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Reinstatement v. Cramdown: Do Secured Creditors Win or Lose?

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INTRODUCTION

Most, if not all, Chapter 11 debtors have some type of secured debt on their balance sheets. In fact, most lenders insist, and most bondholders prefer, that their debt be secured if the debtor has available assets to serve as collateral. The reason for this preference is simple—secured creditors enjoy certain enhanced rights in bankruptcy, such as the right to adequate protection if the debtor uses or sells the collateral[1] and the right to satisfaction of the secured claim before any distributions to junior creditors from the lender's collateral. The latter benefit often gives secured creditors substantial leverage in the plan negotiation process and can be particularly challenging for debtors.

The Bankruptcy Code,[2] however, offers the debtor some assistance in this respect by providing it two options for confirming a Chapter 11 plan without the support or consent of its secured creditors. These two options—generally referred to as "cramdown" and "reinstatement"—establish important parameters for prepetition and postpetition negotiations between debtors and secured creditors. Additionally, the treatment afforded to secured claims in bankruptcy can affect the treatment afforded to junior creditors when the parties have executed a subordination agreement. The Bankruptcy Code sections that govern the treatment of secured debt in Chapter 11 thus not only impact negotiations between the debtor and the secured creditor but also negotiations between senior and junior creditors.

Typically, if a debtor's proposed Chapter 11 plan does not have the support of the debtor's secured creditors, the debtor will seek to "cram down" the plan on its secured creditors under section 1129(b)(2)(A) of the Bankruptcy Code (the Cramdown Statute). The Cramdown Statute sets forth the circumstances under which a dissenting class of secured claims can be forced to accept a Chapter 11 plan that is fair and equitable with respect to that class. Under the Cramdown Statute, the debtor can (A) provide for the full payment of the allowed amount of the secured claim by deferred payments carrying a market rate of interest secured by the prepetition collateral;[3] (B) sell the prepetition collateral under sections 363(f) and (k) of the Bankruptcy Code free and clear of the secured creditor's liens, with the lien attaching to the proceeds;[4] or (C) provide the secured creditor with the realization of the "indubitable equivalent" of the allowed amount of its secured claim.[5] When the secured creditor is substantially oversecured, it generally is entitled to the full benefit of its prepetition and postpetition rights under the security agreement. Accordingly, as discussed below, oversecured creditors generally receive highly favorable treatment in Chapter 11. In contrast, if the secured creditor is undersecured, it may be forced to accept property or deferred payments carrying a market rate of interest having a present value equal to the collateral's value and secured by the prepetition collateral.[6]

Although used less frequently, a debtor also may confirm its proposed plan of reorganization without the consent of its secured creditors under section 1124(2) of the Bankruptcy Code (the Reinstatement Statute).[7] The Reinstatement Statute permits a debtor to reinstate secured claims and retain the benefit of pre-default/prepetition contractual terms under certain circumstances.[8] A secured creditor whose claim is reinstated is deemed conclusively to have accepted a plan of reorganization and is denied the right to vote on plan confirmation.[9] In this respect, the Reinstatement Statute presents a powerful tool for some debtors that are forced to negotiate with an uncooperative secured creditor.

Because a Chapter 11 case usually is filed, among other things, to reduce a debtor's debt burden, reinstatement of prepetition debt often is overlooked as a restructuring tool. Consequently, navigating the largely untested waters of reinstatement may present major obstacles depending on where the debtor's case is filed and the extent to which the secured creditor is entitled to default rate interest and other penalties under the security agreement. In most jurisdictions, a secured creditor's ability to enforce its postpetition right to certain penalty rates remains an open ques-

tion. To complicate matters further, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended certain sections of the Bankruptcy Code affecting reinstatement of secured debt.[10] The impact, if any, of these amendments is unclear.

This article compares and contrasts the rights of debtors and secured creditors under the Cramdown Statute and the Reinstatement Statute. In particular, it provides an overview of a secured creditor's rights with respect to the plan process and the calculation of its allowed secured claim,[11] under a cramdown[12] and by reinstatement.[13] The article then analyzes the changes made by BAPCPA that affect the Reinstatement Statute and suggests that BAPCPA amendments have raised more questions than they clarified.[14] This article also discusses the impact that reinstatement may have on the use of subordination agreements to enforce certain postpetition rights.[15] In addition, it discusses issues posed by attorney's fees, default interest, and prepayment premium clauses. Finally, it highlights the pros and cons of invoking a cramdown or reinstatement in the development and negotiation of a Chapter 11 plan. The Article concludes that both cramdown and reinstatement may be useful tools in building a consensual plan.

I. OVERVIEW OF A SECURED CREDITOR'S RIGHTS WITH RESPECT TO THE PLAN PROCESS

A. Prebankruptcy Rights

Secured creditors enjoy various rights outside of bankruptcy, including the payment of interest and principal and the right to foreclose on their collateral in the event of a default. It is not uncommon for security agreements to provide for the payment of default rate interest[16] and attorneys' fees[17] in the event of a default as compensation for the costs incident to foreclosure. Security agreements also can provide for the imposition of prepayment penalties[18] in the event of default or if the debtor prepays the balance due prior to the expiration of a fixed time period.

Additionally, a secured creditor may benefit from a subordination agreement with a junior creditor.[19] Under most subordination agreements, the junior or subordinated creditor is required to turn over all payments allocable to its claim against the debtor to the senior creditor until the senior creditor's claim is satisfied in full.[20] Thus if the debtor files for bankruptcy, the senior creditor has a right to distributions allocable to the claim held by the junior creditor until its senior claim is satisfied in full.[21]

B. Overview of Plan Process

A debtor generally must satisfy all secured claims in full under a plan of reorganization before making any distributions to junior creditors from the secured creditor's collateral.[22] Section 1129(a) of the Bankruptcy Code sets forth 16 requirements that the debtor (or other plan proponent) generally must satisfy to confirm a Chapter 11 plan.[23] The one exception to this general rule is found in section 1129(a)(8) of the Bankruptcy Code, which provides that each class of creditors must either accept the plan or be unimpaired under the Plan.[24] If a class of claims does not accept the plan, such plan may be "crammed down" on that class if applicable legal standards are met.[25]

If a plan reinstates a class of secured claims under the Reinstatement Statute, that class is conclusively presumed to have accepted the plan and is not entitled to vote to accept or reject the plan.[26] If a plan impairs a class of secured claims and that class votes against the plan, the plan can still be confirmed if it satisfies the Cramdown Statute. The Cramdown Statute generally prohibits "unfair discrimination" and treatment that is not "fair and equitable" with respect to the dissenting class.[27] As discussed below, a plan generally is not "fair and equitable" with respect to a dissenting class of secured claims unless the plan provides for the full payment or the realization of the indubitable equivalent of the allowed amount of each secured claim.[28]

Section 506(a) of the Bankruptcy Code provides that the allowed amount of a creditor's secured claim is limited to the value of the collateral securing the claim.[29] Alternatively, a secured creditor can make an election under section 1111(b) of the Bankruptcy Code (hereinafter, an 1111(b) Election) to have the allowed amount of its secured claim determined under section 502(b) of the Bankruptcy Code to the principal amount of the claim and not under section 506 of the Bankruptcy Code.[30] More often than not, a creditor's secured claim is determined under section 506 of the Bankruptcy Code.

C. Value of a Secured Claim Under Section 506 of the Bankruptcy Code

If the value of the collateral is less than the amount of the secured claim, then the claim is undersecured and, under section 506(a)(1), the claim is split into two claims: (1) a secured claim equal to the value of the collateral and (2) an unsecured claim equal to the remainder, if any, of the obligation owing to the creditor on the petition date.[31] An undersecured creditor cannot assert a claim against the debtor for postpetition interest,

pursuant to section 502(b)(2), which provides for the disallowance of claims for unmatured interest.[32] An undersecured creditor, however, generally can assert an unsecured claim (as opposed to a secured claim) for attorneys' fees[33] and a prepayment penalty[34] if such claims are provided for under the security agreement.

If the value of the collateral is greater than the amount of the secured claim, then the claim is oversecured. Under section 506(b) of the Bankruptcy Code, the allowed amount of the oversecured claim is equal to the sum of (1) the full amount of the claim, (2) postpetition interest on the claim and (3) any prepetition (and, possibly, postpetition) reasonable fees, costs, or charges provided for under the agreement or applicable state law.[35] Thus the allowed amount of an oversecured claim can include postpetition interest and any reasonable fees, costs, or charges provided for under the security agreement or applicable state law.

D. Postpetition Interest Rate Under Section 506(b) of the Bankruptcy Code

If a secured creditor is oversecured, section 506(b) grants that creditor the right to receive postpetition interest.[36] Section 506(b), however, does not specify the applicable interest rate. It thus is unclear whether courts should use the contract rate, the market rate, or some other prevailing rate of interest in calculating the allowed amount of an oversecured claim. In analyzing this uncertainty under section 506(b), the majority of courts have determined that the contract rate of interest is the appropriate rate, subject to rebuttal based upon equitable considerations.[37] Accordingly, an oversecured creditor likely is entitled to interest at the contract rate during the pendency of the case under section 506(b).

E. Default Rate Interest Under Section 506(b) of the Bankruptcy Code

Although an oversecured creditor's right to postpetition interest at the contract rate is fairly well established, less certain is an oversecured creditor's right to default rate interest. The contract under which the oversecured creditor asserts a right to postpetition interest may provide for the imposition of a higher interest rate upon the occurrence of an event of default, which often is defined to include the filing of a bankruptcy petition. Courts applying the contract rate under section 506(b) must determine which contract rate applies.[38] Because the majority of courts rely on the contract rate of interest under section 506(b), the applicability of default rate interest generally hinges on whether the court finds the higher default rate equitable under the circumstances.[39]

To determine whether the default rate provided for under the contract is equitable, courts have considered the following factors: (1) the default rate of interest as compared to the non-default rate and the reasonableness of the differential between the default and non-default rate;[40] (2) the impact that awarding default rate interest will have on other creditors (e.g., if the debtor is solvent, other creditors will still be paid in full if default rate interest is awarded);[41] (3) the purpose of the higher interest rate, i.e., whether the default rate is a disguised penalty or is compensatory in nature;[42] and (4) whether the default rate is enforceable under state law.[43] Most courts have found default rates of interest reasonable or not inequitable when the default rate is 10% or more higher than the pre-default interest rate.[44] Courts, however, generally have found default rates of interest unreasonable or inequitable when the default rate is 10% or more points higher than the pre-default interest rate.[45] A default rate that is within the acceptable range may nonetheless be disallowed as unreasonable based upon the impact on unsecured creditors,[46] whether the default rate is a disguised penalty[47] or whether it is otherwise unenforceable under state law.[48] An award of late charges also may preclude an additional award for default interest.[49]

F. Prepayment Premiums Under Section 506(b) of the Bankruptcy Code

In addition to default interest, courts also have found reasonable prepayment premiums allowable under section 506(b).[50] Section 506(b) provides, in relevant part: "[T]here shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or *charges* provided under the agreement or State statute under which such claim arose."[51] Courts generally have found the term "charges" to encompass prepayment premiums, thus making prepayment premiums part of an oversecured creditor's allowed secured claim under section 502(b).[52]

Since the term "reasonable" in section 506(b) modifies the phrase "fees, costs, or charges provided under the agreement or State statute," a prepayment premium must be "reasonable" in order to be part of an oversecured creditor's allowed secured claim.[53] Whether a prepayment penalty is reasonable ultimately is determined by federal law.[54] State law, however, impacts this determination because a claim that is unenforceable as "unreasonable" under state law is not allowable under section 506(b).[55]

Reasonableness under state law generally depends on whether the prepayment premium is a valid liquidated damages provision or an unenforceable penalty.[56] For example, under New York law, a liquidated damages provision is enforceable if (1) the actual damages are difficult to determine and (2) the sum stipulated is not plainly disproportionate to the possible loss.[57] This determination is made as of the date of the agreement and not at the time of the prepayment.[58] Under New York law, a prepayment premium that fails to satisfy these two requirements is unenforceable as a penalty.

If the secured creditor has a valid right to a prepayment premium under state law, most courts then consider whether the prepayment premium is reasonable under section 506(b).[59] In determining whether a prepayment premium is reasonable under section 506(b), most courts consider whether the prepayment premium is a measure of actual damages.[60] A prepayment premium is treated as a measure of actual damages when it is designed to compensate the lender for the contractual rate of return that the lender would have received had the borrower not elected to repay the debt prior to maturity.[61]

In calculating the amount of actual damages, some courts discount to present value the difference between the market rate of interest at which the funds could be reinvested at the time of prepayment and the contract rate of interest for the duration of the loan.[62] Other courts, however, permit lenders to use the interest rate on a treasury bill of comparable maturity instead of the market rate of interest at which the funds could be reinvested in determining actual damages.[63] A prepayment premium that presumes a loss or produces a windfall to the lender is not a measure of actual damages and may be disallowed as unreasonable under section 506(b) as well as under state law.[64]

G. Reasonable Attorney's Fees Under Section 506(b) of the Bankruptcy Code

An oversecured creditor also can seek reasonable attorney's fees as a part of its allowed secured claim.[65] Prior to BAPCPA, section 506(b) required an oversecured creditor to show that (1) the attorney's fees were reasonable and (2) the agreement giving rise to the secured claim provided for attorney's fees.[66] Thus in the absence of a consensual agreement between the secured creditor and the debtor providing for attorney's fees, attorney's fees could not be a part of the creditor's allowed secured claim under section 506(b).[67] Accordingly, secured claims arising from invol-

untary liens or judgments arising under state law generally did not include attorney's fees.[68]

BAPCPA amended section 506(b) to provide, in relevant part: "[T]here shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided under the agreement *or State statute* under which such claim arose."[69] Thus an oversecured claim based on a state statutory lien can now include reasonable attorney's fees if the statute so provides.[70] Secured claims arising by operation of a security agreement, however, still must have a contractual basis for attorney's fees in order for such fees to be a part of the allowed secured claim under section 506(b).[71]

Secured claims arising by operation of a security agreement and secured claims arising under state law both must satisfy the "reasonableness" requirement under section 506(b).[72] Courts generally have found that whether attorney's fees are "reasonable" if determined in accordance with federal standards.[73] Accordingly, the secured creditor generally will have to submit documentation detailing the services provided and satisfy various factors to support a finding of reasonableness under section 506(b).[74]

Attorney's fees that are reasonable but not yet enforceable under state law also may be included under section 506(b).[75] There is a split of authority, however, as to whether federal law[76] or state law[77] applies in determining the validity or enforceability of a provision providing for attorney's fees. Under certain circumstances, a creditor may have a claim for attorney's fees under the security agreement, but, under state law, such claim may not be enforceable absent compliance with certain notice requirements. Contrary to section 502(b)(1),[78] the legislative history behind section 506(b) suggests that if attorney's fees are unenforceable under state law, they are nevertheless enforceable under section 506(b)(1).[79] The majority view thus is that reasonable attorney's fees can comprise part of an oversecured creditor's allowed secured claim notwithstanding the creditor's failure to comply with certain notice requirements provided by state law.[80]

H. Use of Subordination Agreements to Obtain Amount of Secured Claim

Section 510(a) of the Bankruptcy Code makes a subordination agreement entered into prepetition enforceable in bankruptcy "to the same extent that such agreement is enforceable under applicable nonbankruptcy

law."[81] Accordingly, both oversecured and undersecured senior creditors can recoup amounts due but otherwise unenforceable against the debtor through a subordination agreement with a junior creditor that is entitled to receive a distribution from the debtor's estate.

1. Rule of Explicitness

Prior to 1978, the Bankruptcy Act did not contain any sections explicitly dealing with subordination agreements. Subordination agreements, however, could be enforced in bankruptcy through the bankruptcy court's equitable powers.[82] As a general rule, these courts limited the enforceability of subordination agreements to the allowed amount of the senior creditor's claim as against the debtor, unless the subordination agreement explicitly provided otherwise—known as the Rule of Explicitness.[83] Thus if a senior creditor's claim for postpetition interest was not enforceable against the debtor, the senior creditor could not recover postpetition interest through the subordination agreement unless the subordination agreement explicitly provided for such recovery.[84]

There is a split of authority as to whether the Rule of Explicitness survived the enactment of the Bankruptcy Code in 1978.[85] Some courts have found that the Rule of Explicitness is still applicable.[86] Under this approach, a senior secured creditor's right to distributions allocable to the claim held by the junior creditor is determined by section 502 of the Bankruptcy Code, unless the subordination agreement explicitly provides otherwise.

The United States Court of Appeals for the First Circuit, however, has found that the Rule of Explicitness is not applicable under section 510(a).[87] Under this approach, a senior secured creditor's right to distributions allocable to the claim held by the junior creditor is determined by applicable nonbankruptcy law irrespective of whether the subordination agreement explicitly provides for the enforcement of a claim that is otherwise disallowed under section 502(b)(2).[88] As a result, an undersecured senior creditor that otherwise would be prevented from obtaining postpetition interest under sections 502(b)(2) and 506 can receive such interest, to the extent that the distribution allocable to the junior creditor is sufficient, under section 510(a).

2. Enforcement of Postbankruptcy Rights

Section 510(a) of the Bankruptcy Code also can permit the enforcement of other contractual rights of a senior creditor contained in the subordination agreement that are triggered by a bankruptcy filing. For example, default rate interest, reasonable attorney's fees, and a reasonable prepayment

premium payable on an oversecured claim under section 506(b) can provide a right to distributions allocable to the junior claim, if such items are defined as senior indebtedness in the subordination agreement.[89]

II. THE CRAMDOWN OF SECURED CLAIMS UNDER THE BANKRUPTCY CODE

As discussed above, a debtor (or other plan proponent) can confirm a Chapter 11 plan over the objection of a class of secured claims so long as the plan does not unfairly discriminate against, and is "fair and equitable" with respect to, the dissenting secured class.[90] The Cramdown Statute sets forth three circumstances under which a plan can be considered "fair and equitable" with respect to a class of secured claims: (1) the full payment of the allowed amount of the secured claim[91] by deferred payments carrying a market rate of interest having a present value equal to the collateral's value and secured by the prepetition collateral; (2) the sale of the prepetition collateral under sections 363(f) and (k) of the Bankruptcy Code free and clear of the secured creditor's liens, with the lien attaching to the proceeds; or (3) the realization of the "indubitable equivalent" of the allowed amount of the secured claim.[92] If the plan does not unfairly discriminate and satisfies one of these three standards, then the plan can be confirmed as long as the debtor satisfies the other requirements set forth in section 1129(a) of the Bankruptcy Code, including the requirement that at least one class of impaired creditors accepts the plan.[93]

A. Deferred Payments of Loan Secured by Prepetition Collateral

Section 1129(b)(2)(A)(i) of the Bankruptcy Code (the First Cramdown Provision) requires the full payment of the allowed amount of the secured claim through "deferred cash payments" and the secured creditor's retention of its security interest in its collateral.[94] This option effectively permits the debtor to write a new loan, to be held by the prepetition secured creditor, with an extended maturity period and a changed interest rate.[95] The new loan can, under certain circumstances, involve negative amortization[96] so long as the creditor's interest is adequately protected.[97] The issue most frequently litigated under the First Cramdown Provision pertains to the interest rate used to calculate the "deferred cash payments."[98]

This is because the First Cramdown Provision provides that the "deferred cash payments" must total "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."[99] Sim-

ply put, the deferred cash payments must satisfy two tests: the principal amount test and the present value test. Thus the deferred cash payments must (1) have an arithmetic total equal to the allowed amount of the secured creditor's claim[100] and (2) have a present value[101] equal to the value of the collateral.[102] The most challenging component of the First Cramdown Provision is the present value calculation. Indeed, arriving at the allowed amount of the secured claim is a fairly straightforward process. Courts, however, have long struggled with the appropriate discount rate for the present value calculation. Some courts have used a contract rate approach[103] while others have used a market-based approach—in particular, either a prime plus[104] or forced loan approach.[105]

The Supreme Court recently addressed the proper method for calculating the discount rate used in applying the cramdown requirement applicable to secured creditors under section 1325(a)(5)(B)(ii) of the Bankruptcy Code,[106] which is the counterpart to the First Cramdown Provision for debt adjustment plans for individuals filing under Chapter 13 of the Bankruptcy Code.[107] After considering and rejecting the contract rate, [108] forced loan,[109] and cost of funds approaches,[110] a plurality of the Court determined that the prime plus approach should be used to calculate the present value of a secured creditor's claim in a chapter 13 case. [111] The Court reasoned that the prime plus approach best reflected the risk to the secured creditor inherent in a Chapter 13 plan. [112]

It remains to be seen whether and to what extent *Till's* prime rate plus approach applies to Chapter 11 plans under the First Cramdown Provision.[113] Both former section 1325(a)(5)(B)(ii) and the First Cramdown Provision refer to the "value" of the creditor's allowed secured claim.[114] In *Till*, the Supreme Court explicitly recognized the similarity between cramdown under section 1325(a)(5)(B) and the First Cramdown Provision, stating that "numerous provisions [in the Bankruptcy Code]...require a court to 'discoun[t]...[a] stream of deferred payments back to the[ir] present value'...We think it likely that Congress intended bankruptcy judges and trustees to follow *essentially the same approach* when choosing an appropriate interest rate under any of these provisions."[115]

Accordingly, an argument can be made that the prime rate plus approach should be used in determining the appropriate discount rate under the First Cramdown Provision.[116]

B. Sale of Prepetition Collateral

The second option available under the Cramdown Statute entails the sale of the collateral under section 363(k) of the Bankruptcy Code with liens attaching to the proceeds, as provided in section 363(f).[117] Section 363(k) of the Bankruptcy Code grants the holder of the secured claim the right to credit bid at the sale of the collateral outside the ordinary course of business, unless the court for cause orders otherwise.[118] If the debtor elects to sell the collateral under section 1129(b)(2)(A)(ii) of the Bankruptcy Code (the Second Cramdown Provision), then, because of the exception in section 1111(b)(1)(B)(ii), a nonrecourse secured creditor is not entitled to have its deficiency claim treated as a recourse obligation and a recourse secured creditor cannot make an 1111(b) Election to treat its undersecured claim as fully secured. Both of the foregoing principles apply so long as the secured creditor can credit bid up to the full amount of its claim.[119] The secured creditor's ability to credit bid enables the creditor to protect itself against the court's failure to value the collateral properly.[120] Sales made under the Second Cramdown Provision need not comply with section 363(f) of the Bankruptcy Code.[121]

If the creditor is not the successful bidder at the sale, the creditor's liens must attach to the sale proceeds.[122] Thereafter, the creditor's liens in the sale proceeds become subject to subsections 1129(b)(2)(A)(i) and (iii) of the Bankruptcy Code.[123] Accordingly, the debtor can create a new obligation to the secured party for the allowed amount of the claim secured by a lien against the sale proceeds.[124] Alternatively, the debtor can provide the creditor with the "indubitable equivalent" of its claim by, among other options, turning over the sale proceeds to the secured creditor and thus completely satisfying the creditor's secured claim.[125].

