Chapter 11 Track

The § 1111(b) Election, Plan Feasibility and Cramdown Issues

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BANKRUPTCY CODE SECTION 1111(b) RELEVANT STATUTORY SECTIONS

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Bankruptcy Code section 506(a)

(a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

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Bankruptcy Code section 1111(b)

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

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

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

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

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

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

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

Bankruptcy Code section 1129(a)(7)(B)

With respect to each impaired class of claims or interests–

(A) 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 a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this on such date; or

(B) **If section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the property that secures such claims.**

Bankruptcy Code section 1129(b)(2)(A)(i)

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

With respect to a class of secured claims, the plan provides:

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

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

Federal Rule of Bankruptcy Procedure 3014

An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. If the disclosure statement is conditionally approved pursuant to Rule 3017.1, and a final hearing on the disclosure statement is not held, the election of application of § 1111 (b) (2) may be made not later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111 (b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.

Financial Advisors and Investment Banking Committee

ABI Committee News

Volume 10, Number 1 / February 2013

De-Complicating the § 1111(b)(2) Election: There Is No Such Thing as an Undersecured Claim In a Cramdown

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Over the past few years, the consideration and use of the § 1111(b)(2) election by lenders has grown considerably. In approximately one-third of the 18 cases that I have been involved in over the last two years, secured creditors have seriously considered or used the election in interest rate and feasibility matters.

Confusion over how to implement this little-used section of the Bankruptcy Code into a bankruptcy plan is rampant and exists throughout the restructuring world. Section 1111(b)(2) may be best understood by knowing its history. In 1975, a case named *Pine Gate* appeared before the U.S. Bankruptcy Court for the Northern District of Georgia.[1] Pine Gate was a residential apartment complex that had fallen on hard times. As you might imagine, Pine Gate's valuation was considerably lower than its original mortgage amount.[2]

Unlike the Bankruptcy Code of today, the Bankruptcy Act[3] then in effect allowed debtors to value an asset, pay this amount to the secured creditor in full satisfaction of its claim, and thereby wipe out any possibility of additional recovery to the secured creditor. In fact, this is precisely what happened in *Pine Gate*. Pine Gate filed and confirmed its plan to pay the secured creditor the valuation on its secured claim. Shortly thereafter, the value of Pine Gate's assets recovered and provided a windfall to the owners at the lender's expense.

In response, in 1978, Congress addressed the unfair nature of the existing Act and incorporated § 1111(b)(2) language into the new Code. Congress's intention was to

protect lenders from the type of windfall events that can occur as a result of significantly changing market values, such as in Pine Gate's situation, and also from potentially faulty valuations by a bankruptcy court. Although well intended and like much of the language in the Bankruptcy Code, the language in § 1111(b)(2) and its interaction with other parts of the Code is not always the easiest to interpret.

Under both the former Acts and the current Code, the debtor must treat the entire allowed claim as secured if the value of a secured creditor's security interest exceeds the amount of the secured creditor's allowed claim. In contrast, when the secured creditor's security interest is valued at less than the amount of its claim, both the former and current Code allow the debtor to break the secured creditor's allowed claim into two claims and create a secured claim equal to the value of the security interest and an unsecured claim for the remainder.

However, under the current Code, a secured creditor also receives "1111(b)(2) rights," which provide the secured creditor the additional right to elect to "reassemble" these two claims into a single claim. The amount of this reassembled claim is the creditor's allowed claim and it is secured by the existing lien(s) securing claim. The Code also requires the debtor to pay the secured creditor payments that equal or exceed the amount of this secured claim (i.e., the amount of its allowed claim).

Interpretation of § 1111(b)(2) is complicated by the common misuse of key bankruptcy terms, definitions and Code requirements. Somewhat surprising, the Code does not define some of the simplest terms that restructuring professionals use daily. Before reading further, consider the meaning of the terms: allowed claim, claim, secured claim, unsecured claim, undersecured claim, creditor, secured creditor, unsecured creditor and undersecured creditor. Of these, only "claim" and "creditor" are provided formal definitions within the Code.[4]

Because § 1111(b)(2) deals specifically with these ideas of creditors and claims, the lack of formal definitions for most of these terms has likely caused much of the confusion over this Code section and its interaction with other Code sections. The most common confusion is over the meaning of "secured claim," as many practitioners continue to

associate the lower bifurcated dollar amount with the term "secured claim," even after the § 1111(b)(2) election is made, instead using the higher amount of the reassembled claim for the secured claim.

In these instances, undersecured claim is usually attached to the full amount of the allowed claim. Having worked through several of these scenarios in the last two years, it is clear to me that using very precise terms can eliminate much of the confusion. Fortunately, the Code does give us some starting points as it defines both "claim" and "creditor." "Claim" means "right to a payment." "Creditor" means an "entity that has a claim against the debtor." Unfortunately, neither of these terms speaks to the relationship among the creditor, its claim and the value of its security interest in its collateral.

Consider the use of the undefined, commonly used term "undersecured creditor." Every restructuring practitioner understands this to mean a creditor holding a claim that is greater than the value of its collateral. This term makes sense to us in our everyday language. Now, consider the meaning of "secured claim" "and "unsecured claim." Each of us would agree that a secured claim holds a security interest in the debtor's collateral. Thankfully, "security interest" is defined by the Code as meaning a "lien created by an agreement." In applying this definition, a creditor holding a security interest possesses a secured claim, thereby making it a secured creditor. Any creditor not holding a security interest possesses an unsecured claim and is an unsecured creditor. Importantly, neither term speaks to the value of the security interest, but only as to whether a security interest exists. This is the important distinction.

The natural inclination is to carry over the word "undersecured" from creditor to claim and create the term "undersecured claim," but it is technically incorrect and can create considerable confusion when analyzing the § 1111(b)(2) election. On closer examination, the words "undersecured" and "claim" should not be conjoined when analyzing the creditor's decision of the § 1111(b)(2) election. Most of us think of the amount of the secured claim as synonymous with the value of the creditor's security interest on its collateral, but this is incorrect in the context of § 1111(b)(2). "Secured" merely conveys the existence of a security interest and "claim" merely conveys a right

to payment. Neither word speaks to value.

