American Bankruptcy Institute Law Review

Volume 7 Number 2 Winter 1999

ABI REAL ESTATE COMMITTEE A ROUND TABLE DISCUSSION: SUPREME COURT DECISION

203 N. LaSalle St. Partnership

MR. COLLEN

: I'd like to start this by finding out what the *203 N. LaSalle* [1] case really means. Let me just quote the concluding paragraph of the majority holding: "It is enough to say, assuming a new value corollary, that plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of section 1129(b)(2)(B)(ii)." [2] The Supreme Court then remands the case. [3] And I guess I'll start with Professor Zinman. If you're Judge Wedoff on remand, what guidance do you now have in reconsidering this plan?

PROF. ZINMAN

: Well, I can't speak for Judge Wedoff. But I don't think the opinion offers much guidance at all. It doesn't decide whether there is a new value exception in the Bankruptcy Code. It doesn't hold, if there were a new value exception, whether competing parties must be offered the right to bid. They're just saying that if you only offer old equity the right to bid, the plan couldn't possibly be confirmed. [4] It doesn't deal with the classification issue. It doesn't deal with the requirements for a new value exception. For example, in the Seventh Circuit *LaSalle* decision the court used smoke and mirrors to find that the requirements were met. For example, the requirement of necessity was met, because it was necessary for the debtor's plan, not because it was necessary for the success of the business as Justice Douglas articulated the requirement. [5] Sure, it was necessary for the debtors' plan, otherwise they couldn't keep the property without paying the debt.

Was it reasonably equivalent to what they got? The Court specifically did not deal with the value of control, which the Supreme Court on two occasions, in *Boyd* [6] and *Ahlers*, [7] made clear belong to the creditors. In fact, they went back to the discredited rule that since the mortgage is equal to the value of the collateral, there is no value whatsoever and any bid would be reasonably equivalent. [8] And Justice Douglas talked about the priority rights of creditors being preserved. [9] There's no attempt to protect the priority right of the creditor in that case.

So I'm not sure exactly what the Court will do when they get the case back. I assume it will approve a plan that provides for other people to bid. Then we have the question of what does that mean, and that may be your next question. I'll stop at this point.

MR. COLLEN

: Well, before we get to who can bid and under what conditions, you mention the issue of claims classification. And John Rapisardi, I wonder if you have a viewpoint on the absence of claims classification discussion in this opinion?

MR. RAPISARDI

: Yes. The classification issue didn't come up as the Supreme Court notes in the footnote because it was not raised on appeal. [10] However, that is an issue that really, at the end of the day, if it were properly addressed, we would not have reached the new value issue in this case. [11] And 99% of the time I think a bankruptcy court would identify that as an issue or the lawyers arguing on—or the lenders would hit on the classification issue. In this situation the lender had an unsecured deficiency claim close to $30 million, and it was put in a separate class.

The overwhelming majority of Circuits that have addressed this issue have held that a deficiency claim under section 1111(b) is not different than trade claims or other ordinary unsecured claims that arise in bankruptcy cases and, [12] therefore, it should be properly classified with other trade creditors. [13] Had that been the case in *North LaSalle*, the secured creditor would have controlled the vote under the plan of reorganization and there would have been no accepting classes under the debtor's plan. [14] Also, as a matter of law, and what was not raised in the lower courts was the fact that the secured creditor was receiving sixteen cents on the dollar on account of its unsecured deficiency claim, thereby violating the unfair discrimination rule of the Bankruptcy Code. [15] So, if you look at classification and what the Circuits have said on that issue and on unfair discrimination, you don't get to the new value exception under the *North LaSalle* factual scenario. I view this situation, the new value corollary, or the failure of the debtor to satisfy that concept, as the last defense for the secured creditor. And I've always taken comfort that you don't get to that defensive argument because you have to get by classification and unfair discrimination first. [16]

MR. COLLEN

: Well, turning to some of the other areas where there's a lack of clarity in the Court's decision that were mentioned by Professor Zinman: David Neff, you do quite a bit of debtor work. What kind of options does this give a debtor in the future, in terms of who can bid for equity interests in the debtor and under what circumstances?

MR. NEFF

: Well, I think one of the things that's going to be instructive as this goes back to Judge Wedoff, it will be somewhat of a guide for future debtors, is how he's going to treat the bank's ability to credit bid. [17] Because this is a situation where there was very little unsecured debt vis a vis the deficiency claim of the lender. [18] And if the lender comes in now and says, well, Judge, we'll put in $8 million cash and pay unsecureds in full, in essence, they're offering more consideration than what the debtor offered.

But it's really a ruse because all of the excess cash is going to go right back to the bank on its deficiency claim. And whether that constitutes a higher and better bid than what equity holders have offered is a question that we just have to see how courts are going to rule. If, in fact, courts say that is a better offer, then I think you're going to see substantial leverage by undersecured creditors who want to obtain the property back, and it would be extremely difficult for debtors, I think, to hold on to the property in that situation.

I think also the Court, by inviting now, in essence, competing bids in single asset cases is going to give a great deal more opportunities for competitors to come in and place bids**,** and for strategic purchasers to come in and place bids in situations where they otherwise might not have gotten involved or might not have been able to get involved because the debtor had filed a plan within the exclusive period.

MR. COLLEN

: Alec Ostrow, do you see any way in which debtors can continue to maintain leverage or strategic advantage even in the context of mandatory competitive bidding, whatever the courts may ultimately determine the exact nature of that mandate to be?

MR. OSTROW

: Absolutely. My view of this decision is that the debtor failed, essentially, on a technicality, and it was during that exclusivity where the debtor didn't have a provision for an auction process on the equity in the reorganized enterprise. If you put that in, which is to say that if you propose this plan during the period of exclusivity and you open it up to competitive bidding on the equity in the restructured enterprise subject to the restructured secured debt, then I think the plan works. The only prohibition was that there was a lack of competition and a lack of market testing when the debtor had the exclusive opportunity to bid on the property.

Take away the old equity's exclusive opportunity to bid, and the debtor can get to the exact same point. As debtor you still have the right to restructure the secured debt, and you have the ability to set the ground rules for all the competitive bids, if you just propose a plan during the exclusive period that provides an auction process on the equity in the reorganized enterprise. It would seem to me that under those circumstances you don't have an issue about credit bidding, because you're not bidding on the property; you're bidding on the equity subject to the restructured debt. And the opportunity may exist for vultures to come in, but it seems to me that if you're motivated by the avoidance of a tax nightmare, you're most likely to be the largest bidder anyway.

So I think that this decision is good news for new value and good news for debtors who want to be able to propose this kind of plan. The only thing that they have to do is to allow for an auction process on the new equity.

MR. COLLEN

: Chris Graham, do you agree with Alec Ostrow that debtors are still going to retain a significant tactical advantage in a competitive bidding situation?

MR. GRAHAM

: Yes, I agree with that portion of Alec's statement. I do not agree with Alec that this decision is necessarily good for new value plans or good for debtors. I think this decision is bad for new value plans, and it's bad for debtors. I concur with him, however, that I don't think the decision completely slams the door. I think there's a crack in this decision, which says that if there is a new value corollary—and I believe the Supreme Court has now decided that it's the new value corollary and not the exception. So probably the most significant aspect of the case is that we now have the nomenclature down right. But the new value corollary, if it exists, requires competitive bidding amongst competing plans.

We now know that the new value exception—the new value corollary, if it exists, based on the *Ahlers* [19] case, is not satisfied by sweat equity, and it's not satisfied by some exclusively judicial determination as to necessary contribution of new value. More than that, everything is up for grabs. And I still think, as I said earlier, that the odds are that new value plans are not going to be confirmed over a steadfast lender that wants to obtain possession of property. I think that Judge Wedoff, if I were Judge Wedoff in this case, I would do one of two things: Either, one, I would take the case on remand and brace for an appeal; or number two, try to get everybody in the conference room and work something out, whereby there's a sharing of appreciation in this property and a sharing in the tax benefits with the bank.

MR. COLLEN

: Ed Flint, do you see any guidance in the Supreme Court's decision on how to handle the actual process of bidding for new equity?

MR. FLINT

: I do. I think that—well, let me retract that for a moment. I think that clearly the Supreme Court is telling us that a bid for new equity or, for that matter, a bid for the property, would satisfy the new value corollary and eliminate the problem of beyond account of language. [20] The procedural and substantive mechanisms for that

bid is unclear. It seems to me that debtors or equity holders will always have something of an advantage. And the question that struck me as I reread this last night is that their ability to bid is tantamount to a right of first refusal, even though it may not be said so in the plan. And insiders who either have development plans which others don't or who have this tax avoidance problem**,** are always going to have an incentive to outbid others. I wonder whether a case won't come up at some point, which addresses that issue.

And in the same way that the question arises whether the bank ought to be precluded from credit bidding, should the debtor be precluded from exercising some kind of a right of first refusal, which, as courts have held in other contexts, may shield the bidding? I think that's ultimately a *non sequitur*, but I think that the bidding process that we'll have or what I envision in plans in the future is a bidding process which doesn't create a right of first refusal but, basically, permits equity, even at the last minute, to top any existing bid. And I'll see if that passes muster. It will then open up the equity for bid with the assumption of the debt as I think it was Alec who suggested and move to a simultaneous confirmation hearing and auction hearing.

