ADEQUATE PROTECTION OF OPPORTUNITY COST AFTER *IN RE BRIGGS*

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I. INTRODUCTION

A. RELIEF FROM THE AUTOMATIC STAY IN BANKRUPTCY PROCEEDINGS

When a debtor files a petition under Chapter 11 of the Bankruptcy Code,¹ the initial goal is usually to obtain a respite from creditors and their collection efforts. The principal means by which the Bankruptcy Code provides respite is the automatic stay provision of section 362.² This provision, which is "one of the fundamental debtor protections provided by the bankruptcy laws,"³ prohibits creditors

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² 11 U.S.C. § 362 (Supp. II 1984). Section 362(a) provides:

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 the 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 of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of 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 commencement of the case under this title;

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

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

from taking action outside the bankruptcy courts to collect prepetition debts from the debtor or his property. The debtor can use this breathing spell to formulate a plan of reorganization, restructuring his finances so he may keep operating, pay his debts, and produce a return.

Although the automatic stay applies to all classes of creditors, secured and unsecured, the creditor whose claim is secured by the debtor's property is most directly and adversely affected by the stay. Decline in value of the collateral, whether by use or market turns, loss damage or destruction of the property, and conversion of the property all represent risks created by the automatic stay and borne by the secured creditor. While the Constitution has been interpreted to permit Congress to place these risks on secured creditors, Congress has ameliorated the burden of the automatic stay by providing...
for relief from its terms. A secured creditor may have the automatic stay lifted if the court finds that the creditor’s claim exceeds the value of the collateral and that the collateral is not necessary to a reorganization. In such a case, the creditor is then free to pursue state liquidation remedies of replevin or foreclosure.

The automatic stay may also be lifted for “cause, including the lack of adequate protection [10] of an interest in property.” Thus, under certain circumstances, the Bankruptcy Code requires the debtor to “adequately protect” a creditor’s interest in property. For example, section 363 directs the court to prohibit or condition the sale, use, or lease of property so as to adequately protect those holding an interest in that property. Section 364 requires that the debtor adequately protect existing liens before incurring new secured

be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.


8. 11 U.S.C. § 362(d) (Supp. II 1984). Section 362(d) 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 the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

9. Id.

10. The term “adequate protection” is not defined in the Bankruptcy Code. For a discussion of its derivation, see note 23 infra.


When adequate protection is required under section 362, 363, or 364 of this title of an interest of an equity 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, 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;

(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, 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.


12. 11 U.S.C. § 363(e) (Supp. II 1984). Section 363(e) states:

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.
If adequate protection is not provided as required in sections 363 and 364, the debtor is prohibited from use, sale, or lease of property or is denied permission to incur secured debt, as the case may be. Adequate protection is also required, although somewhat indirectly, by section 362. If the automatic stay threatens an interest in property, the debtor must, to prevent the holder of that interest from obtaining relief from the stay, adequately protect that interest.

Two questions concerning the nature of adequate protection are left unanswered by the Bankruptcy Code. First, the meaning of "interests in property" which requires protection, and second, what protection is adequate.

Where adequate protection is required under sections 363 or 364, the first of these questions presents few problems. The nature of the requested act, to use, sell, lease, or encumber property, does much to define the property interest threatened by the requested act. For the same reasons, the difficulty of determining what protection is adequate is eased somewhat in proceedings under sections 363 or 364.

When adequate protection is demanded under section 362, however, these questions are not so easily answered. In what sense does the automatic stay threaten a secured creditor? Since the stay suspends the secured creditor's power to liquidate the collateral and to apply the proceeds to the secured claim, a decline in value of the collateral during the stay carries the threat that the secured creditor will receive a smaller payment of its claim. Certainly an important goal in taking a security interest in collateral is to secure payment of an obligation, and to the extent that the stay results in a diminution

   The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—
   (A) the trustee is unable to obtain such credit otherwise; and
   (B) There is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.


16. For example, requests to use collateral under § 363 commonly are granted so long as the debtor protects against diminished value caused by that use. See In re Martin, 761 F.2d 472, 476-77 (8th Cir. 1985); In re Sheehan, 38 Bankr. 859, 865 (Bankr. D.S.D. 1984); In re C.F. Simonin's Sons, Inc., 28 Bankr. 707, 712 (Bankr. E.D.N.C. 1983).

17. See Martin, 761 F.2d at 476-77; Sheehan, 38 Bankr. at 865; C.F. Simonin's Sons, 28 Bankr. at 712. Even in § 363 "use" cases, the issue can become complicated. In Sheehan and C.F. Simonin's Sons, the courts determined that adequate protection of the creditors' interest in cash collateral included payment of interest on any cash collateral used. Sheehan, 38 Bankr. at 869; C.F. Simonin's Sons, 28 Bankr. at 713.
of payment, the secured creditor's interest in the property is damaged. Adequate protection of this interest is virtually always required. However, whether other interests should be protected is a more controversial question.

B. ADEQUATE PROTECTION OF OPPORTUNITY COSTS

Of late, secured creditors have demanded protection of another claimed interest in the secured property, the so-called "opportunity cost" created by the automatic stay. According to the proponents of this position, a secured creditor has an interest in the secured property over and above the availability of that property for debt repayment. The secured property represents an allocation of investment capital by the secured creditor. When a debtor stops payment, the creditor's investment yields no return. The secured creditor has an interest in getting his investment out of the debtor's property and into an alternative investment which will yield a return. The only effective method available is to sell the secured property, voluntarily or involuntarily. Since the stay prevents involuntary sales, the creditor is prevented from asserting this interest. Thus, section 362, the argument concludes, requires that, to the extent the creditor is harmed by its being prevented from asserting this interest, the debtor must provide adequate protection.

Proponents of this position initially met with little success. The reasoning of those courts rejecting the opportunity-cost position is best illustrated by Judge Mabey's opinion in In re South Village, Inc. Judge Mabey concluded that Congress, in sections 361 and 362,

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19. See In re American Mariner Indus., Inc., 734 F.2d 426, 435 (9th Cir. 1984); In re South Village, Inc., 25 Bankr. 987, 990-97 (Bankr. D. Utah 1982). One of the earliest cases providing for adequate protection of the time value of collateral was In re Anchorage Boat Sales, Inc., 4 Bankr. 635 (Bankr. E.D.N.Y. 1980). There an inventory financier was given relief from the automatic stay because the debtor failed to adequately protect the creditors interest in inventory and cash collateral. The court characterized the interest as follows:

This Court has recognized that 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 investment. This concept therefore takes into account the fact that "payment ten years hence is not generally the equivalent of payment now."