Once the § 1111(b)(2) election is made, the secured creditor holds a single (secured) claim with a lien on collateral, which is worth less than the amount of its claim. (In making the election, the secured creditor has also given up its unsecured claim.) This is the most important distinction in the § 1111(b) language, and it is often misunderstood or not considered carefully and therefore is the source of many errors when analyzing the election. In a cramdown under § 1129 of the Bankruptcy Code, a secured creditor is entitled to receive the present value of its security interest in its collateral, not the present value of the amount of its secured claim.

Importantly, the election of § 1111(b)(2) does not change the repayment requirements under other parts of the Code that require a debtor to repay the secured creditor the present value of its collateral interest. Section 1111(b), in conjunction with § 1129(b)(2)(A)(i)(II), adds an additional condition to the Code requirements that a debtor must repay the secured creditor the full amount of its allowed claim. In other words, the plan payments made to the secured creditor must equal a present value of the secured creditor's security interest in its collateral and the payments must aggregate to at least the amount of the allowed claim. Both principal and interest payments are counted when determining the aggregate payments under the § 1111(b)(2) election.

As an illustration of these requirements, assume that a creditor held an allowed claim for $110.[5] Its claim is secured by a lien on collateral valued at $100. In its plan, the debtor bifurcates this claim into a secured claim of $100 and an unsecured claim of $10. The plan will repay the secured claim through a single payment of at the end of the first year of the bankruptcy plan. The plan provides no payment for the unsecured claim. The end of the year payments will consist of $100 of principal plus interest at 5 percent ($5) totaling $105. With these plan payments, the debtor satisfies its obligation to repay the secured creditor the present value of its secured claim, *i.e.*, the $100 of current value plus the $5 of interest to account for the time value of money and the plan can be confirmed.

However since the creditor holds a lien on collateral that worth is less than the amount

of the allowed claim, it has rights under § 1111(b)(2). Now assume that the secured creditor has affirmatively elected to require the debtor to treat its bifurcated claim as a single secured claim. The amount of the secured claim becomes $110 and the debtor now has the additional obligation to make payments on account of the secured claim of at least this amount. Under the plan, the payments to the secured creditor total only $105, leaving a $5 deficiency of the Code's requirement of at least $110. As a result of the deficiency, the debtor's reorganization plan cannot be confirmed.

To satisfy the Code's requirements and make the plan viable, the debtor will need to amend its plan to repay the secured creditor at least another $5 of total payments while making payments whose present value continue to be at least $100. One simple solution would be to raise the interest rate paid to the secured creditor to 10 percent. This would create an interest payment of $10, which, along with the $100 principal payment, would total $110, now meeting aggregate payment test of $110 and continuing to meet the Code's present value test. Another solution might be to stretch out the repayment over a longer period, for instance two years of interest-only payments that balloon at the end of the second year. This would generate two years of interest at $5 per year ($10 total) plus the $100 principal repayment at the end of year two to total $110, thereby satisfying the Code's requirements.

In addition to the potential to receive additional payments, there are several other reasons that a secured creditor may decide to make the § 1111(b)(2) election. Three of the most popular reasons are to (1) allow the secured creditor the opportunity to participate in the future appreciation of its collateral; (2) create a balloon balance at the end of the bankruptcy term that is too high for the debtor to repay, thereby making the plan infeasible; and (3) make the economic rewards to the debtor's equity so inconsequential that it loses interest in retaining the asset as part of its bankruptcy plan or abandons its plan altogether. In the final analysis, the secured creditor has to strategically balance these prospects with the condition of giving up its unsecured claim, which may allow it a blocking vote to the plan.

1. *In re Pine Gate Associates Ltd.*, 2 B.C.D. 1478.

2. Pine Gate actually had two secured creditors and mortgages, but for simplicity we will refer to them in a combined manner.

3. Bankruptcy Act 1966

4. 11 U.S.C. § 506(a) provides informal definitions of allowed claim, secured claim and unsecured. Formal code definitions can be found in 11 U.S.C. § 101.

5. For simplicity, this example ignores the adequate-protection argument of negative amortization, the Code's requirement that the claim not be of inconsequential value, and that the interest rate obligations satisfy the Code's requirements.

BANKRUPTCY CODE SECTION 1111(b) KEY CASES
ABI Annual Spring Meeting – April 18-21, 2013

Judge Gregg Zive
United States Bankruptcy Court, Nevada

Eve H. Karasik
Shareholder, Stutman, Treister & Glatt PC

1. *In re Pine Gate Associates, Ltd.*, 1976 U.S. Dist. LEXIS 17366, 2 B.C.D. 1478 (N.D. Ga. 1976)

Pine Gate is the commonly referred to as the opinion that caused Congress to enact Bankruptcy Code section 1111(b). In *Pine Gate*, the debtor owned an apartment complex that was subject to security interests asserted by two life insurance companies (the "Lenders") that had made nonrecourse loans to the debtor. In its plan of arrangement, the Lenders were placed in a separate class and were only entitled to payment of the appraised value of their collateral, which was less than outstanding indebtedness owed to the Lenders.

The Lenders objected to confirmation. However, citing Section 461 of the Bankruptcy Act, the district court held that it was permissible to limit the Lenders' payment to the appraised value of the properties. As a result of the *Pine Gate* decision, "a debtor could file bankruptcy proceedings during a period when real property values were depressed, propose to repay secured indebtedness only to the extent of the value of the collateral at that time, and preserve all potential future appreciation of that property solely for the benefit of the debtor." *See* Haydon, Owens, Salerno & Hansen, *The 1111(b)(2) Election: A Primer*, Bankr. Dev. J. (Vol. 13, Winter 1996). Congress eliminated this option two years later when it enacted section 1111(b).

2. *First Federal Bank of California v. Weinstein (In re Weinstein)*, 227 B.R. 284 (B.A.P. 9th Cir. 1998)

In *Weinstein*, First Federal Bank of California (the "Bank") provided a $1 million loan to the debtors, which was secured by a first deed of trust on a condominium in Santa Monica. Three years later, the debtors filed a chapter 11 petition. The Bank filed a proof of claim in the amount of $1,012,700, and the bankruptcy court determined that the value of the property was $850,000. The Bank elected to have its claim fully secured under section 1111(b)(2) and objected to the chapter 11 plan.

