

100 Harv. L. Rev. 1106 (1987)***1106"ADEQUATE PROTECTION" AND THE AVAILABILITY OF POSTPETITION INTEREST TO UNDERSECURED CREDITORS IN BANKRUPTCY**

Four federal circuits have recently reached conflicting conclusions about whether the federal Bankruptcy Code [\[FN1\]](#) requires a bankrupt estate to compensate its undersecured creditors [\[FN2\]](#) for the cost of delays imposed by bankruptcy proceedings. [\[FN3\]](#) The controversy concerns interpretation of provisions in the Code that require a bankrupt estate to provide 'adequate protection' for the property interests of secured creditors. [\[FN4\]](#) The courts disagree about whether this mandate of 'adequate protection' affords an alternative form of compensation to undersecured creditors, who, unlike oversecured creditors, do not receive interest on their claims after bankruptcy proceedings begin.

Part I of this Note explicates the doctrine framing the question and examines the conflicting answers the courts have provided. Part II argues that the disagreement among the courts stems from inappropriate reliance on ambiguous language in the Bankruptcy Code and its legislative history and suggests that the requirement of 'adequate protection' should instead be interpreted in light of the policies that motivated it. Part III interprets the phrase 'adequate protection' according to the method suggested in Part II and concludes that the standard should not be used to compensate undersecured creditors for the delays of bankruptcy.

I. THE ISSUE OF POSTPETITION INTEREST

Filing a bankruptcy petition automatically invokes a stay under the Bankruptcy Code that prevents creditors from recovering claims ***1107** or enforcing liens against the property of the bankrupt estate until the conclusion of the bankruptcy proceedings. [\[FN5\]](#) The Bankruptcy Code states explicitly, however, that when the proceedings do end, oversecured creditors are entitled to the interest that accrued on their claims during the stay, up to the amount by which they are oversecured. [\[FN6\]](#) Undersecured creditors, by contrast, generally cannot receive interest on their allowed claims at the termination of the stay. [\[FN7\]](#)

Recently, however, undersecured creditors have tried to circumvent this prohibition by using sections 361 and 362(d)(1) as an alternative method for obtaining compensation for the delay imposed by the automatic stay. Under section 362(d)(1), any creditor, whether oversecured or undersecured, may obtain relief from the automatic stay 'for cause, including the lack of adequate protection of an interest in property of such [creditor].' [\[FN8\]](#) A court may either grant this relief by terminating the stay with respect to the creditor's collateral (thus permitting the creditor to enforce its lien on the property) or avoid this drastic step by providing the creditor with the adequate protection the creditor claims is lacking. [\[FN9\]](#) Section 361 authorizes a court to ***1108** provide this protection by ordering the trustee or debtor in possession to make cash payments to the creditor equal to the decrease in either the value of the creditor's interest in the collateral or the 'indubitable equivalent' of that value. [\[FN10\]](#)

Undersecured creditors accordingly have argued that their interest in collateral includes rights of foreclosure and sale under state law and that this interest consequently deserves adequate protection under section 362(d)(1). They have asserted that, to the extent that the automatic stay decreases the present value of their right to foreclose on the collateral (by delaying its exercise), they should receive 'postpetition interest' from the trustee or debtor in possession. [\[FN11\]](#) They have further maintained that periodic (typically monthly) cash payments of postpetition interest, in amounts equivalent to the prospective return on reinvestment of the liquidation value of their collateral, would provide them with adequate protection, because the payments would enable them to realize the 'indubitable equivalent' of their property interests as specified by section 361(3).

***1109** The Ninth Circuit, in *In re American Mariner Industries, Inc.*, [\[FN12\]](#) was the first federal court of appeals to hear this argument. [\[FN13\]](#) The court held that adequate protection does require payment of postpetition interest to compensate for the decrease in the present value of lien enforcement rights. [\[FN14\]](#) Under *American Mariner*, a bankrupt estate must compensate its undersecured creditors for delay in the exercise of these rights. The amount of this compensation must equal the amount that the creditors could have made between the filing of the petition and the end of the bankruptcy suit by foreclosing on the collateral and reinvesting the proceeds at the market rate. [\[FN15\]](#) The court stated, more specifically, that monthly interest payments at the market rate on the liquidation value of the collateral

would provide the required adequate protection, but it noted that other methods might also be acceptable. [\[FN16\]](#)

The American Mariner court found three sources of support for its decision. It noted, first, that when a stay is in effect, section 361 mandates the protection of 'the value of [a creditor's] interest in the property' and not merely a decrease in the value of the collateral itself. [\[FN17\]](#) The court found the 'plain meaning' of this provision to be that adequate protection should extend to a broad range of the creditor's rights in collateral, including the rights of foreclosure and sale. [\[FN18\]](#) Second, the opinion relied on a passage from a House Report stating that 'the purpose of section 361 is to insure that the secured creditor receives in value essentially what he bargained for.' [\[FN19\]](#) The court found that secured creditors bargain, in part, for the right to take possession of the collateral upon a debtor's default, and it concluded that Congress intended to protect the present value of this right. [\[FN20\]](#) Third, American Mariner relied on section 361(3), which states that in providing adequate protection, a court should grant such relief from the automatic stay 'as will result in the realization by the creditor of the indubitable equivalent of such creditor's interest in such property.' [\[FN21\]](#) The court noted that the Bankruptcy Code borrowed the idea of 'indubitable equivalent' from Judge Learned Hand's opinion in *In re Murel Corp.* [\[FN22\]](#) Judge Hand had used the words 'indubitable equivalence' to describe the minimum amount due dissenting creditors in a reorganization under the old Bankruptcy Act and had stated that this amount must include the time value of money. [\[FN23\]](#) The American Mariner court asserted that Congress probably did not intend to alter the meaning that Judge Hand had given to the phrase and concluded that adequate protection must include protection against loss occasioned by time. [\[FN24\]](#)

*1111 Shortly after the American Mariner decision, two other circuits faced the issue of postpetition interest. The Fourth Circuit, in *Grundy National Bank v. Tandem Mining Corp.*, [\[FN25\]](#) followed the American Mariner decision almost in its entirety. [\[FN26\]](#) Several months later, however, the Eighth Circuit in *In re Briggs Transportation Co.* [\[FN27\]](#) diverged from these cases, holding that interest payments may be ordered under sections 361 and 362 when justified by the equities of the case but that they are not--as American Mariner and Grundy had ruled--required as a matter of law.