Id. at 643 (citing In re Murel Holding Corp., 75 F.2d 941, 943 (2d Cir. 1935)).
did not mandate protection of the opportunity cost.\textsuperscript{22} He reached this conclusion based upon available legislative history,\textsuperscript{23} as well as apparent inconsistencies of opportunity-cost recovery with other sections of the Bankruptcy Code.\textsuperscript{24}

The pendulum swung sharply in support of the protection of opportunity cost with the Ninth Circuit's decision in \textit{In re American Mariner Industries, Inc.}\textsuperscript{25} The \textit{American Mariner} court concluded that section 362 required protection of opportunity cost for principally two reasons. First, legislative history suggested that Congress intended that the secured creditor obtain "in value essentially what he bargained for."\textsuperscript{26} Since the secured creditor's "absolute" bargain, the right to sell the collateral, was limited by the automatic stay, the courts must try to compensate the secured creditor for this loss.\textsuperscript{27} Second, the presence of "indubitable equivalent" language in section 361\textsuperscript{28} persuaded the court that Congress was incorporating the spirit

\textsuperscript{22} \textit{Id.} at 996.

Judge Mabey noted that, notwithstanding creditor complaints to Congress that the use value of money was not protected in the Commission's report, Congress failed to change the substance of that report. \textit{South Village}, 25 Bankr. at 994. Thus, the inference was strong that only a decline in value was protected by §§ 361 and 362. \textit{Id.} For a more detailed discussion of the legislative history behind these sections, see note 75 \textit{infra}.

\textsuperscript{24} \textit{South Village}, 25 Bankr. at 997. The \textit{South Village} court believed opportunity cost to be inconsistent with several sections of the Bankruptcy Code. For example, 502(b)(2) suspends interest on claims, once a petition has been filed. Section 506(b) permits the accrual of interest on secured claims if the collateral exceeds the debt. Judge Mabey concluded that permitting an undersecured creditor to receive interest payments would violate both the rule and the exception. \textit{Id.} \textit{But see} note 70 \textit{infra}.

The court also found inconsistencies with 11 U.S.C. § 1124(2), which permits a debtor to cure a default, and 11 U.S.C. § 1111(b), which permits an undersecured creditor to treat his claim as a fully allowed, secured claim. 11 U.S.C. §§ 1111(b), 1124(2) (1982 & Supp. 1982). These sections were believed to demonstrate Congress' willingness to rewrite the creditor's bargain in ways which point away from an intention to protect opportunity costs. \textit{South Village}, 25 Bankr. at 998-99.

\textsuperscript{25} 734 F.2d 426 (9th Cir. 1984).
\textsuperscript{26} \textit{Id.} at 431 (citing H.R. REP. No. 595, supra note 3, at 339, \textit{reprinted in} 1978 \textit{U.S. CODE CONG. & AD. NEWS} at 6295).
\textsuperscript{27} \textit{In re American Mariner Indus., Inc.}, 734 F.2d 426, 431 (9th Cir. 1984).
of In re Murel Holding Corp. These two factors convinced the American Mariner court that an "interest" in property must include all that the creditor bargained for in that property, and that adequate protection must give the secured creditor the present value of those bargained-for rights.

II. EIGHTH CIRCUIT DECISIONS

Following the American Mariner decision, a growing number of courts began ordering adequate protection of opportunity cost, particularly after the Fourth Circuit adopted the American Mariner result. While the Eighth Circuit was presented with at least three opportunities prior to In re Briggs Transportation to adopt or reject the American Mariner approach, it let each opportunity pass.

A. BEFORE BRIGGS TRANSPORTATION

In In re Monnier Brothers, the court discussed adequate protec-
tion, but in the context of an oversecured creditor objecting to a "cram-down" of the debtor's plan of reorganization. While the court thought that the issue was moot, it nonetheless considered the secured creditor's contention that it was not "adequately protected" during the automatic stay. Rejecting this contention, the court concluded that the equity cushion in the debtor's property was sufficient to satisfy the creditor's claim, including accrued, contract-rate interest. Since the creditor did not allege that the contract rate of interest was inadequate to "compensate it for the use of its money," the court was not required to examine the opportunity-cost argument.

The decision of In re Martin considered adequate protection in the context of a debtor's request to use cash collateral under section 363 of the Bankruptcy Code. As suggested earlier, section 363 focuses the adequate protection inquiry upon risks caused by the use, sale, or lease of property. Opportunity cost, or the investment value of property, is thus not usually at issue in such cases and indeed was not raised by the secured creditor in Martin.

Nonetheless, the Martin opinion contains several references to, and apparent approval of, the American Mariner decision. Further, the court noted that the bankruptcy court, upon remand, "may want to consider whether CCC is entitled to interest for any delay in repayment occasioned by the debtors' proposed use of cash collateral."

At least some lower courts in the Eighth Circuit read Martin as having adopted American Mariner. However, this interpretation was not so, as the Eighth Circuit stated expressly in Yamaha Motor

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36. Section 506(a) of the Bankruptcy Code classifies a claim as secured and unsecured depending upon the ratio of debt to value of the collateral. Where the collateral's value exceeds the debt, the creditor is oversecured and, under § 506(b), is entitled to the accrual of interest on the debt. 11 U.S.C. § 506 (1982 & Supp. II 1984).

37. 11 U.S.C. § 1129(b)(1) (1982). The section provides for confirmation of a plan of reorganization over the objection of a class of creditors if the plan meets certain requirements, as set forth in § 1129(b)(2)(A), (B), and (C).

38. Monnier Bros., 755 F.2d at 1342. The secured creditor in Monnier Brothers objected to the plan because it did not give the secured creditor the true present value of its claim. Id.

39. Id. at 1340.

40. Id.

41. The Monnier Brothers court, however, cited with apparent approval American Mariner. Id.

42. 761 F.2d 472 (8th Cir. 1985).

43. Id. at 473.

44. See notes 16-17 and accompanying text supra.

45. 761 F.2d at 474-76, 478.

46. Id. at 477.

47. In re Wolsky, 53 Bankr. 751, 755 (Bankr. D.N.D. 1985). While the Wolsky court was reluctant to adopt the American Mariner view because of its "destructive effect . . . on many agriculture reorganizations," it felt constrained to do so because of
The Briggs Transportation decision was thus the first case in which the court was asked by an undersecured creditor to require the debtor to adequately protect the opportunity-cost interest in a case arising under section 362. In keeping with its measured approach to the adequate protection issue in general, the court stopped short of adopting American Mariner in toto, and instead, attempted to establish guidelines for determining the issue on a case-by-case basis.

B. In re Briggs Transportation

Creditors holding security interests in Briggs's equipment sought relief from the automatic stay under section 362(d)(1), claiming Briggs had not, as was required, adequately protected them for their lost opportunity costs. The Bankruptcy Court for the District of Minnesota held that the debtor need not provide adequate protection for such opportunity costs. Relying on American Mariner, the district court reversed, concluding that the creditors were, as a matter of law, entitled to compensation for the delay in enforcement of their liquidation rights caused by the automatic stay.