The debtors proposed a plan pursuant to Bankruptcy Code section 1129(b)(2)(A)(i). The Bank objected to the plan, arguing that it was entitled to receive a lump sum cash payment of the unsecured portion at the end of the payment period. The Bank also argued that $98,000 in adequate protection payments it received during the case should have been credited against the unsecured portion, rather than the secured portion of its claim. The Bank wanted the secured portion of its claim to be the highest amount possible since under Bankruptcy Code 1129(b)(2)(A)(i) the debtors would be required to make interest payments only on the secured portion of the Bank's claim. The bankruptcy court confirmed the plan and application of the adequate protection payments to the secured portion of the Bank's claim.

The Bankruptcy Appellate Panel for the Ninth Circuit (the "BAP") affirmed the bankruptcy court's decision and stated that the Bankruptcy Code section 1111(b) election provided the undersecured creditor with payments including interest for the present value of the secured portion of the claim and payments without interest on the unsecured claim piece. In addition, the BAP held that by making the Bankruptcy Code section 1111(b) election, the Bank gave up its unsecured claim so that the adequate protection payments should reduce the secured claim. The BAP opinion provides a well-written explanation of the mechanics and basis for the Section 1111(b) election.

3. *General Electric Credit Equities, Inc. v. Brice Road Developments, LLC (In re Brice Road Developments, LLC),* 392 B.R. 274 (B.A.P. 6th Cir. 2008)

In *Brice Road,* the debtor was the owner of a partially completed 264 unit apartment context. The debtor had previously borrowed $15.4 million, and the note and mortgage related to that borrowing was eventually assigned to General Electric Credit Equities, Inc. ("GE"). At the time of the petition, GE had a claim for approximately $16 million and the collateral was valued by the Court at just over $10 million. The plan proponents filed a plan of reorganization and GE made an election under Bankruptcy Code section 1111(b) to have its claim fully secured. The bankruptcy court confirmed the plan over GE's objection.

The plan proposed a 40 year payment amortization for the GE allowed secured claim at a 6.0 percent interest rate (presumably market) with the amount of the restructured note equal to the collateral value, and a lien on the property for the total allowed GE claim. While this treatment did not also provide that GE would receive deferred cash payments equal to its total claim, the plan proponents argued the lien retention coupled with the amortization schedule would result in payment of GE's approximately $16M claim by the 24th year of the restructured note term. Further, the plan proponents argued that since GE retained its lien until the payments equal the total allowed claim amount, if the debtor attempts to cash out GE at any time earlier than the 24th year of the note term, then the debtor must pay GE a “Section 1111(b) premium” equal to the difference between GE's total allowed claim and the outstanding principal balance due under the note, plus the payments made to present. The Court rejected the plan's proposed treatment of the GE claim because the "Section 1111(b) premium" was not evidenced in the plan or the restructured note. The Court concluded that GE's retention of the lien would not protect GE in the event the note is paid off early since the

obligation under the note will have been paid. The Court stated that the restructured note needed to be modified in one of two ways. First, the restructured note could specifically provide for the "Section 1111(b) premium." Or second, the note could be for the full amount of the GE claim, i.e., approximately $16.0M, but with a below market rate of interest such that the present value of the note would equal the present value of the collateral, i.e., approximately $10M. Accordingly, the Sixth Circuit BAP affirmed the confirmation order, except for the finding that the plan was fair and equitable as to GE's Bankruptcy Code section 1111(b) claim, and remanded the case on that issue to the bankruptcy court.

4. *In re Saguaro Ranch Development Corp., et al.*, 2011 Bankr. LEXIS 2201 (Bankr. D. Ariz. 2011)

In *Saguaro*, the debtors borrowed $50 million from two lenders to finance certain improvements to a luxury community project outside Tucson, Arizona. Four years later, the debtors defaulted on the loan and filed for chapter 11 protection. The debtors and lenders attempted to negotiate the terms of a consensual reorganization, but mediation efforts failed. The debtors' first two proposed plans were unconfirmable. A third plan sought confirmation over the lenders' objection.

The lenders opted to make the Bankruptcy Code section 1111(b)(2) election for their undersecured claim and objected to the third plan. The lenders argued that they were entitled to postpetition default interest on their entire claim for the period prior to plan confirmation. While Bankruptcy Code section 506(b) provides for interest on oversecured claims, Bankruptcy Code section 502(b)(2) prohibits claims for postpetition unmatured interest in all other cases. The bankruptcy court stated that while the Bankruptcy Code section 1111(b) election was designed to protect the undersecured creditor when its collateral may appreciate in value, the election was not intended to prefer the undersecured creditor's unsecured claim over that of any other unsecured claim. The bankruptcy court held that the lenders were not entitled to interest on the undersecured portion of their claim notwithstanding the section 1111(b)(2) election.

5. *Airadigm Communications, Inc. v. Federal Communications Commission (In re Airadigm Communications, Inc.),* 519 F.3d 640 (7th Cir. 2008)

Airadigm involved a debtor that had purchased licenses from the FCC to use certain portions of the wireless spectrum. The debtor agreed to pay for the licenses by making a 10 percent down payment, and quarterly installments over a ten year period. The sale agreement contained a due-on-sale clause that allowed the FCC to accelerate the maturity of the debt and demand immediate payment in the event that the debtor sold the licenses.

The debtor filed a plan that provided that if the FCC elected the section 1111(b)(2) treatment, it would obtain a U.S. treasury bond or annuity that would give it a stream of payments over not more than 30 years that (i) had a present value of $33 million and (ii) totaled $64 million, the total amount of the FCC's claim. The FCC, treating the due-on-sale clause as part of its lien, objected to this treatment and asserted

that the plan was not confirmable pursuant to Bankruptcy Code section 1129(b)(2)(A)(i)(I) because it did not provide for the retention of the FCC's due-on-sale rights. The Seventh Circuit disagreed, holding that the due-on-sale provision was a term of payment and not part of a lien.

6. *In re River East Plaza, LLC*, 669 F.3d 826 (7th Cir. 2012)

Debtor, River East Plaza, LLC, owned a building in downtown Chicago with offices and a restaurant. LNV provided the debtor with a first priority mortgage on the building. The debtor defaulted on the mortgage and filed a single asset real estate ("SARE") petition on the eve of foreclosure by LNV. LNV made the Bankruptcy Code section 1111(b) election because it was owed over $38 million and the building value was $13.5 million.