The Briggs court disagreed with American Mariner on two principal points. First, the Eighth Circuit asserted that Congress did not want bankruptcy courts to provide a form of protection that would 'be impossible or seriously detrimental to the policy of the bankruptcy laws.' [\[FN28\]](#) The court concluded that Congress would want a court to consider the facts of a case before requiring protection of the creditor's bargain in the form of postpetition interest. [\[FN29\]](#) Second, the Briggs court noted that even when a court does decide to protect the creditor's bargain, it should recognize that the 'essence' of this bargain is not necessarily the right of foreclosure. [\[FN30\]](#) The Briggs opinion otherwise agreed with American Mariner's three reasons for rejecting the position that undersecured creditors cannot receive any compensation. [\[FN31\]](#) The court added to its opinion, however, a flat dismissal of the argument that section 502(b)(2), which disallows claims for unmatured interest, [\[FN32\]](#) must also preclude paying interest to creditors under section 362(d)(1). [\[FN33\]](#) Finally, noting that Congress legislated flexibility into the Code by adopting the adequate protection standard rather than a standard with a precise definition, [\[FN34\]](#) the Briggs court suggested several factors for bankruptcy courts to consider in deciding whether the facts of a case justify awarding postpetition interest. [\[FN35\]](#)

The greatest departure from American Mariner occurred recently in *In re Timbers of Inwood Forest Associates, Ltd.*, [\[FN36\]](#) in which the Fifth Circuit held that undersecured creditors may not compel payment of postpetition interest as part of their adequate protection. [\[FN37\]](#) The Timbers opinion began by accusing American Mariner and Briggs of looking to policy and economics to determine what the Bankruptcy Code should require rather than reading the Code to see what it actually does require. [\[FN38\]](#) Then, finding itself unable to discern a clear answer solely from the statutory language, the Timbers court concluded that '§ 361 is not only ambiguous on its face but also ambiguous when considered in the light of the interest provisions in sections 502 and 506 of the Code.' [\[FN39\]](#) The court therefore turned to the *1113 legislative history of the Code, where it found two sources of support for its holding. The Timbers court agreed that Congress wanted to ensure that a secured creditor receives the benefit of its bargain. But, unlike the American Mariner court, the Timbers court concluded that this bargain does not include the right to postpetition interest, but only the right 'to receive the collateral or its value upon default.' [\[FN40\]](#) The Fifth Circuit's second source of support consisted legislative statements indicating that Congress had intended to protect collateral only from misuse and depreciation. [\[FN41\]](#) From these statements the court concluded that adequate protection could not include compensation for mere delay. [\[FN42\]](#)

The Timbers court also commented on policy considerations, despite its condemnation of their use by other courts in deciding the issue of postpetition interest. The court found three major problems with compensating undersecured creditors with postpetition interest. First, it asserted that paying postpetition interest would disrupt orderly bankruptcy procedures. The court noted that in most mortgages, the repayment of principal roughly approximates depreciation. Because payments for depreciation are clearly allowable under section 361(1), requiring payment of interest as well would amount to requiring a bankrupt estate to make payments roughly equal to the payments of principal and interest that the debtor had been making before bankruptcy. Because insolvent debtors typically cannot pay their debts, requiring such payments would, as a practical matter, make adequate protection almost impossible. The court added that allowing postpetition interest payments would also disrupt procedures by leading every secured creditor in every bankruptcy proceeding to move for relief under section 362(d)(1). [\[FN43\]](#) The second problem, the court *1114 found, was that paying postpetition interest would conflict with the Bankruptcy Code's general policy of not allowing substantial assets to leave the estate before a court has had an opportunity to find the facts relevant to distribution. [\[FN44\]](#) Finally, the court noted that allowing undersecured creditors to receive postpetition interest would shift almost all of the costs of waiting to determine whether a reorganization will succeed or fail onto unsecured creditors. The court found that shifting the costs in this manner would contradict Congress's intention to put some of the risk that a reorganization would fail on secured creditors. [\[FN45\]](#)

The Fifth Circuit subsequently reinstated the Timbers opinion on rehearing en banc, but it added to it a brief discussion of the recent enactment of section 1205, which makes clear that family farmers in Chapter 12 proceedings do not have to pay postpetition interest. [\[FN46\]](#) The court asserted that the new provision suggests that Congress does not view American Mariner's interpretation of adequate protection as correct. [\[FN47\]](#) The court reasoned that the decision to overrule American Mariner only with respect to the specific problems of family farmers was not an endorsement of postpetition interest in other contexts. [\[FN48\]](#)

II. THE AMBIGUITY OF THE STATUTORY PROVISIONS

The four circuit court decisions construing the mandate of adequate protection--American Mariner, Grundy, Briggs, and Timbers--directly contradict one another on whether adequate protection requires or even allows payments of postpetition interest. The courts disagreed because they relied excessively on certain ambiguous and ultimately indeterminate language in the Bankruptcy Code and its legislative history and because they did not sufficiently consider the general policies embodied in the Bankruptcy Code. Their analyses *1115 followed a pattern of first determining the 'plain meaning' of sections 361 and 362(d)(1) by examining them in isolation and then deciding how pertinent congressional documents should affect acceptance of this meaning. [\[FN49\]](#) Although this is a common approach to statutory interpretation, [\[FN50\]](#) it proved inadequate in practice, as the conflict in the courts' conclusions indicates. The words of the Bankruptcy Code by themselves compel no answer to the issue of postpetition interest; the legislative history of the sections dealing with adequate protection provides only incoherent and unhelpful guidance.

The Bankruptcy Code mandates that secured creditors receive 'adequate protection,' but nowhere does it explain precisely what this term means. The four courts accordingly sought to find an implicit definition by trying to read a decisive meaning into a few somewhat cryptic phrases in sections 361 and 362(d)(1). Only the Timbers court, however, acknowledged after this inquiry, it was still unable to determine solely from the words of these sections whether adequate protection means full protection from the costs of delay. [\[FN51\]](#) The court concluded--quite sensibly, it appears--that when Congress required the protection of value, it simply did not specify whether or not it meant protection of 'present value.' [\[FN52\]](#)

*1116 The other courts, in ruling that the adequate protection provisions are not ambiguous, read too much into the language of the Code. Although they were accurate in noting that Congress used the phrase 'interest in the property' rather than merely 'property' when it specified what must be protected, [\[FN53\]](#) they were wrong to conclude from this usage that Congress was expressing its desire to protect creditors from the costs of delay in enforcing their liens. Their interpretation of the phrase 'interest in property' seems unduly narrow. Section 361, after all, protects interests in property that are not liens. [\[FN54\]](#) More important, the interpretation is unconvincing because Congress probably used the 'interest in property' phrase for a reason that has nothing to do with lien enforcement rights; the phrase neatly prevents secured creditors from seeking relief for a decrease in the value of the collateral when the decrease does not affect their claims. [\[FN55\]](#) For example, it prevents a secured creditor who has a claim worth \$100 that is secured by

an interest in collateral worth \$1,000 from seeking relief from the automatic stay for a decrease of, say, \$50 in the value of the collateral.

The conclusion that the courts disagreeing with Timbers drew from the 'indubitable equivalent' phrase in section 361(3) is similarly unsupported. Although they asserted that Congress must have included the words to reveal its intention to protect present value, [FN56] the correctness of this reasoning is far from clear. It seems more likely that Congress used the words simply to indicate that the particular value specified in section 361, or an equivalent value, must be protected. [FN57] Again, the courts should have concluded, as did the Timbers court, that the statutory language in the sections dealing with adequate protection was not intended to address, and thus cannot answer, the question of postpetition interest.