MR. COLLEN

: Andrew Silfen, what are your views? Is there a road map for bidding procedures here; and if not, what are the vagaries?

MR. SILFEN

: I'm not sure that this decision provides any significant road map. I think the impact of the decision is the implicit recognition of new value. [21] The open question in my mind is the strategic consequences in how debtors will respond and deal with the requirement to open up the proceeding to competition and the fixing and determination of market valuation. The Court doesn't set forth any procedures or processes by which debtors or their professional should be guided in doing this. And in my mind, there may be situations whereby terminating exclusivity is the simplest way of achieving the guidelines that are set forth here. This may only serve to continue to put debtors in a unique opportunity to achieve that which they want to do—retain equity. Because certainly if you're a competitor and you're looking to bid, it's easier to be involved in a higher and better bidding process than it is to draft and file a disclosure statement and plan and go through the voting process and a confirmation process. So if one could satisfy the requirements by simply terminating exclusivity that, in itself, may be a strategic advantage that doesn't really change the practice today.

MR. COLLEN

: David Neff, is this a good decision for debtors, a bad decision for debtors? Who benefits the most from this?

MR. NEFF

: Personally, I think it's a bad decision for debtors because I've unfortunately, been involved in too many situations where lenders have been willing to pay what it takes to try to get properties back, or there have been other parties interested in seeking to bid for the equity. And I think that this case is an open invitation, indeed a mandate for the bankruptcy judge to allow that to happen. So in that regard, where you have sufficiently motivated parties who want to compete for the equity, I think that it's a bad decision for the debtor.

MR. COLLEN

: Professor Zinman, who benefits?

PROF. ZINMAN

: I would disagree to a certain extent. I think it's relatively good for the debtor in the sense that because of the failure to resolve the issues, it opens up numerous opportunities for debtors to propose plans that will be approved by bankruptcy courts and circuit courts of appeals, and it will take a long time to get back to the

Supreme Court. So, there will be a lot of very interesting decisions coming down, and those decisions will probably be favorable to debtors. But the people most benefited by this will be the chapter 11 bankruptcy bar because it encourages litigation for many years to come.

MR. COLLEN

: Alec Ostrow, is this decision bad news for debtors?

MR. OSTROW

: No. I don't think so. I think it's bad news to the extent that they can't get exactly what they want, which is to say, the exclusive right free of competition to bid on the equity in the reorganized enterprise, and, essentially, set their own price. But I think it is, on balance, considering the alternative of outlawing the new value corollary, it is very good news because I believe that it is implicit in this decision that seven members of the court agree that there is no prohibition against equity bidding and old equity is not disqualified, therefore, they can participate.

And I believe there is a road map for equity to set the ground rules under which all competitive bids for the equity must come in. And so as long as they do it during the exclusive period, and I emphasize that the Supreme Court has not prohibited consideration of this during the exclusive period, they can set up a ground rule where you bid on the equity in the reorganized enterprise subject to the restructured debt the way the debtor's exclusive plan has restructured it. So I think, on balance, it's quite good news for debtors. But I do agree with what seems to be the universal observation, that there will be a lot of litigation spawned as a result.

MR. COLLEN

: Ed Flint, how does this impact debtors and creditors going forward?

MR. FLINT

: First of all, from the creditor's standpoint, it certainly gives them a weapon in the arsenal, a secured creditor that they didn't have before. [22] They now have the ability to come in and insist on some form of competition. [23] They have the ability to come in and to test whether the proposed valuation is, in fact, the highest and best value available. [24] From the debtor's standpoint, I think, really there's going to be very little practical impact, except in two cases: One—and my comments assume the ability of the equity to come up with the funds that they're proposing. One, where debtor and debtor's equity simply wanted a bargain, to steal it at below market value. And the second situation which I run into all too frequently is where you have an economically irrational lender who is prepared to bid well above the value of the property for whatever non−economic reason may be driving them. And I do come across that in a number of cases. Other than that, so long as the property is exposed to a fair market process, a competitive process, I agree with the concept that this actually helps debtors. [25] It may take a little bit longer; you may not be subject to exactly the exclusivity provisions we've been used to, but we should be able to get to essentially the same result after a competitive bidding process.

MR. COLLEN

: Chris Graham, do you agree with that?

MR. GRAHAM

: Well, compared to where debtors could have been had the new value corollary been deemed not to exist, I agree. The decision is good for debtors because, as I said earlier, it doesn't slam the door and the debtors still control the reorganization process. I think what this decision does is, it somewhat levels the playing field because the playing field is tilted, particularly at the bankruptcy court level, in favor of the debtors and the

reorganization. I think this somewhat levels the playing field, particularly at the circuit court level. But in that sense it's good for debtors. I think on the merits of actual cases, in terms of litigating potential plans, I think the decision is bad for debtors, I think it is better for creditors.

MR. COLLEN

: Andrew Silfen?

MR. SILFEN

: I think I should answer the question this way: the group that's most enhanced and improved is strategic or financial acquirers. But other than that group, I think I agree with Chris that it just simply levels the playing field as between the debtor and the secured creditors.

MR. COLLEN

: I should interject at this moment that our colleague, Mike Blumenthal, on the committee was not able to join us because of a competing engagement. But he did send me an e−mail, which I think partly addresses Alec Ostrow's point about the ability to utilize a sort of quasi−exclusivity by simply requiring that competing bids adhere to the debtor's plan in all respects except for the price paid for equity. Mike's e−mail reads in part: "They also virtually eliminated exclusivity by default if bidding is required to demonstrate that the new value is not on account of equity's prior interest." And I think that behind that comment is Mike's thought that one could effectively make a competing bid by means of a plan that does change the proposed treatment of debt in some way from the debtor's proposed plan so that, in effect, you have a counterplan sponsored by a creditor. With that, I know that Bob Zinman has been graciously holding a question for some time. And if you haven't forgotten the question through all of this delay, please feel free to raise it.

PROF. ZINMAN

: Alec talked about the opportunity for bidding on the value of the equity, and I just don't know what that is because the equity is usually the value of the property in excess of indebtedness. And since, by definition, we now have a mortgage at 100 percent of the value of the property, where is the equity that people are bidding on? Or did you mean something else like just the ownership?

MR. OSTROW

: Well, my view on this is that we have property rights that are divided. And you know, harkening back to the first year of law school, if you view property rights as a bundle of sticks and if you have a fee−simple absolute not subject to liens and encumbrances, you have all the sticks, and if you have something else, then you've got some sticks and other people have other sticks. [26] It seems to me that when you've got a property with a mortgage on it, the mortgagee has some sticks, including the right to take the property away if the debt goes into default. [27] But the equity still has some sticks, which is the right to use and enjoy the property and, as long as the loan is not in default, get the benefit of some income stream and any increase in value. [28]

So I think that when you restructure the secured debt, you leave that essential division of sticks intact. And those rights or those sticks kept by equity would be the subject of the competing bid on the debtor's new value plan proposed during exclusivity. [29] So the property is not sold. The property is retained by equity. And once the mortgage loan is paid off, the property belongs to equity. [30]

MR. OSTROW

: So it's those rights that the old equity are bidding on under the new value plan and those rights that you should open it up to competitive bids from anybody else. [31]

MR. RAPISARDI

: What I wanted to say was, keep in mind that the Supreme Court came very close to saying something that the Second Circuit in *In re Coltex* [32] clearly stated; and that is, that the new value contribution has to be necessary to the reorganization plan. [33] And what that means is, equity just can't match someone else's bid. It's got to be the best possible price or it's got to be the lender of last resort because no one else is willing to put money into the plan.

If I am representing an undersecured creditor with a very large deficiency claim and old equity comes in and says, "Hey, guys, I'm going to, through the new value plan, contribute $6 million to the plan of reorganization," as an undersecured deficiency creditor, what I would do is match that bid by $1 in excess of the new value contribution and keep driving up the price. Because, at the end of the day, what I am bidding on is not technically the mortgaged property, but the equity interest. And if I can outbid equity, I will wind up with the equity in the entity that owns this property. Which means at the end of the day, that the money that's used to purchase the equity will fund a plan of reorganization and whatever is left over comes to me. [34] Usually what will happen is, the secured lender won't have a problem doing that because the money it's bidding in on the equity goes to pay down the unsecured claims. And as I mentioned before, nine times out of ten, the deficiency claim will be lumped together with the trade creditor claims. [35]

And if the debtor's plan is proposing to pay seventy−five, eighty cents on the dollar, the undersecured creditor is going to get that money back either through the distribution on its unsecured deficiency claim or through the residual on its equity. So I think there's some confusion here about bidding in on mortgaged property. The practical reality, and I think under this position it strengthened the lender's hand saying that it's not enough for old equity to match someone else's bid. It has to be the best possible price. And that's why I think it comes very close to the rationale that's expressed in the Second Circuit's *Coltex* decision. [36]

MR. COLLEN

: John [Rapisardi], do you think that the decision allows, or maybe even requires, credit bidding by the secured lender against equity?

MR. RAPISARDI

: You know, as I mentioned, I think credit bidding is a misnomer. In some ways it's akin to credit bidding, but the secured lender −− the undersecured lender is going to sit back and match whatever bid the old equity makes.