The debtor filed a plan prior to the 90-day SARE deadline to file a chapter 11 plan, which the bankruptcy court did not approve because it did not comply with the cramdown requirements as a result of LNV's section 1111(b) election. The debtor's second plan provided LNV with a lien on substitute collateral, 30-year Treasury bonds. The bankruptcy court rejected the substitution and the Seventh Circuit affirmed stating the "only motive for substitution [where there is a Section 1111(b) election] is that the substitute collateral is likely to be worth less than the existing collateral." 669 F.3d at 831-32. The Court used a hypothetical where the building had a $40 million value in 5 years and the reorganized debtor defaults. A lien on the building would give LNV a $40 million building upon foreclosure, while the lien on the Treasury bonds would require the passage of 25 years for LNV to recover that amount. The Court concluded that "[b]y proposing to substitute collateral with a different risk profile, in addition to stretching out loan payments, River East was in effect proposing a defective subsection (i) cramdown by way of subsection (iii)." 669 F.3d at 833. The debtor filed a third plan that "was – at last – for a genuine subsection (i) cramdown." *Id.* The bankruptcy court was not willing to engage in a valuation and interest battle and refused to consider the third plan. The Circuit Court held that the debtor had "compromised its credibility by submitting two plans that sought to circumvent the statute" and the bankruptcy judge was not required to continue with confirmation proceedings for the third plan. *Id.*

7. *In re Baxley*, 72 B.R. 195 (Bankr. D.S.D. 1986)

In *Baxley*, the FmHA held two liens – a second lien on real estate that would be an unsecured claim under section 506(a) and a first lien on hogs worth $28,500. The FmHA sought to make the section 1111(b) election for its claim. The value of FmHA's collateral in relation to its full claim was approximately eight percent (8%). The debtor objected to the FmHA's election, stating that 8% constituted "inconsequential value". The bankruptcy court disagreed, relying heavily on a passage from Collier on Bankruptcy that stated:

> [I]n order to be eligible for the section 1111(b)(2) election, a creditor must have (i) a claim, (ii) which is allowed under section 502, (iii) which is secured by a lien on property of the estate, (iv) which

> property has a value greater than claims which are secured by liens against the property which are senior to the creditor's lien.

5 *Collier on Bankruptcy*, § 1111.02[4] (emphasis added).

Since the value of the hogs ($28,500) was greater than the value of the "claims which are secured by liens against the [hogs] which are senior to [FmHA]'s claim" (zero), the bankruptcy court concluded that FmHA's claim was not of "inconsequential value." Ultimately, the bankruptcy court held that "the property securing the claim must be of no value for a creditor to be ineligible to make the election under § 1111(b)(2)." *Baxley*, 72 B.R. at 198 (emphasis in original). Other courts have followed *Baxley*'s reasoning. *See, e.g. In re 500 Fifth Avenue Associates*, 148 B.R. 1010 (Bankr. S.D.N.Y. 1993) ("Thus, if a lien has no value, then the holder of that claim cannot make the section 1111(b)(2) election."); *In re Cook*, 126 B.R. 575, 581 (Bankr. D.S.D. 1991); see generally Peter W. Ito, *How Inconsequential is "Inconsequential Value"*?, 31-9 ABIJ 22 (October 2012).

8. *In re Wandler*, 77 B.R. 728 (Bankr. D.N.D. 1987)

Contrary to *Baxley*, in *Wandler*, 77 B.R. 728 (Bankr. D.N.D. 1987), the bankruptcy court found that "inconsequential value" did not mean "no value." In *Wandler*, a secured creditor possessed a claim that was approximately four percent (4%) of the value of its collateral. The secured creditor made the 1111(b) election, and the debtor objected, stating that 4% was "inconsequential value". In reaching its decision that the secured creditor's claim was of inconsequential value, the bankruptcy court disagreed with the *Baxley* holding: "If the inconsequential value language of section 1111(b) was meant to mean no value, then Congress would have so stated under the language of that section." *Wandler*, 77 B.R. at 733. No other cases were found that followed the *Wandler* approach to inconsequential value.

9. *In re Mayslake Village-Plainfield Campus, Inc.*, 441 B.R. 309 (Bankr. N.D. Ill. 2010)

In *Mayslake Village*, the debtor not-for-profit corporation owned real estate that included an undeveloped portion and a senior housing facility that provided moderate-cost housing for lower income senior citizens. The debtor owed successor lender over $30 million in connection with the acquisition and construction of the facility, and the parties agreed that the value of the real estate was less than the lender's claims against the debtor. The debtor proposed a plan that provided for payment of the lender's claims over 25 years with a 3.25% interest rate. The plan also permitted the debtor to sell the undeveloped portion of the real property in the future without the lender's consent.

The lender made the Bankruptcy Code section 1111(b) election and objected to the plan on multiple grounds, including that the sale of property without the lender's consent deprived the lender of its right to credit bid pursuant to Bankruptcy Code sections 1129(b)(2)(A)(ii) and 363(k). The court found that the sale provision violated Bankruptcy Code sections 1129(b)(2)(A)(ii) and 363(k). The court also held that a

speculative future sale under a plan could not eliminate a creditor's rights to make the Bankruptcy Code section 1111(b) election. *Id*., at 323 (citations omitted), ("a debtor may not circumvent an under-secured creditor's § 1111(b) rights by proposing a plan that calls for the sale of encumbered property 'at some unspecified future time, to some unspecified purchaser, at an unspecified price and on unspecified terms.'")

10. *In re Bloomingdale Partners,* 155 B.R. 961 (Bankr. N.D.Ill. 1993)

The debtor in *In re Bloomingdale Partners* was a limited partnership that owned an apartment building. The debtor owed Hancock, successor in interest to the original mortgage lender on the building, in excess of $11.1 million. The court valued the building at $10 million. At the time of the hearing on the disclosure statement for the debtor's reorganization plan, Hancock determined that its $1.1 million unsecured deficiency claim was not large enough to block acceptance of the debtor's plan by the general unsecured creditor plan class. (The general unsecured claim class was the necessary impaired consenting class required under section 1129(a)(10) of the Code for confirmation of the plan.). Accordingly, Hancock made the Bankruptcy Code section 1111(b) election in order to protect itself in the event that the building appreciated in value. However, one day before the plan voting deadline, the debtor's general partners purchased certain of the unsecured claims. As insiders, the general partners were not permitted to vote the purchased claims in the general unsecured creditor class. Now that the purchased claims could not be voted, Hancock's unsecured deficiency claim could control the class of general unsecured claims and cause that class to reject the debtor's plan, thereby preventing confirmation of the debtor's plan due to the absence of an impaired consenting class of claims. Therefore, Hancock filed a motion to withdraw its election under section 1111(b) of the Bankruptcy Code.