C. Indubitable Equivalent of Secured Claim

The third option available under the Cramdown Statute entails providing the secured creditor with the "indubitable equivalent" of the allowed amount of its secured claim.[126] The term "indubitable equivalence" originated in the U.S. Court of Appeals for the Second Circuit's decision in *In re Murel Holding Corp.*, which pre-dated the Bankruptcy Code. In *In re Murel Holding Corp.*, the Second Circuit rejected a debtor's proposal to pay a secured creditor interest on the collateral for 10 years with full payment due at the end of that time. The proposed treatment did not provide for the amortization of principal or for the maintenance of the collateral (an apartment building). The court determined that such proposal failed to provide the secured creditor

with the "indubitable equivalence" of its interest in the property.[127] This concept is now codified in section 1129(b)(2)(A)(iii) of the Bankruptcy Code (the Third Cramdown Provision).[128]

To satisfy the indubitable equivalent standard, a debtor's plan must (1) provide the secured creditor with the present value of its claim, and (2) insure the safety of its principal.[129] Abandonment of the collateral,[130] a substitute lien in property of a value that equals or exceeds the value of the secured claim,[131] or a cash payment equal to the allowed amount of the secured claim[132] are possible ways in which a plan can satisfy the Third Cramdown Provision. The key criterion is that the creditor receive the equivalent of the allowed amount of its secured claim or the value of the collateral,[133] which also is true when the plan proposes to provide treatment that is fair and equitable under the First or Second Cramdown Provisions.[134]

III. THE REINSTATEMENT OF SECURED CLAIMS UNDER THE BANKRUPTCY CODE

Reinstatement is an important tool for debtors because a secured creditor whose claim is reinstated is deemed unimpaired and thus is presumed to accept the debtor's Chapter 11 plan without the right to vote on the plan.[135] A debtor does not need to satisfy the Cramdown Statute with respect to a class of claims that is reinstated.[136] Additionally, a class of claims that is so reinstated is not entitled to the protections afforded by section 1129(a)(7) of the Bankruptcy Code (the "best interests" test), which is explicitly limited to "each impaired class of claims or interests."[137]

The Reinstatement Statute, prior to and as amended by BAPCPA, sets forth two circumstances under which a claim will be determined to be unimpaired under a Chapter 11 plan.[138] First, under section 1124(1), a claim is unimpaired if the plan does not alter the "legal, equitable, and contractual rights" to which the holder of the claim is entitled on account of such claim.[139] Any alteration in the holder's legal, equitable, or contractual rights by the plan—even if such rights are improved or enhanced—will result in the impairment of the claim.[140] This method for leaving a claim unimpaired is an unlikely choice for any secured claims based on a security agreement that makes the filing of a bankruptcy petition an event of default that accelerates the claim.[141] Reinstatement under section 1124(1) cannot undo this acceleration.

In contrast, section 1124(2) of the Bankruptcy Code explicitly negates the effect of "any contractual provision or applicable law that entitles the

holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default."[142] Section 1124(2) thus provides for the deceleration of the debt and reinstatement of the secured claim.[143]

Section 1124(2) can be utilized to reinstate an accelerated secured claim if the debtor's plan satisfies two requirements: (1) the reinstatement of the original terms of the claim,[144] and (2) the cure of any event of default other than those set forth in section 365(b)(2) of the Bankruptcy Code.[145] Sections 1124(2) and 365(b)(2) were amended by BAPCPA.[146] The changes made to these sections do not affect the first requirement that the original terms of the claim be reinstated. Accordingly, case law interpreting old section 1124(2) of the Bankruptcy Code remains applicable in this respect.

The changes made by BAPCPA to sections 1124(2) and 365(b)(2), however, could affect the second requirement that the debtor cure any event of default other than those set forth in section 365(b)(2). In addition, there is a split of authority as to whether the cure requirement under old section 1124(2) of the Bankruptcy Code is determined in accordance with the secured creditor's prepetition or postpetition rights under the security agreement. Each of these potential obstacles to reinstatement is discussed in further detail below.

A. Reinstatement of the Pre-Default Contract Terms

Section 1124(2) of the Bankruptcy Code, prior to and as amended by BAPCPA, permitted the debtor to reinstate the terms of the loan as they existed pre-default, including the loan's interest rate and maturity.[147] For example, in *In re Madison Hotel Associates*, a Chapter 11 debtor proposed a plan of reorganization that reinstated the original terms of a loan that had gone into foreclosure prepetition pursuant to section 1124(2).[148] The secured creditor objected. It argued that, although the debtor could reinstate the original terms of the loan, the debtor could not nullify the legal consequences of the foreclosure because the foreclosure order did not arise by operation of any contractual provision or applicable law but was created by a court order. The bankruptcy court disagreed with the secured creditor and confirmed the debtor's plan of reorganization.[149]

On appeal, the U.S. Court of Appeals for the Seventh Circuit upheld the bankruptcy court's order confirming the debtor's plan of reorganization.[150] According to the Seventh Circuit, "Frequently, the interest rates on long-term loans are substantially less than the current market rate.

Section 1124(2) promotes the economic efficiency of reorganization by allowing the Chapter 11 debtor to reinstate the original terms of an accelerated long-term loan at this lower interest rate."[151] Thus the debtor was permitted to reinstate the original terms of the loan as they existed prior to the default that provided the basis for the foreclosure proceeding.[152]

B. Curing Defaults Under Former Section 1124(2) of the Bankruptcy Code

Prior to BAPCPA, section 1124(2) of the Bankruptcy Code permitted reinstatement only if the debtor was capable of effecting a "cure." Section 1124(2) provided that a claim is unimpaired if the plan: (A) cured any prepetition or postpetition defaults "other than a default of a kind specified in section 365(b)(2) of this title;" (B) "reinstate[d] the maturity of such claim or interest as such maturity existed before" the occurrence of a default that resulted in the acceleration of the loan; (C) compensated the holder of the claim for damages incurred in reliance upon a contractual provision providing for the acceleration of the claim after the occurrence of a default;[153] and (D) did "not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitle[d] the holder of such claim or interest."[154]

The term "cure" is not expressly defined in the Bankruptcy Code.[155] The consequences of default often include both (1) the acceleration of the indebtedness and (2) the imposition of penalties, including default rate interest and attorney's fees. Section 1124(2) explicitly permitted (and still permits) the debtor to undo the acceleration of the indebtedness resulting from an event of default.[156] There is a split of authority, however, as to whether former section 1124(2) permitted a debtor to avoid the imposition of default rate interest and other penalties that also are a consequence of default.[157] Specifically, whether the amount needed to effect a cure under old section 1124(2) is determined with regard to the secured creditor's pre-default or post-default rights is the issue with which courts have struggled.[158]

C. *Entz-White* and the Avoidance of Default Rate Interest

Under former section 1124(2), some courts held that a debtor did not have to pay interest at the default rate during the pendency of the bankruptcy in order to effect a cure and reinstatement by treating the statutory right to decelerate as giving rise to a statutory right to nullify a default interest rate.[159] For example, in *Great Western Bank & Trust v. Entz-White Lumber & Supply, Inc. (In re Entz-White Lumber & Supply)*, the U.S.

Court of Appeals for the Ninth Circuit permitted a debtor to use sections 1124(2) and 1123(a)(5)(G)[160] to liquidate a secured claim and to avoid the payment of default rate interest on such claim.[161]

In *Entz-White*, the debtor defaulted under a promissory note by failing to pay the balance when it became due and, thereafter, filed for relief under Chapter 11 of the Bankruptcy Code.[162] The secured creditor sought payment of the full principal balance due under a secured loan as well as interest at the default rate of 18% per annum. The debtor filed, and the bankruptcy court confirmed, a plan of reorganization that provided for the payment of the full principal balance due under the promissory note with interest at the non-default rate.[163] The secured creditor appealed.

On appeal, the Ninth Circuit first considered whether the debtor could use section 1124(2) to cure a default that did not trigger the acceleration of a debt. For example, the loan matured or became due on its own terms before the debtor filed for bankruptcy. The creditor argued that the first clause in section 1124(2), which permits a debtor to undo the acceleration of a debt, is limited to cures of defaults that result in the acceleration of the debt.[164] Since the debtor's default did not result in the acceleration of the loan, as the loan became due according to its own terms prepetition, the creditor argued that section 1124(2) was inapplicable. The Ninth Circuit rejected this argument and found that the term "cure" found in sections 1123(a)(5)(G) and 1124(2) applies to any default, including those that do not result in the acceleration of the debt.[165] Accordingly, the debtor could cure its failure to pay the promissory note when due and thus utilize section 1124(2) to reinstate the matured promissory note.[166]

Second, the Ninth Circuit considered whether the debtor was required to pay default rate interest as part of the cure required by section 1124(2). The creditor argued that it was entitled to default rate interest as a part of its cure under section 1124(2).[167] The Ninth Circuit rejected this argument and found that "by curing the default, [the debtor] is entitled to avoid all consequences of the default—including higher post-default interest rates."[168]

Some critics argue that the Ninth Circuit's reasoning in *Entz-White* is circular in that once the loan is reinstated, the consequences of default are arguably nullified, but in order for this to occur, the debtor must first effect a "cure." The cure is a prerequisite to the nullification of the default. In effect, the Ninth Circuit found that the debtor's power to decelerate an

accelerated secured claim includes the power to undo the consequences of default.[169]

D. *In re 139-141 Owners Corp.* and the Payment of Default Rate Interest

Under former section 1124(2), and in contrast to *Entz-White*, some courts held that a debtor, depending on the impact on unsecured creditors, must pay interest at the default rate during the pendency of the bankruptcy when the secured creditor has a right to such interest.[170] In *In re 139-141 Owners Corp.*, the bankruptcy court held that the debtor was required to pay oversecured mortgagees interest at the default rate even though the claims of such creditors were reinstated under section 1124(2).[171]

In *139-141 Owners Corp.*, the debtor defaulted under the mortgages secured by commercial real estate,[172] and the mortgagees sent the debtor notices of default and accelerated the mortgages.[173] The debtor then filed a petition for relief under Chapter 11 of the Bankruptcy Code and sold the commercial real estate under section 363(f).[174] Thereafter, the debtor filed its plan of reorganization, which proposed to reinstate the secured claims held by the mortgagees under section 1124(2) and avoid the payment of default rate interest triggered by the debtor's default.[175] Both mortgagees objected to the debtor's plan of reorganization.

The bankruptcy court ruled in favor of the mortgagees and found the default rate enforceable under section 1124(2)(D). Under section 1124(2)(D), except as otherwise provided in section 1124(2) of the Bankruptcy Code, the plan cannot "otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest."[176] The bankruptcy court held that although the first clause in section 1124(2) permits the deceleration of an accelerated secured claim, there is nothing in the first clause of section 1124(2) that permits a debtor to nullify default rate interest.[177] Given the prohibition against "otherwise" altering a secured creditor's "legal, equitable, or contractual rights," if the right to nullify default rate interest cannot be found in the language of section 1124(2), then such right arguably does not exist.[178]

The bankruptcy court ultimately did not rely on this reasoning. Rather, it considered equitable factors, similar to those considered under section 506(b),[179] in allowing default rate interest under section 1124(2).[180] Because the debtor was solvent, the bankruptcy court concluded that the debtor should pay interest to the mortgagees at the default rate provided in the mortgages as a condition to reinstatement under section 1124(2).[181]

The debtor appealed the bankruptcy court's decision, and the district court affirmed as to the enforceability of default rate interest under section 1124(2).[182]

E. Sections 1124(2)(A) and 365(b)(2) of the Bankruptcy Code and the Avoidance of Default Rate Interest

If the bankruptcy court and the district court in *139-141 Owners Corp.* were correct that the right to nullify a default interest rate could not be found in the first clause of former section 1124(2), then the question is whether there was (and still is) a statutory basis for denying a secured creditor the right to default rate interest as a part of its cure in some circumstances under section 1124(2). Section 1124(2)(A) is helpful in resolving this issue. Former section 1124(2)(A) provided that the debtor must cure any default that resulted in the acceleration of the claim "that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title."[183]

Former section 365(b)(2) permitted a debtor to assume an executory contract or unexpired lease without curing defaults that are related to: (1) the insolvency or financial condition of the debtor; (2) the commencement of a case under Chapter 11 of the Bankruptcy Code; (3) the appointment of or taking possession by a trustee in a case under the Bankruptcy Code or a custodian before such commencement; or (4) "the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease."[184] Former section 1124(2)(A), through section 365(b)(2), arguably provided a statutory basis for the reinstatement of secured claims without the curing any of these defaults.[185]

1. *Phoenix Business Park Limited Partnership*

The relationship between sections 1124(2)(A) and 365(b)(2) was recognized by a bankruptcy court in the Ninth Circuit in *In re Phoenix Business Park Limited Partnership*.[186] In *Phoenix Business Park*, the debtor proposed a plan of reorganization that would reinstate a secured note and cure all arrearages due thereunder calculated using the non-default interest rate under section 1124(2).[187] The secured creditor objected and argued that it was entitled to interest at the default rate during the pendency of the case.[188]

The bankruptcy court first considered the Ninth Circuit's decision in *Entz-White* and concluded that, under *Entz-White*, the debtor was not required to pay default rate interest to cure and reinstate the note under sec-

tions 1124(2) and 1123(a)(5)(G).[189] The bankruptcy court then observed that since the Ninth Circuit decided *Entz-White*, section 1123(d) was added to the Bankruptcy Code by the Bankruptcy Reform Act of 1994.[190] Section 1123(d) of the Bankruptcy Code provides that "[n]otwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law."[191]

Some commentators have concluded that the addition of section 1123(d) overruled *Entz-White* insofar as *Entz-White* permitted a debtor to reinstate a secured claim without paying the default rate in the underlying agreement.[192] After reviewing the legislative history behind section 1123(d),[193] the court in *Phoenix Business Park* rejected this position. It concluded that, pursuant to *Entz-White*, the note could be reinstated without the payment of default rate interest.[194] Indeed, section 1123(d) is arguably ambiguous on this point because both default rates and non-default rates can apply "in accordance with the underlying agreement and applicable law."[195]

2. Avoidance of Curing Defaults Under Former Section 365(b)(2) of the Bankruptcy Code

The court in *Phoenix Business Park* considered an alternative theory for denying default rate interest. Specifically, the court considered whether the default interest rate was an unenforceable penalty rate under sections 1124(2)(A) and 365(b)(2)(D).[196] The court ultimately did not need to rely upon this construction because it found *Entz-White* applicable. Nonetheless, this construction warrants further discussion.

Prior to being amended by BAPCPA, section 365(b)(2) arguably provided a statutory basis for avoiding default rate interest and other penalties. Section 365(b)(2) contained four subsections, each of which arguably provided a statutory basis in certain circumstances for rendering a default interest rate unenforceable against a debtor under section 1124(2)(A).

a. Sections 365(b)(2)(A) through (C) of the Bankruptcy Code

Sections 365(b)(2)(A) through (C) exempted and continue to exempt from a debtor's cure requirement under section 1124(2) defaults relating to the financial condition of the debtor, the commencement of a Chapter 11 case, or the prepetition appointment of a trustee.[197] In the context of executory contracts and unexpired leases, these sections prevent the enforcement of ipso facto or bankruptcy termination clauses.[198]

The phrase "relating to" in section 365(b)(2) arguably makes provisions in an unexpired lease or executory contract that are triggered by the financial condition of the debtor or the commencement of a Chapter 11 case unenforceable against the debtor. Thus to the extent that the imposition of default rate interest or a prepayment premium is triggered under the terms of the security agreement by the financial condition of the debtor or the commencement of a Chapter 11 case, sections 365(b)(2)(A) through (C) arguably provided a statutory basis for exempting such obligations from the debtor's cure requirement under section 1124(2). If the imposition of default rate interest or a prepayment penalty is not triggered by the financial condition of the debtor or the commencement of a Chapter 11 case, then sections 365(b)(2)(A) through (C) are not applicable.

b. Former Section 365(b)(2)(D) of the Bankruptcy Code

Prior to BAPCPA, section 365(b)(2)(D), although facially ambiguous, contained language that in nearly all circumstances could nullify a default interest rate under section 1124(2). Section 365(b)(2)(D) was added to the Bankruptcy Code as a part of the Bankruptcy Reform Act of 1994.[199] When it was originally added to the Bankruptcy Code, section 365(b)(2)(D) provided that: "[Paragraph 1 of this subsection does not apply to a default that is a breach of a provision relating to] the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease."[200]

c. Former Section 365(b)(2)(D) of the Bankruptcy Code and Unexpired Leases and Executory Contracts

The case law interpreting former section 365(b)(2)(D) primarily concerned its application to the assumption of unexpired leases and executory contracts. In this context, there was a split of authority as to whether former section 365(b)(2)(D) created one or two exceptions to the cure requirements of section 365(b)(1).[201] Some courts interpreted former section 365(b)(2)(D) as creating the following two distinct and independent exceptions: (i) "the satisfaction of any penalty rate" and (ii) the satisfaction of any "provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease."[202] Other courts, however, interpreted former section 365(b)(2)(D) as creating only one exception for "the satisfaction of any penalty rate [or provision] relating to a default arising from any failure by

the debtor to perform nonmonetary obligations under the executory contract or unexpired lease."[203]

For example, in *Claremont Acquisition Corp.*, the Ninth Circuit adopted the latter interpretation and found that a debtor could not assume an executory contract if it was unable to cure a nonmonetary default that occurred prior to the commencement of the case.[204] The debtors operated an automobile dealership pursuant to a franchise agreement with General Motors.[205] Under the franchise agreement, the debtors' failure to operate the business for seven days constituted a nonmonetary default.[206] After triggering this nonmonetary default, the debtors sought to assume and assign the franchise agreement.[207] General Motors argued that the debtors could not cure their failure to operate the business as this event was an historic fact that prevented the debtors from assuming and assigning the contract under section 365(b).[208]