MR. COLLEN

: Well, let me put it this way: Is that a bid that can come under section 363(k)? [37]

MR. RAPISARDI

: You're, in effect, getting credit for your lien by getting the money back through the plan of reorganization, because that money has to be earmarked for distribution to the unsecured creditors. [38] So, you'll get the money back because you have a very large unsecured deficiency claim, you'll get the money back through that. [39] Or at the end of the day you will have been successful—if you outbid equity, you're going to be the equity holder under the reorganized plan. What's interesting here and what muddies the water, because of the way this issue has been set up, the unsecured deficiency claimant, the lender here, that deficiency claim is in a separate class getting paid 16 cents on the dollar. That usually doesn't happen. Usually, the deficiency claim is together with the trade creditors who are going to be getting paid a large percentage of their claim because the debtor will want the trade creditors to vote in favor of the plan for reorganization.

MR. COLLEN

: I should add that part of Mike Blumenthal's e−mail accuses the Supreme Court of, "punting" on the classification issue.

PROF. ZINMAN

: I think the issue was that they fumbled before they had an opportunity to punt.

MR. COLLEN

: They never had the ball. And I think that is the import of the footnote.

MR. GRAHAM

: I just want to point out on the credit bidding, I think John Rapisardi's answer to your question was that the bidding should be cash as opposed to a credit bid.

MR. RAPISARDI

: That's right.

MR. GRAHAM

: And his thinking was that the cash would then come back to the secured lender. Obviously, that's a big issue in terms of the bidding; does the secured lender have to put up cash or are they allowed to credit bid their deficiency claim.

MR. COLLEN

: I would presume it would only come back ratably to the extent of the lender's participation in the unsecured class.

MR. GRAHAM

: Right.

MR. COLLEN

: Okay.

MR. SILFEN

: Can I ask a question to John [Rapisardi]? This is Andrew Silfen.

MR. COLLEN

: Yes.

MR. SILFEN

: Since one of the new value requirements is that you have to show that the cash is necessary for the reorganization, and you make an evidentiary showing that the market will not contribute or buy in any higher and opening up the process is an exercise in futility, is that evidentiary showing sufficient to meet the standards set forth in this case and dispense with the need of having to open it up?

MR. RAPISARDI

: I think that in order to show that you have, in effect, priced this at market, I think you have to open it up. You have to demonstrate that the process was opened up to let third parties come in and bid in on the value.

MR. COLLEN

: Andrew [Silfen], you really seem to have asked a question that parallels the viewpoint of Justice Stevens in the dissent, [40] which is that if there's an adequate evidentiary showing that you've really priced it at market, the bankruptcy judge ought to be empowered to confirm the plan. [41] Are you advocating the position of Justice Stevens? Is there anyone here who would agree with the dissent?

MR. SILFEN

: I think in certain situations one can make an evidentiary showing that satisfies this requirement. I don't think it's a blanket rule, but certainly I can envision situations where you can make a sufficient evidentiary showing. And based on what new value is and for it to satisfy that test, it can be met in certain situations.

MR. NEFF

: Of course, Justice Stevens says in a footnote that "[i]n order to flush out all facts bearing on value, perhaps the bankruptcy judge should have terminated the exclusivity period and allowed the bank to file its plan." [42] And "that the bank's plan called for liquidation of the property in a single asset context does not necessarily contravene the purposes of Chapter 11." [43] Had that been done, it would have been very problematic for the debtor and probably would have given the secured lender exactly what it wanted.

PROF. ZINMAN

: I just wonder, if we say that there is a new value corollary and that it is met when you open bidding to others, and if you then let the lender propose the lender's plan, by definition you have two plans that are fair and equitable and then it's up to the judge to pick the plan. And there's no requirement in the statute that the judge pick the plan that is best for the lender or best for the estate; rather that he consider the preferences of creditors and security holders in making the determination. [44] The judge can pick the plan that may, for example, carry out the objective of "fresh start" and, therefore, accept the debtor's plan.

MR. SILFEN

: That goes back to my earlier question. If you terminate exclusivity, is that sufficient to meet the standards set forth in this case? Can the debtor say exclusivity is terminated? Does that satisfy the requirements?

MR. OSTROW

: I think it absolutely does. But I think the debtor is giving up too much if it does that. And I must say, I find myself in substantial agreement with Bob Zinman's last comment and with practically everything John Rapisardi has said about the ability in the practical world to use this tool in light of the requirement in most Circuits that you cannot separately classify the deficiency claim. [45] But we have to remember that the new value concept is not just limited to single asset real estate plans. [46] It has, perhaps, been brought into sharpest focus with regard to its policy implications in these kinds of plans, but I've used it all the time in other kinds of contexts where you have a different kind of company and you have a different kind of asset base. And the question is, should the existing equity holders be able to participate by throwing some cash into the deal? And I think that certainly in that kind of situation, this decision is very good news, and it allows for an appropriate result.

PROF. ZINMAN

: I've got to say that I agree with Alec, which is remarkable. But I have no qualms about the fact that if the debtor comes up with some cash for the enterprise that they should get an interest equal to what they put in. The problem, though, that I see (and to use your terms it's the "sticking point") is that when the debtor puts in new equity, it's got to be—they've got to get an interest in accordance with the requirements for new value. And that means that they don't get an interest that is in excess of what their contribution merits and that the priority rights of the creditors are protected. And I don't think that the *LaSalle* plan does that. [47]

MR. OSTROW

: Well, my view is that if the plan restructures the secured debt in a way that satisfies the cram down criteria, [48] then the creditor is getting its priority rights protected by the plan. And what happens to the equity should not be a ground for the creditor's objection.

PROF. ZINMAN

: Well, the creditor only got 16% of its interest, and the debtor kept the property. [49]

MR. OSTROW

: That's on the unsecured claim, not on their secured claim. [50]

PROF. ZINMAN

: Douglas didn't talk only about the secured claim. Douglas talked about the priority rights of creditors. [51]

MR. OSTROW

: Well, maybe your philosophical difference, then, is with the bifurcation in section 506(a). [52] But it seems to me that they're getting the secured claim fully protected. And as to their unsecured claim, they get the same rights that all other unsecured creditors have under the Bankruptcy Code. [53]

MR. NEFF

: I think the Professor has hit on what I believe to be one of the seminal issues that the bankruptcy judges are going to have to decide. And whether they're creditor leaning or debtor leaning may be how they come out. And that is, whether a debtor's cramdown plan can ever be deemed a better offer than a plan proposed by the lender that offers more money than the debtor's cramdown plan, although the additional money all goes back to the lender on its deficiency claim. [54] And I just don't know how courts are ultimately are going to come out, and Judge Wedoff will be one of the first ones to decide that when the bank comes in, presumably, and says we're going to offer more money even though it all comes back to us.

MR. FLINT

: Let me offer this analysis: In that scenario, doesn't the Court, then, under section 1129(a)(7) [55] have to look at—even though the money is going back to the unsecured creditor, it is, nevertheless, providing more recovery, a greater recovery, than the debtor's competing plan. [56] Wouldn't the judge, under that scenario, under section 1129(a)(7), [57] be required to confirm the competing plan that provides a higher rate of recovery to unsecured creditors?

PROF. ZINMAN: Section 1129(a)(7) requires that creditors get what they would get in chapter 7. [58] If the property is only worth the mortgage, [59] they will get nothing in chapter 7. [60]

MR. FLINT

: I think the statute refers to liquidation. [61] My question is, if you're in a competitive bidding situation and you're setting the market value and you're auctioning the property in bankruptcy, I don't know that there's a significant difference between an auction under chapter 7 or chapter 11. [62] And does that auction, itself, set the value or the rate of recovery for purposes of section 1129(a)(7)? [63]

MR. RAPISARDI

: I think that's kind of mixing apples and oranges. The Court has got to first analyze each plan on its own. It's not going to be doing a chapter 7 liquidation analysis based upon what is going to be distributed under another competing chapter 11 plan. But having said that, if you're representing the secured lender, you would want to set it up so that your plan provides for superior recovery to all of the unsecured creditors. Chances are that if that happens, I think the Court would lean toward approving your plan over the debtor's plan. And I believe you would get more creditors appearing in support of your plan.

MR. OSTROW

: I have a very utilitarian view as to which plan is better. That which provides the greatest distribution to the greatest numbers of interest holders and constituencies is the plan that deserves to be the one that is approved. And I include equity holders in that. And so I think the greatest good for the greatest number ought to win. And new value plans certainly provide the opportunity for that kind of competition. [64]

MR. NEFF

: I think we also have to keep in mind that *203 North LaSalle* [65] is in the Seventh Circuit, which mandates separate classification of deficiency claims. [66] So you have an instance where the debtor can propose a plan to pay 100 cents to fairly de minimus unsecured creditors and not have to put the lender's deficiency claim in the same class; [67] whereas, in most jurisdictions we're going to have the lender's deficiency claim being in the same class with the unsecured creditors. So thereby, if the secured creditor wants to bid more for the equity, it actually is going to redound to the benefit of all the unsecureds and not just to itself, presumably by raising the percentage that all unsecureds are going to get.

MR. OSTROW

: I think we can hope for the Supreme Court to accept cert. in a classification case and not find a way to get out of it three times.