The Court denied Hancock's motion to withdraw the election, holding, that the plan had not been modified in a manner that was "objectively and materially adverse" to the treatment of Hancock's claim. The plan modifications were made to address Hancock's section 1111(b) election, so the plan modifications were not materially adverse to Hancock. However, Hancock also argued that it should be permitted to withdraw its section 1111(b) election because the disclosure statement for the modified plan did not provide Hancock with adequate information necessary for Hancock to make an informed, rational section 1111(b) election. In particular, Hancock complained that the disclosure statement failed to disclose the general partners' efforts and eventual "agreement in principle" to purchase the unsecured claims. The Court looked to Bankruptcy Code sections 1125(a) (1) and (2)(c), and emphasized that the adequate information requirement is limited to information that would make a "hypothetical reasonable investor typical of [a] holder of claims or interests of the relevant class to make an informed judgment about the plan . . ." Id. at 972. The Court stated that the issue was (i) what did Hancock know about the general partners' efforts to purchase unsecured claims, and (ii) when did Hancock obtain this information. The Court concluded that Hancock was aware at the time of its section 1111(b) election that the general partners might acquire certain general unsecured claims. Therefore, the Court held that Hancock's election was binding and could not be rescinded.

The Court also addressed the interplay between Bankruptcy Code section 1111(b) and the requirements for cramdown on Hancock's secured claim prescribed in 1129(b)(2)(A)(i)(II) of the Bankruptcy Code. Citing that section of the Bankruptcy Code, the Court stated that a creditor which has made the section 1111(b) election must receive deferred cash payments totaling at least the allowed amount of the creditor's claim (here, $11.1 million), and that the present value of those payments must be equal only to the secured portion of the claim (here, $10 million).The Court noted that when the Bankruptcy Code's basic cramdown requirements have been satisfied, the electing creditor only gets paid the present value of its collateral; while the aggregate deferred cash payments to the secured creditor must be at least equal to the total claim.

Notably the Court also remarked on the "double duty" effect of the interest payments by the debtor to the secured creditor: the interest payments both ensure that the payments over time to the secured creditor (1) give that creditor the present value of its collateral and (2) constitute a component of the aggregate payments to the secured creditor which must total at least the allowed amount of the secured creditor's post-1111(b) election secured claim, i.e., the full prepetition amount of the secured creditor's claim, notwithstanding the value of the collateral securing that claim. The debtor's plan proposed to: (a) make payments to Hancock having the present value of Hancock's collateral, and to (b) pay Hancock the balance of its claim at maturity, thereby giving Hancock more than the minimum amount required to satisfy the Code's cramdown requirements.

Hancock objected to the plan on two primary grounds: (1) that the plan did not pay Hancock present value of Hancock's collateral because the plan reduced the secured portion of the Hancock claim, an amount equal to the value of Hancock's collateral, by the amount of adequate protection payments which the debtor made to Hancock during the case using the rents which constituted Hancock's cash collateral, and (2) that the proposed interest rate used to determine whether the future payments to Hancock had a present value equal to the $10 million value of Hancock's collateral was too low.

Recognizing that Hancock's assignment of rents gave Hancock a security interest in the postpetition rents which the debtor had used to make adequate protection payments to Hancock during the case, the Court ruled that: (a) those rents increased the amount of Hancock's collateral during the case, (b) the adequate protection payments made to Hancock during the case constituted a prepayment of Hancock's secured claim, which prepayment offset the postpetition increase in the value of Hancock's collateral, and (3) that the adequate protection payments made to Hancock should also be applied to reduce the total amount (i.e., $11.1 million) of Hancock's post- section 1111(b) election allowed secured claim. *See also*, *In re Lichtin/Wade*, L.L.C., 2013 WL 492495 (Bankr. E.D.N.C.).

SECTION 1111(b) SCENARIOS

I. DOES THE PLAN SATISFY SECTION 1111(b)(2)?

A. Scenario One

1. Secured Creditor has a $16.5 million claim secured by collateral consisting of a 70% leased office building having a fair market value of $10.5 million. The building is located in the central business district of a large metropolitan area in which vacancy rates are expected to decline, and market rents are expected to increase.

2. The Secured Creditor makes the section 1111(b) election. Under the debtor's plan, the Secured Creditor will receive a note in the principal amount of $10.5 million which (a) bears interest at 6%, (b) provides for (i) monthly principal payments based on a 40 year amortization schedule so that the Secured Party will receive a total of $16.5 million by the end of the 24th year, and (ii) a balloon payment at the end of the 36th year. The note is secured by a $16.5 million lien on the reorganized debtor's office building. The note is silent on what the Secured Creditor will receive if either (a) the reorganized debtor pays the unpaid principal balance of the note before its maturity date or (b) the reorganized debtor defaults in its payments to the Secured Creditor under the note.

3. The Secured Creditor objects to the treatment of its claim under the plan.

4. Can the debtor's plan be confirmed notwithstanding the Secured Creditor's objection?

5. No.

The Debtor's treatment of the Secured Creditor's $16.5 million fully secured claim does not satisfy section 1129(b)(2)(A)(i)(II) of the Bankruptcy Code. Under that section, the Secured Creditor must receive cash payments totaling at least the allowed amount of its claim ($16.5 million), and the present value of those payments must equal at least the value of the Secured Creditor's collateral ($10.5 million). If the note to be given to the Secured Creditor is paid before its maturity date, *e.g.*, by a sale of the property, there is no guarantee that the secured party will receive the full allowed amount of its $16.5 million claim. *See, General Electric Equities, Inc. v. Brice Road Developments, L.L.C. (In re Brice Road Developments, L.L.C.),* 392 B.R. 274, 284-88 (B.A.P. 6th Cir. 2008). In that case, the Bankruptcy Appellate Panel observed that, in order to satisfy Bankruptcy Code sections 1111(b)(2) and 1129(b)(2)(A)(i)(I), the electing Secured Creditor's new note must be re-structured in one of two ways: either (a) by adding to a $10.5 million note a specific provision requiring payment to the Secured Creditor of a $6.5 million premium ($16.5 million less the $10.5 million face amount of the new note) if the new note is paid before maturity, or (b) by increasing the principal amount of the new note to at least $16.5 million, and by providing for an interest rate which will yield a present value of $10.5 million, *Id.*, at 286-87.