The courts were similarly unsuccessful in showing that legislative history compels an answer to the issue. The seemingly most significant evidence from the congressional documents that the courts considered was a passage in the House Report indicating a desire 'to insure that the secured creditor receives in value essentially what he bargained for.' [FN58] But the Timbers, Briggs, and American Mariner courts all failed to show why this statement should compel the results they reached. Although the Timbers court found that this language did not allow postpetition interest payments because the 'bargain' referred to did not include such payments, its reasoning is unpersuasive because it gave no indication of how it determined what the bargain should include. [FN59] The Briggs court's interpretation was equally unhelpful. It avoided the problem by instructing the bankruptcy courts to determine the scope of undersecured creditors' bargains on an individual basis, without providing any basis for determining whether particular creditors had bargained for the possibility of receiving postpetition interest. [FN60]

American Mariner's analysis of the passage is the most problematic. By asserting that creditors bargain for the legal and equitable rights (including foreclosure) associated with a security agreement in *1118 collateral, [FN61] the court seemed more insightful than either the Briggs court or the Timbers court. But American Mariner went on to assert that because the legislative history states that section 361 is intended to protect the creditor's bargain, section 361 should protect the creditor's rights of foreclosure and sale. [FN62] Without more, the argument is circular. Section 361, in protecting the creditor's bargain, may also define, to a certain extent, the creditor's legal and equitable rights under that bargain. If the section itself does not define the bargain as including the rights of foreclosure and sale, then nothing in the legislative history implies that these rights should be protected from the costs of delay. [FN63]

The legislative history bearing on the issue of postpetition interest, in sum, proves no less ambiguous than the statutory language. The courts should have acknowledged that the language of the Code and the congressional documents cannot provide answers to every issue. [FN64] Legislatures are not always clear, and they seldom contemplate all of the questions their statutes must answer. [FN65] When the 'plain meaning' and legislative history of a pertinent statutory provision evince no solution to a problem, courts must look elsewhere for guidance. [FN66] Although the policies embodied in the Bankruptcy Code would have provided such guidance to the four circuit courts that considered this issue, these policies went largely ignored.

III. THE BALANCE OF COMPETING POLICIES

When Congress created the imprecisely defined standard of 'adequate protection,' it explicitly instructed courts to apply it not only with reference to its language and legislative history but also with *1119 reference to general equitable principles. [FN67] Congress thus seems to have intended that courts answer the question of postpetition interest in the way that commentators have traditionally urged courts to answer questions that turn on such open-ended standards: by weighing the competing policies that the standard seeks to further. [FN68] An analysis of both the general aims of the Bankruptcy Code and the specific policies that motivated the automatic stay provision leads to the conclusion that 'adequate protection' should not include compensation for the costs of delay.

Requiring postpetition interest under section 362(d)(1) would undermine the goals of establishing orderly bankruptcy procedures and promoting reorganization. [FN69] The payments would greatly complicate bankruptcy procedure in two ways. First, they would induce every undersecured creditor in every bankruptcy suit to file a motion for relief from the automatic stay. Many orders to provide adequate protection would require the estate to produce impossibly large sums of money and consequently could not be fulfilled by the trustee or debtor in possession. This failure would lead

to subsequent motions requesting termination of the stay. This sequence of events would render the stay provisions almost useless. Second, paying large sums of money from the estate or permitting lien enforcement before the close of the bankruptcy proceedings would increase the risk that funds will fall into the hands of creditors who do not have first claim to them. A court might not know at that point exactly what, if anything, each creditor should receive.

*1120 Paying postpetition interest, furthermore, would not accord with the goal of promoting reorganization. One problem with such payments is that they would often hinder reorganization by reducing the assets of the emerging company at a crucial juncture. [FN70] Another problem is that they would shift even more of the risk of loss resulting from a failed reorganization from the secured creditors to the unsecured creditors, because secured creditors would not bear the costs of delay incurred while waiting to see if reorganization will succeed. [FN71] The flexible approach suggested in Briggs might alleviate the problem of thwarted reorganization--especially since the Briggs court stated that this problem should be considered in deciding whether to grant postpetition interest [FN72]--but it probably worsens the procedural problems. Even though Briggs did not guarantee relief in the way that American Mariner did, creditors will surely continue to ask for it in every instance. Weighing the factors relevant to granting relief, and gathering the preliminary information necessary for weighing them, can only delay the process further.

Providing compensation for delay in the form of postpetition interest would also run seriously afoul of the specific policies underlying the automatic stay. One of the principal justifications for paying postpetition interest is that it would ensure that creditors receive the equivalent of what they could have received by exercising their state lien enforcement rights. Yet throughout the history of bankruptcy law in the United States, stays have existed precisely in order to prevent creditors from getting what they would have gotten by exercising state lien enforcement rights. [FN73] Congress enacted the stay to prevent the swiftest creditors from stripping the estate of its property *1121 at the expense of the other creditors (and to the preclusion of reorganization) and to give the debtor a breathing period during which it could either search for a suitable bidder for its assets or reorganize its affairs. [FN74] Requiring debtors to continue making interest payments throughout the bankruptcy proceedings would diminish their assets and deny them much of the repose Congress desired to give them.

A final reason for not paying postpetition interest in accordance with American Mariner, Grundy, and Ahlers is that doing so would perpetuate the 'race of diligence'--the penalizing of slow-moving creditors--which is an aspect of state law that federal law greatly seeks to avoid. [FN75] The Grundy approach denies a creditor postpetition interest until it files a section 362(d)(1) motion; [FN76] and thus the approach rewards the fastest creditors. Worse yet, all three cases calculate what a creditor could have received by enforcing its rights in the collateral according to how long it would have taken to enforce these rights absent the stay. [FN77] The decisions thus favor the creditors that commence lien enforcement before the bankruptcy petition is filed. [FN78]

Denying postpetition interest to undersecured creditors, however, would not accord with every aim of the federal Bankruptcy Code. The law generally strives to treat like creditors equally. [FN79] Imposing a stay on lien enforcement but denying undersecured creditors compensation for the delay that the stay causes would conflict with this goal. In some cases, it might increase the funds available for distribution *1122 to the holders of unsecured claims by providing the estate with the free use of secured creditors' income-producing collateral during the bankruptcy proceedings. [FN80] This increase apparently would come at the expense of the secured creditors; if the automatic stay did not prevent them from enforcing their liens, the secured creditors would keep all of the income produced by the collateral during this period. [FN81]

But the severity of this disparate treatment should not be overstated. Under section 506(b), oversecured creditors already receive accrued interest at the contract rate to the extent that they are oversecured. [FN82] Undersecured creditors, however, although they do not receive all of the gains from the use of their collateral, do at least share them: section 506(a) gives them unsecured claims to the extent that they are undersecured. [FN83] In fact, it is possible that undersecured creditors will receive as much or more at the end of the bankruptcy proceedings than they would have received if the stay had not prevented them from recovering their collateral. This could happen when no creditors hold other unsecured claims, when the estate cannot pay any unsecured claims, or when the collateral only has value while in the hands of the debtor (such as a security interest in unharvested crops but not in proceeds).