PROF. ZINMAN

: I have a problem with the whole concept of how the bidding would work in a new value situation under this case. For example, if there is credit bidding, true credit bidding, then the debtor will not be able to keep the property without paying the debts because the lender will continuously bid the property up to the indebtedness. So in *LaSalle*, in order for the debtor to keep the property, it would have to come up with the $38.5 million deficiency claim, [68] which they wouldn't be able to do. If, on the other hand, you say there's no credit bidding, then the lender has to come up with cash to put into the enterprise. Now, the question is, where does that cash go? If the lender is the successful bidder at the foreclosure sale, I don't think the lender would complain if it goes to the building because the lender would have to put that money into the building anyway. But if it goes to creditors, and, in *LaSalle*, the second mortgage is held by partners of the debtor, [69] the cash would go to pay the debtor. Now, the lender has already lost $38.5 million and you're saying if you want to keep the property, put in another million dollars that will go to pay junior creditors. [70] I don't think you'll ever get a lender to bid. So I just don't know how this could possibly work either way.

MR. OSTROW

: I don't think not getting a lender to bid is such a bad thing, but then that's the lender's choice. But I agree with John Rapisardi. The cash goes to unsecured creditors. And if the lender is the biggest unsecured creditor, then the lender gets most of it right back.

PROF. ZINMAN

: I think, Alec, what you're saying is that the debtor should be able to keep the property without paying the debt and that's certainly contrary to the philosophy by which the bankruptcy bargain in this country was made.

MR. OSTROW

: Well, I do disagree with you about that, Bob. It seems to me that chapter 11 allows for reorganization and allows for retention of property, not foreclosure. [71] And what you're suggesting is that foreclosure is the answer every time, and I don't believe that's the right answer.

PROF. ZINMAN

: No. I'm just saying that absolute priority provides that the property in the reorganized company be distributed in order of priority with old equity being at the bottom of the totem pole.

MR. OSTROW

: That's right. And the consideration that's paid gets distributed to creditors first. [72] And after the creditors are fully paid, including the bank's deficiency claim, then equity can participate. [73] But for a new value bid, that consideration goes to the unsecured creditors, including the deficiency claim. [74] And if there's an auction process on the new equity, then perhaps you will bid it up high enough so that all unsecured creditors can be paid in full. [75]

MR. SILFEN

: Alec, let me ask you this question. Based on the Seventh Circuit having separate classification, let's say that the junior classes that are paid under a plan, are paid, rather than a percentage, a fixed amount. And under your scenario you're bidding for the equity and you're bidding for the equity under the plan that's in existence. The additional moneys that you're putting in are not necessarily going to the junior creditors, because their amounts are fixed. It's not a percentage, it's a fixed amount. So it's just going to flow down even further.

MR. OSTROW

: You're absolutely right about that. But it would seem to me that in that kind of situation, there is a lot of pressure that could be brought to bear on the bankruptcy judge to lift exclusivity, to allow a different plan that would allow the unsecured creditors to get a greater percentage of the auction proceeds, if the debtor wishes to stand by the existing plan and hold the unsecured creditor's recovery fixed while the auction process allows more consideration to come into the estate.

MR. RAPISARDI

: As a practical reality, what would happen here, and there seems to be some confusion, it's really not credit bidding as though you're credit bidding for a piece of property at an auction, and yet, in substance, that's what's happening. But what you would do in representing the secured lenders, you would propose a competing plan of reorganization. And you're going to put in your plan −− you're going to fix a number on your secured claim. You can go as high as you want. At the end of the day, you're going to have to demonstrate that your plan satisfies the feasibility requirements under the Bankruptcy Code. [76] So your plan is going to have to propose funding or a sum of money that will be used for capital expenditures of the building and its ongoing expenses, servicing your secured note under the plan, whatever value you fix on it, and paying

off the unsecured claims which, presumably, would include your deficiency claim.

I think at the end of the day, boiling it all down, it's going to be the secured creditor bidding against the old equity and making sure that their bid is at least as good as the old equity, making sure that the capital infusion that's coming into the entity, the reorganized entity, is at least as good as what the old equity is proposing. And I'm talking in terms of cash. And however you structure the plan, bidding in your secured claims is possible; in *LaSalle* the secured claim was $50 million. [77] You could make it $80 or $90 million. But at the end of the day, you've got to make sure that the way the note is structured, the interest rate and how it's

amortized, that there's sufficient cash there to amortize that note and you're satisfying feasibility as compared to the debtor's plan.

MR. OSTROW

: John Collen, do you care to sum up?

MR. COLLEN

: Gentlemen, thank you for a very enlightening and productive conversation. I think that the discussion has illustrated a number of areas that will require future case law to clarify, including the mechanics of how competing bids will be made, the interrelationship between classification issues and competing bids and the relationship between terminating exclusivity and the type of counterplan or bid that could be proposed. I think people have also pointed to a number of policy questions or concerns about who will really benefit from this admittedly vague decision, and that has all been very useful. So I want to thank everybody for their time and participation, and at this point I think we'll go off the record.

FOOTNOTES:

[1] Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411 (1999).Back To Text

[2] *203 N.* LaSalle St. Partnership, 119 S. Ct. at 1424 (holding reorganization plans that allow junior interests exclusive bidding rights do not fall within absolute priority rule). The Bank of America National Trust and Savings Association (creditor) extended a loan to the 203 North LaSalle Partnership (debtor), which was secured by a mortgage on an office building that was undersecured. When the debtor filed for relief under the Bankruptcy Code, a reorganization plan was proposed whereby the old equity shareholders would infuse capital into the company and become the sole owners of the company. Under the plan the creditor's unsecured portion of the debt would not be repaid. The debtor relied on the "cramdown process" established under chapter 11 of the Bankruptcy Code to argue that the plan should be accepted despite the creditor's exceptions. *See* id. at 1414−15. In comparison, the creditor argued the "absolute priority rule" codified in chapter 11. *See* id. Under the absolute priority rule, with respect to a class of unsecured claims, "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 in any property." *See* § 1129(b)(2)(B)(ii) (1994).Back To Text

[3] *See 203 N.* LaSalle St. Partnership, 119 S. Ct. at 1424. This case had previously been reviewed by the Court of Appeals for the Seventh Circuit which confirmed the reorganization plan proposed by the 203 North LaSalle Partnership. The Court of Appeals determined that the language in 11 U.S.C. § 1129(b) allowed for the recognition of a "new value corollary." *See* In re 203 N. LaSalle St. Partnership, 126 F.3d 955, 964−65 (7th Cir. 1997) *judgement rev'd by* Bank of Am. Nat'l Trust & Savings Ass'n v. 203 N. LaSalle Street Partnership, 119 S. Ct. 1411 (1999). The Supreme Court granted *certiorari* and determined that debtor's proposed plan did not satisfy the statute and the case was reversed and remanded. *See 203 N.* LaSalle St. Partnership, 119 S. Ct. at 1424.Back To Text

[4] *See 203 N.* LaSalle St. Partnership, 119 S. Ct. at 1422. The court indicated that "[the plan] is doomed, we can say without necessarily exhausting its flaws, by its provision for vesting equity in the reorganized business in the Debtor's partners without extending an opportunity to anyone else either to compete for that equity or to propose a competing reorganization plan." *See* id. The court provides that to not allow open bidding may keep the price unnaturally low. *See* id. In addition, it is considered necessary that this exclusive opportunity to be treated as an item of value in order to maintain equitable results. *See, e.g.*, Coltex Loop Central Three Partners v. BT/SAP Pool Assoc. (In re Coltex), 138 F.3d 39, 42, 45 (2d Cir. 1998) (establishing that right to purchase post−petition equity is itself property); Khan v. Nate's Shoes No. 2, Inc. (In re Khan), 908 F.2d 1351, 1356 (7th Cir. 1990) (questioning why rational shareholders would want to invest in valueless property unless exclusive right to purchase actually does have value).Back To Text

[5] *See* Case v. Los Angeles Lumber Co. (In re Case), 308 U.S. 106, 122 (1939) (suggesting that equity shareholders may participate in reorganization plan despite "absolute priority" rule if shareholder contributed "money or money's worth").Back To Text

[6] Northern Pacific Ry. Co. v. Boyd, 228 U.S. 482 (1913).Back To Text

[7] Norwest Bank Worthington v. Ahlers (In re Ahlers), 485 U.S. 197, 204 n.3 (1988) (holding even if new value exception exists, promise of future work does not qualify as "money or money's worth"); *see also* Boyd, 228 U.S. at 502 (stating contracts for reorganization between bondholders and stockholders of corporations involving transfer of corporate property to new corporation cannot, even where made in good faith, defeat claim of non−assenting creditors). *But see* In re Coltex, 138 F.3d at 44 (positing "[f]or the most part debtors remain in control of their property and the former protections against self dealing afforded by trustee and bankruptcy judge control are no longer present").Back To Text

[8] *See* In re Ahlers, 485 U.S. at 202 (noting reorganization plans where debtors retain equity interest violates absolute priority rule); Boyd, 228 U.S. at 508 (stating creditors are entitled to retain property interest before shareholders); In re 203 N. LaSalle St. Partnership, 190 B.R. 567, 588 (Bankr. N.D. Ill. 1995) (holding new value exception to absolute priority rule allowed retention of ownership by debtor's partners).Back To Text