The debtors argued that former section 365(b)(2)(D) relieved them of their obligation to cure this nonmonetary default. The bankruptcy court and the district court agreed and found that the debtor did not have to cure the incurable default of failing to operate the business under old section 365(b)(2)(D).[209] The Ninth Circuit, however, disagreed. According to the Ninth Circuit, former section 365(b)(2)(D) only relieved a debtor of its obligation to satisfy a penalty provision relating to a default arising from any failure by the debtor to perform a nonmonetary obligation.[210] The Ninth Circuit found that the term "penalty" modified both the words "rate" and "provision."[211] Thus the Ninth Circuit found that section 365(b)(2)(D) did not excuse the debtors' failure to operate the business, thus making the franchise agreement nonassumable.[212]

In *Bankvest Capital Corp.*, the First Circuit rejected the Ninth Circuit's construction of section 365(b)(2)(D) in *Claremont Acquisition Corp.* and concluded that a debtor could assume an executory contract even if it was unable to cure a nonmonetary default that occurred prior to the commencement of the case.[213] In *Bankvest Capital Corp.*, the debtor entered into a lease agreement whereby it agreed to provide certain computer equipment to a lessee.[214] The debtor allegedly failed to deliver some of the items specified in the lease agreement, and the lessee obtained substituted items.[215] During the bankruptcy, the debtor proposed to assume this lease under section 365(b).[216] The lessee objected and claimed that the lease could not be assumed because the debtor could not cure its nonmonetary default; i.e., its prior failure to deliver the computer equipment.[217]

Although neither party raised the issue, the bankruptcy court held that section 365(b)(2)(D) permitted the debtor to assume the unexpired lease without curing the nonmonetary default.[218] The lessee appealed the bankruptcy court's decision to the First Circuit. On appeal, the First Circuit affirmed the bankruptcy court's interpretation of section 365(b)(2)(D) and found that the term "penalty" described only the term "rate" thus creating a distinct exception for nonmonetary defaults.[219] The First Circuit found section 365(b)(2)(D) ambiguous[220] but preferred the bankruptcy court's interpretation over the Ninth Circuit's interpretation for practical reasons.[221] Namely, a debtor should not be prevented from assuming a beneficial contract because of a historical event.[222] The debtor thus was not required to satisfy the provision relating to its failure to perform the nonmonetary obligation in order to assume the unexpired lease.[223]

d. Former Section 365(b)(2)(D) of the Bankruptcy Code and the Nullification of Default Rate Interest

The First Circuit's construction of former section 365(b)(2)(D) in *Bankvest Capital Corp.* separated the second clause found in section 365(b)(2)(D) relating to nonmonetary defaults from the first clause relating to the satisfaction of penalty rates.[224] Section 365(b)(2)(D), interpreted in this manner and read in conjunction with section 1124(2)(A), would provide a statutory basis for nullifying a default interest rate and other penalties in nearly all circumstances.[225] Under the First Circuit's construction of former section 365(b)(2)(D), a debtor would not be required to cure "a default [relating to—(D) the satisfaction of a penalty rate]" in order to reinstate a secured claim.[226]

The Ninth Circuit's construction of former section 365(b)(2)(D) in *Claremont Acquisition Corp.* also provided a statutory basis for nullifying a default interest rate and other penalties but only when such penalties were triggered by a nonmonetary default.[227] By interpreting former section 365(b)(2)(D) as creating only one exception to the cure requirements found in section 365(b)(1), the term "penalty rate" was tied directly to the second clause dealing with nonmonetary defaults.[228] Section 365(b)(2)(D), interpreted in this manner and read in conjunction with section 1124(2)(A), would provide a statutory basis for nullifying a default interest rate triggered by a nonmonetary default. Such a default should include the debtor's bankruptcy filing.[229] Under the Ninth Circuit's construction of old section 365(b)(2)(D), a debtor would not be required to cure "a default [relating to—(D) the satisfaction of a penalty

rate relating to a default arising from any failure by the debtor to perform a nonmonetary obligation]" in order to reinstate a secured claim.[230]

IV. NEW SECTIONS 1124(2)(D) AND 365(b)(2)(D) OF THE BANKRUPTCY CODE AND THE NULLIFICATION OF DEFAULT RATE INTEREST

BAPCPA made several changes to sections 365(b) and 1124(2) of the Bankruptcy Code. It added language to section 365(b)(1)(A) regarding the debtor's obligation to cure nonmonetary defaults. It added language to section 365(b)(2)(D), which arguably fails to resolve the ambiguities already present therein. It also added a new subsection to section 1124(2) requiring compensation for pecuniary losses relating to certain nonmonetary defaults.[231] The impact, if any, of these additions on the enforceability of default interest rates and other penalties under section 1124(2) of the Bankruptcy Code is untested and unclear.

A. New Section 365(b) of the Bankruptcy Code

The language added to section 365(b)(1)(A) by BAPCPA appears to adopt the reasoning of the Ninth Circuit's decision in *Claremont Acquisition Corp.* for all executory contracts and unexpired leases, other than unexpired real property leases. Specifically, new section 365(b)(1)(A) requires a debtor to cure nonmonetary defaults "(other than a [related] penalty rate or penalty provision)" under executory contracts and unexpired personal property leases as a condition to assumption of those agreements under section 365(a). This new section carves out unexpired real property leases, thereby permitting the assumption of such leases without curing certain nonmonetary defaults.[232]

BAPCPA also changed section 365(b)(2)(D). This section now provides that subsection (b)(1) does not apply to a default relating to "the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease."[233] Standing alone, new section 365(b)(2)(D) is still ambiguous. The section can still be read one of two ways. First, it can be read to create the following two exceptions: (i) "the satisfaction of any penalty rate" and (ii) the satisfaction of any "penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease."[234] Second, it can be read to create only one exception for "the satisfaction of any penalty rate [or penalty provision] relating to

a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease."[235]

Read in light of certain relevant considerations, however, new section 365(b)(2)(D) may in fact offer only one exception. For example, the Report of the House of Representatives Committee on the Judiciary that accompanies BAPCPA provides that "section 328(a)(1) amends section 365(b)(2)(D) to clarify that it applies to penalty provisions."[236] Additionally, since new section 365(b)(1)(A) now specifies when and how a debtor may assume an agreement without curing certain nonmonetary defaults, the practical considerations that influenced the First Circuit's decision in *Bankvest Capital Corp.* arguably are no longer present.[237] Moreover, the requirement in new section 365(b)(1)(A) that mandates cure of certain nonmonetary defaults, other than related "penalty rates and penalty provisions," arguably counsels in favor of a restricted reading of section 365(b)(2)(D): a reading that excuses from cure only penalty rates relating to nonmonetary defaults and not simply any penalty rate under the applicable contract.

B. New Section 1124(2)(D) of the Bankruptcy Code

BAPCPA also amended section 1124(2) by adding a new subsection (D).[238] This new subsection provides that the plan must compensate the holders of certain reinstated claims or interests relating to nonmonetary defaults "for any actual pecuniary loss incurred by such holder as a result of such" defaults.[239] The primary exception to this new requirement relates to nonresidential real property leases subject to the new provisions of section 365(b)(1)(A). New section 1124(2)(D), together with new section 365(b)(2)(D), may diminish the power of the Reinstatement Statute to nullify default interest rates and other penalties.

Section 1124(2)(A) incorporates new section 365(b)(2)(D) and thus now provides that the debtor need not cure a default relating to "the satisfaction of a penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease."[240] As explained above, new section 1124(2)(D) requires certain compensation for claims or interests relating to nonmonetary defaults.[241] The practical effect of these two sections is that a debtor need not cure a penalty rate or penalty provision relating to a default arising from the failure to perform a nonmonetary obligation, but the debtor must compensate the secured creditor for any "actual pecuniary loss" resulting from such failure.[242]

The term "actual pecuniary loss" also is used in section 365(b)(1) of the Bankruptcy Code. Courts have found that the term "actual pecuniary loss" under section 365(b)(1) encompasses attorney's fees[243] and interest on past-due amounts, thus making the payment of such interest a prerequisite to assuming an executory contract or unexpired lease.[244] Cases under section 365(b)(1), however, do not focus on interest triggered by an ipso facto clause or the debtor's bankruptcy filing. Rather, these cases focus on interest triggered by the debtor's failure to make timely payments under the contract. Additionally, principles applicable solely in the contract assumption context—i.e., the debtor is liable for performance of the entire assumed contract as though bankruptcy never intervened—underlie each of these decisions.[245]

On this basis, it would be inappropriate to construe the term "actual pecuniary loss" in section 1124(2)(D) as including default rate interest or other penalties that are a result of the intervention of bankruptcy. This result also would be consistent with the legislative history behind the enactment of section 365(b)(2)(D).[246] A court, however, could reach a contrary conclusion if it found the default interest rate to be compensatory and thus within the scope of section 1124(2)(D).[247] It remains to be seen how courts will resolve the dictates of new sections 1124(2)(A), 365(b)(2)(D), and 1124(2)(D) in the context of reinstatement.

C. Summary of Reinstatement Under Section 1124(2) of the Bankruptcy Code

Section 1124(2) permits the debtor to reinstate the original terms of the loan as it existed pre-default, including the loan's interest rate and maturity.[248] In order to reinstate the original terms of the loan, the debtor must first cure certain defaults.[249] Some courts have determined that a debtor may reinstate a secured claim without curing any default rates by treating the statutory right to decelerate as giving rise to a statutory right to nullify a default interest rate.[250] This approach, however, fails to recognize that a cure is a prerequisite to the nullification of the default.[251] Other courts have held that a debtor must pay postpetition default rate interest in order to cure and reinstate a secured claim under section 1124(2).[252] This approach, however, fails to recognize that there was (and likely still is) a statutory basis for exempting bankruptcy related defaults and the payment of penalty rates.[253]

Section 1124(2), as amended by BAPCPA, requires a debtor to compensate a secured creditor for any actual pecuniary loss resulting from

certain nonmonetary defaults.[254] It remains to be seen how courts will interpret sections 1124(2)(A), 365(b)(2)(D), and 1124(2)(D) in the context of the reinstatement of secured claims and to what extent a secured creditor's postbankruptcy rights will impact the cure analysis under section 1124(2).[255] Given the case law under section 365(b)(1), it appears likely that a debtor will not be required to pay default rate interest when such default rate interest is triggered solely by a bankruptcy filing.[256] Debtors, however, should expect creditors to make arguments to the contrary. Additionally, the resolution of this issue may impact the extent to which section 510(a) of the Bankruptcy Code can be or will be used to enforce certain provisions in subordination agreements (such as provisions implicating the rule of explicitness).

V. REINSTATEMENT AND THE USE OF SUBORDINATION AGREEMENTS

As discussed above, subordination agreements generally are enforceable in bankruptcy and allow a secured creditor to receive payments otherwise allocable to the junior creditor under the plan of reorganization.[257] As also discussed above, a secured creditor is deemed unimpaired if its secured claim is reinstated under the plan.[258] An issue thus arises as to whether reinstatement negates the rights of the secured creditor under the subordination agreement.

Under former section 1124(2), a debtor arguably could reinstate a secured claim without paying default rate interest as a part of its cure pursuant to section 365(b)(2)(D)[259] or pursuant to *Entz-White* and its progeny.[260] Once a cure is provided, and the original terms are reinstated, the debtor and the secured creditor are returned to pre-default conditions, and the consequences of default are nullified.[261] A senior creditor's rights vis-à-vis the junior creditor generally are contingent on the senior creditor's rights vis-à-vis the debtor. Thus if the senior claim is reinstated and is "made whole" by the debtor, then it follows that the senior creditor no longer has any right to distributions allocable to the claim held by the junior creditor.[262] This approach would foreclose the secured creditor from collecting default rate interest (not being paid by the debtor) under the subordination agreement.[263]

Under former section 1124(2), a contrary argument could be made that section 365(b)(2)(D) makes a claim for default rate interest "unenforceable" against the debtor. Under section 502(b)(1), a claim that is "unenforceable" against the debtor is disallowed.[264] Notably, claims for unma-

tured postpetition interest, which is generally disallowed under section 502(b)(2), nonetheless are generally enforceable against a junior creditor under section 510(a) and an intercreditor subordination agreement.[265] Thus a secured creditor may argue that, likewise, claims for default rate interest that are disallowed under section 502(b)(1) should be enforceable against a junior creditor under section 510(a). Courts, however, generally have held that a "cure of a default under an unexpired lease pursuant to 11 U.S.C. § 365 is more akin to a condition precedent to the assumption of a contract obligation than it is to a claim in bankruptcy" subject to allowance or disallowance under section 502(b).[266]

This same issue exists under new section 1124(2). A court could determine that a debtor must cure default rate interest and other similar charges in order to reinstate secured claims under section 1124(2). If a court does not reach this conclusion, however, the debtor may be able to avoid the payment of these amounts in the reinstatement context, and the secured creditor may lose its rights to collect these amounts, even under an otherwise enforceable subordination agreement. In other words, the question remains as to whether the debtor's reinstatement of the secured creditor's debt is a reinstatement as to all parties.[267]

VI. THE CRAMDOWN STATUTE AND THE REINSTATEMENT STATUTE

When a debtor will utilize the Cramdown Statute or the Reinstatement Statute to deal with a secured claim depends on various factors, including whether (A) the secured creditor is oversecured or undersecured; (B) interests rates have increased or decreased; (C) the debtor needs to extend the maturity of the loan; and (D) the secured creditor has enforceable claims for default rate interest or prepayment premiums under section 506(b).

The Cramdown Statute presents a highly effective tool for dealing with undersecured claims. Under section 506, absent an 1111(b) Election, a creditor's secured claim is limited to the value of the debtor's interest in the collateral.[268] Accordingly, an undersecured creditor cannot claim default rate interest, attorney's fees, and prepayment premiums in the secured portion of its claim; however, an undersecured creditor may assert an unsecured claim for attorneys' fee and prepayment premiums.[269] In contrast, a debtor is unlikely to use the Reinstatement Statute to deal with an undersecured claim because the original contract terms would be binding on the reorganized debtor and would cause the undersecured creditor to receive more than it would be entitled to under the Bankruptcy Code

(i.e., "payment in full" under reinstatement vs. a bifurcated claim and less than "payment in full" if the claim is impaired).[270]

Because a debtor can use the First Cramdown Provision to stretch out the secured creditor's loan at a market rate of interest and may confirm a Chapter 11 plan on that basis over the objection of the secured creditor, the Cramdown Statute presents a viable option when interest rates have substantially declined from the date of the original loan.[271] The First Cramdown Provision also presents a viable option when the debtor needs to extend the maturity of the loan. Conversely, if interest rates have substantially increased and if the debtor does not need to extend the maturity of the loan, the Reinstatement Statute may present a better option if the creditor is fully secured.[272]

The Reinstatement Statute also may present a more effective tool for dealing with oversecured claims when, for example, the secured creditor has enforceable claims for default rate interest or prepayment premiums under section 506(b). Under the Cramdown Statute, an oversecured creditor is entitled to the benefit of its postpetition rights under the security agreement, which can include (under certain circumstances) the right to default rate interest,[273] prepayment premiums,[274] and attorney's fees.[275] In contrast, the Reinstatement Statute may allow the debtor to limit the secured creditor to its prepetition rights under the security agreement—i.e., no default rate interest or prepayment premiums if these items were triggered solely by the bankruptcy or other nonmonetary default.[276]

Ironically, an oversecured creditor could conceivably receive *less* under the Reinstatement Statute than the Cramdown Statute and also be denied the right to vote on plan confirmation.[277] By contrast, the Cramdown Statute would entitle the oversecured creditor to the protections afforded by subsections 1129(a)(7) and 1129(b) of the Bankruptcy Code as well as the right to vote.[278] This result may occur under the Reinstatement Statute even when the oversecured creditor is the beneficiary of subordination rights enforceable against a junior creditor in bankruptcy under section 510(a) and the applicable intercreditor agreement.[279] This disparity may suggest a need to clarify or rethink a secured creditor's entitlement to default rate interest, prepayment premiums, and similar charges under sections 506(b) and 1124(2).

VII. CONCLUSION

Nearly all debtors must resolve secured debt claims in their Chapter 11 cases. The Cramdown Statute and the Reinstatement Statute govern the

rights of debtors and secured creditors under Chapter 11. Thus an understanding of their respective relative benefits and merits is critical when analyzing the debtor's plan options under the Bankruptcy Code. Those sections establish important parameters for prepetition and postpetition debt restructuring negotiations between debtors and secured creditors. The changes made by BAPCPA to the Reinstatement Statute, unfortunately, add little certainty and may add more confusion to this area of the law than existed under the former version of the Bankruptcy Code. This is likely to promote litigation in an area of the law where certainty is highly desirable for both debtors, secured creditors, and unsecured creditors.

NOTES

1. See 11 U.S.C.A. § 361 (2006).
2. 11 U.S.C.A. §§ 101-1532 (2006) (the Bankruptcy Code).
3. See infra section III.A of this article.
4. See infra section III.B of this article.
5. See infra section III.C of this article.
6. See infra section II.C of this article.
7. See infra section IV of this article.
8. See infra section IV.A of this article.
9. See 11 U.S.C.A. § 1126(f) (2006) ("Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.").
10. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 328, 119 Stat. 23, 100 (2005).
11. See infra section II of this article.
12. See infra section III of this article.
13. See infra section IV of this article.
14. See infra section V of this article.
15. See infra section VI of this article.
16. See infra section II.E of this article.
17. See infra section II.G of this article.
18. See infra section II.F of this article.
19. See infra section II.H of this article.
20. See generally Ruda, Asset-Based Financing § 13.02 (2004) ("By virtue of the subordination of its claim, the holder of the junior debt has agreed to yield its right to payment to the senior creditor all dividend payments allocable to its claim against the debtor until the senior debt is satisfied.").
21. See Lawrence P. King, Collier on Bankruptcy ¶ 510.03[1] (15th rev. ed. 2005) ("Creditors may agree to subordinate their claims in a rehabilitation effort in the hope of eventual full payment. In that case, they may enter into a subordination agreement with a prospective lender in which the creditors agree that the lender will be paid prior to their own claims in the event of the debtor's liquidation or reorganization.").

22. See 11 U.S.C.A. § 1129(b)(1) (providing that in order for a plan to be "fair and equitable" with respect to a class of secured claims, the holders of such claims must receive deferred cash payments, retain a lien in the sale proceeds of the collateral or receive the indubitable equivalent of the allowed amount of their claims).

23. See 11 U.S.C.A. § 1129(a) (2006) ("The court shall confirm a plan only if all of the following requirements are met").

24. See 11 U.S.C.A. § 1129(a)(8) (2006) ("With respect to each class of claims or interests—(A) such class has accepted the plan; or (B) such class is not impaired under the plan.").

25. See Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 441, 119 S. Ct. 1411, 143 L. Ed. 2d 607, 34 Bankr. Ct. Dec. (CRR) 329, 41 Collier Bankr. Cas. 2d (MB) 526, Bankr. L. Rep. (CCH) P 77924 (1999) ("There are two conditions for a cramdown. First, all requirements of § 1129(a) must be met (save for the plan's acceptance by each impaired class of claims or interests, see § 1129(a)(8)).").

26. See 11 U.S.C.A. § 1126(f) (2006) ("Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.").

27. 11 U.S.C.A. § 1129(b)(1) (2006):

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

28. See infra section III of this article.

29. See 11 U.S.C.A. § 506(a)(1) (2006) ("An allowed claim of a creditor secured by a lien on property in which the estate has an interest...is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property...and is an unsecured claim to the extent that the value of such creditor's interest...is less than the amount of such allowed claim."); see also Associates Commercial Corp. v. Rash, 520 U.S. 953, 961, 117 S. Ct. 1879, 138 L. Ed. 2d 148, 30 Bankr. Ct. Dec. (CRR) 1254, 37 Collier Bankr. Cas. 2d (MB) 744, Bankr. L. Rep. (CCH) P 77409 (1997) ("To separate the secured from the unsecured portion of a claim, a court must compare the creditor's claim to the value of 'such property,' i.e., the collateral.").

30. See 11 U.S.C.A. § 1111(b)(2) (2006) ("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 [under section 502 of the Bankruptcy Code].").

31. See 11 U.S.C.A. § 506(a)(1) (2006); U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 239, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) P 72575, 89-1 U.S. Tax Cas. (CCH) P 9179, 63 A.F.T.R.2d 89-652 (1989) ("Subsection (a) of § 506 provides that a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured.").

32. See 11 U.S.C.A. § 502(b)(2) (2006) (providing that a claim shall be allowed as filed except to the extent that "such claim is for unmatured interest").