Denying postpetition interest would also conflict with the Bankruptcy Code's general aim of respecting state law property entitlements. The Constitution authorizes Congress to establish laws 'on the subject of Bankruptcies

throughout the United States,' [\[FN84\]](#) but the Supreme Court has made clear that Congress does not have unfettered discretion in doing so. As the Court stated in *Butner v. United States*, [\[FN85\]](#) ' p roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.' [\[FN86\]](#) If respected, state law would determine the legal and equitable rights included in the creditor's bargain, and section 361 would not alter these rights. [\[FN87\]](#) Assuming that secured creditors bargain for lien enforcement *1123 rights [\[FN88\]](#) and that Congress wants secured creditors to receive the benefit of such bargains, creditors should receive what they could have made by enforcing their liens: interest at the market rate on the liquidation value of their collateral. [\[FN89\]](#) In the context of postpetition interest, however, the general aims of the Bankruptcy Code and the specific policies of the automatic stay--other than treating creditors equally--do seem to provide a compelling federal interest that will permit altering entitlements under state law in accordance with *Butner*. [\[FN90\]](#)

The issue of postpetition interest is, in sum, a question that must be decided under the standard of adequate protection, and an analysis of the policies that the standard seeks to further is a proper means of resolving that question. Although denying postpetition interest will sometimes cause undersecured creditors to bear what seems to be more than their fair share of the costs of delay, such denial will greatly further the objectives of establishing orderly bankruptcy proceedings, promoting reorganization, and providing protection for debtors and creditors in accordance with the automatic stay. Weighing these considerations, it seems that the scale must lean toward denying payments of postpetition interest under the adequate protection provision of sections 361 and 362(d)(1).

IV. CONCLUSION

The four federal circuit courts that have considered the issue have avoided policy considerations in deciding whether adequate protection requires, or even permits, compensation for the costs of delay in the form of postpetition interest payments. However, because the adequate protection provisions and the legislative history of these provisions by themselves do not specifically address this question, the rationales of these decisions are unpersuasive. Analysis of the policies *1124 that underlie the Bankruptcy Code indicates that even though denying compensation imposes a cost on undersecured creditors, postpetition interest should not be paid, because such payments would impose an unacceptably greater cost on others. Because the courts preferred to conceal the need to weigh costs in their opinions, they failed to make the contours of the adequate protection requirement any clearer. Questions under sections 361 and 362(d)(1) and other sections [\[FN91\]](#) using this standard will continue to arise. Unless the courts addressing these issues explicitly balance competing values, they will fail to produce answers that are any more appropriate or that provide any more guidance than the answers thus far produced by the conflicting circuits in deciding the issue of postpetition interest.

[\[FN1\]](#) 11 U.S.C. §§ 101-151, 326 (1982 & Supp. III 1985).

[\[FN2\]](#) A creditor is undersecured if its allowed secured claim is secured by property of lesser value than the claim. For example, a creditor with a \$200 claim secured by a lien on property worth \$100 is undersecured. The creditor would be oversecured if it had a lien on property worth more than \$200.

[\[FN3\]](#) See *In re Timbers of Inwood Forest Assocs.*, 793 F.2d 1380 (5th Cir. 1986), *aff'd* on rehearing, No. 85-2678 (5th Cir. Jan. 9, 1987) (en banc); *In re Briggs Transp. Co.*, 780 F.2d 1339 (8th Cir. 1985); *Grundy Nat'l Bank v. Tandem Mining Corp.*, 754 F.2d 1436 (4th Cir. 1985); *In re American Mariner Indus., Inc.*, 734 F.2d 426 (9th Cir. 1984).

[\[FN4\]](#) 11 U.S.C. § 362(d)(1) (allowing relief from the automatic stay (of lien enforcement and other rights) for lack of adequate protection of a creditor's interest in property); see *id.* § 363(e) (conditioning the sale, use, or lease of collateral on adequate protection of the creditor's interest in it); *id.* § 364(d)(1)(B) (conditioning the trustee's power to obtain credit secured by a lien on the ability to provide adequate protection to holders of interest in the property on which the lien is granted); *id.* §§ 361(1)-(3) (indicating the ways in which a court can provide adequate protection for a creditor's interest in the property when required by §§ 362-364); see also *id.* §§ 363(o)(1), 364(d)(2) (placing the

burden of proof with respect to the issue of adequate protection on the trustee).

[FN5] See *id.* [§ 362\(c\)](#) (continuing the stay until the case is closed or dismissed or until a discharge is granted). [Section 362\(a\)\(1\)](#) makes the stay operative immediately upon the filing of the bankruptcy petition. Liquidation, reorganization, or debt adjustment cannot be completed until responsive and other pleadings have been received, adversary proceedings and the bankruptcy case itself have been tried, and any authorization to operate the business has terminated. See *id.* § 721 (authorizing the trustee to operate the business for a limited period prior to liquidation); *id.* § 1108 (authorizing the trustee to operate the business pending reorganization); *id.* § 1304 (authorizing the debtor in an individual debt adjustment case to operate his business). Reorganizations typically take longest to resolve; thus, the issue of adequate protection arises most frequently in such cases.

[FN6] See *id.* § 506(b). However, it has been argued that the postpetition interest allowed to oversecured creditors is not itself entitled to adequate protection under § 361 before it is paid at distribution. See O'Toole, Adequate Protection and Postpetition Interest in Chapter 11 Proceedings, 56 AM. BANKR. L.J. 251, 264-74 (1982); see also *infra* note 52 (discussing whether § 506(b) should, by negative implication, prohibit payment of postpetition interest in all circumstances other than to oversecured creditors at distribution).

[FN7] See [11 U.S.C. § 502\(b\)\(2\)](#) (prohibiting claims for unmatured interest at a contract rate). One exception is that interest is payable at the legal rate on allowed claims in the unlikely event that the estate remains solvent after distributing property in satisfaction of all claims. See *id.* §§ 726(a)(5), 1129(a)(7), 1325(a)(4).

[FN8] [Section 362\(d\)](#) provides:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

- (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
- (2) with respect to a stay of an act against property under subsection (a) of this section, if--
 - (A) the debtor does not have an equity in such property; and
 - (B) such property is not necessary to an effective reorganization.

Id. [§ 362\(d\)](#).

[FN9] See *id.* ('[T]he court shall grant relief . . . by terminating, annulling, modifying or conditioning the stay . . .').

[FN10] [Section 361](#) provides:

When adequate protection is required under [section 362](#), [363](#), or [364](#) of this title of an interest of an entity in property, such adequate protection may be provided by--

- (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under [section 362](#) of this title, use, sale, or lease under [section 363](#) of this title, or any grant of a lien under [section 364](#) of this title results in a decrease in the value of such entity's interest in such property;
- (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease or grant results in a decrease in the value of such entity's interest in such property;
- (3) granting such other relief, other than entitling such entity to compensation allowable under [section 503\(b\)\(1\)](#) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

Id. § 361.