[9] *See* In re Case, 308 U.S. at 116 (stating "stockholders interest in the property is subordinate to the rights of the creditors") (quoting Louisville Trust Co. v. Louisville N. A. & C. Ry. Co., 174 U.S. 674 (1899)). The *Case* Court also noted that the creditor has priority over the stockholders under reorganization plans. *See* id. at 116−17. The Court went on to state "[t]o the extent of their debts creditors are entitled to priority over stockholders against all of the property of an insolvent corporation." Id. at 116 (quoting In re Kansas City Terminal Ry., 271 U.S. at 455). S*ee also supra* note 5.Back To Text

[10] *See* Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1417 n.15 (declaring that "we do not decide whether the statute includes a new value corollary or exception, but hold that on any reading respondent's proposed plan fails to satisfy the statute, and accordingly reverse.").Back To Text

[11] *See* John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Assocs., 987 F.2d 154, 162 n.12 (3d Cir. 1993) (noting that it is not necessary to review absolute priority rule after determining under chapter 11 that unsecured portion of mortgagee's claim was no different from other unsecured claims); Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture), 995 F.2d 1274, 1277 (5th Cir. 1991) (stating significance of proper classification of creditors to ensure equal treatment); In re City of Colorado Springs Spring Creek General Improvement Dist., 187 B.R. 683, 690 (Bankr. D. Colo. 1995) (noting that absolute priority rule is not applicable when all classes of unsecured creditors vote in favor of plan).Back To Text

[12] *See* In re Greystone III Joint Venture, 995 F. 2d at 1280 (stating that Code−created unsecured deficiency claims and other unsecured claims should be treated same); In re Waterways Barge Partnership, 104 B.R. 776, 784 (Bankr. N.D. Miss. 1989) (noting deficiency claims are entitled to same treatment as all other unsecured

claims); In re Pine Lake Village Apartment Co., 19 B.R. 819, 830 (Bankr. S.D.N.Y. 1982) (observing unsecured claims including tort, trade and unsecured deficiency claims should generally be grouped together).Back To Text

[13] *See* Lumber Exch. Bldg. Ltd. Partnership v. The Mutual Life Ins. Co. (In re Lumber Exchange Bldg. Ltd. Partnership), 968 F.2d 647, 649−50 (8th Cir. 1992) (asserting no legitimate reason for separating classification of deficiency claim); Oxford Life Ins. Co. v. Tucson Self Storage, Inc. (In re Tucson Self Storage), 166 B.R. 892, 898 (B.A.P. 9th Cir. 1994) (noting there is no evidence justifying separate classification of trade creditors from deficiency claim); In re Boston Post Road Ltd. Partnership, 145 B.R. 745, 748 (Bankr. D. Conn. 1992) *aff'd sub nom.* Boston Post Road Ltd. Partnership v. Federal Deposit Ins. Corp. (In re Boston Post Road Ltd. Partnership), 21 F.3d 477 (2d Cir. 1994) (stating overwhelming weight of authority holds that it is improper to separately classify unsecured deficiency claims). Back To Text

[14] *See* In re Boston Post Road Ltd. Partnership, 21 F.3d at 482 (stating that if unsecured deficiency claim is classified with other general unsecured claims, holder of deficiency claim "will control the vote of the class and the debtor will be unable to present an impaired class to approve the plan"); s*ee also* Barakat v. Life Ins. Co. of Virginia, 99 F.3d 1520, 1525 (9th Cir. 1996) (noting classification of creditor's deficiency claim with other unsecured claims would make it largest claimant in its class and its vote against reorganization could block reorganization plan); In re Greystone III Joint Venture, 995 F.2d at 1279 (discussing impact of classification of deficiency claims on voting rights); Michael E. Rubinger & Gary W. Marsh, *"Sale of Collateral"* Plans Which Deny a Nonrecourse Undersecured Creditor the Right to Credit Bid: Pine Gate Revisited, 10 Bankr. Dev. J. 265, 271 n.29 (1994) (opining that "most valuable attribute" of deficiency claim is accompanying voting rights).Back To Text

[15] *See* 11 U.S.C. § 1129(b)(1) (1994). Courts recognize four instances where discrimination between classes is permitted: (1) there is a reasonable basis for the discrimination; (2) the reorganization plan could not be confirmed without discrimination; (3) the differing treatment is proposed in good faith; and (4) there is a direct relation between the discrimination and the reasonable basis for it. *See* In re Eitemiller, 149 B.R. 626, 628 (Bankr. Idaho 1993) (outlining four instances of allowable discrimination); In re Kemp, 134 B.R. 413, 417 (Bankr. E.D. Cal. 1991) (same); *see also* In re Waterways Barge Partnership, 104 B.R. at 785 (stating differential treatment and classification is unfair if done solely to create class to vote in favor of reorganization plan).Back To Text

[16] *See* In re Resorts Int'l Inc., 145 B.R. 412, 481−82 (Bankr. D.N.J. 1990) (noting that to extent case represents classification issue, holding does not demand that all class members must be treated precisely same in all respects, but rather that there be approximate measure of equality); In re Rochem, Ltd., 58 B.R. 641, 642 (Bankr. D.N.J. 1985) (focusing primarily on discrimination in classification without considering new value exception at all). *But see* Liberty Nat'l Enter. V. Ambanc La Mesa Ltd. Partnership, 115 F.3d 650, 654 (9th Cir. 1997) (considering new value corollary in addition to classification and discrimination).Back To Text

[17] *See* In re Broad Ass'n Ltd. Partnership, 125 B.R. 707, 712 (Bankr. D. Conn. 1991) (determining creditor's inability to credit bid is not unfair because creditor could still make 11 U.S.C. § 1111(b) election to have deficiency claim secured); In re Waterways Barge Partnership, 104 B.R. at 782 (holding creditor is not granted right to credit bid simply because it did not make § 1111(b) election); Rubinger, supra note 14, at 284 (arguing credit bid right can be denied because creditors can make § 1111(b) election and still be secured).Back To Text

[18] The creditor's deficiency claim was $38.5 million. *See* Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1415 n.9 (1999).Back To Text

[19] Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988). *see also* Wilbur G. Silberman, Recent Decisions, 60 Ala. L. Rev. 273, 276 (1999) (stating there is no Supreme Court ruling on whether or not new value exception exists). Back To Text

[20] After stressing that exposure to the market would be the best way to determine the "top−dollar" value of the bill for equity, the Supreme Court did not decide whether market test mandates opportunity to offer competing plans or right to bid for same interest sought by old equity. *See* In re Ahlers, 485 U.S. at 1423. "It is enough to say, assuming a new value corollary, that plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of § 1129(b)(2)(B)(ii)." *Id.* at 1424; *see also* Richard L. Epling, *An Exchange of Views: The New Value Exception: Is There a Practical Workable Solution?*, 8 Bankr. Dev. J. 335, 337 (1991) (acknowledging allowing bids for new equity may help simplify operation of new value exception).Back To Text

[21] *See 203 N.* LaSalle Partnership, 119 S. Ct. at 1418 (acknowledging possibility that new value corollary exists**)**; David J. Mark, *Life After LaSalle: A Mixed Bag for the Debto*r, The Bankruptcy Strategist, June 1999 at 1 (stating that new value corollary still exists in same form even though Supreme Court was not explicit about existence of new value but predicting ruling in favor of new value exception if faced squarely with issue in future). *But see* Silberman, supra note 19, at 276 (opining that it is unclear whether new value exception to absolute priority rule exists).Back To Text

[22] *See* 11 U.S.C. § 1129(b)(1) (1994) (stating reorganization plan is forced on dissenting impaired creditors if plan "does not discriminate unfairly, and is fair and equitable."). *See generally* Kenneth N. Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 Am. Bankr. L.J. 133**,** 134 (1979) (examining parameters of cramdown option for debtors pre−*LaSalle*).Back To Text

[23] *See 203 N.* LaSalle Partnership, 119 S. Ct. at 1424 (stating "assuming a new value corollary . . . plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of § 1129(b)(2)(B)(ii)").Back To Text

[24] *See* Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1423 (1999) (observing "the exclusiveness of the opportunity, with its protection against the market's scrutiny of the purchase prices by means of competing bids or even competing plan proposals, renders the partners' right a property interest extended 'on account of' the old equity position and therefore subject to an unpaid senior creditor class's objection.").Back To Text

[25] *See* Douglas G. Baird, The Elements of Bankruptcy, 262−63 (The Foundation Press, Inc. 1993) (positing that shareholders are better suited than bankruptcy judges to arrive at accurate valuations because of their superior information sources); Bruce A. Markell, *Owners, Auctions and Absolute Priority in* Bankruptcy Reorganizations, 44 Stan. L. Rev. 69, 111 (noting "[o]wner bids can increase creditor dividends in at least two ways. First, they may increase competition with other bids. Second, they may make more and potentially higher quality information available to all bidders."). *But see* Thomas J. Salerno et al., *Urgent Message to the Supreme Court: 'Just Do It!'*, BCD News and Comment, May 25, 1999 (observing "bankruptcy courts, as perhaps the most specialized commercial court[s] in the world, are uniquely qualified to make these valuation determinations, and have done so for years").Back To Text