The Eighth Circuit Court of Appeals reversed, refusing to hold that a secured creditor is always entitled to compensation under section 362(d)(1) for lost opportunity cost. Rather, the court held that

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48. 762 F.2d 668, 670 (8th Cir. 1985) (decided after Martin).
49. The opportunity-cost issue is most frequently raised by the undersecured creditor, as in American Mariner, since the fully secured creditor accrues contract-rate interest under § 506(b). However, even the oversecured creditor could raise the opportunity-cost argument if the contract rate provides a rate of return which is less than the prevailing market rates. See In re Lippy, 56 Bankr. 524, 526-27 (Bankr. N.D. Ind. 1986).
50. Briggs Transp., 780 F.2d at 1350.
51. Id. at 1341. The parties entered into a stipulation providing for periodic payments by the debtor to compensate the creditors for depreciation in the equipment caused by the debtor's use during bankruptcy. Id.
52. Id.
54. Briggs Transp., 780 F.2d at 1341. The district court relied upon the American Mariner decision, which was published after the bankruptcy court had decided the issue.
55. Id. at 1350-51. Judge John R. Gibson dissented, believing that the flexibility,
adequate protection issues must be decided on a case-by-case basis, providing protection for opportunity costs only in those cases where the deciding court believes such protection is an essential part of the secured creditor's reasonable expectations. To aid in discovering these expectations, the court suggested a nonexclusive list of factors which may have a bearing on the question. Based on these and other factors, trial courts were directed to reconstruct the creditor's bargain and to determine which interests are entitled to adequate protection during the pendency of the automatic stay.

After briefly responding to and rejecting the creditors' constitutional challenges, the court noted that "cogent arguments" for and against protection of the opportunity cost have been developed. Nonetheless, it believed that evidence existed which revealed a congressional intent that adequate protection encompasses a broad range of interests, but not necessarily every interest, contained in an economic bargain.

Chief among this evidence, the court believed, was the legislative history behind section 361. The House and Senate reports accompanying the bills which became the Bankruptcy Code traced the notion of adequate protection to In re Bermec Corp. and In re Yale Express System, Inc. In both of these cases, the creditor sought pro-

which the majority emphasized, applied only to the "proper method of protection," and not to the "question of entitlement." Id. at 1351. Judge Gibson's position rests on the premise that the term "indubitable equivalent" serves to identify the rights worthy of protection. Id. at 1352. The majority clearly rejected this premise: "However, 'indubitable equivalent' simply describes what would constitute adequate protection. It does not define the interest to be protected." Id. at 1346.

56. Id. at 1349.
57. Id. For the factors deemed relevant by the Briggs Transp. court, see note 71 and accompanying text infra.
58. Id. at 1349.
59. Id. at 1342. The court stated:
   "In the bankruptcy context, adequate protection is a safeguard which is provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of their property, and there is no constitutional claim of the creditor to more than that."
Id. (citation omitted). For a discussion of the cases on constitutional requirements, see note 7 supra.
60. Briggs Transp., 780 F.2d at 1344.
61. Id. at 1345. The court explained: "This statutory scheme indicates that adequate protection is intended to encompass a broad range of creditor interests and does not mandate an interpretation of the creditors' interest as the whole of the economic bargain." Id.
64. 445 F.2d 367, 369 (2d Cir. 1971). See note 21 supra.
65. 384 F.2d 990, 992 (2d Cir. 1967). See note 21 supra.
tection against the diminution of the collateral value as a result of de-
preciation and, thus, sought to preserve the status quo.

The Briggs Transportation court believed that the express con-
gressional reference to these cases, particularly Bermec, implied con-
gressional approval of those cases and, indeed, provided the basis for
subsections 361(1) and (2). Further, it demonstrated Congress' rec-
ognition that "creditors may at times be unable to obtain compensation
for their interests in collateral above the lien or salvage value of
that property."

Second, the court believed that the "indubitable equivalent" lan-
guage of subsection 361(3), rather than supporting the creditors' con-
tentions in Briggs Transportation, indicated a congressional intent to
expand the range of permissible solutions to adequate protection
claims. In the court's view, the phrase serves to identify what protec-
tion is adequate; it does not define what interest is to be protected.
Finally, the very fact that Congress left undefined the meaning of ade-
quate protection persuaded the courts that what was intended was a
flexible, pragmatic approach.

Having concluded that adequate protection of opportunity cost
may, but need not always, be ordered, the Eighth Circuit suggested
guidelines for future cases. Factors such as the existence of an equity
cushion, the quality of the collateral, the length of the stay, the sta-
bility of the collateral, the likelihood that a plan of reorganization
would be successful, and whether taxes and other similar payments
are being made were mentioned by the court as having a bearing on
whether a debtor must make payments to protect a creditor's oppor-

66. Bermec, 445 F.2d at 369; Yale Express Sys., 384 F.2d at 992.
67. Briggs Transp., 780 F.2d at 1345-46. The court quoted Bermec:
   We are conscious of the deep concern of the manufacturing secured credi-
tors lest their security depreciate beyond adequate salvage, but we must bal-
ance that with the congressional mandate to encourage attempts at corporate
reorganization where there is a reasonable possibility of success.
   Id. at 1346 (quoting Bermec, 445 F.2d at 369).
68. Id.
69. Id. The court noted that the appearance of "indubitable equivalent" in § 361
   was the result of a compromise between the House and Senate bankruptcy bills. Id.
   However, it inferred from this only that a court should "as nearly as possible provide
   the creditor with his bargained-for rights." Id. But see notes 28-30 and accompanying
   text supra (discussing the inference drawn by American Mariner on this same
   compromise).
70. See Briggs Transp., 780 F.2d at 1344-46. The Briggs court agreed with the au-
thorities which had concluded that §§ 502(b)(2) and 506(b) have no application to the
question of whether a secured creditor is entitled to time value compensation. Id. at
1347 (citing 3 COLLIER ON BANKRUPTCY ¶ 506.05, at 506-40 (1984)); Comment, Compen-
sation for Time Value as Part of Adequate Protection During the Automatic Stay in
997 (stating that § 506(b) "provides for the allowance but not the payment of interest
where a creditor is oversecured and where his contract permits").
tunity costs.\textsuperscript{71}

Ultimately, however, the \textit{Briggs Transportation} decision states that courts deciding this question must "reconstruct" the creditor's bargain, with a view toward protecting the parties' reasonable expectations.\textsuperscript{72} Whether this reconstruction can be done on a reasoned basis, or whether \textit{Briggs Transportation} merely opens the door for \textit{ad hoc} decisions, is the challenge presented by the Eighth Circuit's decision.