B. Scenario Two

1. Same facts as those in IA, except that in addition to periodic payments, the electing Secured Creditor's new note also pays that creditor a $6 million premium ($16.5 million minus $10.5 million) if the new note is paid before maturity.

2. For the reasons stated in the *Brice Road Developments* case, the debtor's treatment of the Secured Creditor's claim satisfies Bankruptcy Code sections 1111(b)(2) and 1129(b)(2)(A)(i)(I). The Secured Creditor will receive the full allowed amount of its claim if the reorganized debtor pays the new note before that note matures, thereby giving the Secured Creditor, in addition to the present value of its collateral, the benefit of any post-confirmation appreciation in the value of that collateral and, conversely, preventing the debtor from obtaining a windfall by paying the Secured Creditor only $10.5 million and capturing any future appreciation above that amount.

C. Scenario Three

1. Same facts as those in Scenario IA, except that the Secured Creditor will receive a note in the principal amount of more than $16.5 million bearing interest at a below market rate that will cause the present value of the aggregate payments through the new note's maturity date to equal $10.5 million.

2. Relying on a statement in 7 COLLIER ON BANKRUPTCY ¶1111.03[6][b] (Alan N. Resnick & Henry J. Sommer eds. 16th eds.), the BAP opinion in *Brice Road Developments* suggested that a lengthy amortization period coupled with a below market interest rate that yields a present value equal to the value of the Secured Creditor's collateral would satisfy sections 1111(b)(2) and 1129(b)(2)(A)(i)(II) of the Bankruptcy Code. *Id.*, at 287. However, the statement in Collier's to which the *Brice Road* BAP referred cites no authority supporting the proposition that a secured creditor's election to have its claim treated as fully secured under section 1111(b)(2) relieves the debtor of the obligation imposed by *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L.Ed.2d 787 (2004) and its progeny to compute the present value of future payments to the Secured Creditor using an interest rate that reflects the risks to which the Secured Creditor is exposed *See, In re Marble Cliff Crossing Apartments,* 2013 WL 485869 at *4-5 (Bankr. S.D. Ohio 2013 (with respect to plan proposing payment to secured creditor over 32 years, court rejected debtor's proposed cramdown interest rates ranging from 2.25% to 2.85% when that rate did not approximate market interest rate – here 8.25% - for loans of comparable risk and length of repayment) Notably, even if a court permitted a low interest rate coupled with, a lengthy amortization period, the extended amortization period would increase the likelihood of the bankruptcy court finding that the debtor's plan does not satisfy the feasibility requirement in section 1129(a)(11) of the Bankruptcy Code. *See*, *In re Marble Cliff Crossing Apartments, supra.* at *5-6 (proposed payments to objecting secured creditor over 32 years rendered debtor's projections unreliable so that plan was not feasible); *In re VIP Motor Lodge*, 133 B.R. 41, 45 (Bankr. D. Del. 1991) (court held that plan which proposed payments to secured creditor over 30 years was not fair and equitable, and denied confirmation).

D. Scenario Four

3. Same facts as those in Scenario IA, except that the Secured Creditor will receive a note in the face amount of $16.5 million secured by a lien on $16. 5 million of 30 year United States Treasury Bonds in lieu of the Secured Creditor's lien on the debtor's office building

4. The plan cannot be confirmed. Although the debtor's plan satisfies section 1111(b)(2), the plan does not satisfy the requirement in section 1129(b)(2)(A)(i)(I) that the secured creditor retain the lien securing its claim. *In re River East Plaza, LLC*, 669 F. 39 826 (7th Cir. 2012).

II. SHOULD THE SECURED PARTY MAKE THE 1111(b)(2) ELECTION?

Scenario One

A. Facts

1. Secured Creditor made a $10 million non-recourse loan, guaranteed by the sole member of the limited liability company debtor.

2. Secured Creditor's loan is secured by a mortgage on a shopping center with a $6 million fair market value.The shopping center is 70% leased to tenants paying below market rents under leases. One half of those leases will expire during the next 3 years. Market rents are expected to increase for several years. The thirty percent vacancy is attributable to space formerly occupied by the center's anchor tenant.

3. The Debtor has unsecured trade debt of $100,000 held by 10 creditors. One of the unsecured creditors holds a $40,000 claim.

4. Within 90 days of the petition date, the debtor files a plan of reorganization.

B. Treatment of Claims and Interests Under Debtor's Plan

1. The debtor's plan proposes the following alternative treatments of the Secured Creditor' claim:

(a) if the Secured Creditor *does not* make the section 1111(b)(2) election, its claim will be bifurcated into a $6 million secured claim and a $4 million unsecured deficiency claim. The Secured Creditor will receive a $6 million note secured by a lien on the shopping center, together with monthly interest at rate equal to the prime rate plus an upward adjustment to reflect the risks to the Secured Creditor, together with principal payments based on a 20 year amortization schedule, and a balloon payment of the unpaid principal balance at the end of 8 years or,

(b) if the secured creditor *does* make the section 1111(b)(2) election. The Secured Creditor will receive a $10 million note secured by a lien on the shopping center, together with monthly interest payments at a below market rate, and full amortization over 30

years, yielding a stream of payments with (i) a present value of $6 million and (ii) an aggregate value of at least $10 million

2. Holders of Unsecured Trade Claims will receive a pro rata share of the reorganized debtor's net cash flow for 3 years following effective date of the plan (estimated to total $250,000).

3. If the Secured Creditor does not make the section 1111(b)(2) election, the Secured Creditor's deficiency claim will be placed in a separate class and will receive (a) $50,000 upon entry of the confirmation order, and (b) the first $1million of net proceeds from a sale or refinancing of the reorganized debtor's property.

4. Interests of Equity Security Holders are unimpaired. The debtor's sole member will contribute $500,000 to the reorganized debtor. Those funds will be used for (a) note payments to the secured creditor to the extent the reorganized debtor lacks sufficient cash flow to make those payments, (b) the $50,000 payment to the Secured Creditor on account of its deficiency claim, and (c) tenant improvements in vacant space which the reorganized debtor leases to new tenants.