[Section 361](#), however, no longer applies to all bankruptcy cases. The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of [1986, Pub. L. No. 98-544](#), 1 Bankr. L. Rep. (CCH) pp 1725-1745 C (to be codified at [12 U.S.C. §§ 1201-1231](#)), has added a new Chapter 12 to the Bankruptcy Code for the adjustment of debts of a family farmer with regular income. In enacting the new chapter, Congress recognized that cases such as *In re American Mariner Industries, Inc.*, [734 F.2d 426 \(9th Cir. 1984\)](#), had required compensation for delay under § 361. Although Congress expressed no opinion with regard to the correctness of such decisions, it made clear that adequate

protection in chapter 12 (but no other chapters) would be governed by § 1205 and not § 361 and that the new section would not require a family farmer to pay this compensation. See H.R. CONF. REP. NO. 958, 99th Cong., 2d Sess. 49-50, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5246, 5250-51.

[FN11] The courts that have considered the issue have ascribed different names to the payments requested under § 362(d)(1). Some courts seem to have avoided the term 'interest payments,' because paying interest during the pendency of the bankruptcy proceedings is not authorized by §§ 502 and 506, but it seems impossible to draw any meaningful distinction between postpetition interest and postpetition 'opportunity cost payments.' See *In re Timbers of Inwood Forest Assocs.*, 793 F.2d 1380, 1382 n.1 (5th Cir. 1986). For the sake of convenience, this Note will follow *Timbers* and refer to these payments as postpetition interest.

[FN12] 734 F.2d 426 (9th Cir. 1984).

[FN13] The *American Mariner* court noted, however, that eight bankruptcy courts had already considered and rejected, the argument that adequate protection requires a debtor to make postpetition interest payments. See *id.* at 434 & n.9.

[FN14] The *American Mariner* decision has since been cited over 50 times in lower court opinions on this issue, with the vast majority of cases following its holding.

[FN15] See *American Mariner*, 734 F.2d at 435 n.12. More precisely, the court stated that interest should be paid at either the contract rate or the market rate, but not at the market rate if the contract rate is lower. The court did not make entirely clear, however, whether a lower market rate might be paid instead of a higher contract rate. See *id.* The court also did not state how to choose or calculate the market rate, which is not a single number but rather a figure that varies according to the creditworthiness of the borrower. See Fortgang & Mayer, *Valuation in Bankruptcy*, 32 *UCLA L. REV.* 1061, 1078 (1985); V. Countryman, *Debtors' and Creditors' Rights* 555 (Sept. 1986) (unpublished manuscript); *infra* note 26.

[FN16] See *American Mariner*, 734 F.2d at 435. The court stated that 'the debtor should be permitted maximum flexibility in structuring a proposal for adequate protection' that would provide the creditor with the value of his bargained-for rights, but it cautioned against giving a creditor too much protection. It instructed the bankruptcy court to take account of several factors in calculating the appropriate compensation, including the usual time and expense involved in taking possession of and selling collateral and the possibility that the market rate of interest will exceed the contract rate. See *id.* at 435 & n.12.

[FN17] *Id.* at 430 (quoting 11 U.S.C. § 361(2) (1982 & Supp. III 1985)) (emphasis added in *American Mariner*). Section 362(d)(1) and every subsection of § 361 require protection of what they call an 'entity's interest' in collateral rather than requiring protection of the collateral itself. See 11 U.S.C. §§ 361, 362(d)(1) (1982 & Supp. III 1985).

[FN18] Citing *Watt v. Alaska*, 451 U.S. 259, 265-66 (1981), the court asserted that the 'plain meaning' of the statute would control its decision unless it could find that the legislative history indicated that it should not. *American Mariner*, 734 F.2d at 429-30. The court held that a reference in the committee report on the Senate's version of § 361, which indicated that the Senate intended to make the Code compatible with *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273 (1940) (suggesting that, under the old Bankruptcy Act, protection extended to a secured creditor's collateral but not necessarily to its rights in the collateral), did not evince a contrary intention. Congress, in the court's view, had rejected the Senate's version of section 361 and instead adopted the House's more expansive approach to adequate protection. See *American Mariner*, 734 F.2d at 430 n.4; H.R. REP. NO. 595, 95th Cong., 2d Sess. 339, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6295 [hereinafter HOUSE REPORT]; S. REP. NO. 989, 95th Cong., 2d Sess. 54, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5840 [hereinafter SENATE

REPORT].

[FN19] [American Mariner, 734 F.2d at 431](#) (quoting HOUSE REPORT, supra note 18, at 339, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 6295).

[FN20] See [id. at 431](#). The court noted that although compensating for delay might not accord with the Bankruptcy Code's general aim of giving debtors a 'breathing spell' during bankruptcy proceedings, it would be consistent with the provisions of [§§ 361](#) and [362](#) that clearly protect creditors at the expense of debtors. To support this proposition, the court cited [§ 362\(e\)](#) (automatically terminating the stay if the court does not hold a hearing within 30 days) and [§ 362\(f\)](#) (providing creditors with ex parte relief) and referred to [§ 361\(g\)](#) (placing on the debtor in possession the burden of proving that the creditor's interest is adequately protected). See [id. at 431-32](#).

[FN21] [Id. at 431](#) (quoting [11 U.S.C. § 361\(3\) \(1982 & Supp. III 1985\)](#)); see supra note to.

[FN22] See [id. at 432](#) (citing [In re Murel, 75 F.2d 941 \(2d Cir. 1935\)](#)). Congress added the phrase 'indubitable equivalent' in resolving the conflicts between the House and Senate versions of [§ 361](#). See [id.](#)

[FN23] See [Murel, 75 F.2d at 942](#).

[FN24] See [American Mariner, 734 F.2d at 432-34](#).

[FN25] [754 F.2d 1436 \(4th Cir. 1985\)](#).

[FN26] The major difference between *Grundy* and *American Mariner* is that the *Grundy* court ruled that the entitlement to postpetition interest cannot begin until after the creditor has asked for relief from the automatic stay. See [id. at 1441](#). Under *American Mariner*, the entitlement to such interest begins upon the filing of the bankruptcy petition. See [American Mariner, 734 F.2d at 435 & n.12](#). Both courts, however, require some accounting for the usual time and expense involved in foreclosure, repossession, and sale in determining the exact date upon which the entitlement begins. See [Grundy, 754 F.2d at 1441](#); [American Mariner, 734 F.2d at 435 & n.12](#). *Grundy* also indicates that a court should require payment at the market rate 'for the same type of loan' but that the contract rate 'may be more appropriate' if it is lower. [Id.](#)

[FN27] [780 F.2d 1339 \(8th Cir. 1985\)](#).

[FN28] [Id. at 1347](#) (quoting SENATE REPORT, supra note 18, at 53, reprinted in 1978 U.S. CONG. & ADMIN. NEWS at 5839).

[FN29] See [id. at 1346](#). The court stated:

[I]n determining the exact scope of [the creditor's] bargained-for rights, the boundaries of the indubitable equivalence standard cannot be so rigidly defined as to mandate interest payments for the delay in foreclosing, liquidating, and reinvesting collateral in every case. Rather, indubitable equivalence must be construed as an alternative means of calculating value in light of a particular case's facts.

[Id.](#)

[FN30] See *id.* at 1347. The court did not explain why a court should protect only the 'essence' of the creditor's bargain or how to determine what the essence is. It suggested, however, that the essence may be payment in full, up to the lien value of the collateral.