33. The Supreme Court left open in Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co., 127 S. Ct. 1199, 167 L. Ed. 2d 178, 47 Bankr. Ct. Dec. (CRR) 265, Bankr. L. Rep. (CCH) P 80880 (U.S. 2007), whether postpetition fees are allowable to an unsecured creditor. See also Matter of 268 Ltd., 789 F.2d 674, 678, 14 Collier Bankr. Cas. 2d (MB) 904, Bankr. L. Rep. (CCH) P 71137 (9th Cir. 1986) ("Our rejection of Sanson's construction of § 506(b) does not preclude it from seeking the contractual fees in excess of $20,000 as an unsecured claim."); In re

Martin, 761 F.2d 1163, 1168, 12 Collier Bankr. Cas. 2d (MB) 1129, Bankr. L. Rep. (CCH) P 70542 (6th Cir. 1985) ("The validity of the creditor's claim for attorney's fees does not depend on whether the obligation is secured (unless state law so provides)."); In re United Merchants and Mfrs., Inc., 674 F.2d 134, 137, 6 Collier Bankr. Cas. 2d (MB) 321, Bankr. L. Rep. (CCH) P 69005 (2d Cir. 1982) ("the case law does not support a distinction between secured and unsecured creditors who seek to recover collection costs in bankruptcy"); Liberty Nat. Bank and Trust Co. of Louisville v. George, 70 B.R. 312, 317 (W.D. Ky. 1987) ("it is now apparent that in the case sub judice the bankruptcy court should not have limited Liberty's claim for contractual attorney's fees to the value of the excess collateral, but should have allowed the balance of these fees as an unsecured claim under Section 502(b)(1)"); In re Byrd, 192 B.R. 917, 919, 28 Bankr. Ct. Dec. (CRR) 943, 35 Collier Bankr. Cas. 2d (MB) 996, Bankr. L. Rep. (CCH) P 76981 (Bankr. E.D. Tenn. 1996) (finding unsecured contractual claim for postpetition attorney's fees could be allowed under section 502 of the Bankruptcy Code even if disallowed under section 506(b) of the Bankruptcy Code); In re Tricca, 196 B.R. 214, 220, 35 Collier Bankr. Cas. 2d (MB) 1528, Bankr. L. Rep. (CCH) P 77013 (Bankr. D. Mass. 1996) ("while § 506(b) precludes a claim from assuming secured status, it is still necessary to examine 11 U.S.C. §§ 101(5) and 502(b) to determine whether the Bank's claim for legal fees and costs may be allowable as an unsecured claim"); In re Hyer, 171 B.R. 67, 71, 25 Bankr. Ct. Dec. (CRR) 1589 (Bankr. W.D. Mo. 1994) ("Any claim by the Bank [for attorney's fees] above the value of the [collateral] is an unsecured claim"); In re Independent American Real Estate, Inc., 146 B.R. 546, 555 (Bankr. N.D. Tex. 1992) (rejected by, In re Hamilton Roe Intern., Inc., 162 B.R. 590, 25 Bankr. Ct. Dec. (CRR) 164 (Bankr. M.D. Fla. 1993)) ("The Court concludes that MexTex's status as an undersecured creditor does not bar it from asserting its claim for attorney fees under the Note."); In re A. Tarricone, Inc., 83 B.R. 253, 255, 17 Bankr. Ct. Dec. (CRR) 425 (Bankr. S.D. N.Y. 1988) ("To the extent that GATX's claim arose out of a contractual obligation on the part of the debtor to pay the appropriate attorney fees, GATX is entitled to file a claim as an unsecured creditor of the debtor."); In re Tri-State Homes, Inc., 56 B.R. 24, 26 (Bankr. W.D. Wis. 1985) ("the court concludes that the Mears' status as unsecured creditors does not bar them from asserting their claim for attorney's fees under the promissory note."); In re Ladycliff College, 46 B.R. 141, 143 (Bankr. S.D. N.Y. 1985), order aff'd, 56 B.R. 765, 29 Ed. Law Rep. 1055 (S.D. N.Y. 1985) ("Section 506(b) does not preclude an unsecured creditor from making a contractual claim for collection costs.") ("The debtor's reliance upon § 506 as excluding the attorney fee is misplaced. Section 506(b) does not limit an undersecured creditor's contractual claim for attorney's fee."); In re Missionary Baptist Foundation of America, Inc., 24 B.R. 970, 971 (Bankr. N.D. Tex. 1982) ("each [undersecured creditor is] entitled to have its claim for reasonable contractual attorneys fees allowed as an unsecured claim."). But see In re Woodmere Investors Ltd. Partnership, 178 B.R. 346, 356 (Bankr. S.D. N.Y. 1995) (rejected by, In re Byrd, 192 B.R. 917, 28 Bankr. Ct. Dec. (CRR) 943, 35 Collier Bankr. Cas. 2d (MB) 996, Bankr. L. Rep. (CCH) P 76981 (Bankr. E.D. Tenn. 1996)) ("Connecticut Mutual, as an under-secured creditor, is not entitled to post-petition attorney fees."); In re Saunders, 130 B.R. 208, 211 (Bankr. W.D. Va. 1991) (finding undersecured creditors cannot recover contractual attorneys' fees); In re Sakowitz, Inc., 110 B.R. 26, 2758 (Bankr. S.D. Tex. 1989) (rejected by, In re Byrd, 192 B.R. 917, 28 Bankr. Ct. Dec. (CRR) 943, 35 Collier Bankr. Cas. 2d (MB) 996, Bankr. L. Rep. (CCH) P 76981 (Bankr. E.D. Tenn. 1996)) (same).

34. The prepayment penalty must be enforceable under state law to be allowed as a claim against the debtor's estate. See 11 U.S.C.A. § 502(b)(1) (2006) (providing that a claim shall be allowed as filed except to the extent that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured"); see also infra section II.F of this article.

35. See 11 U.S.C.A. § 506(b) (2006) ("To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such

claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.").

36. See Ron Pair, 489 U.S. at 241 ("The natural reading of the phrase entitles the holder of an oversecured claim to postpetition interest and, in addition, gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs, and charges provided for in that agreement. Recovery of postpetition interest is unqualified.").

37. See Matter of Southland Corp., 160 F.3d 1054, 1059-60, 33 Bankr. Ct. Dec. (CRR) 681, Bankr. L. Rep. (CCH) P 77849 (5th Cir. 1998) ("The cases find that a default interest rate [provided by the contract] is generally allowed, unless 'the higher rate would produce an inequitable...result.'"); In re Milham, 141 F.3d 420, 423, 32 Bankr. Ct. Dec. (CRR) 581, 39 Collier Bankr. Cas. 2d (MB) 1275, Bankr. L. Rep. (CCH) P 77677 (2d Cir. 1998) ("Most courts have awarded pendency interest at the contractual rate; but nevertheless, however, widespread this practice may be, it does not reflect an entitlement to interest at the contractual rate."); Matter of Terry Ltd. Partnership, 27 F.3d 241, 243, 31 Collier Bankr. Cas. 2d (MB) 231, Bankr. L. Rep. (CCH) P 75933 (7th Cir. 1994) ("What emerges from the post-Ron Pair decisions is a presumption in favor of the contract rate subject to rebuttal based upon equitable considerations."); Matter of Laymon, 958 F.2d 72, 75, 22 Bankr. Ct. Dec. (CRR) 1332, Bankr. L. Rep. (CCH) P 74536 (5th Cir. 1992) ("we hold that when an oversecured creditor's claim arises from a contract, the contract provides the rate of post-petition interest"); In re Sublett, 895 F.2d 1381, 1386-87, 22 Collier Bankr. Cas. 2d (MB) 868, Bankr. L. Rep. (CCH) P 73279 (11th Cir. 1990) (reversing bankruptcy court's denial of an award of postpetition interest to an oversecured creditor at the applicable contract rate where assets of the estate were sufficient to pay all of the creditors' claims); In re Casa Blanca Project Lenders, L.P., 196 B.R. 140, 143, 29 Bankr. Ct. Dec. (CRR) 129 (B.A.P. 9th Cir. 1996) ("In keeping with Vanston and Ron Pair, bankruptcy courts considering the issue generally apply the contract rate subject to rebuttal based upon equitable considerations."); In re Dixon, 228 B.R. 166, 172 (W.D. Va. 1998) ("The great majority of courts to have considered the issue of entitlement to postpetition interest since Ron Pair have concluded that the contract rate of interest applies."); KCC-Leawood Corporate Manor I v. Travelers Ins. Co., 117 B.R. 969, 973 (W.D. Mo. 1989) ("The contract rate in this case is 12.75 percent. Travelers is entitled to that rate of interest on its claim."); In re Payless Cashways, Inc., 287 B.R. 482, 489 (Bankr. W.D. Mo. 2002) ("cases hold that section 506(b) contemplates the award of interest to an oversecured creditor at the contract rate, barring equitable considerations or restrictions under state law"); In re Route One West Windsor Ltd. Partnership, 225 B.R. 76, 87, 40 Collier Bankr. Cas. 2d (MB) 1069 (Bankr. D. N.J. 1998) ("The effect of the rebuttable presumption in favor of the contract rate is to impose upon the debtor the burden of proving that the equities favor allowing interest at a different rate."); In re Liberty Warehouse Associates Ltd. Partnership, 220 B.R. 546, 550 (Bankr. S.D. N.Y. 1998) ("There is 'a presumption in favor of the contract rate subject to rebuttal based on equitable considerations.'"); In re Ace-Texas, Inc., 217 B.R. 719, 723, 32 Bankr. Ct. Dec. (CRR) 459 (Bankr. D. Del. 1998) ("To determine the proper interest rate, courts employ a presumption in favor of the contractual rate of interest subject to rebuttal based upon the equitable considerations specific to each case."); In re Vest Associates, 217 B.R. 696, 702 (Bankr. S.D. N.Y. 1998) ("The developing consensus is a presumption in favor of the contract default rate subject to equitable considerations."); In re Johnson, 184 B.R. 570, 573, 27 Bankr. Ct. Dec. (CRR) 723, 34 Collier Bankr. Cas. 2d (MB) 72 (Bankr. D. Minn. 1995) ("[B]ankruptcy courts recognize a presumption in favor of the parties agreed interest rate subject to rebuttal based upon equitable considerations."); In re Kalian, 178 B.R. 308, 312-13, 26 Bankr. Ct. Dec. (CRR) 898, 32 Collier Bankr. Cas. 2d (MB) 1923 (Bankr. D. R.I. 1995) ("Generally speaking, when it comes to determining the appropriate postpetition interest rate applied to consensual, oversecured claims, including those arising from agreements with default interest provisions, bankruptcy courts give deference to the parties' agreed interest term, but may modify the rate in appropriate circumstances."); In re Beare Co., 177 B.R. 883, 885 (Bankr. W.D. Tenn. 1994) ("First American is entitled to be paid its contractual rate of interest (the original note interest rate of 12%) until the effective date of the plan."); In re Boardwalk Partners, 171 B.R. 87, 92 (Bankr. D. Ariz. 1994) ("this Court is of the view that the claim of an over-

secured creditor must include interest calculated at the contract rate and may include interest calculated at a post-maturity default rate, depending upon the equities of the case"); In re Foertsch, 167 B.R. 555, 561, 31 Collier Bankr. Cas. 2d (MB) 525 (Bankr. D. N.D. 1994) ("In determining the 'amount' of postpetition interest under § 506(b) *only*, this court follows the view of the majority courts which hold that such interest should be computed at the 'contract rate'"); In re Consolidated Properties Ltd. Partnership, 152 B.R. 452, 454 (Bankr. D. Md. 1993) ("This court agrees with the Fifth Circuit in Laymon that a base contractual rate of interest should be used for purposes of awarding interest to an oversecured creditor under § 506(b)"); In re Courtland Estates Corp., 144 B.R. 5, 9, 23 Bankr. Ct. Dec. (CRR) 624 (Bankr. D. Mass. 1992) ("this Court will permit the calculation of interest on the Bank's overdue principal at the rate specified in the Note."); Matter of Martindale, 125 B.R. 32, 37 (Bankr. D. Idaho 1991) ("Since the default interest terms are clearly set forth and agreed to in the contract documents, and are not unenforceable under state law, the Court has no license to disregard these provisions."); In re Hollstrom, 133 B.R. 535, 537, 22 Bankr. Ct. Dec. (CRR) 417, 25 Collier Bankr. Cas. 2d (MB) 1621, Bankr. L. Rep. (CCH) P 74320 (Bankr. D. Colo. 1991) ("Section 506(b) should be construed to include reference to interest at the contract rate."); DWS, 121 B.R. at 849 ("Usually, the court should apply the contract rate, but it has the power to apply a different rate depending upon equitable considerations."). But see Wasserman v. City of Cambridge, 151 B.R. 4, 7 (D. Mass. 1993) (applying federal judgment rate under section 506(b) of the Bankruptcy Code instead of the state statutory rate of interest for state property tax liens); In re DeMaggio, 175 B.R. 144, 148 (Bankr. D. N.H. 1994) (same); In re Schaumburg Hotel Owner Ltd. Partnership, 97 B.R. 943, 951 (Bankr. N.D. Ill. 1989) ("A court should allow contractually bargained for default interest rate under § 506(b) without examining the reasonableness of these rates provided they fall within the range of acceptable rates."). But c.f. In re Skyler Ridge, 80 B.R. 500, 511, 16 Bankr. Ct. Dec. (CRR) 1122, Bankr. L. Rep. (CCH) P 72167 (Bankr. C.D. Cal. 1987) ("This Court finds no authorization in section 506(b) to examine the reasonableness of the interest rate charged by the secured creditor.").

38. At least one court, however, has found that a claim for default rate interest is a "charge" under section 506(b) of the Bankruptcy Code. See Consol. Props., 152 B.R. at 455 ("A default rate of interest that reflects a reasonable attempt to compensate a creditor for extra costs incurred after default is more in the nature of additional 'fees, costs, or charges provided for under the agreement' than mere 'interest on such claim', which is not tied to an underlying agreement by § 506(b).").

39. See Southland Corp., 160 F.3d at 1059-60 ("The cases find that a default interest rate is generally allowed, unless 'the higher rate would produce an inequitable...result.'"); Terry Ltd. P'ship, 27 F.3d at 243 ("Courts have found the presumption to be sufficiently rebutted in cases where the contract rate was significantly higher than the predefault rate without any justification offered for the spread."); Layman, 958 F.2d at 75 ("whether the 18% default rate, rather than the 10% pre-default rate, should apply in this case must be decided by examining the equities involved in the bankruptcy proceeding."); Payless Cashways, Inc., 287 B.R. at 489 ("cases hold that section 506(b) contemplates the award of [default] interest to an oversecured creditor at the contract rate, barring equitable considerations or restrictions under state law"); In re Vanderveer Estates Holdings, Inc., 283 B.R. 122, 134, 40 Bankr. Ct. Dec. (CRR) 30 (Bankr. E.D. N.Y. 2002) ("the developing consensus is a presumption in favor of the contract default rate subject to equitable considerations.") (quotation omitted); Route One, 225 B.R. at 90 ("there is a presumption that the federal courts will enforce the [default] contract rate in bankruptcy, subject to rebuttal based upon the equities of the case"); Liberty Warehouse, 220 B.R. at 551 ("Usually, the court should apply the [default] contract rate, but it has the power to apply a different rate depending upon equitable considerations."); Ace-Texas, Inc., 217 B.R. at 723 ("To determine the proper [default] interest rate, courts employ a presumption in favor of the contractual rate of interest subject to rebuttal based upon the equitable considerations specific to each case."); Vest Assocs., 217 B.R. at 702 ("The developing consensus is a presumption in favor of the contract default rate subject to equitable considerations."); In re Maywood, Inc., 210 B.R. 91, 93, 30 Bankr. Ct. Dec. (CRR) 1225 (Bankr. N.D. Tex. 1997) ("This court cannot find that the equities in the instant case favor the

oversecured creditor['s right to default interest.]"); Johnson, 184 B.R. at 573 ("Most courts have correctly construed Ron Pair and § 506(b) to require analyzing default rates based on the facts and equities of a case."); Kalian, 178 B.R. at 314 ("Default interest rate demands are evaluated 'on the facts and equities specific to each case.'"); In re Boulders on the River, Inc., 169 B.R. 969, 975 (Bankr. D. Or. 1994) (considering whether the default rate was a penalty); Courtland Estates Corp., 144 B.R. at 9 (apply default rate in note where "the equities of the case [did] not compel a different result."); Matter of Timberline Property Development, Inc., 136 B.R. 382, 386 (Bankr. D. N.J. 1992) ("Under both state and federal law, the clause increasing the interest rate after default is an unenforceable penalty, since by the RTC's own admission the clause was meant to coerce prompt payment."); Hollstrom, 133 B.R. at 539 ("This Court chooses to adopt the Supreme Court's flexible approach initially set forth in Vanston Bondholders"); In re DWS Investments, Inc., 121 B.R. 845, 849, 21 Bankr. Ct. Dec. (CRR) 102 (Bankr. C.D. Cal. 1990) ("Section 506(b) does not specify the contract rate in calculating interest on oversecured claims. On the other hand, pre-Code law does empower the bankruptcy judge to balance the equities in determining the appropriate interest rate."); In re Consolidated Operating Partners L.P., 91 B.R. 113, 117 (Bankr. D. Colo. 1988) ("The equities of this case do not favor any deviation from the imposition of the Late Payment Rate."); In re White, 88 B.R. 498, 511 (Bankr. D. Mass. 1988) (herinafter White I) ("if the default rate of interest sought by Wedgestone were reasonable...this Court would have no trouble enforcing it."); In re W.S. Sheppley & Co., 62 B.R. 271, 278 (Bankr. N.D. Iowa 1986) ("I conclude that a bankruptcy court presented with a § 506(b) motion is not required in all cases to apply a contractual default rate of interest in determining the amount of an 'allowed secured claim'"). But see Schaumburg Hotel Owner, 97 B.R. at 951 ("A court should allow contractually bargained for default interest rate under § 506(b) without examining the reasonableness of these rates provided they fall within the range of acceptable rates."); Skyler Ridge, 80 B.R. at 511 ("This Court finds no authorization in section 506(b) to examine the reasonableness of the interest rate charged by the secured creditor.").

40. See Southland Corp., 160 F.3d at 1060 ("The 2% spread between default and pre-default interest rates is relatively small."); Payless Cashways, Inc., 287 B.R. at 489 ("The default rate is one percent higher than the non-default rate...I find that the rate as applied here is a reasonable one."); Vanderveer Estates Holdings, Inc., 283 B.R. at 134 ("Both the default interest rate of 12.56%, and the differential of 5% between the default and non-default rates, are well within the range of default rates that have been allowed as reasonable charges under § 506(b)"); Route One W. Windsor Ltd. P'ship, 225 B.R. at 90 ("courts have declined to enforce very high default rates"); Ace-Texas, Inc., 217 B.R. at 723 ("I find the 2% Differential reasonable and appropriate under the circumstances."); Vest Assocs., 217 B.R. at 703 ("a differential of 5% certainly falls within the range of reasonableness"); see also cases cited infra notes 44 and 45.

41. See Southland Corp., 160 F.3d at 1060 ("We find it especially significant—as did the bankruptcy court—that no junior creditors will be harmed if the Banks are awarded default interest."); In re Dixon, 228 B.R. 166, 176 (W.D. Va. 1998) (awarding default interest where "there are no junior creditors, secured or unsecured, who will be prejudiced by an award of the default term."); In re Trinity Meadows Raceway, Inc., 252 B.R. 660, 669, 43 U.C.C. Rep. Serv. 2d 1249 (Bankr. N.D. Tex. 2000) ("The ten percent (10%) spread between the contract rate and the default rate is relatively large; and while there is no evidence that the Lawleys obstructed the liquidation process, other creditors will be harmed if the Court applies the default rate of interest."); Liberty Warehouse Assocs. Ltd. P'ship, 220 B.R. at 551 ("Here, debtor is solvent. It will pay the allowed claims of unsecured creditors in full, with interest, irrespective of whether it pays Associates pendency interest at the default or non-default rate under its loan."); Ace-Texas, Inc., 217 B.R. at 725 (considering impact on unsecured creditors in awarding default rate interest); Vest Assocs., 217 B.R. at 703 ("A debtor's solvency is thus an important factor in determining whether default interest should be allowed."); Maywood, Inc., 210 B.R. at 93 ("it is unclear whether the unsecured creditors in this case will receive any distribution whatsoever"); Johnson, 184 B.R. at 573 ("enforcement of the default rate would not adversely affect other creditors"); Boardwalk Part-

ners, 171 B.R. at 92 ("The additional 8% comes directly out of the hide of junior creditors, not from the Debtor"); DWS Invs., Inc., 121 B.R. at 849 (finding default rate interest inappropriate where the estate was insolvent); Consol. Props. Ltd. P'ship, 152 B.R. at 458 (denying default rate interest where collection would come "at the expense of junior creditors."); Courtland Estates Corp., 144 B.R. at 9 ("As the Debtor has paid all pre-petition unsecured creditors without court authority, the equities of the case do not compel a different result.").