\section{RECONSTRUCTING THE BARGAIN}

It is difficult to fault the Eighth Circuit's judgment in \textit{Briggs Transportation} that both the nature and extent of the interests protected under sections 361 and 362 of the Bankruptcy Code were left open by Congress. The definition of adequate protection is noticeably vague and incomplete in section 361; subsection 361(3) does include the "indubitable equivalent" language first appearing in \textit{Murrel}. Further, the legislative history of these sections includes language which expresses a concern for protecting the creditor's bargain,\textsuperscript{73} and this congressional protection is greater than the constitutionally required minimum.\textsuperscript{74} However much one is struck by the absence in this history of specific reference to "opportunity cost" or "investment value," it cannot be said that the \textit{Briggs Transportation} resolution is plainly inconsistent with the stated congressional intent.\textsuperscript{75}

\begin{itemize}
\item \textsuperscript{71} \textit{Id.} at 1349-50. The court added: "We emphasize that our list here is not exclusive, but merely indicative of the particular risk and reliance factors shown in the nature and history of the credit transactions which a court may take into account in making adequate protection determinations." \textit{Id.}
\item \textsuperscript{72} \textit{Id.} at 1349.
\item \textsuperscript{73} \textit{See, e.g.,} H.R. REP. NO. 595, \textit{supra} note 3, at 339, \textit{reprinted in} 1978 U.S. CODE CONG. & AD. NEWS at 6295-96.
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} A comparison of the House and Senate reports on the adequate protection provisions is, at best, inconclusive. However, at the very least, this comparison demonstrates a move from the inflexibility of the Senate's version to the flexibility of the House's version. It is unclear whether this flexibility was intended simply to apply to methods of protection, or if it was designed to make the nature of the interests protected a variable as well.

The Senate report accompanying S. 2266 states that the "concept of adequate protection is derived from the fifth amendment protection of property interests as enunciated by the Supreme Court." S. REP. NO. 989, \textit{supra} note 3, at 49, \textit{reprinted in} 1978 U.S. CODE CONG. & AD. NEWS at 5835 (citing \textit{Wright} v. Union Cent. Life Ins. Co., 311 U.S. 273, 278-79 (1940); \textit{Louisville Joint Stock Land Bank v. Radford}, 295 U.S. 555, 589-90 (1935). The \textit{Wright} case seems to require protection only of the value of the collateral. \textit{Wright}, 311 U.S. at 278 stating: "Safeguards were provided to protect the rights of secured creditors throughout the proceedings, to the extent of the value of the property."). Thus, the Senate seems to have intended to require adequate protection only of that value.

Further, the Senate report states that "[t]he section specifies two exclusive means of providing adequate protection . . . ." S. REP. NO. 989, \textit{supra} note 3, at 54, \textit{reprinted
Nonetheless, the danger that Briggs Transportation will lead to a series of disconnected, ad hoc, adequate protection decisions is a real one. To reduce this risk, courts applying Briggs Transportation should strive to establish consistency and, thus, predictability on the following issues: (A) the meaning of the "bargain" to be reconstructed; (B) the relative weight accorded the creditor's bargain and the debtor's bankruptcy entitlements; and (C) the nature of the

76. The term "entitlement" refers to the debtor's expected benefits in a reorganization proceeding. Jackson, supra note 18, at 857, 860. It is meant to suggest that,
protection required to preserve the creditor's bargain.

A. THE MEANING OF "BARGAIN"

It seems clear that Briggs Transportation represents the Eighth Circuit's acceptance of the bargain theory of adequate protection as requiring something more than the maintenance of the collateral's liquidation value during the period before the confirmation of a plan. It seems equally clear that it represents the court's rejection of the expansive view of that bargain espoused by American Mariner and writers such as Professor Jackson. The bargaining to be protected is thus something less than all possible creditor expectations.

Since creditors advance value expecting a return on their investment, all rational creditors would, if asked, reply that they expect compensation if the return is not forthcoming. All creditors, secured and unsecured, can be expected to provide in their arrangements with debtors for additional or increased interest when repayment is delayed. The automatic stay of section 362 disappoints the expectations of unsecured, as well as secured, creditors on this aspect of the bargain, but clearly, unsecured creditors are not entitled to interim compensation.

The Briggs Transportation court reasoned that, for secured creditors to warrant treatment different from unsecured creditors, they must show that their secured status was obtained, at least in part, in

while the debtor expects certain benefits, they are not rights creating corresponding duties in creditors, but are the result of a balancing process.

77. See generally Jackson, supra note 18. Professor Jackson argues first that the major goal in bankruptcy is "creditor distribution" in a manner consistent with the bargain the creditors would make having the knowledge that bankruptcy had intervened. Id. at 860. Finding that a collective system of distribution is best and would be part of the creditor's bargain, id. at 869, and also that a secured creditor's rights should be protected in bankruptcy, he concludes that it is in both the secured creditor's and the unsecured creditor's interest to preserve in toto the secured creditor's right. See id. at 871. This result is because, by doing so, the debtor may retain the collateral to increase the value of the bankruptcy estate. The beneficiaries of this increase, the unsecured creditors, should pay for this increase, which they would do by transferring some of the increase to the secured creditor in the form of interest. Id. at 872-73.

Professor Jackson's major criticism of adequate protection cases is that this transfer from unsecured creditors to secured creditors is not done. Thus, the unsecured creditors obtain a windfall in bankruptcy, since they constructed their bargains assuming that secured creditors would be realizing their debts out of the collateral. Id. at 874.

Finally, he contends that this windfall to unsecured creditors leads to two undesirable consequences: (1) the secured creditor will increase the cost of secured credit based on the bankruptcy risk; and (2) the unsecured creditors will have an undeserved incentive to urge reorganization of a business rather than its liquidation. Id. at 875-76.

78. For example, it is a standard practice for promissory notes to include default interest rates. By doing so, the creditor seeks to provide compensation for the loss of the use of the amount of loaned funds in default.
order to secure that treatment. In this sense, a creditor would have bargained for an interest in the collateral beyond securing the repayment of the original debt. As a result, such a creditor can be said to have bargained for the right to look to the collateral for realization of lost investment income through the foreclosure and reinvestment of the collateral.

When has a secured creditor made this bargain? One writer, Professor Raymond Nimmer, has proposed answering this question in a manner which seems similar in approach to that which was adopted in Briggs. Professor Nimmer concluded that a flexible approach to the opportunity-cost issue was intended by Congress, and that the resulting equitable analysis must take into account two areas of concern.

The first major concern, the “characteristics of the loan transaction,” helps to define the meaning of the term “bargain.” Professor Nimmer asserts that secured creditors structure their bargains differently, depending in large part on the nature of the collateral. For example, the equipment creditor generally structures repayment to coincide with the depreciation or other loss of the equipment’s recoverable value, but the creditor does not protect against the possible interruption of interest payments. On the other hand, the inventory or accounts creditor is primarily concerned with a steady payment flow and is less concerned with maintaining the collateral. This focus is because the secured party expects payment out of the sale proceeds.

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79. See Briggs Transp., 780 F.2d at 1346-51. The court noted that bankruptcy does in fact change the creditor’s economic position and that the interest in collateral is subject to federal law. Id. at 1347. It also suggested that one of the economic interests subject to change was the right to expect an uninterrupted return on investment stating: “The essence of a creditor’s interest in the collateral is not necessarily foreclosure and reinvestment, but may be the guarantee that, as a secured creditor, it will be paid in full up to the lien value of the collateral.” Id.

80. See generally Nimmer, supra note 18, at 14-49. The Briggs Transportation court cited Professor Nimmer’s article as one proposal which focuses on a range of adequate protection factors. Briggs Transp., 780 F.2d at 1350 n.11.

