup)

85 Ahlers, supra note 83, 108 S. Ct. at 969-70. See In re Barrington Oaks Gen. Partnership, 15 Bankr. 952, 957 (Bankr. D. Utah 1981), ("This in turn prevents the foisting of worthless securities on unsuspecting investors.").

87 (Popup)

86 [Hereinafter the management incentive prohibition.] Los Angeles Lumber, supra note 83, 308 U.S. at 119-21. The issuance of stock in exchange for "new value" is discussed more fully infra at part II.G.

88 (Popup)

87 Los Angeles Lumber, supra note 83, 308 U.S. at 122. "Such items are illustrative of a host of intangibles which, if recognized as adequate consideration for the issuance of stock to valueless junior interests, would serve as easy evasions of the principle of full or absolute priority . . . ." Id.

89 (Popup)

88 Report of the Comm. on the Bankr. Laws of the United States, H. Doc. No. 137, pt. I, 93d Cong., 1st Sess. 242, 254 (1973) (proposed § 7-303(4) & comment 9(b)).

90 (Popup)

89 H.R. 10792, 93d Cong., 1st Sess. 209 (1973) (proposed § 7-303(4)); H.R. 31, 94th Cong., 1st Sess. 209(1975) (proposed § 7-303(4)); S. 236, 94th Cong., 1st Sess. 204-05 (1975) (proposed § 7-303(4)).

91 (Popup)

90 S. 235, 94th Cong., 1st Sess. 223 (1975) (proposed § 7-301(4)); H.R. 32, 94th Cong., 1st Sess. 223 (1975) (proposed § 7-301(4)).

92 (Popup)

91 The proposals were dropped, following hearings in 1976, when the bills introduced in the 95th Congress dropped any reference to the subject. See H.R. 6, 95th Cong., 1st Sess. (1977); S. 2266, 95th Cong., 1st Sess. (1977).

93 (Popup)

92 Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, pt. II, 710 (1975); Hearings on H.R.31 and H.R.32 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary, pt. 4, ser. 27, 2182 (1976) (statement of Phillip A. Loomis, Jr., Commissioner) ("We do not believe that Congress should provide a reward for the very persons under whose stewardship the corporation found its way into reorganization, while at the same time denying participation by public stockholders.").

94 (Popup)

93 As the Supreme Court points out (particularly when it is convenient to do so), the "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 500-01. See United Sav. Assn. v. Timbers of Inwood Forest Assocs. (In re Timbers of Inwood Forest

Assocs.), 484 U.S. 365, 108 S. Ct. 626, 634 (1988); Kelly v. Robinson, 479 U.S. 36, 50-51 (1986). Contra, e.g., United States v. Ron Pair Enters., ___ U.S. ___, 109 S. Ct. 1026, 1030-31 (1989) (enforcing a "plain meaning rule" to overturn established judicial precedent). See 109 S. Ct. at 1036-37 (O'Connor, J., dissenting).

95 (Popup)

94 It can be debated whether the new value exception is an exception at all to the fair and equitable rule, since the securities received or retained are not on account of the prior ownership interest but in exchange for a new investment. See Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.), 800 F.2d 581, 588 (6th Cir. 1986); In re Greystone III Joint Venture, 102 Bankr. 560, 575 n.20 (Bankr. W.D. Tex. 1989).

96 (Popup)

95 E.g., Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 121 (1939) ("where [the necessity for new capital] exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made"); Kansas City Terminal Ry. v. Central Union Trust Co., 271 U.S. 445, 455 (1926) ("Generally additional funds will be essential to the success of the undertaking, and it may be impossible to obtain them, unless stockholders are permitted to contribute and retain an interest . . . ."). But see Ayer, supra note 2, at 1016, 1024 (noting that no reported Chapter X case expressly permitted the debtor or former equity owners to retain assets on the strength of a new value contribution and that the new value doctrine is "highly evanescent").

97 (Popup)

96 Los Angeles Lumber, supra note 95, 308 U.S. at 121-22. As previously mentioned, a pledge of "financial standing and influence in the community" coupled with "continuity of management" was "[i]nadequate consideration" that could not be deemed "money's worth." See Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S. Ct. 963, 967 (1988), construing Los Angeles Lumber's "dictum".

98 (Popup)

97 All of the cases discussing the new value exception refuse to confirm the plan. See, e.g., Los Angeles Lumber, supra note 95, 308 U.S. at 119-21, Kansas City Terminal, supra note 95, First Nat'l Bank v. Poland Union, 109 F.2d 54 (2d Cir.), cert. denied, 309 U.S. 682 (1940).

99 (Popup)

98 See Ahlers, supra note 96, 108 S. Ct. at 967 n.3.

100 (Popup)

99 The House Report, Senate Report, and statements of legislative leaders in the House Record and Senate Record are silent with respect to the new value exception. See supra notes 14, 15 & 48. "[I]f Congress intends for legislation to change the interpretation of a judicially created concept it makes that intent specific." Midlantic Nat'l Bank v. New

Jersey Dep't of Envtl. Protection, 474 U.S. 494, 500-01 (1986).