42. See Terry Ltd. P'ship, 27 F.3d at 244 ("the bankruptcy court correctly determined that the default rate was designed to compensate for losses suffered in addition to those provided for in the agreement"); Johnson, 184 B.R. at 573 ("Specifically, does the default rate merely compensate the creditor for any loss resulting from the nonpayment of the principal at maturity, or is it a disguised penalty?"); Kalian, 178 B.R. at 313-14 ("If, though labeled interest, it exacts a penalty or sets liquidated damages in an impermissible manner, it will not be enforced."); Boardwalk Partners, 171 B.R. at 92 ("No serious attempt has been made by Foss to justify the default interest rate of 26% as anything other than a contractual sledgehammer against the Debtor."); Boulders on the River, Inc., 169 B.R. at 975 ("This court is not persuaded that the default rate of interest constitutes anything but a mere penalty."); Timberline Prop. Dev., Inc., 136 B.R. at 386 (denying default interest that, while only 3% points higher than the non-default rate, was "designed to induce payment" and was therefore unenforceable as a penalty); Hollstrom, 133 B.R. at 539 ("The default rate of interest has not been established as having any relationship to actual or projected loss as a result of nonpayment."); White I, 88 B.R. at 511 (refusing to enforce the default rate where the default rate was "nothing more than a device (akin to a sledgehammer) to coerce the Debtors into prompt payment.").

43. See 11 U.S.C.A. § 502(b)(1) (2006) (providing that a claim shall be allowed as filed except to the extent that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured"); 11 U.S.C.A. § 101(5)(A) (2006) (defining a claim as a "right to payment"); Route One W. Windsor Ltd. P'ship, 225 B.R. at 90 ("The court has thus far determined that the secured creditors' default rate is enforceable under New York law."); Liberty Warehouse Assocs. Ltd. P'ship, 220 B.R. at 551 ("debtor does not contend that the default interest rate payable under the Associates Loan is illegal, and it does not appear that it is"); Kalian, 178 B.R. at 314 n.12 ("State law limitations on loan charges limit the extent of secured claims."); Timberline Prop. Dev., Inc., 136 B.R. at 385 ("Under New Jersey Law, The Clause Providing For Default Rate of Interest Is Unenforceable As A Penalty."); DWS Invs., Inc., 121 B.R. at 849 ("Furthermore, under California law I question whether this [default] rate would be legal."); Consol. Operating Partners, L.P., 91 B.R. at 116 ("Texas also upholds contracts or promissory notes that contain specific default interest rates that are higher than the pre-default interest rates."); Skyler Ridge, 80 B.R. at 511 ("Apart from usury and unconscionability, the Court has no power to determine the reasonableness of a default interest rate.").

44. See Southland Corp., 160 F.3d at 1060 (finding 2% differential reasonable); Terry Ltd. P'ship, 27 F.3d at 244 (finding 3% differential reasonable); Payless Cashways, Inc., 287 B.R. at 489-90 (finding 1% differential reasonable); Vanderveer Estates Holdings, Inc., 283 B.R. at 134 (finding 5% differential reasonable); Route One W. Windsor Ltd. P'ship, 225 B.R. at 90 (finding 8% differential reasonable); Liberty Warehouse Assocs. Ltd. P'ship, 220 B.R. at 551 (finding 8.8% differential reasonable); Ace-Texas, Inc., 217 B.R. at 723 (finding 2% differential reasonable); Vest Assocs., 217 B.R. at 703 (finding 5% differential reasonable); Johnson, 184 B.R. at 573 (finding 2% differential reasonable); Courtland Estates Corp., 144 B.R. at 9 (finding 3% differential reasonable); In re White, 88 B.R. 494, 498 (Bankr. D. Mass. 1988) (White II) (finding 5% differential reasonable); see also Skyler Ridge, 80 B.R. at 511 (applying default rate that was 4% points higher than non-default rate); In re Schaumburg Hotel Owner Ltd. Partnership, 97 B.R. 943, 951 (Bankr. N.D. Ill. 1989) (applying default rate that was 4.3% points higher than the non-default rate). But see Boardwalk Partners, 171 B.R. at 92 (finding 8% differential unreasonable); Boulders on the River, Inc., 169 B.R. at 975 (finding 5% differential unreasonable); Timberline Prop. Dev., Inc., 136 B.R. at 386 (finding 3% differential unreasonable).

45. See Trinity Meadows Raceway, Inc., 252 B.R. at 669 (finding 10% differential unreasonable); Kalian, 178 B.R. at 317 (finding 18% differential unreasonable); Boardwalk Partners, 171 B.R. at 92 (finding 14.5% differential unreasonable); Consol. Props. Ltd. P'ship, 152 B.R. at 458 (finding 36% differential unreasonable); Hollstrom, 133 B.R. at 539 (finding 24% differential unreasonable); DWS Invs., Inc., 121 B.R. at 850 (finding 10-11 % differential unreasonable); White I, 88 B.R. at 511 (finding 31.5% differential unreasonable). But see Dixon, 228 B.R. at 176 (finding 18% differential reasonable).

46. See Boardwalk Partners, 171 B.R. at 92 ("The additional 8% comes directly out of the hide of junior creditors, not from the Debtor, and allowing it to be paid would be contrary to the policy of 'ratable distribution of assets among the bankrupts' creditors'"); see also cases cited supra note 41.

47. See Boulders on the River, Inc., 169 B.R. at 975 ("This court is not persuaded that the default rate of interest constitutes anything but a mere penalty."); Timberline Prop. Dev., Inc., 136 B.R. at 386 (denying default interest that, while only 3% points higher than the non-default rate, was "designed to induce payment" and was therefore unenforceable as a penalty); see also cases cited supra note 42.

48. See cases cited supra note 43.

49. See In re AE Hotel Venture, 321 B.R. 209, 216, 44 Bankr. Ct. Dec. (CRR) 92 (Bankr. N.D. Ill. 2005) (adopting view that "when a creditor will be paid late charges, the creditor cannot also claim default interest under section 506(b) because payment of both would amount to a double recovery."); In re Vest Associates, 217 B.R. 696, 701 (Bankr. S.D. N.Y. 1998) ("The decisional law is uniform that oversecured creditors may receive payment of either default interest or late charges, but not both."); In re Consolidated Properties Ltd. Partnership, 152 B.R. 452, 458 (Bankr. D. Md. 1993) ("In this reorganization case under the Bankruptcy Code, it is not reasonable to allow Citibank a secured claim for default interest in addition to late charges of 5% on the entire principal balance."). But see Matter of Terry Ltd. Partnership, 27 F.3d 241, 244, 31 Collier Bankr. Cas. 2d (MB) 231, Bankr. L. Rep. (CCH) P 75933 (7th Cir. 1994) (affirming bankruptcy court's decision to permit creditor "to recover the costs and charges associated with the default as provided for in the promissory note [in addition to] the award of default interest").

50. See In re Imperial Coronado Partners, Ltd., 96 B.R. 997, 1001 (B.A.P. 9th Cir. 1989) (finding prepayment premium allowable pursuant to section 506(b) of the Bankruptcy Code); AE Hotel Venture, 321 B.R. at 221 (same); In re Vanderveer Estates Holdings, Inc., 283 B.R. 122, 132, 40 Bankr. Ct. Dec. (CRR) 30 (Bankr. E.D. N.Y. 2002) (same); In re Anchor Resolution Corp., 221 B.R. 330, 341 (Bankr. D. Del. 1998) (same); In re Outdoor Sports Headquarters, Inc., 161 B.R. 414, 425, 25 Bankr. Ct. Dec. (CRR) 30, 30 Collier Bankr. Cas. 2d (MB) 710 (Bankr. S.D. Ohio 1993) (same).

51. 11 U.S.C.A. § 506(b) (2006) (emphasis added).

52. See Imperial Coronado Partners, Ltd., 96 B.R. at 1000 ("the prepayment premium is clearly a 'charge provided for under the agreement' and, thus, subject to the reasonableness limitation."); Outdoor Sports Headquarters, Inc., 161 B.R. at 424 ("Prepayment charges are encompassed in the term 'charges,' as used in § 506(b)."); In re Duralite Truck Body & Container Corp., 153 B.R. 708, 711 (Bankr. D. Md. 1993) ("The concept of 'charge' as used in § 506(b) encompasses prepayment charges."); In re A.J. Lane & Co., Inc., 113 B.R. 821, 823, 20 Bankr. Ct. Dec. (CRR) 869, 23 Collier Bankr. Cas. 2d (MB) 576 (Bankr. D. Mass. 1990) ("Whatever rubric appears in the loan documents, the statutory language compels the conclusion that this requested payment is one of the 'charges' which § 506(b) governs."); In re Skyler Ridge, 80 B.R. 500, 506, 16 Bankr. Ct. Dec. (CRR) 1122, Bankr. L. Rep. (CCH) P 72167 (Bankr. C.D. Cal. 1987) (viewing the prepayment premium as falling within the scope of a "charge" under section 506(b) of the Bankruptcy Code).

53. See Imperial Coronado Partners, Ltd., 96 B.R. at 1000 ("the prepayment premium is clearly a 'charge provided for under the agreement' and, thus, subject to the reasonableness limitation"); AE

Hotel Venture, 321 B.R. at 217 ("the prepayment premium must satisfy section 506(b): the charge must be one 'provided for under the agreement,' and it must be 'reasonable'"); Anchor Resolution Corp., 221 B.R. at 341 ("I find that the Amended Make-Whole Amount is not a penalty and is 'reasonable' within the contemplation of Code § 506(b)"); Outdoor Sports Headquarters, Inc., 161 B.R. at 424 (considering whether prepayment premium is "reasonable" under section 506(b) of the Bankruptcy Code); Duralite Truck Body & Container Corp., 153 B.R. at 713 ("The reasonableness restriction limits both fees and charges."); A.J. Lane & Co., 113 B.R. at 823-30 (considering whether prepayment premium is reasonable under section 506(b) of the Bankruptcy Code); In re Planvest Equity Income Partners IV, 94 B.R. 644, 645, 18 Bankr. Ct. Dec. (CRR) 1107, Bankr. L. Rep. (CCH) P 72593 (Bankr. D. Ariz. 1988) ("It is this Court's view that under § 506(b), Columbia is not entitled to the prepayment penalty in the instant case because such penalty is not a reasonable fee under the circumstances."); Skyler Ridge, 80 B.R. at 507 ("The Court finds that the liquidated damages sought by Travelers are unreasonable under section 506(b)").

54. See Imperial Coronado Partners, Ltd., 96 B.R. at 1000-01 ("What constitutes a 'reasonable' charge under section 506(b) is a question of federal, not state law."); AE Hotel Venture, 321 B.R. at 217 ("Whether a charge is 'reasonable' is, of course, a question of federal law"); In re Schwegmann Giant Supermarkets Partnership, 264 B.R. 823, 827, 38 Bankr. Ct. Dec. (CRR) 64 (Bankr. E.D. La. 2001) ("The determination of whether to award prepayment fees is a question of federal law controlled by Section 506(b)."); Outdoor Sports Headquarters, Inc., 161 B.R. at 424 ("The issue of what constitutes a "reasonable" charge in this proceeding is a question of federal law."); Duralite Truck Body & Container Corp., 153 B.R. at 713 ("The reasonableness of costs and charges under 11 U.S.C. § 506(b) is a matter of federal law."); A.J. Lane & Co., 113 B.R. at 825 ("I seek guidance from decisions in all jurisdictions dealing with assessment of prepayment charges or analogous transactions."); Skyler Ridge, 80 B.R. at 504-07 (considering Kansas law and federal law in assessing reasonableness of prepayment premium). But see In re Kroh Bros. Development Co., 88 B.R. 997, 999 (Bankr. W.D. Mo. 1988) ("If the [prepayment] clause is enforceable under state law it may also be considered a 'reasonable charge' pursuant to § 506(b).").

55. See 11 U.S.C.A. § 502(b)(1) (2006) (providing that a claim shall be allowed as filed except to the extent that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured"); 11 U.S.C.A. § 101(5)(A) (2006) (defining a claim as a "right to payment"); AE Hotel Venture, 321 B.R. at 218 ("Because possession of a state law right is a prerequisite to consideration of the right's reasonableness under section 506(b), most courts first consider the prepayment premium's enforceability under state law."); Kroh Bros. Dev. Co., 88 B.R. at 1000-01 (finding prepayment premium unenforceable under section 506(b) of the Bankruptcy Code where such prepayment premium was unenforceable under Missouri law); Skyler Ridge, 80 B.R. at 504-06 (finding prepayment premium unenforceable under section 506(b) of the Bankruptcy Code where such prepayment premium was unenforceable under Kansas law).

56. See AE Hotel Venture, 321 B.R. at 220 ("Enforceability depends on whether the premium is meant to liquidate damages or impose a penalty."); Kroh Bros. Dev. Co., 88 B.R. at 999-1000 (considering whether prepayment premium is enforceable as a liquidated damages clause under Missouri law); Skyler Ridge, 80 B.R. at 504 (considering whether prepayment premium is enforceable as a liquidated damages clause under Kansas law); see also A.J. Lane & Co., 113 B.R. at 828 (evaluating prepayment premium as a liquidated damages clause); In re Schaumburg Hotel Owner Ltd. Partnership, 97 B.R. 943, 953 (Bankr. N.D. Ill. 1989) ("In determining the validity of a prepayment clause, the court must look to the damages that the parties could anticipate at the time the parties contracted.").

57. See Duralite Truck Body & Container Corp., 153 B.R. at 711 ("Liquidated damages provisions are enforceable in New York, if '(1) actual damages may be difficult to determine and (2) the sum stipulated is not plainly disproportionate to the possible loss.'") (quoting Walter E. Heller & Co. v. Am. Flyers Airline Corp., 459 F.2d 896, 899 (2d Cir. 1972)); Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc., 41 N.Y.2d 420, 1018, 393 N.Y.S.2d 365, 361 N.E.2d 1015 (1977) ("A

contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation."); see also Kroh Bros. Dev. Co., 88 B.R. at 999 ("Missouri enforces liquidated damages clauses if the amount fixed as damages is a reasonable forecast of just compensation for the harm that is caused by the breach and if the harm caused by the breach is incapable or very difficult of accurate estimation."); Skyler Ridge, 80 B.R. at 504 ("Kansas follows the common law on liquidated damages: liquidated damages are authorized if the amount specified is determined to be reasonable and the amount of damages is difficult to ascertain.")

58. See Duralite Truck Body & Container Corp., 153 B.R. at 711 ("The time soundness of such clauses is tested in light of the circumstances existing as of the time that the agreement is entered into rather than at the time that the damages are incurred or become payable.") (quoting Walter E. Heller & Co., 459 F.2d at 898-99); Truck Rent-A-Center, Inc., 361 N.E.2d at 1019 ("the agreement should be interpreted as of the date of its making and not as of the date of its breach"); see also United Order of American Bricklayers and Stone Masons Union No. 21 v. Thorleif Larsen & Son, Inc., 519 F.2d 331, 333, 89 L.R.R.M. (BNA) 3113, 77 Lab. Cas. (CCH) P 11030 (7th Cir. 1975) ("In determining whether the amount stated is unreasonable, we must view it in relation to damages which could be reasonably anticipated at the time of making the contract."); Schaumburg Hotel, 97 BR at 953 ("In determining the validity of a prepayment clause, the court must look to the damages that the parties could anticipate at the time the parties contracted.").

59. See cases cited supra note 54.

60. See Imperial Coronado Partners, Ltd., 96 B.R. at 1001 ("ICP argues that the court should look to the 'actual' damages suffered by Home Federal as a result of its prepayment (i.e., the difference between the contract rate and the market rate from the date of prepayment until the date of maturity). We agree."); In re Vanderveer Estates Holdings, Inc., 283 B.R. 122, 132, 40 Bankr. Ct. Dec. (CRR) 30 (Bankr. E.D. N.Y. 2002) (approving formula used to calculate prepayment premium where formula "compensate[d] the lender for the actual yield loss incurred upon prepayment."); Schwegmann Giant Supermarkets P'ship, 264 B.R. at 829 (finding prepayment premium unreasonable because "[t]he prepayment charge formula presumes a loss" and is thus not compensatory); Outdoor Sports Headquarters, Inc., 161 B.R. at 424 ("the court finds that 'reasonable' charges under § 506(b) are those that compensate the lender for the harm caused by the prepayment, the amount of actual damages which result from the prepayment"); Duralite Truck Body & Container Corp., 153 B.R. at 714 ("This court approves of actual damages as the measure of reasonableness for prepayment charges under 11 U.S.C. § 506(b)."). But see A.J. Lane & Co., 113 B.R. at 828 (evaluating prepayment premium as a liquidated damages clause); Schaumburg Hotel, 97 B.R. at 953 ("In determining the validity of a prepayment clause, the court must look to the damages that the parties could anticipate at the time the parties contracted.").

61. See Matter of LHD Realty Corp., 726 F.2d 327, 330 (7th Cir. 1984) ("prepayment premiums serve a valid purpose in compensating at least in part for the anticipated interest a lender will not receive if a loan is paid off prematurely"); Outdoor Sports Headquarters, Inc., 161 B.R. at 424 ("Prepayment charges are designed to assure that the lender will receive the contractual rate of return agreed upon over the life of the loan. They protect a lender against falling interest rates, which give a borrower an incentive to refinance the loan, thereby depriving the lender of the interest it could have earned over the life of the loan...[Such prepayment charges are] 'reasonable' charges under § 506(b)."); Duralite Truck Body & Container Corp., 153 B.R. at 713 ("[P]repayment premiums protect lenders against falling interest rates. Without a prepayment premium, a borrower would have an incentive to refinance the debt, thus depriving the lender of the benefit of its bargain, namely, the unearned interest at above current market rates over the unexpired term of the loan.").

62. See Duralite Truck Body & Container Corp., 153 B.R. at 714 ("Case law suggests that actual damages are measured by the difference between the market rate of interest at the time of prepayment and the contract rate for the duration of the loan, discounted to present value."); Kroh Bros. Dev. Co., 88 B.R. 997 (disallowing prepayment premium because the formula compared the

contract rate to the rate for a U.S. Treasury that was comparable in maturity instead of the market rate at which the funds could be reinvested and the formula failed to discount the differential to present value); Skyler Ridge, 80 B.R. at 505 (same); see also Imperial Coronado Partners, Ltd., 96 B.R. at 1001 ("In our view...a lender is entitled, under section 506(b), to collect only the difference between (1) the market rate of interest on the prepayment date, and (2) the contract rate, for the remaining term of the loan.").

63. See Vanderveer Estates Holdings, 283 B.R. at 132 (allowing prepayment premium based upon the difference between the current yield on a Treasury Bill of comparable maturity and the original mortgage rate); In re Anchor Resolution Corp., 221 B.R. 330, 341 (Bankr. D. Del. 1998) ("[T]he make-whole claim is calculated as the outstanding principal and remaining interest payable under the Series B Notes discounted to present value using a discount rate equal to 0.50% over Treasury rates of the same weighted average life to maturity as the Series B Notes.").

64. See Vanderveer Estates Holdings, 283 B.R. at 132 (distinguishing prepayment premium from prepayment premiums found unreasonable by other courts because prepayment premium under consideration did not presume a loss); Anchor Resolution Corp., 221 B.R. at 340 (same); Duralite Truck Body & Container Corp., 153 B.R. at 714 ("A prepayment charge formula must effectively estimate actual damages, otherwise, the charges may operate as either a penalty on the debtor or a windfall to a lender, at the expense of other creditors of the bankruptcy estate."); A.J. Lane & Co., 113 B.R. at 828-29 (utilizing § 2-718(1) of the Uniform Commercial Code and § 356(1) of the Restatement (Second) of Contracts in disallowing prepayment premium as "void as a penalty" where interest rates had increased and the lender "benefited from the prepayment rather than suffered damage"); In re Planvest Equity Income Partners IV, 94 B.R. 644, 645, 18 Bankr. Ct. Dec. (CRR) 1107, Bankr. L. Rep. (CCH) P 72593 (Bankr. D. Ariz. 1988) ("Columbia has failed to show that the prepayment penalty in excess of $300,000 is an actual or reasonable cost resulting from the 'prepayment' of the subject loan."); Skyler Ridge, 80 B.R. at 503 ("A liquidated damages clause that is in reality a penalty cannot be enforced in a bankruptcy court."); see also cases cited supra notes 55 and 60.