[26] *See* Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into* Real Property Law, 25 B.C. Envtl. Aff. L. Rev. 347, 366−86 (1998) (tracing origin of "bundle of sticks" metaphor to either Supreme Court Justice Benjamin N. Cardozo or Professor Wesley Hohfeld, but acknowledging neither may actually have coined term); *see also* Thomas Ross, Metaphor and Paradox, 23 Ga. L. Rev. 1053, 1061 (1989) (attributing "bundle of sticks" metaphor largely to Hohfeldian abstractions of property rights and duties in observing "[t]he bundle metaphor…expresses a special sense of the separability of the various sorts of legally recognized interests"); Michelle Andrea Wenzel, The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests, 42 Am. U. L. Rev. 607, 609 n.4 (1993) (crediting Justice Cardozo with promulgating analogy of property ownership to "bundle of sticks").Back To Text

[27] *See* RTC Mortgage Trust v. Guadalupe Plaza, 918 F.Supp. 1441, 1445 (D.N.M. 1996) (holding *prima facie* foreclosure case established by possession of Note and Mortgage which remain unpaid after due date); *see*

also Kepler v. Slade, 896 P.2d 482, 484 (N.M. 1995) (finding upon default, mortgagee may bring action on note and mortgagee may bring action on note and mortgagee so long as double recovery is not permitted); Belote v. McLaughlin, 673 S.W.2d 27, 31 (Mo. 1984) (stating mortgagee may sue on note or foreclose on mortgage, or both contemporaneously).Back To Text

[28] *See* Butner v. United States, 440 U.S. 48, 49 (1979) (finding state law is to be applied in determining whether creditors have rights to rent payable to debtors); *see also* In re Thymewood Apartments, Ltd., 123 B.R. 969, 972 (Bankr. S.D. Ohio 1991) (noting in lien theory states, rights of possession and ownership remain with debtor, even after default, up until time of foreclosure); Thomas Plank, The Outer Boundaries of the Bankruptcy Estate, 47 Emory L.J. 1193, 1207 (1998) (discussing in detail "bundle of sticks" metaphor used to describe interests in property).Back To Text

[29] *See* Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1423 (1999) (holding pre−bankruptcy equity holders could be precluded from introducing fresh capital and obtaining ownership interests in reorganized entity); In re Moonracker Assoc. Ltd., 200 B.R. 955, 955 (Bankr. N.D. Ga. 1996) (noting creditor bidding in connection with new value plan may be beneficial in enhancing value and may also appropriately reflect creditor bargain relative to other interested parties). *But see* Plank, supra note 28, at 1221 (noting inconsistent use of "bundle of sticks" metaphor when dealing with debtor's interest and creditor's interest in property).Back To Text

[30] *See* 5 Collier On Bankruptcy ¶ 541.05, at 14−15 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (stating it is generally true under § 541(a)(1) that equity of redemption in mortgaged land becomes property of estate of mortgagor [upon repayment of mortgage loan]); *cf.* Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 514−15 (reasoning "person whose land has been sold at foreclosure sale and now holds right of redemption is, for all practical purposes, in the same debt situation as ordinary mortgagor in default; both are faced with same ultimate prospect, either of paying sum of money, or of being completely divested of their land").Back To Text

[31] *See* In re BMW Group I Ltd., 168 B.R. 731, 735 (Bankr. W.D. Okla. 1994) (reasoning since debtor's obligation is to maximize returns to bankruptcy estate it would not be acceptable for trustee to grant old equity, or anyone else, exclusive option to purchase interest without receiving some fair value in return); *see also* In re 203 N. LaSalle St. Partnership, 126 F. 3d 955, 964−65 (7th Cir. 1997) (explaining that when old equity holder retains an equity interest in reorganization, debtor, by meeting requirement of new value corollary, is not receiving or retaining that interest on account of its prior equitable ownership of debtor).Back To Text

[32] *See* Coltex Loop Central Three Partners v. BT/SAP Pool Assoc. (In re Coltex), 138 F.3d 39 (2d Cir. 1998).Back To Text

[33] *See* G Collier on Bankruptcy, App. 44 at 319 (stating "not without dissent, the Commission explicitly endorses the new value exception to the absolute priority rule, as articulated by the U.S. Court of Appeals for the Ninth Circuit in *Bonner Mall* and, more recently, by the Seventh Circuit in *203 North LaSalle Street Partnership*. That support, however, carries important qualification: the Commission recommends that any debtor in possession that attempts to 'cramdown' a new value plan should lose the exclusive right to propose a plan of reorganization").Back To Text

[34] *But see* In re Woodbrook Assoc., 19 F.3d 312, 320 (7th Cir. 1994) (stating "token cash infusion violates absolute priority rule because old equity owners are receiving opportunity to purchase new equity interests at bargain price [on account of] their prepetition ownership"); In re Snyder, 967 F.2d 1126, 1131 (7th Cir. 1992) (reasoning "[c]ontributions that are merely nominal, or 'gratuitous, token cash infusions proposed primarily to 'buy' cheap financing,' will not suffice") (quoting Greystone III Joint Ventures, 102 B.R. 560, 575 (Bankr. W.D. Tex. 1989)). *But see* In re Trevarrow Lanes, Inc., 183 B.R. 475, 494−95 (Bankr. E.D. Mich. 1995) (criticizing Snyder for confusing *Case v. Los Angeles Lumber Co*. "essentialness requirement.").Back To Text

[35] *See* 4 Collier On Bankruptcy ¶ 506.03, at 84 n.213 (stating if § 1111(b) election is not made, § 1111(b)(1)(A) converts nonrecourse claim into recourse claim for benefit of secured creditor to extent that amount of creditor's claim exceeds value of collateral); *see also* 7 Collier On Bankruptcy ¶ 1111.03, at 22 (reasoning "if partnership's sole asset is a building which does not generate sufficient income to service debt, it is highly unlikely that debtor can sustain its burden of proof that the debtor can provide full payment of the claims of unsecured creditors, including mortgagees' deficiency claims"). Back To Text

[36] In re Coltex, 138 F.3d at 43 (reasoning that equity's prior position and rights emanating from that position are not merely tangentially related to old equity's receipt of debtors primary asset under plan); *see also* Zohlman v. Zoldan, 226 B.R. 767, 771 (S.D.N.Y. 1998) (agreeing that new value exception is limited and under circumstances may not be applied as against the absolute priority rule); In re Dwell Co. I Ltd. Partnership, 219 B.R. 5, 10 (Bankr. D. Conn. 1998) (noting that old equity is barred from receiving property via reorganization due to its prior equitable ownership when senior classes are not fully paid).Back To Text

[37] That section reads as follows:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k) (1994).Back To Text

[38] *See* 11 U.S.C. § 1123 (requiring plan provide means for its implementation, such as sale of property and distribution of proceeds among those having an interest); s*ee also* In re Vermont Real Estate Investment Trust, 25 B.R. 808, 809 (Bankr. D. Vt. 1982) (requiring that plan for reorganization should provide proper distribution of values among parties entitled to participate, according to their respective entitlements).Back To Text

[39] *See* In re St. Croix Hotel Corp., 44 B.R. 277, 279 (Bankr. D. Vt. 1984) (allowing creditor purchaser immediate offset on intermediate basis, subject to determination of whether it was entitled to allowed claim); *cf.* In re Valley Building Supply, Inc. 39 B.R. 131, 132−33 (Bankr. D. Vt. 1984) (holding that creditor purchaser may offset its interest against purchase price regardless of whether determination of secured status had been made). *But cf.* In re Beulah Moritz, 162 B.R. 618, 619 (Bankr. M.D. Fla. 1994) (holding that while secured creditor may statutorily offset its claims against purchase price, there is no comparable provision that would permit unsecured creditors to offset their claims).Back To Text

[40] Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership 119 S. Ct. 1411, 1427−29 (1999) (Stevens, J., dissenting) (noting that majority's decision suggests statute should be construed to require competitive bidding, but while this may be wise requirement, procedure is not required by text of statute); *see also* 11 U.S.C. § 1129(b)(2)(B)(ii) (stating "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").Back To Text

[41] *See 203 N.* LaSalle St. Partnership, 119 S. Ct. at 1429 (stating that old equity owners were "required by law" to follow terms of plan once judge confirms plan); *see also* In re Stockbridge Properties, I Ltd., 141 B.R. 469, 470 (Bankr. N.D. Ga. 1992) (suggesting most appropriate method for valuation is fair market price); In re El Paso Truck Ctr., Inc., 129 B.R. 109, 111 (Bankr. W.D. Tex. 1991) (defining fair market price as most probable price property would bring in competitive open market under all conditions requisite to fair sale). Back To Text

[42] *203 N.* LaSalle St. Partnership, 119 S. Ct. at 1429, n.10; *see also* 11 U.S.C. § 1121(d) (1994) (allowing court, for cause, to reduce period of exclusivity for debtor's filing of plan); *cf.* In re River Village Assocs., 181 B.R. 795, 803 (Bankr. E.D. Pa. 1995) (stating that § 1121(d) clearly permits filing of plan by creditors after

expiration of debtor's exclusivity period).Back To Text

[43] *203 N.* LaSalle St. Partnership, 119 S. Ct. at 1429, n.10; *see also* In re Naron & Wagnor, Chartered, 88 B.R. 85, 89 (Bankr. D. Md. 1988) (noting that though primary function of chapter 11 is reorganization of business, liquidation plans are authorized); In re Coastal Equities, Inc., 33 B.R. 898, 904 (Bankr. S.D. Cal. 1983) (stating that use of word "reorganization" as used in chapter 11 encompasses liquidation of debtor).Back To Text