81. Nimmer, supra note 18, at 16. Professor Nimmer rejects Professor Jackson’s conclusion by disputing Professor Jackson’s major premise that creditors act rationally to optimize benefits. Id. at 14. Further, Professor Nimmer believes that in some cases nonfinancial safeguards will protect the secured creditor, making opportunity-cost payments unnecessary. Id.

82. Id. at 17. Professor Nimmer stated: “This equitable analysis requires consideration of two broad areas. The first involves the characteristics of the loan transaction. . . The second general area involves behavioral considerations and encompasses the debtor’s conduct and current prospects for reorganization.” Id.

83. Id.

84. Id. at 20. Professor Nimmer stated: “The significant feature of the equipment cases is that protection against depreciation or other value loss is the only form of financial protection required to safeguard the creditor.” Id.
of the collateral and expects it regularly.\textsuperscript{85} The major credit risk for this creditor is not the diminution in value of the collateral, but the danger that the creditor will not participate in the income realized from the collateral's sale.\textsuperscript{86}

Classifying collateral according to whether or not the creditor bargains for "cash flow" enables one to use the collateral's nature as an aid in applying section 361 of the Bankruptcy Code. For example, subsections 361(1) and (2) seem to be designed to provide protection against any decrease in recoverable value of collateral,\textsuperscript{87} while subsection 361(3) protects other interests in property. However, where maintenance of the value of the collateral is the central concern, with repayment tied to its expected decline in value, subsections 361(1) or (2) seems to protect the creditor best. Where maintenance of the status quo is not the major credit concern, subsection 361(3) requires the court to approve only those adequate-protection offers which provide the creditor with protection against the principal credit risk. The inventory financier's principal credit risk is that the inventory will be sold without application of all or some of the proceeds to the remaining debt. A central part of its bargain is thus threatened where periodic cash payments of principal and interest are not received. For this creditor, adequate protection should include payments for any delay in realization from the collateral because it truly bargained for that realization.\textsuperscript{88}

The equipment creditor, of course, is disappointed if its debtor stops making regular payments. Clearly, the equipment creditor is further disappointed if it receives no interest on the debt once bankruptcy intervenes. But if one accepts the 	extit{Briggs Transportation} court's premise that "foreclosure and reinvestment" are not the essence of every secured interest in collateral,\textsuperscript{89} then where they are not the essence, opportunity-cost protection is not required.\textsuperscript{90}

\textsuperscript{85} Id. at 34-35.
\textsuperscript{86} Id. at 34.
\textsuperscript{87} Id. at 12. Indeed, as was implied earlier, Congress may have intended depreciation cases to be handled exclusively under subsections 361(1) or (2). See notes 23, 75 and accompanying text supra. There is support for this view in 	extit{Briggs Transportation}, where the court stated:

The legislative history also notes that the use in section 361(1) of periodic cash payments to compensate for expected decreases in the value of the creditors' interest in property may be especially appropriate for adequate protection purposes where, as here, the property in question is depreciating at a relatively fixed rate. 

\textit{Briggs Transp.}, 780 F.2d at 1345.


\textsuperscript{89} Briggs Transp., 780 F.2d at 1347.

\textsuperscript{90} Nimmer, supra note 18, at 20. Professor Nimmer's belief that equipment
Adequate protection distinctions, based on the nature of the collateral, help to reconstruct the bargain since it is likely that the stability of collateral has a bearing on the extent to which a creditor negotiates for cash-flow protection. As instability increases, the risk of loss of cash-flow payments also increases, and one would expect the creditor to insist upon protection in the credit arrangement against that risk.\textsuperscript{91} 

One, however, should not exaggerate the value of this classification scheme.\textsuperscript{92} It provides, at best, a frame of reference as to the usual concerns of a given creditor group.\textsuperscript{93} The other factors listed by the Briggs Transportation court,\textsuperscript{94} as they relate to the nature of the cases require no cash-flow or opportunity-cost payments to the creditor is not always borne out by those cases. The American Mariner decision was an equipment case. See American Mariner, 734 F.2d at 427. More significantly, in C.F. Simonin's Sons, the court ordered opportunity-cost payments based on the value of the debtor's plant and equipment, even though that value was apparently not depreciating during bankruptcy. C.F. Simonin's Sons, 28 Bankr. at 713. \textsuperscript{91}

Cf. e.g., C.F. Simonin's Sons, 28 Bankr. at 713 (noting that adequate protection offer provided for detailed reports, similar to prebankruptcy practice on accounts, and limits on use of cash collateral). \textsuperscript{92}

Some cases have made the stable nature of equipment a basis for the decision. See, e.g., In re Francis, 42 Bankr. 763, 767 (Bankr. E.D. Mo. 1984) (stating that oil drilling machinery was not depreciating; thus, no adequate protection required); In re Ramco Well Serv., Inc., 32 Bankr. 525, 531-32 (Bankr. W.D. Okla. 1983) (noting that adequate protection is based on depreciation, which is based on the useful life of collateral times the original cost). Others cases have paid no particular attention to the collateral's character. See, e.g., In re Langley, 30 Bankr. 595, 606 (Bankr. N.D. Ind. 1983) (use of collateral in farming operation required payment of interest to undersecured creditor); In re Paradise Boat Leasing Corp., 5 Bankr. 822, 825 (D.V.I. 1980) (adequate protection required the insurance of seagoing vessel). Similarly, in real estate cases, courts have required opportunity-cost payments without reference to the land's stable basis. See, e.g., In re Independence Village, Inc., 52 Bankr. 715, 731 (Bankr. E.D. Mich. 1985); In re Monroe Park, 17 Bankr. 934, 940 (D. Del. 1982). \textsuperscript{93}

An example is the real estate mortgagee. Under normal conditions, real estate is a stable asset, and thus, the mortgagee typically bargains for fixed-term repayment, paying close attention to the debt-to-value ratio. As in the equipment cases, this practice shows that the creditor is "essentially" interested in the collateral's recoverable value. Such a creditor is not, under Professor Nimmer's view, entitled to opportunity-cost protection. Nimmer, supra note 19, at 46-47. See also note 92 supra. \textsuperscript{94}

However, mortgagees also bargain for other risk-limiting terms, which create "reasonable expectations" to be honored. For example, real estate mortgages require the debtor to pay property taxes in order to maintain the mortgagee's priority. This part of the creditor's bargain surely deserves protection. Courts have conditioned the automatic stay on the debtor's payment of real estate taxes. See, e.g., In re Pond, 43 Bankr. 522, 524 (Bankr. D.N.D. 1984). Also, real estate mortgages frequently contain default provisions assigning rents and profits to the mortgagee or allowing for the appointment of a receiver. See, e.g., In re Anderson, 50 Bankr. 728, 731 (D. Neb. 1985). The presence of these terms demonstrates a concern with "foreclosure and reinvestment," and as such, the terms deserve protection. See In re Rowe, 43 Bankr. 157, 158 (Bankr. D. Mo. 1984) (stating that debtor must pay beneficiary of trust deed rental value of land). \textsuperscript{94} See text accompanying note 71 supra.
debtor's benefits and to the extent of the protection that is deemed adequate, must be evaluated in the bargain's reconstruction.