65. See 11 U.S.C.A. § 506(b) (2006) ("To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.").

66. See In re Kord Enterprises II, 139 F.3d 684, 689, 32 Bankr. Ct. Dec. (CRR) 425 (9th Cir. 1998) (providing that in order to recover attorney's fees under section 506(b), the creditor must show that it is oversecured in excess of the fees requested, that the fees are reasonable and that the agreement giving rise to the claim provides for the fees requested); In re Schriock Const., Inc., 104 F.3d 200, 201, 30 Bankr. Ct. Dec. (CRR) 195, 37 Collier Bankr. Cas. 2d (MB) 575, Bankr. L. Rep. (CCH) P 77221 (8th Cir. 1997) (same); In re White, 260 B.R. 870, 880, 37 Bankr. Ct. Dec. (CRR) 191, 45 Collier Bankr. Cas. 2d (MB) 1500 (B.A.P. 8th Cir. 2001) (same); In re Nunez, 317 B.R. 666, 668 (Bankr. E.D. Pa. 2004) (same); In re Elk Creek Salers, Ltd., 290 B.R. 712, 715, 41 Bankr. Ct. Dec. (CRR) 17, 49 Collier Bankr. Cas. 2d (MB) 1474 (Bankr. W.D. Mo. 2003) (same); In re Staggie, 255 B.R. 48, 51 (Bankr. D. Idaho 2000) (same); see also cases cited infra note 67.

67. See U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) P 72575, 89-1 U.S. Tax Cas. (CCH) P 9179, 63 A.F.T.R.2d 89-652 (1989) ("Recovery of fees, costs, and charges, however, is allowed only if they are reasonable and provided for in the agreement under which the claim arose. Therefore, in the absence of an agreement, postpetition interest is the only added recovery available."); In re Gledhill, 164 F.3d 1338, 1342, 33 Bankr. Ct. Dec. (CRR) 1014, Bankr. L. Rep. (CCH) P 77881 (10th Cir. 1999) (finding oversecured judgment creditor not entitled to attorney's fees as a part of allowed secured claim because no consensual agreement); In re Connolly, 238 B.R. 475, 479, 34 Bankr. Ct. Dec. (CRR) 1219 (B.A.P. 9th Cir. 1999) (finding oversecured creditor not entitled to attorney's fees incurred in defending preference action because such fees were beyond the

scope of attorney-fee provision in the security agreement); In re Brunswick Apartments of Trumbull County, Ltd., 215 B.R. 520, 525, 31 Bankr. Ct. Dec. (CRR) 1350, 1998 FED App. 0002P (B.A.P. 6th Cir. 1998), judgment aff'd, 169 F.3d 333, 33 Bankr. Ct. Dec. (CRR) 1251, 41 Collier Bankr. Cas. 2d (MB) 706, Bankr. L. Rep. (CCH) P 77894, 1999 FED App. 0069P (6th Cir. 1999)) (finding the creditor was entitled to attorney's fees where the "ordinary meaning" of the contract provided that the creditor was entitled to such fees); Elk Creek Sales, Ltd., 290 B.R. at 716 (finding fees incurred in litigation with another creditor were not part of allowed secured claim because the plain language of the agreement did not encompass such fees); In re Shapiro, 208 B.R. 318, 320, 30 Bankr. Ct. Dec. (CRR) 1099 (Bankr. E.D. N.Y. 1997) (finding oversecured creditor was not entitled to attorney's fees where the underlying promissory note limited recovery of attorney's fees to $7,500, which amount had already been paid and awarded prepetition); In re D.W.G.K. Restaurants, Inc., 84 B.R. 684, 687 (Bankr. S.D. Cal. 1988) ("The legislative history makes it perfectly clear that the agreement referred to in § 506(b) is a security agreement."); see also cases cited infra note 68.

68. See In re Brentwood Outpatient, Ltd., 43 F.3d 256, 261-62, 26 Bankr. Ct. Dec. (CRR) 540, 32 Collier Bankr. Cas. 2d (MB) 909, 1994 FED App. 0408P (6th Cir. 1994) (finding that a local government was not entitled to attorney's fees as part of its secured claim because the fees arose by operation of law and not by agreement); Matter of Pointer, 952 F.2d 8, 89-902, 22 Bankr. Ct. Dec. (CRR) 799, 26 Collier Bankr. Cas. 2d (MB) 551, Bankr. L. Rep. (CCH) P 74439 (5th Cir. 1992) (finding postpetition penalties, fees, and costs on nonconsensual tax liens were not recoverable under section 506(b) in the absence of an agreement); In re Tricca, 196 B.R. 214, 218-20, 35 Collier Bankr. Cas. 2d (MB) 1528, Bankr. L. Rep. (CCH) P 77013 (Bankr. D. Mass. 1996) (finding oversecured creditor was not entitled to attorney's fees as part of its secured claim where such fees did not arise by agreement but under state law; however, creditor could maintain unsecured claim for such fees); In re Vulpetti, 182 B.R. 923, 927, 27 Bankr. Ct. Dec. (CRR) 409, Bankr. L. Rep. (CCH) P 76571 (Bankr. S.D. Fla. 1995) ("The Bankruptcy Code does not authorize payment of fees where, as here, there is no consensual security agreement providing for the creation of a lien. When the lien arises by statute, the secured party is placed in a superior position to that of unsecured creditors, but this improved position does not extend to the payment of fees under § 506(b)."); Matter of Provincetown-Boston Airline, Inc., 67 B.R. 66, 69 (Bankr. M.D. Fla. 1986) ("The Bankruptcy Code does not authorize payment of attorney's fees where, as here, there is no consensual security agreement providing for the creation of a lien. When the lien arises by statute, the secured party is placed in a superior position to that of unsecured creditors, but this improved position does not extend to the payment of fees under § 506(b).").

69. 11 U.S.C.A. § 506(b) (2006) (emphasis added).

70. Since section 506(b) explicitly refers to state law, it is unclear whether attorney's fees arising under federal law can be included in the allowed amount of an oversecured claim. Arguably, since Congress chose to use the phrase "State statutes" as opposed to "applicable law" or "state and federal law," secured claims arising under federal law should not include attorney's fees.

71. See cases cited supra note 67.

72. 11 U.S.C.A. § 506(b) (2006).

73. See In re Welzel, 275 F.3d 1308, 1315, 38 Bankr. Ct. Dec. (CRR) 237 (11th Cir. 2001) (en banc) ("[E]ven if contractually set attorney's fees owed to oversecured creditors are enforceable under state law because they are vested and comply with state notice procedures, it does not follow that the fees are per se reasonable under the Bankruptcy Code."); In re Hudson Shipbuilders, Inc., 794 F.2d 1051, 1057, Bankr. L. Rep. (CCH) P 71263 (5th Cir. 1986) ("[F]ederal law should be the measure of 'reasonableness' called for by 11 U.S.C. § 506(b)."); Matter of 268 Ltd., 789 F.2d 674, 675-76, 14 Collier Bankr. Cas. 2d (MB) 904, Bankr. L. Rep. (CCH) P 71137 (9th Cir. 1986) ("[Sanson] argues that if the contractual fee provision would be enforceable under Nevada law, then the amount provided is reasonable per se under § 506(b). Reasonableness and enforceability are not, however, coterminous."); In re Staggie, 255 B.R. 48, 52 (Bankr. D. Idaho 2000) ("The standard employed to determine 'reasonableness' is one based on federal law."); In re Lund,

187 B.R. 245, 250 (Bankr. N.D. Ill. 1995) ("In making a determination of reasonableness, the Court does not look to state law, but rather, makes an independent evaluation."); In re Harper, 146 B.R. 438, 444 (Bankr. N.D. Ind. 1992) ("the reasonableness of any attorney's fees awarded pursuant to any such agreement is determined by a federal standard"); In re Smith, 109 B.R. 421, 422 (Bankr. D. Mont. 1988) ("To determine the reasonableness of an oversecured creditor's attorney's fees and costs under § 506(b), the Court must apply federal law and not state law to the underlying contract.").

74. See, e.g., Lund, 187 B.R. at 251:

> Several factors that must be considered...in determining the reasonableness of fees under § 506(b) are: 1) time and labor required; 2) novelty and difficulty of questions; 3) skill requisite to perform legal services; 4) preclusion of other employment by acceptance of the case; 5) customary fee; 6) whether the fee sought is fixed or contingent; 7) time limitations; and 8) the amount involved and results achieved.

Smith, 109 B.R. at 423 ("When determining the award of reasonable attorney's fees the Court may consider several factors. Such factors may include the time and labor devoted to the matter, its difficulty, whether the fee is fixed or contingent, the amount of claim involved, the results obtained, and other awards in similar cases.").

75. See cases cited infra note 76.

76. See Welzel, 275 F.3d at 1315 ("we conclude that in the oversecured creditor context, § 506(b) applies a reasonableness standard across-the-board to all contractually set attorney's fees"); In re Schriock Const., Inc., 104 F.3d 200, 203, 30 Bankr. Ct. Dec. (CRR) 195, 37 Collier Bankr. Cas. 2d (MB) 575, Bankr. L. Rep. (CCH) P 77221 (8th Cir. 1997) ("We disagree with the bankruptcy court's reasoning that it is mere happenstance that a fee provision unenforceable under state law would be given effect in bankruptcy proceedings; rather, that is the clearly intended effect of section 506(b)."); Hudson Shipbuilders, Inc., 794 F.2d at 1056 ("Congress intended that federal law should govern the enforcement of attorneys' fees provisions, notwithstanding contrary state law."); Unsecured Creditors' Committee 82-00261c-11A v. Walter E. Heller & Co. Southeast, Inc., 768 F.2d 580, 585, 13 Bankr. Ct. Dec. (CRR) 612, 13 Collier Bankr. Cas. 2d (MB) 105, Bankr. L. Rep. (CCH) P 70652 (4th Cir. 1985) ("[W]e conclude that, in rejecting the House version of § 506(b), Congress intended to abrogate the pre-existing requirement that attorney's fee agreements were enforceable only in accordance with state law."); In re Virginia Foundry Co., Inc., 9 B.R. 493, 497 (W.D. Va. 1981) (rejected by, In re Francis, 42 B.R. 760 (Bankr. E.D. Mo. 1984)) ("even if such interest, fees, costs or charges are not allowable under state law, they may be allowed as a matter of federal law by the bankruptcy court"); In re Center, 282 B.R. 561, 565, 40 Bankr. Ct. Dec. (CRR) 65, 2002 BNH 29 (Bankr. D. N.H. 2002) ("[T]his Court agrees with the majority view and holds that section 506(b) preempts state law with respect to the addition to an allowed secured claim in a bankruptcy proceeding of interest and reasonable fees, costs or charges provided for under the agreement under which such claim arose when the value of the collateral securing the claim exceeds the amounts of the claim."); Harper, 146 B.R. at 444 ("the validity and enforceability of such agreements for attorney's fees be determined by federal law"); In re McGaw Property Management, Inc., 133 B.R. 227, 230, 22 Bankr. Ct. Dec. (CRR) 369, 25 Collier Bankr. Cas. 2d (MB) 1517 (Bankr. C.D. Cal. 1991) ("Section 506(b)...establishes a federal right to reasonable attorney's fees for the oversecured creditor irrespective of state law."); In re Bristol, 92 B.R. 276, 278 (Bankr. S.D. Ohio 1988) ("reasonable attorney fees should be allowed as part of an allowed secured claim to the extent the collateral has value to support such allowance if such fees are provided for in the agreement under which the obligation arose, notwithstanding state law to the contrary"); In re American Metals Corp., 31 B.R. 229, 234, 9 Collier Bankr. Cas. 2d (MB) 168, Bankr. L. Rep. (CCH) P 69329 (Bankr. D. Kan. 1983) ("A review of the legislative history, case law and commentators convinces this Court that § 506(b) allows an oversecured creditor attorney fees if provided for in the security agreement, notwithstanding contrary state law.").

77. See In re Dent, 137 B.R. 78, 82 (Bankr. S.D. Ga. 1992) ("The attorney's fees provision of the note, security agreement and deed to secure debt are unenforceable [under Georgia law]. Therefore, under § 506 there is no enforceable provision for recovery of attorney's fees."); In re Morse Tool, Inc., 87 B.R. 745, 748, Bankr. L. Rep. (CCH) P 72437 (Bankr. D. Mass. 1988) ("[Section] 506(b) does not supplant state law, rather, it supplements state law, so that a charge within the purview of § 506(b) must be enforceable under applicable state law, as § 502(b)(1) requires, *and* must be reasonable within the meaning of § 506(b)") (emphasis in original); In re Banks, 31 B.R. 173, 175, 9 Bankr. Ct. Dec. (CRR) 1413 (Bankr. N.D. Ala. 1982) ("It is well established that in a bankruptcy proceeding the validity and construction of a clause in a note or mortgage providing for attorney's fees is a matter of state law."); In re Dye Master Realty, Inc., 15 B.R. 932, 935-36, 8 Bankr. Ct. Dec. (CRR) 475 (Bankr. W.D. N.C. 1981) ("[B]efore a creditor's attorneys fees can be awarded under Section 506(b), and thus made part of the secured claim of that creditor, there must have been compliance with the applicable state law as to fulfillment of any conditions precedent to such recovery. Validity and construction of contracts stipulating attorneys' fees is [sic] a question of state law."); In re Sholos, 11 B.R. 782, 785, 8 Bankr. Ct. Dec. (CRR) 109, Bankr. L. Rep. (CCH) P 68223 (Bankr. W.D. Pa. 1981) ("the validity in bankruptcy proceedings of a provision in a secured note calling for attorney's fees presents a question of state law").

78. See 11 U.S.C.A. § 502(b)(1) (2006) (providing that a claim shall be allowed as filed except to the extent that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured").

79. The last pronouncements from both the House and the Senate prior to the enactment of the Bankruptcy Code in 1978 suggest that attorney's fees should be enforceable under section 506(b) of the Bankruptcy Code even if such fees might not be enforceable under state law:

> Section 506(b) of the House amendment adopts the language contained in the Senate amendment and rejects language contained in H.R. 8200 as passed by the House. If the security agreement between the parties provides for attorneys' fees, it will be enforceable under title [11], notwithstanding contrary law, and is recoverable from the collateral after any recovery under section 506(c).

124 Cong. Rec. H11,095 (daily ed. Sept. 28, 1978); S17,411 (daily ed. Oct. 6, 1978).

80. See cases cited supra note 76.

81. 11 U.S.C.A. § 510(a) (2006) ("A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.").

82. See In re Time Sales Finance Corp., 491 F.2d 841, 844 (3d Cir. 1974) ("we cannot say that [the district court's] refusal to allow post-petition interest constituted an abuse of the discretion it has with regard to the exercise of its equitable power"); In re Credit Indus. Corp., 366 F.2d 402, 410, 22 A.L.R.3d 897 (2d Cir. 1966) ("A bankruptcy court, in order to effectuate its duty to do equity, must enforce lawful subordination agreements according to their terms and prevent junior creditors from receiving funds where they have 'explicitly agreed not to accept them.'"); see also In re Bank of New England Corp., 364 F.3d 355, 362, 42 Bankr. Ct. Dec. (CRR) 243, 51 Collier Bankr. Cas. 2d (MB) 1634, Bankr. L. Rep. (CCH) P 80079 (1st Cir. 2004) ("subordination provisions were enforced in bankruptcy [prior to the enactment of the Bankruptcy Code] through the bankruptcy court's equitable powers"); In re Ionosphere Clubs, Inc., 134 B.R. 528, 533, 22 Bankr. Ct. Dec. (CRR) 651, 26 Collier Bankr. Cas. 2d (MB) 955 (Bankr. S.D. N.Y. 1991) ("Since the enactment of the Bankruptcy Code and section 510(a), enforcement of subordination provisions is no longer solely an application of the court's equitable powers. It is mandated by statute.").

83. See Matter of King Resources Co., 528 F.2d 789, 792 (10th Cir. 1976) ("If a creditor desires to establish a right to post-petition interest and a concomitant reduction in the dividends due to subordinated creditors, the agreement should clearly show that the general rule that interest stops on the date of the filing of the petition is to be suspended, at least vis-a-vis these parties.");

In re Kingsboro Mortg. Corp., 514 F.2d 400, 401 (2d Cir. 1975) ("Post-petition interest...is...not recoverable by senior creditors out of dividends due from the estate to junior creditors, at least absent a structure of priorities among creditors by express provision in the subordination contract."); Time Sales Fin. Corp., 491 F.2d at 844 ("If a creditor desires to establish a right to post-petition interest and a concomitant reduction in the dividends due to subordinated creditors, the agreement should clearly show that the general rule that interest stops on the date of the filing of the petition is to be suspended."); In re King Resources Co., 385 F. Supp. 1269, 1279 (D. Colo. 1974), judgment aff'd, 528 F.2d 789 (10th Cir. 1976) ("If a creditor desires to establish a right to post-petition interest and a concomitant reduction in the dividends due to subordinated creditors, the agreement should clearly show that the general rule that interest stops on the date of the filing of the petition is to be suspended, at least vis-a-vis these parties.").

84. See cases cited supra note 83.

85. Compare cases cited infra note 86 with cases cited infra note 87.

86. See In re Southeast Banking Corp., 179 F.3d 1307, 1310, 34 Bankr. Ct. Dec. (CRR) 755, 42 Collier Bankr. Cas. 2d (MB) 639, Bankr. L. Rep. (CCH) P 77953 (11th Cir. 1999) ("[W]e conclude that the district court was correct in the portion of its opinion affirming the bankruptcy court's holding that Chase and Gabriel may not claim post-petition interest or reasonable costs or fees for prosecuting this action because the right to post-petition interest, fees, or costs is not 'clearly, explicitly, precisely, and unambiguously provided for in the indentures.'"); Ionosphere Clubs, Inc., 134 B.R. at 533-34 ("[T]he First Series Trustee has not disputed the continuing validity of Kingsboro and it is not clear to this Court that it is inconsistent with § 510(a). Therefore, this Court concludes that Kingsboro retains its vitality and remains the controlling law in the Second Circuit.").

87. See In re Bank of New England Corp., 364 F.3d 355, 363, 42 Bankr. Ct. Dec. (CRR) 243, 51 Collier Bankr. Cas. 2d (MB) 1634, Bankr. L. Rep. (CCH) P 80079 (1st Cir. 2004) ("There is simply no reason to believe that the New York courts would apply the Rule of Explicitness outside of the bankruptcy context. Accordingly, the Rule of Explicitness cannot hold sway.").

88. Bank of New England Corp., 364 F.3d at 366 (finding the Rule of Explicitness no longer applicable under section 510(a) of the Bankruptcy Code and looking to "general principles of contract enforcement" to determine whether the subordination provision is enforceable).

89. See Bank of New England Corp., 364 F.3d at 367-68 (finding that a senior creditor could receive postpetition interest under section 510(a) of the Bankruptcy Code notwithstanding section 502(b)(2) of the Bankruptcy Code).

90. 11 U.S.C.A. § 1129(b)(1) (2006):

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

91. For cramdown purposes, the allowed amount of a secured claim is determined on the date the plan is confirmed and not the petition date. See In re Ahlers, 794 F.2d 388, 400 n.14, 14 Bankr. Ct. Dec. (CRR) 768, 15 Collier Bankr. Cas. 2d (MB) 111, Bankr. L. Rep. (CCH) P 71227 (8th Cir. 1986), judgment rev'd on other grounds, 485 U.S. 197, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) P 72186 (1988) (finding that for cramdown purposes, the collateral securing a creditor's claim is valued at or in close proximity to the date of confirmation); In re Moreau, 135 B.R. 209, 213 (N.D. N.Y. 1992) (same); In re Cason, 190 B.R. 917, 925, 34 Collier Bankr. Cas. 2d (MB) 1476 (Bankr. N.D. Ala. 1995) (same); In re Stanley, 185 B.R. 417, 425, 27 Bankr. Ct. Dec. (CRR) 917, 34 Collier

Bankr. Cas. 2d (MB) 473 (Bankr. D. Conn. 1995) (same); In re Union Meeting Partners, 178 B.R. 664, 674 (Bankr. E.D. Pa. 1995) (same); In re Columbia Office Associates Ltd. Partnership, 175 B.R. 199, 202, 32 Collier Bankr. Cas. 2d (MB) 621 (Bankr. D. Md. 1994) (same); Matter of Atlanta Southern Business Park, Ltd., 173 B.R. 444, 450, 26 Bankr. Ct. Dec. (CRR) 138, 32 Collier Bankr. Cas. 2d (MB) 174 (Bankr. N.D. Ga. 1994) (same); In re Schreiber, 163 B.R. 327, 332, 25 Bankr. Ct. Dec. (CRR) 283, 30 Collier Bankr. Cas. 2d (MB) 1105, Bankr. L. Rep. (CCH) P 75848, 94-1 U.S. Tax Cas. (CCH) P 50202, 73 A.F.T.R.2d 94-1132 (Bankr. N.D. Ill. 1994) (same); In re Melgar Enterprises, Inc., 151 B.R. 34, 39, 23 Bankr. Ct. Dec. (CRR) 1681 (Bankr. E.D. N.Y. 1993) (same); Matter of Savannah Gardens-Oaktree, 146 B.R. 306, 308 (Bankr. S.D. Ga. 1992) (same); Matter of Seip, 116 B.R. 709, 711, 20 Bankr. Ct. Dec. (CRR) 1206, 24 Collier Bankr. Cas. 2d (MB) 123 (Bankr. D. Neb. 1990) (same). But see In re Beard, 108 B.R. 322, 327, 19 Bankr. Ct. Dec. (CRR) 1801, 22 Collier Bankr. Cas. 2d (MB) 341 (Bankr. N.D. Ala. 1989) (finding that collateral values should be determined on the petition date for purposes of confirming a Chapter 11 plan).