C. Factors Weighing Against Making the Section 111(b)(2) Election

1. The Secured Creditor can argue that confirmation should be denied because the plan's separate classification of the Secured Creditor's deficiency claim violates section 1122(a) of the Bankruptcy Code despite (a) the non-recourse character of its loan and (b) the sole member's prepetition guaranty of the Secured Creditor's loan to the debtor.

(a) For cases on separate classification of a guaranteed deficiency claim, *Compare*, *In re 18 RVC LLC,* 2012 WL 5336722 (Bankr. E.D. N.Y 2012 (existence of personal guaranty of undersecured deficiency claim does not support separate classification of deficiency claim) *and Wells Fargo Bank NA v. Loop 79 LLC (In re Loop 76 LLC),* 465 B.R. 525 (B.A.P. 9th Cir. 2012).

(b) For cases on separate classification of a non-recourse under-secured creditor's deficiency claim, *Compare, In re Woodbrook Associates,* 19 F.3d 312 (7th Cir. 1994)(separate classification required because, unlike claims of general unsecured creditors, deficiency claim of non-recourse undersecured creditor does not exist in a chapter 7) *and In re Greystone III Joint Venture*, 995 F.2d 1274 (5th Cir. 1991, *cert. denied sub nom. Phoenix Mutual Life Insurance Company v. Greystone III Joint Venture,* 506 U.S. 822 (1992 (prohibiting separate classification of non-recourse undersecured creditor's deficiency claim absent business or economic justification)

2. The Secured Creditor can also argue that the disparate treatment accorded the class of unsecured trade claims and the class containing the Secured Creditor's Deficiency Claim constitutes unfair discrimination

3. The Secured Creditor will be able to vote its deficiency claim against the plan, thereby causing a class of unsecured creditors – either the separate class in which the holder of the deficiency claim is the sole member or the single class of unsecured creditors in which the deficiency claim represents more than one-third of the total claims in that class - to reject the plan. The Secured Creditor, as the holder of an unsecured deficiency claim, will then argue that confirmation should be denied because the sole member's retention of his equity interest after the class containing the Secured Creditor's deficiency claim has rejected the debtor's plan violates the absolute priority rule contained in section 1129(b)(2)(B)(ii) of the Bankruptcy Code. *Bank of America National Trust & Savings Ass'n v. 203 North LaSalle Street Partnership*, 526 U.S. 434 (1999); *In the Matter of Castelton Plaza, LP,* 2013 WL 5337269 (7th Cir. Feb. 14, 2013)(plan which proposed to issue all of the reorganized debtor's equity to wife of 98% equityholder, without opportunity for competitive bidding , in exchange for $375,000 of new capital violated absolute priority rule after class containing lender's deficiency claim voted to reject plan)

4. The Secured Creditor can purchase the $40,000 unsecured trade claim which represents more than one-third of the claims in that class, and then vote that claim against the debtor's plan, thereby causing that class to reject the debtor's plan. *See*, Bankruptcy Code §1126(c)(acceptance by class of claims requires votes by creditors holding at least two-thirds in amount and more than one-half in number of the allowed claims that have accepted or rejected the plan).When the undersecured creditor also votes its separately classified deficiency claim against the plan, the Secured Creditor can then argue that confirmation should be denied because no impaired class of claims has accepted the plan, as required by section 1129(a)(10) of the Bankruptcy Code.

D. Factors Weighing in Favor of Making the Section 1111(b)(2) Election

1. The Secured Creditor will capture future appreciation in the value of its collateral up to $4 million.

2. The Secured Creditor can object to confirmation of the debtor's plan on the grounds that (a) the use of a below market interest rate to determine the present value of the payments it will receive violates the requirement, that in the absence of an efficient market for exit loans to chapter 11 debtors, a cramdown interest rate should be determined by adding a risk premium to the prevailing prime rate. *See, Till v. SCS Credit Corp.supra; Bank of Montreal v. Official Committee of Unsecured Creditors (In re American Home Patient, Inc.*), 420 F.3d 559 (6th Cir. 2005) (absent an efficient market for loans to reorganizing chapter 11 debtors, the cramdown interest rate should be the national prime rate plus an upward adjustment to reflect the risks associated with the particular loan), and (b) that (i) a 30 year amortization period is excessive and prevents a finding that the plan is feasible, as required by section 1129(a)(11) of the Bankruptcy Code. *In re Mayslake Village-Plainfield Campus, Inc.,* 441 B.R. 309, 317 (Bankr. N.D. Ill. 2010) (the longer the term of the restructured note – 22 years in this case – the more doubtful the debtor's projections of future income and the more likely a court will deny confirmation); *In re Mallard Pond, Ltd.,* 217 B.R. 782, 790 (Bankr. M.D. ATenn. 1997) (59 year plan not feasible); *In re Agawau Creative Marketing Associates, Inc.,* 63 B.R. 612, 620-22)

(Bankr. D. Mass. 1986) (30 year plan to be funded out of operating revenues not feasible where debtor lacked proven track record of profitable operations over a 5 year period).

3. The Secured Creditor can attempt to purchase the $40,000 unsecured trade claim, vote that claim against the plan (thereby causing the class of unsecured trade claims to reject the plan), and argue that confirmation should be denied because no impaired class of claims has accepted the plan, as required by section 1129(a)(10) of the Bankruptcy Code.

III. CAN THE SECURED CREDITOR ELECT TREATMENT OF ITS CLAIM UNDER SECTION 1111(b)(2)?

A. Facts

1. Debtor's plan bifurcates *recourse* claims of Secured Creditors and places the secured portion of each such claim in its own, individual class. Each of those claims is secured by partially developed properties which the reorganized debtor proposes to finish developing and then sell without either allowing a Secured Creditor holding a lien on the property to credit bid at the sale or without paying 100% of the sale proceeds to the affected Secured Creditor.

2. The Debtor's plan does not state when any such sales will occur, nor does the plan provide any other details regarding the sale, *e.g.*, the name of the buyer, the price and the anticipated closing date.