[44] *See* 11 U.S.C. § 1129(c) (providing that if there is more than one plan, "the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm"); *203 N.* LaSalle St. Partnership, 119 S. Ct. at 1423 (recognizing that 11 U.S.C. § 1126(c) calls for creditors, rather than courts, to accept or reject reorganization plans which do not provide adequate protection or fails to honor absolute priority rule); Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 207 (1988) (asserting that Code provides "fair and equitable" reorganization plan comply with absolute priority rule and it is creditor's choice to accept or reject reorganization plan); *see also* Eric Brunstad, Jr., et al., Review of the Proposals of the National Bankruptcy Review Commission Pertaining to Business Bankruptcies: Part One, 53 Bus. Law. 1381, 1406 n.136 (1998) (noting that creditors and equity security holders are often better judges of own economic interest and debtor's economic viability than courts).Back To Text

[45] *See 203 N.* LaSalle St. Partnership, 119 S. Ct. at 1414 n.6 (noting bank had no unsecured claim outside of chapter 11 because it had agreed to waive recourse against any property of debtor other than real property, but that § 1111(b) provides that undersecured nonrecourse secured creditors must be treated as if they had recourse); *see also* Tampa Bay Assocs. v. Mutual Benefit Life Ins. Co. in Rehabilitation (In re Tampa Bay Assoc., Ltd.), 864 F.2d 47, 49 (5th Cir. 1989) (quoting 11 U.S.C. § 1111(b)(1)(A): "claim secured by a lien on a property of the estate shall be allowed or disallowed under § 502 of this title . . . the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse"). *But see* In re Woodbrook Assocs., 19 F.3d 312, 319 (7th Cir. 1994) (holding that § 1111(b) and 1122(a) require separate classification of HUD's § 1111(b) unsecured deficiency claim in Class 4).Back To Text

[46] *See* Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1417 (1999) (recognizing *In re* Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993), arose in single asset real estate context); *see also* Strub, Competition, Bargaining, and Exclusivity Under the New Value Rule: Applying the Single−Asset Paradigm of Bonner Mall, 111 Banking L.J. 228, 231 (1994) (recognizing that most cases discuss new value in connection with single asset debtor's attempt to reorganize under chapter 11); 7 Collier On Bankruptcy ¶1129.04, at 123 (Lawrence P. King et al. eds., 15th ed. rev. 1999) (opining that immediate legacy of *203 North LaSalle* would "seem to be more litigation as participants in reorganization cases, particularly single asset real estate cases, try to sort out what types of additional activity are necessary to satisfy Court's market test while at the same time litigating whether the new value principles have any remaining vitality").Back To Text

[47] *See 203 N.* LaSalle St. Partnership, 119 S. Ct. at 1417 (explaining court was not deciding whether § 1129(b)(2)(B)(ii) includes new value corollary or exception, but holding "that on any reading respondent's proposed plan fails to satisfy the statute"). *But see* In re Woodbrook Assocs., 19 F.3d at 319−20 (noting "new value precept permits old equity owners to participate in a plan, without full payment to the dissenting creditors, if they make a new contribution (1) in money or money's worth, (2) that is reasonably equivalent to the value of the new equity interests in the reorganized debtor, and (3) that is necessary for implementation of a feasible reorganization plan"); Bonner Mall Partnership v. U.S. Bancorp Mortgage (In re Bonner Mall Partnership), 2 F.3d 899, 908 (9th Cir. 1993) (stating contribution must be "1) new, 2) substantial, 3) [in] money or money's worth, 4) necessary for a successful reorganization, and 5) reasonably equivalent to the value or interest received").Back To Text

[48] *See* 11 U.S.C. § 1129(b)(1) (1999) (stating that if all requirements of subsection (a) are met, then court "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"). *See, e.g.*, *203 N.* LaSalle St. Partnership, 119 S. Ct. at 1415−16 (setting forth two requirements for cram down).Back To Text

[49] *See 203 N.* LaSalle St. Partnership, 119 S. Ct. at 1415 (noting bank's $38.5 million unsecured deficiency claim would be discharged for estimated 16% of present value).Back To Text

[50] *See* id.Back To Text

[51] *See* Case v. Los Angeles Lumber Prod. Co., Ltd., 308 U.S. 106, 116 (1939) (citing Northern Pacific Ry. Co. v. Boyd, 228 U.S. 482, 508) (noting stockholders are subsequent to creditors property right); Kansas City Terminal Ry. Co. v. Central Union Trust Co., 271 U.S. 445, 455 (1926) (stating "to the extent of their debts creditors are entitled to priority over stockholders against all the property of an insolvent corporation"); *see also* Matter of Central R.R. Co. of N.J., 579 F.2d 804, 811 (3d Cir. 1978) (discussing "familiar rule" that stockholders rights are subordinate to creditors rights).Back To Text

[52] 11 U.S.C. § 506(a) (1994). *See also* Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1414 (1999) (noting bank's election to divide its undersecured claim into secured and unsecured deficiency claims); S. Rep. No. 95−989 (1978) (discussing that creditor's can have both secured claim and unsecured claim); Patrick Fitzgerald, *Bankruptcy Code Section 506(a) and* Undersecured Creditors: What Date for Valuation, 34 UCLA L. Rev. 1953, 1954 (1987) (noting Code's distinction between secured and unsecured claims).Back To Text

[53] *See* Louisville Trust Co. v. Louisville, N.A. & C.R. Co., 174 U.S. 674, 684 (1899) (stating "[T]he familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors"); *see also* In re Templeton, 154 B.R. 930, 935 (Bankr. W.D. Tex. 1993) (stating unsecured creditors gain no advantage over other unsecured creditors by seeking priority status).Back To Text

[54] *See* 11 U.S.C. § 1129(a)(7) (1994); *203 N.* LaSalle St. Partnership, 119 S. Ct. at 1415 (observing debtor's choice of alternate route to confirmation or reorganization plan of "cramdown" process for imposing plan on dissenting class); *see also* In re 625 Corp., 228 B.R. 758, 759 (Bankr. M.D. Fla. 1998) (noting debtor's need for acceptance by at least one impaired class); In re BMW Group I, Ltd., 168 B.R. 731, 745 (Bankr. W.D. Okla. 1994) (discussing distribution pattern under cramdown plan).Back To Text

[55] 11 U.S.C. § 1129(a)(7) (1994). The text of this provision is as follows:

> (a) The Court shall confirm a plan only if all of the following requirements are met:
>
> (7) Each holder of a claim or interest of such class—
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of value, as of the effective date of the plan, that is not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7 of such title.

Id.; s*ee also 203 N.* LaSalle St. Partnership, 119 S. Ct. at 1415 7 n.13 (discussing § 1129(a)(7)).Back To Text

[56] *See* Bell Rd. Inv. Co. v. Arabians (In re M. Long Arabians), 103 B.R. 211, 217 (9th Cir. Ariz. 1989) (stating 1129(a)(7) requires court to find that each impaired class of claims receive more under chapter 11 plan than in chapter 7 liquidation); M & I Thunderbird Bank v. Birmingham (In re Consolidated Water Utilities), 217 B.R. 588, 592 (B.A.P. 9th Cir. 1998) (applying liquidation analysis under 11 U.S.C. §§ 726(a)(5) and 1129 in determining that chapter 11 creditor is entitled to at least as much as it would receive

under chapter 7); In re Future Energy Corp., 83 B.R. 470, 489 (Bankr. S.D. Ohio 1988) (holding proponents of plan have burden of establishing that each holder of claim will receive at least amount such holder would receive under chapter 7 liquidation).Back To Text

[57] 11 U.S.C. § 1129(a)(7).Back To Text

[58] *See* 11 U.S.C. § 1129(a)(7)(A)(ii) (stating that confirmation of plan will occur only if each claim holder will receive no less than it would receive under chapter 7); In re Celotex Corp., 204 B.R. 586, 611 (Bankr. M.D. Fla. 1996) (noting that in determining whether to confirm proposed chapter 11 plan, court need not consider if proposed plan is "best" plan promulgated, offering highest return to creditors); In re Drexel Burnham Lambert Group Inc., 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992) (declaring each "non−accepting" creditor ought to receive or retain value that is not less than amount he would receive upon liquidation); In re Victory Constr. Co. Inc., 42 B.R. 145, 151 (Bankr. C.D. Cal. 1984) (stating that each creditor under § 1129(a)(7) should receive no less than such creditor would receive under chapter 7 liquidation).Back To Text

[59] *See* 11 U.S.C. § 506(a) (stating "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . , is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property"); *see also* Mount Vernon Consumer Discount Co. v. Bracken (In re Braken), 35 B.R. 84, 85 (Bankr. Pa. 1983) (discussing secured interest in mortgaged property); Spadel v. Household Consumer Discount Co., (In re Spadel), 28 B.R. 537, 538 (Bankr. Pa. 1983) (concluding since there was no equity in debtor's residence over and above first two mortgages, claim of third mortgagee was unsecured pursuant to § 506(a)).Back To Text