92. 11 U.S.C.A. § 1129(b)(2) (2006):

> For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides—
>
> (i) (I) that the holder of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

93. See 11 U.S.C.A. § 1129(a)(10) (2006) ("If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.").

94. 11 U.S.C.A. § 1129(b)(2)(A)(i) (2006).

95. 11 U.S.C.A. § 1123(a)(5)(H) (2006) (providing for the "extension of a maturity date or a change in an interest rate or other term of outstanding securities"); see, e.g., In re Mulberry Agr. Enterprises, Inc., 113 B.R. 30, 33 (D. Kan. 1990) ("The Court believes that § 1129 does not per se prohibit long term payouts."); In re Manion, 127 B.R. 887, 890 (Bankr. N.D. Fla. 1991) ("It has been consistently held that § 1129 does not per se prohibit long term payouts ...Section 1129(b) requires that the dissenting claimant receive full payment over a reasonable period of time."); In re Dilts, 126 B.R. 470, 472 (Bankr. W.D. Pa. 1991) ("If the Debtor utilizes his power to modify an obligation over the objection of a secured creditor under § 1123, it is the 'cramdown' provision of § 1129(b) that enables the Debtor to force the modification upon the creditor."); In re Crane Automotive, Inc., 88 B.R. 81, 83, 19 Collier Bankr. Cas. 2d (MB) 307, Bankr. L. Rep. (CCH) P 72372 (Bankr. W.D. Pa. 1988) ("The Bankruptcy Code permits a Chapter 11 debtor to modify both the contractual rate of interest of a secured claim and to pay a secured claim in deferred cash payments which extend beyond the original maturity date of the underlying obligation."); In re

Mulnix, 54 B.R. 481, 484, 13 Collier Bankr. Cas. 2d (MB) 969 (Bankr. N.D. Iowa 1985) ("The Court believes that § 1129 does not per se prohibit long term payouts.").

96. "Negative amortization refers to 'a provision wherein part or all of the interest on a secured claim is not paid currently but instead is deferred and allowed to accrue,' with the accrued interest added to the principal and paid when income is higher." Great Western Bank v. Sierra Woods Group, 953 F.2d 1174, 1176, 22 Bankr. Ct. Dec. (CRR) 949, 26 Collier Bankr. Cas. 2d (MB) 342, Bankr. L. Rep. (CCH) P 74428 (9th Cir. 1992).

97. See Great W. Bank, 953 F.2d at 1178. The factors that are relevant to determining whether negative amortization is permissible:

1. Does the Plan offer a market rate of interest and present value of the deferred payments;
2. Is the amount and length of the proposed deferral reasonable;
3. Is the ratio of debt to value satisfactory throughout the plan;
4. Are the debtor's financial projections reasonable and sufficiently proven, or is the plan feasible;
5. What is the nature of the collateral; and is the value of the collateral appreciating, depreciating, or stable;
6. Are the risks unduly shifted to the creditor;
7. Are the risks borne by one secured creditor or class of secured creditors;
8. Does the plan preclude the secured creditor's foreclosure;
9. Did the original loan terms provide for negative amortization; and
10. Are there adequate safeguards to protect the secured creditor against plan failure.

In re Sunflower Racing, Inc., 226 B.R. 673, 688-89 (D. Kan. 1998) (same); In re Howard, 212 B.R. 864, 878, 38 Collier Bankr. Cas. 2d (MB) 1082 (Bankr. E.D. Tenn. 1997) (same); In re Carlton, 186 B.R. 644, 649 (Bankr. E.D. Va. 1994) (same); In re Calvanese, 169 B.R. 104, 111, Bankr. L. Rep. (CCH) P 75993 (Bankr. E.D. Pa. 1994) (same); In re Oaks Partners, Ltd., 141 B.R. 453, 457, 22 Bankr. Ct. Dec. (CRR) 1587 (Bankr. N.D. Ga. 1992) (same); see also Matter of D & F Const. Inc., 865 F.2d 673, 676, 18 Bankr. Ct. Dec. (CRR) 1529, 20 Collier Bankr. Cas. 2d (MB) 716, Bankr. L. Rep. (CCH) P 72719 (5th Cir. 1989) ("We do not hold there can never be an occasion when negative amortization would be fair and equitable."); In re Apple Tree Partners, L.P., 131 B.R. 380, 395 (Bankr. W.D. Tenn. 1991) ("In assessing whether negative amortization plans may be considered to be fair and equitable to an oversecured creditor, this Court is not prepared to adopt a per se rule that such a plan could never be fair and equitable."); In re Orfa Corp. of Philadelphia, 129 B.R. 404, 419 (Bankr. E.D. Pa. 1991) ("The existence of a negative amortization feature in the original loan supports the fairness of such payment terms in the Plan."); In re Club Associates, 107 B.R. 385, 400, 19 Bankr. Ct. Dec. (CRR) 1708 (Bankr. N.D. Ga. 1989), subsequently aff'd, 956 F.2d 1065, 22 Bankr. Ct. Dec. (CRR) 1294, Bankr. L. Rep. (CCH) P 74526 (11th Cir. 1992) and (rejected by, In re Landing Associates, Ltd., 157 B.R. 791 (Bankr. W.D. Tex. 1993)) ("[T]he negative amortization proposed in the Plan is fair and equitable."); In re Memphis Partners, L.P., 99 B.R. 385, 388, 19 Bankr. Ct. Dec. (CRR) 742, Bankr. L. Rep. (CCH) P 72889 (Bankr. M.D. Tenn. 1989) ("The court agrees that, with an appropriate interest rate, a negative amortization plan can mathematically provide present value."); In re Century Inv. Fund VII Ltd. Partnership, 96 B.R. 884, 891 (Bankr. E.D. Wis. 1989) ("a plan [calling for negative amortization] is not necessarily unfair per se under 11 U.S.C. § 1129(b)(2)(A)(i)(II)"); In re Spanish Lake Associates, 92 B.R. 875, 878, 18 Bankr. Ct. Dec. (CRR) 693 (Bankr. E.D. Mo. 1988) ("This Court...is reluctant to place a blanket prohibition on negative amortization and believes the issue should be resolved on a case-by-case basis."). But see In re McCombs Properties VIII, Ltd., 91 B.R. 907,

911 (Bankr. C.D. Cal. 1988) ("I do not believe Congress had in mind the deferral of any portion of the current interest payments required to make a secured creditor whole under the fair and equitable test.").

98. See Lawrence P. King, Collier on Bankruptcy ¶ 1129.05[2][a][ii] (15th rev. ed. 2005) ("The primary issue litigated under section 1129(b)(2)(A)(i) is the appropriate interest rate that the deferred payments will bear.").

99. 11 U.S.C.A. § 1129(b)(2)(A)(i)(II) (2006).

100. If the secured creditor makes an 1111(b) Election, the allowed amount of its claim is determined without regard to section 506, and is thus equal to the total amount of the indebtedness. See 11 U.S.C.A. § 1111(b)(2) (2006) ("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 [under section 502 of the Bankruptcy Code].").

101. Present value is represented by the formula $PV = P/(1+I)^N$, where PV is present value, P is the future amount, I is the discount rate, expressed as a decimal and N is the number of periods discounted. Accordingly, the present value of $100 payable in 2 years at a 7% discount rate is $87.34 or $\$100/(1 + 0.05)^2$.

102. See, e.g., In re Bryson Properties, XVIII, 961 F.2d 496, 500, 22 Bankr. Ct. Dec. (CRR) 1391, 26 Collier Bankr. Cas. 2d (MB) 1290, Bankr. L. Rep. (CCH) P 74545 (4th Cir. 1992) ("Under the second requirement, total deferred payments must have a 'present value' equal to the amount of the allowed secured claim."); Corestates Bank, N.A. v. United Chemical Technologies, Inc., 202 B.R. 33, 51, 37 Collier Bankr. Cas. 2d (MB) 520 (E.D. Pa. 1996) ("In order for the Plan to satisfy § 1129(b)(2)(A)(i)(II), it must provide CoreStates with deferred cash payments totaling at least the present value of its claim."); Matter of Bugg, 172 B.R. 781, 785, 26 Bankr. Ct. Dec. (CRR) 84, 32 Collier Bankr. Cas. 2d (MB) 650, Bankr. L. Rep. (CCH) P 76127 (E.D. Pa. 1994) ("The 'fair and equitable' standard requires that a secured claim holder retain its lien and receive deferred cash payments totalling [sic] at least the allowed amount of the claimant's secured claim and a present value equal to the value of its collateral."); In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 232 (Bankr. D. N.J. 2000) ("The first example in effect substitutes a new loan for the previous indebtedness, in the amount of the allowed secured claim, with a replacement lien against the property, and with payments going to the secured claimant going forward, adjusted for present value."); In re Ridgewood Apartments of DeKalb County, Ltd., 183 B.R. 784, 791, 33 Collier Bankr. Cas. 2d (MB) 873 (Bankr. S.D. Ohio 1995) ("Subsection (A)(i)(II) of § 1129(b)(2) contemplates that each holder of a claim in a dissenting class of secured claims, if it is to be paid in deferred cash payments, must receive a total amount equal in value, as of the effective date of the plan, of at least the value of the secured claim. As the legislative history reflects, this requirement recognizes the concept of the "time-value" of money."); In re Bloomingdale Partners, 155 B.R. 961, 974, 28 Collier Bankr. Cas. 2d (MB) 1600, Bankr. L. Rep. (CCH) P 75328 (Bankr. N.D. Ill. 1993) ("[T]he payments under the plan must satisfy two requirements: (1) the simple, arithmetic total of the stream of payments must at least equal the total claim, and (2) those payments must have a present value equal to the value of the collateral."); H.R. Rep. No. 595, 1st Sess. 414 (1977) ("This contemplates a present value analysis that will discount value to be received in the future.").

103. See, e.g., GMAC, 999 F.2d at 70 ("The contract rate of interest is, of course, the rate that the creditor voluntarily agreed to accept at an earlier date. While in some cases the passage of time will have seen a material increase or decrease in the lending rate of the creditor, the contract rate is a fair place to begin."); Matter of Smithwick, 121 F.3d 211, 214 (5th Cir. 1997) ("In the absence of a stipulation regarding the creditor's current rate for a loan of similar character, amount and duration, we believe it would be appropriate for bankruptcy courts to accept a plan utilizing the contract rate.") (quotation omitted); see also Matter of Kauffunger, 16 B.R. 666, 668 (Bankr. D. N.J. 1981) ("this Court feels that the contract rate of interest should not be disturbed"); Matter of Cooper, 11 B.R. 391, 394, 7 Bankr. Ct. Dec. (CRR) 854, 4 Collier Bankr. Cas. 2d (MB) 564 (Bankr. N.D. Ga. 1981) (rejected by, In re Caudill, 82 B.R. 969 (Bankr. S.D. Ind. 1988)) ("[I]n the

absence of evidence introduced by the parties, there is a presumption that the contract rate of interest is the appropriate rate of deferred compensation where, in effect, an involuntary loan is required under the cram-down provision of § 1325(a)(5)(B)(ii)."); Matter of Smith, 4 B.R. 12, 13, 6 Bankr. Ct. Dec. (CRR) 424, 2 Collier Bankr. Cas. 2d (MB) 77 (Bankr. E.D. N.Y. 1980) ("absent evidence which would rebut a presumption that the discount rate and contract rate are equivalent, this Court holds that the two rates are the same").

104. See, e.g., In re Valenti, 105 F.3d 55, 63, 30 Bankr. Ct. Dec. (CRR) 210, Bankr. L. Rep. (CCH) P 77251 (2d Cir. 1997) (abrogated by, Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S. Ct. 1879, 138 L. Ed. 2d 148, 30 Bankr. Ct. Dec. (CRR) 1254, 37 Collier Bankr. Cas. 2d (MB) 744, Bankr. L. Rep. (CCH) P 77409 (1997)) and (holding modified by, In re Marquez, 270 B.R. 761 (Bankr. D. Ariz. 2001)):

> [W]e hold that the market rate of interest under § 1325(a)(5)(B)(ii) should be fixed at the rate on a United States Treasury instrument with a maturity equivalent to the repayment schedule under the debtor's reorganization plan...Because the rate on a treasury bond is virtually risk-free, the § 1325(a)(5)(B)(ii) interest rate should include a premium to reflect the risk to the creditor in receiving deferred payments under the reorganization plan.

In re Fowler, 903 F.2d 694, 697, 22 Collier Bankr. Cas. 2d (MB) 1659, Bankr. L. Rep. (CCH) P 73390 (9th Cir. 1990) ("The second method for determining the appropriate market rate is the use of a formula. Under this approach, the court starts with a base rate...and adds a factor based on the risk of default and the nature of the security...We approved the use of the formula approach."); U.S. v. Doud, 869 F.2d 1144, 1146, 19 Bankr. Ct. Dec. (CRR) 325, 20 Collier Bankr. Cas. 2d (MB) 1156, Bankr. L. Rep. (CCH) P 72809 (8th Cir. 1989) (rejected by, In re Cassell, 119 B.R. 89 (W.D. Va. 1990)) (using interest rate on treasury bonds plus a 2% risk premium to determine the interest in a Chapter 12 cramdown); In re Camino Real Landscape Maintenance Contractors, Inc., 818 F.2d 1503, 1508, 16 Collier Bankr. Cas. 2d (MB) 1341, Bankr. L. Rep. (CCH) P 71859, 88-1 U.S. Tax Cas. (CCH) P 9225, 61 A.F.T.R.2d 88-496 (9th Cir. 1987) (using the rate of interest on treasury obligation plus a risk factor to determine the present value of a tax claim under § 1129(a)(9)(C) of the Bankruptcy Code); In re Ivey, 147 B.R. 109, 117 (M.D. N.C. 1992) ("the [riskless rate plus] approach is to use the yield on a treasury bond of like maturity to the plan and typically add a 1-2% upward adjustment to account for risk of default under the plan"); In re DeMaggio, 175 B.R. 144, 151 (Bankr. D. N.H. 1994) ("For the reasons outlined in Computer Optics, the court will utilize the riskless rate as the basis for a present value analysis of the value of a secured creditor's claim for purposes of determining the appropriate treatment of the claim in a chapter 13 plan."); In re Oaks Partners, Ltd., 135 B.R. 440, 446-47, 22 Bankr. Ct. Dec. (CRR) 673, 26 Collier Bankr. Cas. 2d (MB) 721 (Bankr. N.D. Ga. 1991) ("If the plan were confirmed today, the Court would add 3% to the base rate of 7.24% [the average yield on a treasury obligation with a maturity matched to the term of the plan] and round upwards to the nearest quarter percent."); In re Computer Optics, Inc., 126 B.R. 664, 672, 24 Collier Bankr. Cas. 2d (MB) 1812 (Bankr. D. N.H. 1991) ("[T]he better approach is that taken in the Doud case and similar decisions that place the primary emphasis upon determining the appropriate riskless rate to reach the present value of the deferred stream of payments...with an additional upward adjustment possible in a appropriate case to take into account any general risk attributable to the closeness of the decision finding the plan to be feasible.").

105. See, e.g., In re Lambert, 194 F.3d 679, 684, 35 Bankr. Ct. Dec. (CRR) 44, Bankr. L. Rep. (CCH) P 78045 (5th Cir. 1999) ("We therefore conclude and hold that the proper rate of interest under 11 U.S.C. § 1129(a)(9)(C) is the current market rate equivalent to the rate the debtor would have to pay to borrow the same amount in the commercial loan market."); Wade v. Bradford, 39 F.3d 1126, 1130, 26 Bankr. Ct. Dec. (CRR) 301, 32 Collier Bankr. Cas. 2d (MB) 568, Bankr. L. Rep. (CCH) P 76186 (10th Cir. 1994) ("in the absence of special circumstances, such as the market rate being higher than the contract rate, Bankruptcy Courts should use the current market rate

of interest used for similar loans in the region") (quoting Hardzog v. Fed. Land Bank (In re Hardzog), 901 F.2d 858, 860 (10th Cir. 1990)); United Carolina Bank v. Hall, 993 F.2d 1126, 1130, 24 Bankr. Ct. Dec. (CRR) 508, 28 Collier Bankr. Cas. 2d (MB) 1388 (4th Cir. 1993) ("Therefore we conclude that it is fairer to treat the value of the collateral retained by the debtor under the 'cram down' provision of Chapter 13 as a new loan and to match its rate of return to the secured creditor with that which the creditor would otherwise be able to obtain in its lending market."); U.S. v. Arnold, 878 F.2d 925, 929, 19 Bankr. Ct. Dec. (CRR) 978, 21 Collier Bankr. Cas. 2d (MB) 266 (6th Cir. 1989) ("Because we viewed the 'cramdown' provision of section 1325(a)(5)(B) as forcing the creditor to make a new loan in the amount of the current value of the collateral, we found the creditor entitled to the current market rate for similar loans at the time the loan was made."); U.S. v. Neal Pharmacal Co., 789 F.2d 1283, 1285, 14 Collier Bankr. Cas. 2d (MB) 708, Bankr. L. Rep. (CCH) P 71073, 86-1 U.S. Tax Cas. (CCH) P 9427, 57 A.F.T.R.2d 86-1125 (8th Cir. 1986) ("[I]n determining the discount rate, the court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration for the quality of the security and the risk of subsequent default.") (quoting Prudential Ins. Co. of Am. v. Monnier (In re Monnier Bros), 755 F.2d 1336, 1339 (8th Cir. 1985)); Matter of Southern States Motor Inns, Inc., 709 F.2d 647, 651, 10 Bankr. Ct. Dec. (CRR) 1470, 8 Collier Bankr. Cas. 2d (MB) 1283, Bankr. L. Rep. (CCH) P 69332 (11th Cir. 1983) ("[I]n determining the discount [interest] rate, the court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration of the quality of the security and the risk of subsequent default."); Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427, 431, 9 Bankr. Ct. Dec. (CRR) 1140, 7 Collier Bankr. Cas. 2d (MB) 727, Bankr. L. Rep. (CCH) P 68901, Bankr. L. Rep. (CCH) P 68946 (6th Cir. 1982) ("we hold that in the absence of special circumstances bankruptcy courts should use the current market rate of interest used for similar loans in the region"); In re Cassell, 119 B.R. 89, 94 (W.D. Va. 1990) ("this court follows the court in Hardzog and rejects the method advanced by Doud and concludes that any formula used initially must be determined by reference to the prevailing market rates"); In re Birdneck Apartment Associates, II, L.P., 156 B.R. 499, 508 (Bankr. E.D. Va. 1993) ("the appropriate discount rate used to calculate present value must be determined by reference to the 'market' interest rate for a loan of like terms, with due consideration for the quality of the collateral and the risk of subsequent default"); In re Shannon, 100 B.R. 913, 939, 19 Bankr. Ct. Dec. (CRR) 1157 (S.D. Ohio 1989) ("the Court now holds that the appropriate method for setting discount rates under section 1225(a)(5)(B)(ii) is to ascertain the market rate for similar loans among regional and local lenders pursuant to the coerced loan theory"); In re Milspec, Inc., 82 B.R. 811, 820, 17 Bankr. Ct. Dec. (CRR) 349, Bankr. L. Rep. (CCH) P 72216, 88-1 U.S. Tax Cas. (CCH) P 9263, 61 A.F.T.R.2d 88-615 (Bankr. E.D. Va. 1988) ("we adopt the market rate/case-by-case approach as set forth by the Eighth Circuit in *Neal*").