3. The Secured Creditors elect treatment of their claims under section 1111(b)(2) of the Bankruptcy Code.

4. The Debtor objects to the foregoing elections, arguing that section 1111(b)(1)(B)(ii) of the Bankruptcy Code prohibits a Secured Creditor from electing treatment under section 1111(b)(2) of the Bankruptcy Code when that Secured Creditor holds a recourse claim and the Secured Creditor's collateral is to be sold either under section 363 of the Bankruptcy Code, or under the plan.

5. Query:

(a) What constitutes a "sale under a plan" which will deprive an under secured creditor holding a recourse claim of the right to elect treatment of its claim under section 1111(b)(2) of the Bankruptcy Code?

(i) A sale under a plan which occurs at some unspecified future time to an unspecified purchaser at an unspecified price and on unspecified terms does not constitute a sale under a plan which will prevent an undersecured creditor from electing treatment of its claim – whether recourse or non-recourse – under section 1111(b)(2). *In re Mayslake Village-Plainfield Campus, Inc.*, 441 B.R. 309, 323 (Bankr. N.D. Ill. 309); *H & M Parmely Farms v. Farmers Home Admin.,* 127 B.R. 644, 649 (D.B.D. 1990).

(b) Can there be a "sale under the plan" which does not occur substantially contemporaneously with plan confirmation?

(ii) No. *In re Georgetown Park Apts. Ltd.,* 103 B.R. 248, 250 (Bankr. S.D. Cal. 1989) (sale 4 years after confirmation is not a sale under the plan)

(c) Can there be a "sale under a plan" if the plan prevents an under-secured creditor holding a recourse claim from credit bidding a such a sale?

(iii) No. *In re Saguoro Ranch Development Corp.,* 2011 WL 21 82 416 (Bankr. D. Ariz. 2011) (sale of lots which permitted reorganized debtor to retain 30% of sale proceeds not confirmable because it deprived the undersecured creditor that had made the section 111(b)(2) election of both its right to credit bid as required under Bankruptcy Code section 1129(b)(2)(A)(ii) and, alternatively, its right to be paid 100% of the sale proceeds, *i.e*., the indubitable equivalent of its claim, as provided in section 1129(b)(2)(A)(iii) of the Bankruptcy Code.

(d) Can the Debtor retain a portion of the proceeds from the sale of each lot?

(iv) No. *In re Saguaro Ranch Development Corporation,* 2011 WL 2182416 (Bankr. Ariz. 2011) (bankruptcy code section 1129(b)(2)(A)(ii) requires that objecting secured creditor which has made the 1111(b)(2) election receive 100% of lot sale proceeds).

B. Facts

1. Debtor owns property worth $10 million. The property is encumbered by two liens – a senior lien securing a $9.9 million claim, and a junior lien securing a $5 million claim.

2. The Debtor's plan bifurcates the claim secured by the junior lien into a $100,000 secured claim and a $4.9 million unsecured claim.

3. The junior lienholder elects under section 1111(b)(2) to have its $5 million claim treated as fully secured.

4. The Debtor objects to the foregoing election, arguing that the value of the electing creditor's interest in the debtor's interest in the encumbered property "is of inconsequential value" within the meaning of section 1111(b)(1)(B)(i).

Query: Can the junior lienholder elect to have its $5 million claim treated as fully secured under section 1111(b)(2) of the Bankruptcy Code?

(a) Yes. *In re Baxley,* 72 B.R. 195 (Bankr. D.S.D. 198C) (claim secured by collateral worth 8% of undersecured creditor's entire claim was not of "inconsequential value").

C. Facts Same as those in IIIB except the value of the junior creditor's lien is only $10,000.

Query: Can the junior creditor elect to have its $5 million claim treated as fully secured under section 1111(b)(2) of the Bankruptcy Code?

(b) Cases are split. *Compare*, *In re Baxley, supra,* (any value of collateral more than zero is not of "inconsequential value) *and In re Wandlers,* 77 B.R. 728 (Bankr. D.N.D. 1987) (collateral worth only 4% of amount of creditor's total claim was of "inconsequential value")

IV. HOW SHOULD THE DEBTOR'S PAYMENTS BE APPLIED TO THE ELECTING SECURED CREDTOR'S FULLY SECURED CLAIM?

A. Facts

1. A Secured Creditor loaned $10 million to the debtor secured by a lien on property worth $6 million. The Secured creditor makes the section 1111(b) election, thereby giving it a $10 million allowed secured claim. The debtor's plan gives the Secured Creditor a $10 million note secured by a lien on the reorganized debtor's property. The plan provides for payment to the Secured Creditor on the first anniversary of the confirmation date of $60,000, representing interest at 10% (the market interest rate) on the value of the Secured Creditor's collateral, plus the $10 million principal amount of the note. The Secured Creditor objects to the plan on the grounds that the plan fails to pay the Secured Creditor the present value of its collateral, i.e. $6 million. The Secured Creditor argues that the plan improperly includes the $60,000 "interest" payment in the stream of payments which, under Bankruptcy Code section 1129(b)(2)(A)(i)(II), must have a present value of at least $6 million, and which must also total at least $10 million. If the $60,000 "interest payment" is excluded from the present value calculation, then the payment of $10 million one year after confirmation will not have a present value equal to $10 million.

Query: Can the debtor's plan be confirmed?

(a) Yes. The majority of cases hold that the interest component of the stream of payments paid to an electing creditor does "double duty," *i.e*., the interest component ensures that the stream of payments to the electing creditor will have a present value equal to the value of its collateral, and the interest component is also included in the aggregate payments to the Secured Creditor, which payments must total at least the allowed amount of the electing creditor's claim. *In re Pamplico Highway Development, LLC,* 468 B.R. 783, 790-791 (Bankr. D S.C. 2012); *In re Bloomingdale Partners*, 155 B.R. 961, 974 (Bankr. N.D. Ill. 1993); Steven R. Haydon, Steven R. Owens, Thomas J. Salerno and Craig D. Hansen, *The 1111(b)(2) Election: a Primer,* 13 Bankr. Dev. J. 99, 126 (1996). The minority view, which rejects the "double duty" concept, is reflected in cases such as *In re 680 Fifth Ave. Assocs.,* 156 B.R. 726, 733 (Bankr. S.D.N.Y. 1993), and *In re 222 Liberty Assocs.,* 108 B.R. 971-993-94 (Bankr. E.D. Pa. 1990).