[FN31] See *supra* pp. 1109-10.

[FN32] See [11 U.S.C. § 502\(b\)\(2\) \(1982 & Supp. III 1985\)](#). [Section 506\(b\)](#) acts as somewhat of an exception to [§ 502\(b\)](#), allowing an oversecured creditor interest on a secured claim to the extent that the value of its security interest exceeds the value of the claim. See *id.* [§ 506\(b\)](#); *supra* p. 1107. The court in *American Mariner* held that these provisions had a bearing on the rate at which postpetition interest should be paid; but the court did not consider whether their existence militated against paying postpetition interest as part of adequate protection. See *In re American Mariner Indus., Inc.*, [734 F.2d 426, 435 n.12 \(9th Cir. 1984\)](#).

[FN33] See [Briggs, 780 F.2d at 1347 & n.9](#). The only support the court cited in dismissing the contention was Note, [Compensation for Time Value as Part of Adequate Protection During the Automatic Stay in Bankruptcy, 50 U. CHI. L. REV. 305, 322 \(1983\)](#) (arguing that [§ 506\(b\)](#) should not prohibit payment of postpetition interest to undersecured creditors by negative implication, because [§ 506\(b\)](#) is an alternative to, and not a limitation on, adequate protection). See *infra* note 52.

[FN34] See [Briggs, 780 F.2d at 1348-49](#).

[FN35] See [id. at 1349-50](#). These factors include the extent to which a creditor is oversecured, the parties' reasonable expectation in the bargain, the stability of the value of the creditor's lien, the effects of taxes, and the chances of successful reorganization. The Eighth Circuit reaffirmed and applied these factors in *In re Ahlers*, [794 F.2d 388, 394-98 \(8th Cir. 1986\)](#). Ahlers also held that the starting date for adequate protection payments of postpetition interest should be 'the date when the creditor, absent the filing of a bankruptcy petition, could have taken possession of the collateral under state law and could have sold it to a third party.' *Id.* at 396. The payments should equal 'the creditor's expected return upon reinvestment.' *Id.*; see *supra* note 26.

[FN36] [793 F.2d 1380 \(5th Cir. 1986\)](#), *aff'd on rehearing*, No. 85-2678 (5th Cir. Jan. 9, 1987) (en banc).

[FN37] See [id. at 1382](#).

[FN38] See [id. at 1384](#).

[FN39] [Id. at 1389](#). The Timbers court rejected the contention that the 'indubitable equivalent' language authorized compensation for the costs of delay, holding instead that the phrase refers merely to a substitute for a particular interest and does not independently authorize compensation for anything. See *id.* at 1388-89 (interpreting [11 U.S.C. § 361\(3\) \(1982 & Supp. III 1985\)](#)). The court went on to state that because Congress used the 'indubitable equivalent' phrase in a different context from the one in which Judge Hand had used the phrase--that is, in the context of adequate protection rather than in the context of dissenting creditors' rights in a reorganization--Congress did not intend to give the phrase the same meaning that Judge Hand had. See [id. at 1401](#).

[FN40] [Id. at 1397](#). The Timbers court concluded, as did the court in *American Mariner*, that the Senate version, had it not been changed, would have protected creditors only against a decline in value of their collateral. See *supra* note 18.

[FN41] See [Timbers, 793 F.2d at 1398-400](#). The court quoted Rep. Butler, who stated that '[i]f a creditor is concerned that property is being misused or depreciating, the creditor can demand adequate protection or relief from the automatic stay.' See [id. at 1399](#) (quoting 124 CONG. REC. 32,419 (1978)).

[FN42] See [id. at 1399-401](#). The court also noted that the Code does not provide explicitly for such compensation, does not indicate when such compensation would begin, does not specify the rate at which it would be paid, and does not state how it would affect a debtor's ability to cure. See [id. at 1403](#). It reasoned that postpetition interest payments might encourage delay and anomalously allow creditors to receive more through payment of interest during the bankruptcy proceedings under [sections 361](#) and [362\(d\)\(1\)](#) than they are explicitly allowed to receive for their claim at termination under [section 506](#). See [id. at 1405-08](#).

[FN43] See [id. at 1408-09 & n.49](#). The court presented statistics indicating that the average number of [§ 362\(d\)](#) petitions filed had increased from 92 per 100 cases at the time that *American Mariner* was decided to 163 per 100 cases during the first three months of 1986. The court implied that if Congress had intended for secured creditors to be entitled to postpetition interest as a matter of law, Congress would have provided an easier mechanism for them to receive payment. See *id.*

[FN44] See [id. at 1409-10](#). The court stated that it would be preferable not to distribute assets according to the abbreviated procedures established by [§ 362](#), because they do not afford the careful assessment of the creditors' relative priorities that a court could provide. The court cited the new discovery procedures of the 1978 Code as evidence of a policy of not acting until full information has been gathered. See, e.g., [12 U.S.C. § 521\(1\)](#) (requiring the debtor to provide information through comprehensive schedules); *id.* § 1102(a) (establishing creditor committees to secure adequate representation for unsecured creditors at meetings in which the debtor is examined under oath).

[FN45] See [Timbers, 793 F.2d at 1410-11](#).

[FN46] See *In re Timbers of Inwood Forest Assocs.*, No. 85-2678, slip op. at 3-19 (5th Cir. Jan. 9, 1987).

[FN47] See *id.* at 16.

[FN48] See *id.* at 17-18.

[FN49] See *In re Ahlers*, 794 F.2d 388, 394-95 (8th Cir. 1986); *In re Timbers of Inwood Forest Assocs.*, 793 F.2d 1380, 1384, 1393-401 (5th Cir. 1986), *aff'd* on rehearing, No. 85-2678 (5th Cir. Jan. 9, 1987) (en banc); *In re Briggs Transp. Co.*, 780 F.2d 1339, 1344 (8th Cir. 1985); *Grundy Nat'l Bank v. Tandem Mining Corp.*, 754 F.2d 1436, 1441 (4th Cir. 1985) (finding *American Mariner's* use of this analysis correct); *In re American Mariner Indus., Inc.*, 734 F.2d 426, 430 (9th Cir. 1984).

[FN50] See [United States v. Missouri Pacific R.R.](#), 278 U.S. 269, 278 (1929) (stating that a statute's plain meaning should be adopted and that extrinsic aids should be used to confirm that meaning); Murphy, *Old Maxims Never Die: The 'Plain-Meaning Rule' and Statutory Interpretation in the 'Modern' Federal Courts*, 75 COLUM. L. REV. 1299, 1301 (1975) (stating that *Missouri Pacific* epitomizes one way statutes have been construed).

[FN51] See *supra* p. 1112.