101 (Popup)

100 See generally Ayer, supra note 2, at 1009-10, 1016-19 and cases cited therein.

102 (Popup)

101 E.g., In re Landau Boat Co., 13 Bankr. 788, 792 (Bankr. W.D. Mo. 1981); Buffalo Sav. Bank v. Marston Enters. (In re Marston Enters.), 13 Bankr. 514, 518 (Bankr. E.D.N.Y. 1981).

103 (Popup)

102 See Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.), 800 F.2d 581, 588 (6th Cir. 1986); Official Creditors Comm. v. Potter Material Serv. (In re Potter Material Serv.), 781 F.2d 99, 102-04 (7th Cir. 1986); Brown v. Brown's Indus. Uniforms (In re Brown's Indus. Uniforms), 58 Bankr. 139, 141 (Bankr. N.D. Ill. 1985).

104 (Popup)

103 E.g., In re Eaton Hose & Fitting Co., 73 Bankr. 139, 140 (Bankr. S.D. Ohio 1987); In re Sawmill Hydraulics, 72 Bankr. 454, 456 (Bankr. C.D. Ill. 1987); In re Jartran, Inc., 44 Bankr. 331, 366-68 (Bankr. N.D. Ill. 1984).

105 (Popup)

104 Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S. Ct. 963, 967 n.3 (1988).

106 (Popup)

105 Id., 108 S. Ct. at 965.

107 (Popup)

106 Id., 108 S. Ct. at 965-66.

108 (Popup)

107 Id., 108 S. Ct. at 971.

109 (Popup)

108 Justice Kennedy took no part in the consideration or decision of the case. Id.

110 (Popup)

109 Id., 108 S. Ct. at 968.

111 (Popup)

110 Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 121-22 (1939).

112 (Popup)

111 Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S. Ct. 963, 967 (1988).

113 (Popup)

112 Id. (emphasis in original).

114 (Popup)

113 Id., 108 S. Ct. at 968.

115 (Popup)

114 Id., 108 S. Ct. at 967 n.3.

116 (Popup)

115 See Brief for United States as Amicus Curiae 17-23.

117 (Popup)

116 Ahlers, supra note 111, 108 S. Ct. at 967 n.3.

118 (Popup)

117 Compare In re Stegall, 865 F.2d 140, 142 (7th Cir. 1989) ("We emphasize, however, that the issue is an open one in this circuit, Potter notwithstanding.") with Official Creditors Comm. v. Potter Material Serv. (In re Potter Material Serv.), 781 F.2d 99, 102-04 (7th Cir. 1986).

119 (Popup)

118 Stegall, supra note 117.

120 (Popup)

119 Compare, e.g., Pennbank v. Winters (In re Winters), 99 Bankr. 658, 660-63 (Bankr. W.D. Pa. 1989) (rejecting survival of new value exception in automatic stay context) and In re Rudy Debruycker Ranch, 84 Bankr. 187, 190 (Bankr. D. Mont. 1988) (questioning survival of new value or any other uncodified exception) with In re Greystone III Joint Venture, 102 Bankr. 560, 575 (Bankr. W.D. Tex. 1989) (holding that new value exception is still good law and confirming plan); In re Yasparro, 100 Bankr. 91, 99 (Bankr. M.D. Fla. 1989) (finding that new value exception survives but not applied on facts of case); In re 47th & Belleview Partners, 95 Bankr. 117, 119-20 (Bankr. W.D. Mo. 1988) (same); and In re Henke, 90 Bankr. 451, 455 (D. Mont. 1988) (decided by same judge who previously decided Rudy Debrucker Ranch; holding that new value exception survives and confirming plan).

121 (Popup)

120 E.g., Ayer, supra note 2; Powlen & Wuhrman, The New Value Exception to the Absolute Priority Rule, 93 Comm. L.J. 303 (1988).

122 (Popup)

121 See In re Sandy Ridge Dev. Corp., 77 Bankr. 69, 72 (Bankr. M.D. La. 1987), rev'd on other grounds, 881 F.2d 1346 (5th Cir. 1989).

123 (Popup)

122 See Consolidated Rock Prods. Co. v. Du Bois, 312 U.S. 510, 525-27 (1941); In re Sandy Ridge Dev. Corp., 881 F.2d 1346, 1354 (5th Cir. 1989) ("[W]e must reject [the] argument that the bankruptcy court cannot set the value of property but instead must in all instances require the debtor to abandon that property and let the foreclosure sale market determine its price. This is simply not required by the Code.").

124 (Popup)

123 Contra In re Greystone III Joint Venture, 102 Bankr. 560, 577 n.22 (Bankr. W.D. Tex. 1989) ("[I]t is inappropriate to approach the problem as though the ownership of the enterprise were up for sale. . . . At confirmation, the court is not at liberty to 'conduct an auction' of the equity.").