Further, the "essence of the bargain" in relation to the nature of the collateral is not static. Events may, and frequently do, change that bargain. Where a creditor has the prebankruptcy opportunity to assert bargained—for rights and fails to do so, that failure should have some bearing on the extent of the bargain in bankruptcy. Finally, events beyond the control of the parties or conditions imposed upon the parties may change and, thus, define the parties bargain in bankruptcy.

This discussion suggests that a court, deciding whether to order the payment of opportunity costs must have a starting point. Defining the bargain based on expectations common to various kinds of creditors is a good starting point. It tells a court, for example, in which direction the initial equities point. With this beginning, other factors can be evaluated to determine how much, if at all, the equities shift.

B. THE DEBTOR'S REORGANIZATION EXPECTATIONS

The Briggs Transportation court noted that the creditor's contractual rights are subject to federal law. It is important, in this context, to remember that the Bankruptcy Code has as one of its goals the rehabilitation of debtors. With this goal in mind, a court deciding a creditor's claim for adequate protection must consider the effect of its decision on the debtor's ability to reorganize.

The effect on the debtor's reorganization ability is particularly important where periodic cash payments are ordered, since such pay-
ments generally put the greatest burden on debtors. In some cases, for example, where the debtor proposes to use cash collateral or where the collateral is depreciating, the risk of loss to the creditor is so great that the burden is justified. In these cases, the opportunity given the debtor to formulate a plan of reorganization threatens not only the creditor's contract rights, but also the collateral itself. If the collateral disappears, the creditor's rights have not been simply suspended; they have been destroyed.

Where opportunity cost is the only interest for which protection is sought, the stakes are not as high. Whichever result is reached, the collateral remains available to secure repayment. A court is thus engaged in a more traditional equitable determination. Assuming a creditor makes a case that "foreclosure and reinvestment" are an important part of the bargain, its right to opportunity-cost protection must be balanced by the debtor's expected reorganization benefits.

Two of the factors listed by the Briggs Transportation court are useful in weighing the debtor's reorganization benefits. The first factor is the length of the stay. Where the request for relief comes early in the stay period, the debtor's equities are strong. The debtor's finances in the early stages of bankruptcy are likely to be both fragile and disordered. Ordering opportunity-cost protection here effectively may end reorganization prospects before they are intelligently explored.

100. See, e.g., C.F. Simonin's Sons, 28 Bankr. at 711-12; Bermec Corp., 445 F.2d at 369. But see In re Stein, 19 Bankr. 458, 460 (Bankr. E.D. Pa. 1982) (allowing debtor to use cash collateral without payments to creditor; effect of each use was to improve overall position of secured creditor and constituted adequate protection).

101. In such a case, absent adequate protection, the constitutional foundation of § 362 is undermined. See Wright, 304 U.S. at 516-17.

102. Some would disagree. See, e.g., Jackson, supra note 18, at 875. Professor Jackson assumed that a deviation from the market value of the secured creditor's interest would result in higher credit costs. Whether this is true or not, Professor Jackson candidly recognized that any increase charged by a secured creditor would, in an ideal creditor world, result in a decrease in the cost of unsecured credit. Id. at 875 n.83.

103. Unlike cases where the value of the collateral is threatened and, thus, which involve constitutional guarantees, cases involving the creditor's opportunity cost interest require a comparison of equities. Compare Wright, 304 U.S. at 516-17 with Briggs Transp., 780 F.2d at 1346.

104. Briggs Transp., 780 F.2d at 1349 (length of stay and chances of reorganization).

105. A secured creditor may file a motion for relief at any time, and under § 362(e), the motion must be heard within 30 days. 11 U.S.C. § 362(e) (Supp. II 1984). Theoretically, the adequate-protection issue could arise as early as the first month into the case.

106. The cases do not make this distinction, at least as to its being a limiting factor. Cf. Independence Village, 52 Bankr. at 735. The court stated:

Lastly, we are not blind to the potentially apocalyptic effect of our ruling on the debtor. Because we hold that monthly payments of $27,500 have been due since April 4, 1985, the debtor is now (5 months later) hit with an immediate liability of $137,500. Although we cannot say this with any authority, we
Second, the debtor's reorganization chances should play an important role in deciding the opportunity-cost question. Where those chances appear good the creditors, including secured creditors, will usually benefit from waiting for the reorganization. This benefit will likely offset the opportunity costs incurred during the waiting period, while, at the same time, the congressional policy favoring reorganization is being advanced.\textsuperscript{107} Where the debtor's reorganization chances appear poor, particularly after a lengthy stay period, the equities shift heavily in favor of the creditors.\textsuperscript{108}

Also, where reorganization seems reasonably possible, opportunity-cost adequate protection may not be necessary. Where a reorganization plan is proposed and confirmed, either by acceptance or under the Bankruptcy Code's "cram-down" provisions, the secured creditor frequently will receive compensation in an amount adequate to repay lost opportunity costs.

To be confirmed, a plan must propose payment to a secured creditor equal to the present value of that creditor's secured claim.\textsuperscript{109} Congress seems to have intended that the method of valuation be determined by the nature of the valuation request.\textsuperscript{110} The value of the doubt that the debtor has the means to tender a lump sum in this amount. Its inability to do so should not be the death knell for this Chapter 11. This is a relatively large and unquestionably complex case, which has resulted in some delay in fully resolving the issues herein. Now that a determination has been made, the debtor should be given a reasonable opportunity to make provisions to comply with our ruling. Accordingly, we believe that it would be equitable to allow the debtor to pay these already due payments in installments.

\textit{Id.} However, where the stay is long, courts are inclined to order opportunity-cost payments. \textit{See, e.g., In re Hagendorfer, 42 Bankr. 13, 16 (Bankr. S.D. Ala.), aff'd, Hagendorfer v. Marlette, 42 Bankr. 17 (S.D. Ala. 1984).} \textsuperscript{107} \textit{See, e.g., In re Penny, 52 Bankr. 816, 820 (Bankr. E.D.N.C. 1985); In re Stein, 19 Bankr. 458, 460 (Bankr. E.D. Pa. 1982).} \textsuperscript{108} Hagendorfer v. Marlette, 42 Bankr. 17, 19 (S.D. Ala. 1984) (involving no plan's being filed for a year and no prospect of profitable crop year); \textit{In re Kingman Warehouse Co. IX, 17 Bankr. 377, 381-82 (Bankr. N.D. Iowa 1982)} (involving a debtor unable and unwilling to make payment on an obligation on a warehouse, which was empty for a long period of time, and with no likely buyer).

\textsuperscript{109} 11 U.S.C. § 1129(b) (1982 & Supp. II 1984). Section 1129(b) states conditions under which the court may confirm a proposed plan of reorganization notwithstanding the rejection of the plan by one or more classes of creditors. Section 1129(b)(2)(A)(i)(II) sets forth one condition:

\textit{That each holder of a claim of such class receive on account of such claim deferred cash payments totalling 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.} § 1129(b)(2)(A)(i)(II) (1982).