[FN52] One problem with legislative silence is that it permits a wide array of contradictory interpretations. One can make the common statutory argument that Congress did not intend the adequate protection provisions to extend to present value because Congress could have incorporated the concept of present value into [section 361](#) explicitly (it did so in nine places in the Bankruptcy Code) but chose not to do so. See [11 U.S.C. §§ 1129\(a\)\(7\)\(A\), 1129\(a\)\(7\)\(B\), 1129\(a\)\(9\)\(B\)\(i\), 1129\(b\)\(2\)\(A\)\(i\)\(II\), 1129\(b\)\(2\)\(B\)\(i\), 1129\(b\)\(2\)\(C\)\(i\), 1325\(a\)\(4\), 1325\(a\)\(4\), 1325\(a\)\(5\)\(B\)\(ii\) \(1982 & Supp. III 1985\)](#); V. Countryman, *supra* note 15, at 553; cf. [NLRB v. Bildisco](#), 465 U.S. 513, 522-23 (1984) (making this type of argument with respect to a different issue in the Bankruptcy Code). On the other hand, Congress seems to have specifically disallowed a present value measure in section 1322(b)(2). If this interpretation is correct, then no inference can be drawn about what Congress means when it does not explicitly allow or disallow a present value measure, as in [§ 361](#). See [11 U.S.C. § 1322\(b\)\(2\) \(1982 & Supp. III 1985\)](#) (providing for deferred cash payment of priority claims in a chapter 13 debt adjustment case). To suggest yet another possibility, if it is true that the Bankruptcy Code never specifically disallows a present value measure (assuming that the proposed interpretation of [§ 1322](#) above is incorrect), then one might surmise that Congress wanted never to disallow it. Statutory arguments of this kind are so ambiguous, however, that they add little to the understanding of the statute. See Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400-06 (1950).

Similar difficulties arise in arguing whether the availability of postpetition interest to oversecured creditors at distribution under [§ 506\(b\)](#) should, by negative implication, prohibit periodic postpetition interest payments to undersecured creditors under [§ 361](#) during the pendency of the bankruptcy proceedings. See *supra* p. 1107; p. 1112 & n. 33. The Bankruptcy Code does not state whether [§ 506\(b\)](#) is an alternative to or a limitation on adequate protection; equally plausible interpretations have been put forth on both sides, compare [Timbers](#), 793 F.2d at 1387 (interpreting [§ 506\(b\)](#) as a limitation) with [Briggs](#), 780 F.2d at 1347 & n.8 (interpreting [§ 506\(b\)](#) as an alternative).

[FN53] See *In re Briggs Transp. Co.*, 780 F.2d 1339, 1344 (8th Cir. 1985); [Grundy Nat'l Bank v. Tandem Mining Corp.](#), 754 F.2d 1436, 1440 (4th Cir. 1985); *In re Ahlers*, 794 F.2d 388, 394 (8th Cir. 1985); *supra* p. 1109.

[FN54] See 2 COLLIER ON BANKRUPTCY ¶ 362.07[1] (15th ed. 1986) (indicating that posignors, lessors, and coowners are also entitled to adequate protection).

[FN55] Although none of the circuit courts recognized this fact in deciding the issue of postpetition interest, other courts have regularly denied payments for depreciation to oversecured creditors because of the existence of such an 'equity cushion'—an excess of value of the collateral over the value of the secured creditor's claim. See, e.g., *In re Rogers Dev. Corp.*, 2 Bankr. 679, 683 (Bankr. E.D. Va. 1980) (indicating that an 'equity cushion' can be adequate protection); 2 COLLIER ON BANKRUPTCY, *supra* note 54, p 361.02[3].

[FN56] See [Briggs](#), 780 F.2d at 1346; *supra* p. 1110.

[FN57] The *Timbers* court accepted a similar counterargument. See *supra* p. 1112.

[FN58] HOUSE REPORT, *supra* note 18, at 339, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 6295. Little weight should be given to the arguments, of lesser significance but comparable ambiguity, that focused on the Senate Report's reference to [Wright v. Union Central Life Ins. Co.](#), 311 U.S. 273, 278 (1940) (standing for the principle that Congress intended to protect only the collateral itself and not necessarily the creditor's rights in the collateral). *American Mariner* seems justified in having cursorily rejected this argument. See *In re American Mariner Indus., Inc.*, 734 F.2d 426, 430 & n.12 (9th Cir. 1984); *supra* p. 1109. The *Timbers* court, although it attempted to point to the ambiguity created by this argument, could not really use the reference in support of its own conclusions. See *In re Timbers of Inwood Forest Assocs.*, 793 F.2d 1380, 1401 (5th Cir. 1986), *aff'd on reh'ring*, No. 85-2678 (5th Cir. Jan. 9, 1987) (en banc); *supra* p. 1113.

The discussion of the new § 1205 in the en banc *Timbers* decision suffers from comparable ambiguity. Notwithstanding the court's finding that Congress intended to address only the problem of farm bankruptcies, see *supra* p. 1117, the fact

remains that Congress had lengthy discussions at the time it passed § 1205 about the incorrectness of the American Mariner decision but still did not overrule the case with respect to its interpretation of § 361. See *In re Timbers of Inwood Forest Assocs., Ltd.*, No. 85-2678, slip op. at 17 (5th Cir. Jan. 9, 1987). Thus, it seems that Congress abstained from either accepting or rejecting the American Mariner opinion and that the enactment of § 1205 provides no persuasive evidence about congressional intent on the issue of postpetition interest under § 361.

[FN59] See [Timbers, 793 F.2d at 1397](#); supra p. 1113.

[FN60] See [Briggs, 780 F.2d at 1348-49](#); supra p. 1111.

[FN61] See [American Mariner, 734 F.2d at 431](#); supra p. 1110.

[FN62] See supra p. 1110.

[FN63] The American Mariner court would need to find some external constraint--such as a prohibition on altering state entitlements--to render its logic noncircular. The court, in fact, maintained at a later point in its opinion that such a constraint does exist, see [734 F.2d at 435](#), but closer inspection indicates that the constraint cannot be strict enough to prohibit § 361 from altering state entitlements completely. See infra pp. 1122-23.

[FN64] Litigants have a tendency to see only their own side of an ambiguity. See, e.g., Brief For Appellant at 7 and Brief for Appellee at 8, In re [Timbers of Inwood Forest Assocs., Ltd., 793 F.2d 1380 \(5th Cir. 1986\)](#) (both indicating that the statute is unambiguous but drawing opposing conclusions).

[FN65] The Bankruptcy Code itself is far from perfect and has often contained important technical errors. See Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. LEG. 1, 42 (1985). The failure of the Code to provide more specific guidance about the adequate protection standard, however, does not seem to be a mistake or an oversight. Rather, as Part III of this Note explains more fully, it appears that Congress intended 'adequate protection' to be an imprecise standard that would allow courts a measure of discretion. See infra p. 1119.

[FN66] See [United States v. Cooper Corp., 312 U.S. 600, 605 \(1941\)](#).

[FN67] See HOUSE REPORT, supra note 18, at 339, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 6295 ('It is expected that courts will apply the concept [of a dequate protection] in light of the facts of each case and general equitable principles.'). The Bankruptcy Code employs similar standards in several other places. See, e.g., [11 U.S.C. §§ 365\(b\)\(1\)\(B\), \(b\)\(3\), \(f\)\(2\)\(B\) \(1982 & Supp. III 1985\)](#) (using 'adequate assurance' standard); id. § 721 (using 'best interest' standard); id. § 1102(a)(2) (using 'adequate representation' standard).