[60] *See* 11 U.S.C. § 1129(a)(7) (1994); s*ee also* Higgens v. Household Fin. Corp. (In re Higgins), 201 B.R. 965, 967 (B.A.P. 9th Cir. 1996) (explaining where debtor has home worth value of mortgage, debtor is entitled to exempt residual interests and avoid liens); Clifton Sav. Bank v. Jackson (In re Jackson), 184 B.R. 16, 19 (Bankr. D. N.J. 1995) (discussing situation where property was worth less than amount due on mortgage).Back To Text

[61] *See* In re Siena−Cal, 210 B.R. 168, 172 (Bankr. E.D. Cal. 1997) (expressing that § 1129(a)(7) confirmation requires hypothetical chapter 7 liquidation be performed); *see also* In re Voluntary Purchasing Groups, Inc., 222 B.R. 105, 107 (Bankr. E.D. Tex. 1998) (stating that bankruptcy court is required, under § 1129(a)(7), to see that each creditor receives no less than would be received under liquidation).Back To Text

[62] *See* 11 U.S.C. § 506(a) (governing valuation of chapter 7 liquidations and secured claims in chapter 7 reorganizations); *see also* Lynn M. LoPucki, Strategies for Creditors in Bankruptcy Proceedings 354 − 62 (3d ed. 1997) (noting that in chapter 7 liquidations secured creditors are entitled to satisfaction from proceeds of trustee's sale of collateral). *But see* Chris Lehart, *Toward a Midpoint Valuation Standard in* Cram Downs: Ointment for the Rash Decision, 83 Cornell L. Rev. 1821, 1826 (1998) (recognizing that value of collateral is set by debtor in chapter 11 proceeding, not by actual sale).Back To Text

[63] *See* 11 U.S.C. § 1129(a)(7) (establishing "best interest of creditor" test, which asks whether creditors would receive under chapter 11 plan amount equivalent to that which would be received under chapter 7 liquidation); *see also* Chaim J. Fortgang & Thomas Moers Mayer, *Valuation in* Bankruptcy, 32 UCLA L. Rev. 1061, 1106 (1985) (noting parties not voting for plan must receive at least what they would have upon liquidation); Kevin A. Kordana & Eric A. Posner, A Positive Theory of Chapter 11, 74 N.Y.U. L. Rev. 161, 191 (1999) (observing chapter 7 sets floor on amount creditor can receive in chapter 11, thus creditors at same level of priority must receive at least as much as they would under *pro rata* sharing rules in chapter 7, but they do not have to share *pro rata* in chapter 11).Back To Text

[64] *See* Bonner Mall Partnership v. U.S. Bancorp Mortgage (In re Bonner Mall Partnership), 2 F.3d 899, 915−16 (9th Cir. 1993) (observing that equity owners may retain their interest in debtor despite absolute priority rule if they contribute new value to debtor), cert. granted, 510 U.S. 1030, dismissed as moot, 513 U.S. 118 (1994).Back To Text

[65] Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1414 (1999) (holding that old equity holders are disqualified from participating in new value transaction because junior interest holders are barred from receiving property because of prior interest); *see also BNA Bankruptcy Law Daily, Chapter 11: New Value Exception Cannot be Invoked by Debtor Retaining Exclusive Right to Own*, BNA Bankruptcy Law Daily, May 4, 1999, at D2 (noting that court in LaSalle expressly declined to resolve split in Circuits regarding issue of whether new value exception to absolute priority rule survived 1978 enactment of Bankruptcy Code).Back To Text

[66] *See* 11 U.S.C. § 1122 (governing general classification of claims); *see also In re* Woodbrook Assocs.., 19 F.3d 312, 318 (7th Cir. 1994) (noting that significant disparities existing between legal rights of § 1111(b) claimants and general unsecured creditors require separate classification). *But see* In re Pine Lake Village Apartment Co., 19 B.R. 819, 831 (Bankr. S.D.N.Y. 1982) (noting that allowing debtors to classify deficiency claims separately undermines recognition that deficiency claims are entitled to same treatment as all other unsecured claims under debtor's plan).Back To Text

[67] *See* In re Woodbrook Assoc's, 19 F.3d at 319 (allowing separate classification of deficiency claims). *But see* Olympia & York Florida Equity Corp. v. Bank of New York (In re Holywell Corp.), 913 F.2d 873, 880 (11th Cir. 1990) (stating that reorganization plan proponent's discretion to classify claims and interests is limited); Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co., Inc. (In re U.S. Truck Co., Inc.), 800 F.2d 581, 586 (6th Cir. 1986) (agreeing that debtor's power to classify creditors is limited).Back To Text

[68] *See 203 N.* LaSalle St. Partnership, 119 S. Ct. at 1414−15 (noting that original amount of debt owed to lender was $93 million, of which $38.5 million was unsecured); *see also* Condor One, Inc. v. Moonraker Assoc.'s, Ltd. (In re Moonraker Assoc.'s, Ltd.), 200 B.R. 950, 955 (Bankr. N.D. Ga. 1996) (explaining that credit bidding by lender forces debtor, seeking to retain property, to bid at least up to amount owed to lender); In re Homestead Partners, Ltd., 197 B.R. 706, 719 n.15 (Bankr. N.D. Ga. 1996) (stating that allowing holder of first priority lien to bid forces debtor to bid at least up to amount owed to lienholder, regardless of actual perceived value of lienholder).Back To Text

[69] *See* In re 203 N. LaSalle St. Partnership, 195 B.R. 692, 696 (Bankr. N.D. Ill. 1996) (acknowledging debtor's general partner held second mortgage in amount of $11.3 million). *See generally* Mark, supra note 21, at 1 (noting even where senior creditor proposes reorganization plan, it must provide for satisfaction of priority claims, regardless of their junior status, to meet requirements for confirmation under § 1129(a)(9); Elizabeth Warren, A Theory of Absolute Priority, 1991 Ann. Surv. Am. L. 9, 24−25 (Feb. 1992) (providing example where lender, whose bid is successful, is required to satisfy junior creditors to retain ownership).Back To Text

[70] *See 203 N.* LaSalle St. Partnership, 195 B.R. at 696 (detailing claims of junior creditors that must be satisfied by successful bidder). *See generally*, Mark supra note 21, at 1 (noting drawback of § 1129(a)(9) requirement that priority claims be satisfied); Warren, supra at 69, at 24−25 (providing example of situation where successful bid by senior creditor that results in ownership of business does not extinguish claims of junior creditors).Back To Text

[71] *See* Toibb v. Radloff, 501 U.S. 157, 163 (1991) (stating one goal of chapter 11 is to maximize value of estate); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984) (stating goal of chapter 11 is to permit rehabilitation of debtors); Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership), 2 F.3d 899, 915 (9th Cir. 1993) (acknowledging two major objectives of chapter 11 are permitting successful rehabilitation of debtors and maximizing value of estate).Back To Text

[72] *See* Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1417 (1999) (noting common law principle that creditors are satisfied before equity); s*ee also* Louisville Trust Co. v. Louisville, N.A. & C.R. Co., 174 U.S. 674, 684 (1899) (reiterating rule that equity rights are satisfied only after creditor's rights); Warren, supra note 69, at 37 (acknowledging well settled common law principle that

creditors are paid before equity).Back To Text

[73] *See* 11 U.S.C. § 1129(b)(2)(B)(ii) (1994) (stating senior interests be paid in full before junior interests are paid).Back To Text

[74] *See* 11 U.S.C. § 507 (establishing order of priority for expenses and claims); s*ee also* William Blair, Article, *Classification of Unsecured Claims in* Chapter 11 Reorganization, 58 Am. Bankr. L.J. 197, 209, n.42 (1984) (stating that § 1129(b)(2)(B)(ii) shows that unfair discrimination standards apply to both unsecured creditors and equity holders); Charles D. Booth, Article, The Cramdown on Secured Creditors: An Impetus Toward Settlement, 60 Am. Bankr. L.J. 69, 71−74 (1986) (noting descending rank for payment starting from senior creditors to junior creditors, to unsecured creditors, to shareholders).Back To Text

[75] *See* G Collier On Bankruptcy, App. 44 at 563 (finding that new value exception allows for competition and assures that unsecured creditor cramdown plans do not lessen old equity as does absolute priority rule); *see also* In re Bonner Mall Partnerships, 2 F.3d at 909−10 (holding that § 1129(b)(2)(B)(ii) does not eliminate new value exception); In re Snyder, 967 F.2d 1126, 1129 (7th Cir. 1992) (stating that § 1129(b) does not modify new value exception corollary that 75 years of judicial construction has created).Back To Text

[76] *See* 11 U.S.C. § 1129(a)(11) (1994) (stating "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan"). *But see* Martin J. Whitman & David M. Barse, Esq., Professionals Paid By Debtors Ought to Represent the Debtors' Interests, 1 Am. Bankr. Inst. L. Rev. 367, 368 (1993) (discussing problem faced by reorganized companies due to noncompliance of feasibility test). *See generally* 7 Collier On Bankruptcy, ¶1129 (stating legislative history of § 1129).Back To Text

[77] *See* In re 203 N. LaSalle St. Partnership, 190 B.R. 567, 576 (Bankr. N.D. Ill. 1995) (bank's secured claim was $54,544,500).Back To Text