\textsuperscript{110} S. REP. NO. 989, \textit{ supra note 3, at 68, reprinted in 1978 U.S. CODE CONG. \& AD. NEWS at 5854.} The report stated: "While courts will have to determine value on a case-by-case basis, the subsection makes it clear that valuation is to be determined in light of the purpose of the valuation and the proposed disposition or use of the subject property." \textit{Id.}
claim depends upon the value of the collateral, which can, of course, depend upon the method of valuation. A creditor claiming the right to opportunity-cost adequate protection seeks compensation for the loss of foreclosure and reinvestment rights. For such a request, value should be liquidation value, and more specifically, forced liquidation value.\(^{111}\)

However, if a plan is confirmed, the creditor’s secured claim may be given a value somewhat higher than the forced liquidation value. Where value is a question, as it would be under section 1129(b)(2)(A)(i)(II), the Bankruptcy Code's history indicates that valuation compromises will be reached.\(^{112}\) Furthermore, the undersecured creditor, who needs opportunity-cost protection most, normally will receive some payment on its unsecured claim under section 1129(b)(2)(B)(i).\(^{113}\) These two factors make it likely, as a practical matter, that the secured creditor will receive more under the plan than it would have at the time the adequate protection issue is decided.

An additional factor in any equitable balancing test is the debtor’s conduct. Under section 362(d), secured creditors are entitled to relief from the automatic stay “for cause”; lack of adequate protection qualifies as “for cause.”\(^{114}\) Another example of “cause” for relief is bad faith in filing the Chapter 11 petition. For example, where the debtor files a petition solely to stall a foreclosure action and has no prospects for reorganization, courts have granted the creditor relief from the stay.\(^{115}\)

While these cases consider “cause” as it relates to requests for relief, a determination that insufficient cause exists for relief need not make that cause irrelevant. The debtor may nonetheless be acting in a manner demonstrating an abuse of the Bankruptcy Code’s protection. If so, the creditor’s opportunity-cost equities are enhanced.\(^{116}\)

\(^{111}\) American Mariner, 734 F.2d at 431. Contra Monnier Brothers, 755 F.2d at 1341 (using fair market value as the appropriate measure); Contra In re La Jolla Mortg. Fund, 18 Bankr. 283, 289 (Bankr. S.D. Cal. 1982) (using market value less 15%, reflecting the value obtainable in reasonable time).


\(^{113}\) 11 U.S.C. § 1129(b)(2)(B)(i) (1982). The section provides: “With respect to a class of unsecured claims—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.”


\(^{115}\) See, e.g., In re Saxon Indus., 43 Bankr. 64, 67 (Bankr. S.D. N.Y. 1984).

\(^{116}\) In In re Philadelphia Consumer Discount Co., 37 Bankr. 946 (E.D. Pa. 1984), the district court granted relief from the stay because the debtor had not provided for “stability” of cash collateral. Id. at 950-51. Further, the court found that the debtor’s
The reverse should also be true. Where the debtor acts in good faith to maintain the bargain, notwithstanding bankruptcy, his equities should be enhanced. For example, keeping taxes current, as is required in most real estate mortgages, demonstrates the debtor's good faith, as does making other required payments. If a reorganization justification is the belief that all creditors benefit from the enhanced value of an ongoing business, the debtor who conscientiously pursues this enhancement should be encouraged.

C. WHAT PROTECTION IS ADEQUATE

Where the bargain is reconstructed in bankruptcy to require protection of the opportunity cost, questions of adequacy must also be answered. First, while periodic cash payments equal to the interest on the liquidation value of the collateral will be commonly ordered, they should not be the exclusive means of providing adequate protection. In addition, cash payments should be calculated to give the secured creditor its bargain, but no more than that bargain.

The American Mariner court ordered the debtor to make cash payments to the creditor equal to the creditor's expected rate of return upon the reinvestment of the collateral's value. Other courts have generally ordered similar periodic cash payments. Yet, as both American Mariner and Briggs Transportation agree, periodic cash payments are but one form of adequate protection. If the creditor's bargain can be protected by some other form of protection, no good reason exists to require such periodic payments.

The real estate mortgagee, for example, usually can protect itself by negotiating an equity cushion. Where this cushion exists, allowing the secured claim to earn interest, as it would under section 506(b), normally gives this creditor all the protection it needs.

primary motive in filing the Chapter 11 petition was to stop foreclosure efforts. The court said: "This fact weighs against the relief debtors request." Id. at 952. See also In re Southerton Corp., 46 Bankr. 391, 400 (M.D. Pa. 1982) (stating that it would be inequitable to subject creditor to a long-term wait for its payment where no reasonable prospect exists for debtor's successful rehabilitation).

118. American Mariner, 734 F.2d at 435.
119. See cases cited note 31 supra.
120. See Briggs Transp., 780 F.2d at 1348; American Mariner, 734 F.2d at 435.
121. See Briggs Transp., 780 F.2d at 1348; American Mariner, 734 F.2d at 435.
122. See, e.g., In re San Clemente Estates, 5 Bankr. 605, 610 (Bankr. S.D. Cal. 1980) (stating that equity cushion gives creditor adequate protection).
Alternatives to periodic cash payments may even involve no payment. For example, in *In re Vanas*, the bankruptcy court found an undersecured creditor's opportunity cost adequately protected because one asset, livestock, was appreciating faster than another asset, equipment, was depreciating, thus providing a net increase in value to the secured creditor. Moreover, in *In re Penny*, the court found an undersecured first mortgage adequately protected by the projected increase in the collateral's value as a result of the debtor's proposed orderly liquidation of the property. In an appropriate case, the creditor's bargain may also be adequately protected by giving that creditor a lien on other collateral to secure accruing interest. In other situations, as noted in *Briggs Transportation*, payments to an entity other than the creditor may provide protection.

Even the secured creditor who receives opportunity-cost adequate protection payments should not, by virtue of those payments, receive a windfall. To avoid overcompensating the creditor, the court must "take account of the usual time and expense involved in repossession and sale of collateral."