[FN68] See, e.g., K. LLEWELLYN, JURISPRUDENCE 217 (1962) (advocating that statutes be interpreted 'in accordance with [their] purpose and reason'); Wiseman, [The Limits of Vision: Karl Llewellyn and the Merchant Rules](#), 100 HARV. L. REV. 465, 493-503 (1987). In [General Motors Corp. v. Devex Corp., 461 U.S. 648 \(1982\)](#), the Supreme Court itself recently applied this method of statutory interpretation in deciding a similar issue under a similar standard in a nonbankruptcy context. The Court interpreted [35 U.S.C. § 284 \(1982\)](#), which specifies that damages in a patent infringement suit must be 'adequate to compensate for the infringement,' by looking at the policies of patent law. The Court held that prejudgment interest ordinarily should be awarded under [§ 284](#) because doing so would be consistent with Congress's overriding purpose of affording patent owners complete compensation. See [461 U.S. at 655](#).

[FN69] Timbers presented the best discussion of these aims and goals, even though its disdain for policy considerations prevented it from making them an important part of the rationale for its decision. See *supra* pp. 1112-14; see also *supra* note 20 (discussing American Mariner's policy consideration). Reorganizing bankrupt businesses can be desirable from the standpoint of both society and creditors, because it preserves the surplus of going-concern value over liquidation value. See V. BRUDNEY & M. CHIRELSTEIN, *CASES AND MATERIALS ON CORPORATE FINANCE* 125 (1979).

[FN70] Deciding whether to retain assets in order to promote reorganization requires a balancing of costs and benefits. The Bankruptcy Code recognizes that reorganizations should not be attempted in all cases. Approval of a plan for reorganization is conditioned on a formula of payment that preserves the priority of creditors, see [11 U.S.C. §§ 1129\(a\)\(2\), \(a\)\(9\) \(1982 & Supp. III 1985\)](#), and a determination of feasibility, see *id.* [§ 1129\(a\)\(11\)](#).

[FN71] Most of the risk that a reorganization will fail already falls upon the unsecured creditors. See V. BRUDNEY & M. CHIRELSTEIN, *supra* note 69, at 127 n.o. If undersecured creditors are compensated with postpetition interest for delay in waiting to see whether a reorganization will succeed, then the completely unsecured creditors will bear almost all of the costs of failed reorganizations. The Supreme Court, however, has indicated that secured creditors must bear some of the risks of the rehabilitative process. See [Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 165 \(1946\)](#). Its holding would seem to include the risk of incurring the costs associated with attempting a reorganization that may ultimately end in liquidation. See *In re Timbers of Inwood Forest Assocs.*, [793 F.2d 1380, 1410 \(5th Cir. 1986\)](#); O'Toole, *supra* note 6, at 259.

[FN72] See [In re Briggs Transp. Co.](#), [780 F.2d 1339, 1349 \(8th Cir. 1985\)](#); *supra* note 35.

[FN73] See, e.g., *Ex parte Christy*, [44 U.S. \(3 How.\) 292, 312 \(1845\)](#) (Story, J.) (holding that a federal court sitting in bankruptcy, in a case that is not a reorganization, may enjoin state lien enforcement because 'the purposes so essential to the just operation of the bankrupt[cy] system, could scarcely be accomplished' otherwise).

[FN74] See HOUSE REPORT, *supra* note 18, at 340, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 6296.

[FN75] Congress stated:

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claim in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

Id.

[FN76] See [Grundy Nat'l Bank v. Tandem Mining Corp.](#), [754 F.2d 1436, 1441 \(4th Cir. 1985\)](#); *supra* note 26.

[FN77] See *In re American Mariner Industries, Inc.*, [734 F.2d 426, 435 & n.12 \(9th Cir. 1984\)](#); [Grundy](#), [754 F.2d at 1441](#); *In re Ahlers*, [794 F.2d 388, 395 \(8th Cir. 1986\)](#); *supra* note 35; *supra* note 26.

[FN78] A race of diligence has far fewer detrimental effects when there is only one unclear secured creditor, as seems to have been the case in *American Mariner*, *Briggs*, and *Timbers*.

[FN79] See, e.g., HOUSE REPORT, *supra* note 18, at 340, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 6297 ('Bankruptcy is designed to provide an orderly liquidation procedure under which all [unsecured and non priority] creditors are treated equally.'). The prohibition of preferential transfers and the so-called absolute priority rule for dissenting creditors in reorganization effect this policy by proscribing certain distributions that would cause secured creditors to receive less than they would have received had the estate been liquidated. See [11 U.S.C. §§ 547\(b\)\(5\)\(A\) \(1982 & Supp. III 1985\)](#) (barring preferential transfers); *id.* [§ 1129\(b\)\(1\)](#) (stating the absolute priority rule); V. BRUDNEY & M. CHIRELSTEIN, *supra* note 69, at 124 & n.k. Neither of these rules, however, seems to control the issue of postpetition interest.

[FN80] If the creditor has a security interest that extends to the proceeds, rents, or profits of its collateral, use of the property may not increase the funds available for unsecured claims. See [11 U.S.C. § 552\(b\) \(1982 & Supp. III 1985\)](#). The Bankruptcy Code would, furthermore, greatly restrict the ability of the debtor in possession to use such proceeds, rents, or profits during the stay. See *id.* [§§ 363\(a\), 363\(c\)\(2\)](#).

[FN81] See Note, *supra* note 33, at 320.

[FN82] See *supra* p. 1107.

[FN83] See [11 U.S.C. § 506\(a\) \(1982\)](#).

[FN84] U.S. CONST. art. I, § 8.

[FN85] [440 U.S. 48 \(1979\)](#).

[FN86] *Id.* at 55. The Supreme Court was, in part, concerned with the possibility that a contrary rule would give rise to opportunities for forum shopping. See *id.*

[FN87] Reading [§ 361](#) tacitly to define the bargain it protects creates a problem of circularity. See p. 1118. No such problem exists if state law defines the bargain and [§ 361](#) merely protects it.

[FN88] Professor Thomas Jackson has argued at length that this assumption is correct. See T. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 21-27 (1986); Baird & Jackson, [Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy](#), *51 U. CHI. L. REV.* 97, 109-11 (1984); Jackson, [Bankruptcy, Nonbankruptcy Entitlements, and the Creditors' Bargain](#), *91 YALE L. J.* 857, 859-60, 868-71 (1982).

[FN89] See T. JACKSON, *supra* note 88, at 185 ('If [a secured creditor] is not given the liquidation value of [its collateral] at the time it would have obtained the money through a sale of the asset if a default occurred and a bankruptcy petition ha[d] not been filed, the value of its nonbankruptcy rights are not being protected.').

[FN90] The Supreme Court has not made it difficult to show a compelling federal interest, nor does it seem to consider the existence of a federal interest exceptional. See *Wright v. Union Central Life Ins. Co.*, 304 U.S. 503, 515 (1938) ('Bankruptcy proceedings constantly modify and affect the property rights established by state law.').

[\[FN91\]](#) See supra note 4.

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