In calculating the amount and timing of opportunity-cost payments, a court must factor in the costs which would have been sus-

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124. Id. at 1000.
126. Id. 820. The *Penny* court also concluded that a second mortgage was entitled to no adequate protection for lost opportunity cost, since if the property was liquidated, the first mortgage would exhaust the proceeds. The second mortgage thus was not harmed by the stay. Id.
127. Id. at 821. See also, *In re Errington*, 52 Bankr. 217, 219 (Bankr. D. Minn. 1985) (stating that decline in value of creditor's interest in debtor's farmland was not a result of the automatic stay, but rather of the market, and would be an ongoing decline in value regardless of the bankruptcy proceedings).
129. *Briggs Transp.*, 780 F.2d at 1349. The court stated: "Similarly, a court might look to whether taxes and other payments designed to keep the collateral free of statutory liens are being paid or will be paid by a debtor in determining whether a secured creditor is entitled to compensation for delay in foreclosure caused by the stay." Id. This factor should also be considered when the initial question of right to opportunity cost is decided, see notes 116-17 and accompanying text supra, but it has relevance here as well. Of course, a debtor who fails to make the above payments seriously damages its ability to keep the collateral during reorganizations proceedings. See, e.g., *In re Pittman*, 7 Bankr. 760, 762-63 (Bankr. S.D.N.Y. 1980).
130. See note 117 and accompanying text supra.
tained by the creditor absent bankruptcy. Foreclosure and reinvestment take the creditor's time and use its money. Deducting from an opportunity-cost payment the expected costs fairly attributable to such delay does no more than give the creditor the actual value of its reinvestment interest. However, in doing so, the court must guard against overestimating these delay costs.

In *Grundy National Bank v. Tandem Mining Corp.*, the Fourth Circuit Court of Appeals determined the timing of opportunity-cost payments as follows:

We also consider the beginning period for the computation of interest. Interest should not begin any earlier than the time that the creditor petitions for relief from the automatic stay. Even then the timing of interest should be postponed to take account of the time that would be consumed in repossession and sale of the collateral. This approach overstates the delay and, thus, the costs associated with repossession and sale. Since filing the bankruptcy petition triggers the automatic stay, whether or not the creditor has begun the steps leading to liquidation, the stay now prevents that liquidation. In any subsequent request for relief brought by that creditor where opportunity cost is appropriate, the debtor should offer payments from the date the petition is filed, less an amount equal to the loss sustained during the time it would take the creditor from that date to liquidate and reinvest the proceeds. However, to avoid charging the creditor twice for this delay, some allowance must be made for the possibility of delays if reorganization is unsuccessful. This allowance could be done, for example, by requiring the debtor as part

132. 754 F.2d 1436 (4th Cir. 1985).
133. *Id.* at 1441.
134. 11 U.S.C. § 362(a) (Supp. II 1984). *See Lippy*, 56 Bankr. at 524, 527; *In re Landsea Mktg., Inc.*, 53 Bankr. 436, 437-38 (Bankr. C.D. Cal. 1985); *In re Deeter*, 53 Bankr. 623, 628-29 (Bankr. N.D. Ind. 1985); *In re Bear Creek Ministorage, Inc.*, 49 Bankr. 454, 458 (Bankr. S.D. Tex. 1985). The *Bear Creek* and *Deeter* courts both concluded that compensation for lost opportunity cost should begin as of the time bankruptcy was filed, less costs associated with delays in foreclosure and sale. *Deeter*, 53 Bankr. at 629; *Bear Creek*, 49 Bankr. at 458. The *Bear Creek* court also suggested that periodic payments need not be made for periods prior to the time that the creditor sought relief under § 362, even though the applicable delay period had elapsed prior to such motion. *Bear Creek*, 49 Bankr. at 458 n.11. This result, the court believed, avoided the potentially disastrous effects of an order directing the debtor to pay past-due opportunity-cost payments. *Id. But see Independence Village*, 52 Bankr. at 735 (ordering debtor to pay $137,500 in back, adequate protection payments).
136. The *Independence Village* court concluded that costs which the creditor would experience outside of bankruptcy due to delay ought not to be deducted from opportunity-cost payments, since these delays would be experienced if the reorganization was unsuccessful. *Independence Village*, 52 Bankr. at 730-31. It, however, did compute the payments from the date the motions for relief were filed, rather than the
of the adequate protection, to agree to waive applicable state procedural protections contributing to delay.\textsuperscript{137}

\section*{IV. CONCLUSION}

This article has suggested a framework for implementing the balancing test required by \textit{Briggs Transportation}. Inevitably, as a result of the balancing process, some creditors will be denied opportunity-cost adequate protection and will be disappointed. The function of this article's framework is to focus on factors which will limit that disappointment to cases where creditors' opportunity cost expectations are low and debtors' reorganization expectations are high.

There are some clear lines which can be drawn. Collateral which is wholly or partially liquid, including cash collateral, should entitle the secured creditor to opportunity cost adequate protection. This protection is both because the creditor typically would have had high expectations about regular, cash-flow payments, and because the debtor usually will be earning a return on that collateral. Requiring the debtor to pay some or all of that return to the creditor is fair.

Collateral which is depreciating on a regular basis should entitle the secured creditor to periodic payments equal to the depreciation, but not to opportunity-cost payments. This distinction is particularly true where these payments are based on fixed depreciation from the original cost down to zero value at the close of the collateral's useful life. Equipment, machinery, and real estate are examples of this type of collateral.

The other factors discussed in \textit{Briggs Transportation}, such as the duration of the stay or the likelihood of successful reorganization, will be useful principally in determining when opportunity-cost payments, not otherwise required, must be made. That is, even where the creditor's bargain did not include a high expectation of regular cash payments, opportunity-cost payments may be ordered after a prolonged stay or when it becomes evident that the debtor cannot reorganize. For example, a creditor with a security interest in livestock would normally not be entitled to opportunity cost, since the creditor

\footnote{\textsuperscript{137} This may present problems in cases, like \textit{Independence Village}, where the collateral is real estate. Most states have statutes prohibiting the "clogging" of the debtor's equity of redemption. See, e.g., \textit{Coursey v. Fairchild}, 436 P.2d 35, 39 (Okla. 1967). However, federal law should preempt these state statutes. See \textit{United States v. John Hancock Mut. Life Ins. Co.}, 364 U.S. 301, 309 (1960) (stating that federal law preempts state redemption laws). Even if the federal law does not preempt these state laws, the real estate mortgagor could, consistent with state laws, give its mortgagee a deed in lieu of a foreclosure coupled with the adequate protection offer. See G. Osborne, G. Nelson \& D. Whitman, \textbf{REAL ESTATE FINANCE LAW} 421 (3d ed. 1979).}
would anticipate waiting a substantial time before the collateral would be marketed. However, where a debtor has had ample time to propose a plan of reorganization and has not done so, interest payments become appropriate.

Finally, as in all equity calculations, the parties' actions must be factored into the computation. The debtor who deliberately conceals or disposes of collateral, or who intends to make no good faith attempt to reorganize, should be treated differently from the debtor who acts aboveboard and in good faith. Similarly, the creditor who sits on its rights should not be heard to complain about delay brought about by the automatic stay.

Using this framework, the creditors in Briggs Transportation should have been denied opportunity cost. The equipment which constituted the collateral in Briggs Transportation, tractor-trailers, was classic fixed-depreciating property. Periodic payments reflecting this depreciation would have been the essence of the bargain for these creditors, and such payments were being made by the debtor. Unless the debtor was unreasonably tardy in proposing a plan, or had no realistic prospects for reorganization, the case falls squarely in the Bermec mold. For such cases, a court would be on solid ground if it were to conclude that Congress intended that the debtor need only provide protection for the value of the collateral.