106. Prior to being amended under BAPCPA, 11 U.S.C.A. § 1325(a)(5) (2004) provided that:

> (5) with respect to each allowed secured claim provided for by the plan—
>
> (A) the holder of such claim has accepted the plan;
>
> (B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
>
> (C) the debtor surrenders the property securing such claim to such holder[.]

107. Till v. SCS Credit Corp., 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787, 43 Bankr. Ct. Dec. (CRR) 2, 51 Collier Bankr. Cas. 2d (MB) 642, Bankr. L. Rep. (CCH) P 80099 (2004).

108. See Till, 541 U.S. at 477-78 (rejecting the contract rate approach because it "improperly focuses on the creditor's potential use of the proceeds of a foreclosure sale" and tends to reward "poorly managed lenders with...higher cram down rates").

109. See Till, 541 U.S. at 477 (rejecting the forced loan approach because it is overly burdensome on courts and it tends to overcompensate creditors because the market lending rate is inflated by transaction costs that are not present in the context of a cramdown).

110. See Till, 541 U.S. at 478 (rejecting the cost of funds approach because "it mistakenly focuses on the creditworthiness of the *creditor* rather than the debtor.") (emphasis in original).

111. Till, 541 U.S. at 479 ("The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The court must therefore hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment."). At least one court attempting to apply Till, however, has concluded that since five justices did not agree on a legal rationale, Till does not produce binding precedent. See In re Cook, 322 B.R. 336, 341 (Bankr. N.D. Ohio 2005) ("That lack of a legal rationale shared by five Justices leads to the inescapable conclusion that Till does not produce binding precedent.").

112. In determining the risk premium, the Supreme Court instructs courts to consider the following four factors: "(1) the probability of plan failure; (2) the rate of collateral depreciation; (3) the liquidity of the collateral market; and (4) the administrative expenses of enforcement." Till, 541 U.S. at 484.

113. Cases decided since Till generally have favored the prime plus approach. See In re American HomePatient, Inc., 420 F.3d 559, 568 69, 45 Bankr. Ct. Dec. (CRR) 47, Bankr. L. Rep. (CCH) P 80341, 2005 FED App. 0345P (6th Cir. 2005), cert. denied, 127 S. Ct. 55, 166 L. Ed. 2d 251 (U.S. 2006) (affirming the bankruptcy court's and the district court's application of the coerced loan approach but stating "where no efficient market exists for a Chapter 11 debtor, then the bankruptcy court should employ the formula approach endorsed by the Till plurality"); In re Cantwell, 336 B.R. 688, 693, 45 Bankr. Ct. Dec. (CRR) 262 (Bankr. D. N.J. 2006) (holding that in the absence of an efficient market, the court would use the prime plus approach to calculate the appropriate rate of interest in a Chapter 11 case); In re Deep River Warehouse, Inc., 54 Collier Bankr. Cas. 2d (MB) 1777, 2005 WL 2319201 at *11 (Bankr. M.D. N.C. 2005) (reviewing Till and finding the prime plus approach applicable in a Chapter 11 case); In re Prussia Associates, 322 B.R. 572, 589-91, 44 Bankr. Ct. Dec. (CRR) 160 (Bankr. E.D. Pa. 2005) (reviewing Till and applying the prime plus approach where it was not possible to discern the market rate of interest from the testimony of the parties' experts).

114. Compare 11 U.S.C.A. § 1129(b)(2)(A)(i)(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"), with 11 U.S.C. § 1325(a)(5)(B)(ii) (2004) ("the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim").

115. Till, 541 U.S. at 474 (emphasis added).

116. There is language in Till, however, that supports the position that the prime rate plus approach is not appropriate in Chapter 11 when there is a readily apparent "cram down market rate of interest." In footnote 14, the Supreme Court stated, "[T]here is no free market of willing cram down lenders [in Chapter 13]. Interestingly, this is *not* true in the Chapter 11 context, as numerous lenders advertise financing for Chapter 11 debtors in possession...Thus, when picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." Till, 541 U.S. at 477 n.14 (emphasis in original). The reasoning of footnote 14 has been criticized on at least two grounds. First, the financing to which the Supreme Court refers in footnote 14 generally occurs at the beginning of a Chapter 11 case, in contrast to a loan imposed on a creditor under the First Cramdown Provision which occurs at the end of a Chapter

11 case when there is less risk because the debtor is presumably more stable. Second, the distinction drawn between cramdown loans under Chapter 13 and cramdown loans under Chapter 11 in footnote 14 is questionable as there is no more a market for a Chapter 13 cramdown loan than there is for a Chapter 11 cramdown loan. See Lawrence P. King, Collier on Bankruptcy ¶ 1129.06[1][c][i] (15th rev. ed. 2005) ("The problem with [the] suggestion [in footnote 14] is that the relevant market for involuntary loans in chapter 11 may be just as illusory as in chapter 13."); see also In re Prussia Associates, 322 B.R. 572, 591, 44 Bankr. Ct. Dec. (CRR) 160 (Bankr. E.D. Pa. 2005) (adopting the prime rate plus approach where it was not possible to reconcile the testimony of the parties' experts regarding the market rate of interest).

117. 11 U.S.C.A. § 1129(b)(2)(A)(ii) (2006).

118. See 11 U.S.C.A. § 363(k) (2006) ("At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.").

119. See 11 U.S.C.A. § 1111(b)(1)(A)(ii) (2006) (providing that a nonrecourse deficiency claim is not treated as a recourse obligation when the "property is sold under section 363 of this title or is to be sold under the plan"); 11 U.S.C.A. § 1111(b)(1)(B)(ii) (providing that a class of claims may not make election under section 1111(b)(2) of the Bankruptcy Code if "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"); Matter of T-H New Orleans Ltd. Partnership, 10 F.3d 1099, 1102, 30 Collier Bankr. Cas. 2d (MB) 478 (5th Cir. 1993) ("Under subsection (ii), however, a nonrecourse deficiency claim is not treated as a recourse obligation when there is a sale of the collateral at which a creditor may credit bid up to the full amount of its claim. However, subsection (ii) may only be utilized when a creditor is entitled to credit bid up to the full amount of its claim, not just the amount of its secured claim."); Matter of Tampa Bay Associates, Ltd., 864 F.2d 47, 50, 19 Bankr. Ct. Dec. (CRR) 97 (5th Cir. 1989) ("Section 1111(b)(1)(A)(ii) explicitly excepts from the election option any nonrecourse holder whose secured property is sold pursuant to 11 U.S.C. § 363 or pursuant to a plan of reorganization."); In re California Hancock, Inc., 88 B.R. 226, 229, 19 Collier Bankr. Cas. 2d (MB) 550 (B.A.P. 9th Cir. 1988) ("§ 1111(b)(1)(A)(ii) provides an exception to the above rule when the property is being sold *pursuant to a plan of reorganization*.") (emphasis in original); H & M Parmely Farms v. Farmers Home Admin., 127 B.R. 644, 648 (D.S.D. 1990) ("1111(b)(1)(B)(ii) precludes a recourse undersecured creditor's election under 1111(b)(2) if the secured property is sold under the plan or if a prospective sale of the property is made pursuant to 11 U.S.C. § 363."); In re 222 Liberty Associates, 108 B.R. 971, 979, 19 Bankr. Ct. Dec. (CRR) 1955 (Bankr. E.D. Pa. 1990) ("Case law holds that an undersecured lender, if unable to have its non-recourse claim converted to one with recourse under § 1111(b)(1)(A)...must be permitted to credit-bid at the sale of its collateral."); In re National Real Estate Ltd. Partnership-II, 104 B.R. 968, 975 (Bankr. E.D. Wis. 1989) ("Since ConCap has foreclosed upon the property of the debtor, it has received the benefit of its bargain. It is not entitled to status as a recourse claimant under § 1111(b) and has no unsecured claim against the debtor."); In re Woodridge North Apts., Ltd., 71 B.R. 189, 190, 15 Bankr. Ct. Dec. (CRR) 799 (Bankr. N.D. Cal. 1987) ("The controlling issue in this proceeding is whether the 'sale exception' to the general rule of section 1111(b)(1)(A) applies to a sale at which lienholders may not credit bid. I hold that it does not."); Rubinger & Marsh, "Sale of Collateral" Plans Which Deny a Nonrecourse Undersecured Creditor the Right to Credit Bid: Pine Gate Revisted, 10 Bankr. Dev. J. 265, 273 (1994) ("[R]ecourse treatment will be denied pursuant to this exception only if the property securing a nonrecourse creditor's obligation is to be sold *and* the creditor is given the right to credit bid at the sale.") (emphasis in original).

120. See Tampa Bay Assocs., Ltd., 864 F.2d at 50 ("The lender has the opportunity to become the highest bidder and take title to the property...With this protection, the nonrecourse secured lender does not need the statutory protection of section 1111(b)."); Cal. Hancock, Inc., 88 B.R. at 230 (finding § 1111(b) inapplicable when property is sold under the plan pursuant to section 363

of the Bankruptcy Code because "of the secured party's *right to bid* in the full amount of his allowed claim at any sale of collateral *under section 363(k)*") (emphasis in original); 222 Liberty Assocs., 108 B.R. at 979 ("Sale of property under section 363 or under the plan is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at any sale of collateral under section 363(k)."); Matter of DRW Property Co. 82, 57 B.R. 987, 992, 14 Collier Bankr. Cas. 2d (MB) 1032 (Bankr. N.D. Tex. 1986) ("If the property is being sold for less than the outstanding indebtedness and the lender feels this price is too low or if it feels future appreciation will be meaningful, it may bid the full amount of its debt at the sale and take title to the property. With this protection, the non-recourse secured lender does not need and therefore is not given the statutory protection of § 1111(b)."); Woodridge North Apts., Ltd., 71 B.R. at 192 ("the purpose of section 1111(b)(1)(A) is not satisfied by a sale at which the lienholder may not credit bid. In such circumstances, the lienholder still bears the risk of undervaluation.").

121. See In re TMA Associates, Ltd., 160 B.R. 172, 177, 24 Bankr. Ct. Dec. (CRR) 1462 (D. Colo. 1993) ("A sale of the debtor's property is permitted under section 1129(b)(2)(A)(ii) if the lien of a secured creditor attaches to the proceeds of the sale to the extent of the allowed amount of the claim...Because the protections of § 363(f) do not apply here, there was no need for the bankruptcy judge to address them."); In re Beker Industries Corp., 63 B.R. 474, 477, 15 Collier Bankr. Cas. 2d (MB) 52, Bankr. L. Rep. (CCH) P 71408 (Bankr. S.D. N.Y. 1986) ("[I]t is undisputed that collateralized property can be sold for less than the amount of the lien at confirmation by cramming down a secured creditor. Section 1129(b)(2)(A)(ii) so provides without any references to the protections of § 363(f)[.]"); Lawrence P. King, Collier on Bankruptcy ¶ 1129.05[2][b][iv] (15th rev. ed. 2005) ("Under [section 363(f)], a sale free and clear can occur under only one of five conditions. In particular, if the property to be sold is encumbered by liens in excess of its value, most cases under section 363(f) will not permit a sale free and clear. Under section 1129(b)(2)(A)(ii), however, there is no such limitation.").

122. 11 U.S.C.A. § 1129(b)(2)(A)(ii) (2006).

123. 11 U.S.C.A. § 1129(b)(2)(A)(ii) (2006).

124. See supra section III.A of this article.

125. See infra section III.C of this article.

126. 11 U.S.C.A. 1129(b)(2)(A)(iii) (2006).

127. In re Murel Holding Corp., 75 F.2d 941, 942 (C.C.A. 2d Cir. 1935) ("payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that...We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most indubitable equivalence.").

128. S. Rep. No. 95-989, at 127 (1978) ("The indubitable equivalent language [in Paragraph 9(A)] is intended to follow the strict approach taken by Judge Learned Hand in *In re Murel Holding Corp.*, 75 F.2d 941 (2nd Cir. 1935)."). The term "indubitable equivalent" also appears in section 361(3) of the Bankruptcy Code, which governs the provision of adequate protection under sections 362, 363 and 364 of the Bankruptcy Code. 11 U.S.C.A. § 361(3) ("When adequate protection is required under section 362, 363, or 364 of this title..., such adequate protection may be provided by—(3) granting such other relief...as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.").

129. See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 378, 108 S. Ct. 626, 98 L. Ed. 2d 740, 16 Bankr. Ct. Dec. (CRR) 1369, 17 Collier Bankr. Cas. 2d (MB) 1368, Bankr. L. Rep. (CCH) P 72113 (1988) ("In rejecting the plan, Murel used the words 'indubitable equivalence' with specific reference not to interest (which was assured), but to the jeopardized principal of the loan[.]"); In re Arnold & Baker Farms, 85 F.3d 1415, 1421-22, 29 Bankr. Ct. Dec. (CRR) 223, 35 Collier Bankr. Cas. 2d (MB) 1681, Bankr. L. Rep. (CCH) P 76975 (9th Cir. 1996) ("[W]e must decide whether the bankruptcy court's finding with respect to the

value of the real property for the purpose of determining the amount of the creditor's secured claim provided the secured creditor with the indubitable equivalent of its claim. In addition...the partial distribution must insure the safety of or prevent jeopardy to the principal."); In re Monnier Bros., 755 F.2d 1336, 1339, 12 Collier Bankr. Cas. 2d (MB) 323, Bankr. L. Rep. (CCH) P 70286 (8th Cir. 1985) ("Such *a substitute clearly must both compensate for present value and insure the safety of the principal.*") (quoting Am. Mariner Indus., 734 F.2d 426, 433 (9th Cir. 1984)) (emphasis in original); In re Wiersma, 324 B.R. 92, 111, 56 U.C.C. Rep. Serv. 2d 452 (B.A.P. 9th Cir. 2005), aff'd in part, rev'd in part, 483 F.3d 933, 48 Bankr. Ct. Dec. (CRR) 15 (9th Cir. 2007), for additional opinion, see, 2007 WL 1073782 (9th Cir. 2007) and aff'd in part, 2007 WL 1073782 (9th Cir. 2007) ("Judge Hand concluded that the creditor's right 'to get his money or at least the property' may be denied under a plan for reorganization only if the debtor provides 'a substitute of the most indubitable equivalence.' Such a substitute clearly must both compensate for present value and insure the safety of the principal."); In re Monarch Beach Venture, Ltd., 166 B.R. 428, 434, 24 Bankr. Ct. Dec. (CRR) 1555 (C.D. Cal. 1993) (stating that the plan must "(1) [provide] the creditor with the present value of its claim, and (2) [ensure] the safety of its principle [sic]" to satisfy the indubitable equivalent standard); In re San Felipe @ Voss, Ltd., 115 B.R. 526, 529 (S.D. Tex. 1990) ("If a reorganization plan proposes to satisfy an allowed secured claim with anything other than the secured creditor's collateral, a court must examine (1) whether the substituted security is completely compensatory and (2) the likelihood that the secured creditor will be paid."); In re Sparks, 171 B.R. 860, 866, 25 Bankr. Ct. Dec. (CRR) 1752, 32 Collier Bankr. Cas. 2d (MB) 329, Bankr. L. Rep. (CCH) P 76130 (Bankr. N.D. Ill. 1994) ("In the context of the 'fair and equitable' standard, courts have explained that a particular plan meets the 'indubitable equivalent' requirement if the plan '(1) provides the creditor with the present value of its claim, and (2) insures the safety of its principle [sic].'").

130. See In re Arnold & Baker Farms, 85 F.3d 1415, 1423, 29 Bankr. Ct. Dec. (CRR) 223, 35 Collier Bankr. Cas. 2d (MB) 1681, Bankr. L. Rep. (CCH) P 76975 (9th Cir. 1996) ("a creditor necessarily receives the indubitable equivalent of its secured claim when it receives the collateral securing that claim"); Matter of Sandy Ridge Development Corp., 881 F.2d 1346, 1350, 18 Bankr. Ct. Dec. (CRR) 13, 19 Bankr. Ct. Dec. (CRR) 1237, Bankr. L. Rep. (CCH) P 73070 (5th Cir. 1989) ("The current plan provides that LNB will receive Brightside itself, and since common sense tells us that property is the indubitable equivalent of itself, this portion of the current plan satisfies the 'indubitable equivalent' requirement."); In re Pennave Properties Associates, 165 B.R. 793, 795, Bankr. L. Rep. (CCH) P 75772 (E.D. Pa. 1994) ("Generally, return of collateral to a secured creditor provides that creditor with the indubitable equivalent of the secured claim."); Matter of Hock, 169 B.R. 236, 239 (Bankr. S.D. Ga. 1994) ("the abandonment of collateral provides a non-accepting secured creditor with the 'indubitable equivalent' of its secured claim"); In re Thornebrook Development Corp., 96 B.R. 350, 352, 20 Collier Bankr. Cas. 2d (MB) 885, Bankr. L. Rep. (CCH) P 72702 (Bankr. N.D. Fla. 1989) ("The legislative history of Section 1129 indicates that abandonment of property to a secured creditor is the indubitable equivalent, since the creditor then retains all of its bargained for state law rights, including that of seeking deficiency."); 124 Cong. Rec. H11,103 (daily ed. Sept. 28, 1978) (statement of the sponsors of Pub. L. No. 95-598) ("Abandonment of the collateral to the creditor would clearly satisfy indubitable equivalence, as would a lien on similar property."); 124 Cong. Rec. S17, 420 (daily ed. Oct. 6, 1978) (statement of the sponsors of Pub. L. No. 95-598) (same); Lawrence P. King, Collier on Bankruptcy ¶1129.05[2][c] (15th rev. ed. 2005) ("[A]bandonment, or other unqualified transfer of the collateral, to the secured creditor satisfies [section 1129(b)(2)(A)(iii) of the Bankruptcy Code.]").

131. See, e.g., Matter of Sun Country Development, Inc., 764 F.2d 406, 409, Bankr. L. Rep. (CCH) P 70633 (5th Cir. 1985) (finding 21 first liens held by the debtor on lots that it had sold were the indubitable equivalent of the single first lien held by the creditor on 200 adjacent lots because the present value of the notes was greater than the claim and the lots' value provided an equity cushion); San Felipe @ Voss, Ltd., 115 B.R. at 529-30 (finding securities with a value greater than the creditor's claim and a history of stability and liquidity were the indubitable equiv-

alent of a first mortgage on an office building); In re Keller, 157 B.R. 680, 686, 24 Bankr. Ct. Dec. (CRR) 948 (Bankr. E.D. Wash. 1993) ("Debtor's Plan which provides an annuity contract as substitute collateral for a partial release of Creditor's lien against property of the estate may satisfy the indubitable equivalent requirement of § 1129(b)(2)(A)(iii)").

132. See In re Temple Zion, 125 B.R. 910, 922 (Bankr. E.D. Pa. 1991) ("[A]ll that is required by § 1129(b)(2)(A)(iii) is that the creditor receive the indubitable equivalent of its claim. A cash payment of its claim in full is unquestionably the equivalent or better of RTC's retention of the full measure of its security interest in the Debtor's realty."); In re Future Energy Corp., 83 B.R. 470, 495, 17 Bankr. Ct. Dec. (CRR) 159 (Bankr. S.D. Ohio 1988) ("I conclude that Congress refined its language to the result that payment in cash is specifically authorized").

133. See cases cited supra note 129.

134. See 11 U.S.C.A. § 1129(b)(2)(A) (2006).

135. See 11 U.S.C.A. § 1126(f) (2006) ("Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required."); In re J T Thorpe Co., 308 B.R. 782, 787 (Bankr. S.D. Tex. 2003), aff'd, 2004 WL 720263 (S.D. Tex. 2004) ("Classes 1, 5, and 6 are Classes of unimpaired Claims and are conclusively presumed to have accepted the Plan under Section 1126(f) of the Bankruptcy Code."); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 771 (Bankr. S.D. N.Y. 1992) ("Each of the unimpaired classes of Claims...is conclusively presumed to have accepted the Plan and solicitation of acceptance with respect to each such Class is not required. 11 U.S.C. § 1126(f).").

136. See 11 U.S.C.A. § 1129(a)(8) (2006) ("With respect to each class of claims or interests—(A) such class has accepted the plan; or (B) such class is not impaired under the plan."); In re Polytherm Industries, Inc., 33 B.R. 823, 833, 11 Bankr. Ct. Dec. (CRR) 47, 9 Collier Bankr. Cas. 2d (MB) 758, Bankr. L. Rep. (CCH) P 69448 (W.D. Wis. 1983) ("Section 1129(a)(8) identifies those classes that cannot be subjected to cramdown: unimpaired classes and accepting impaired classes. Unimpaired classes affirmatively rejecting a reorganization plan do not qualify for cramdown protections[.]"). Because section 506(b) of the Bankruptcy Code is applicable under section 1129(a) of the Bankruptcy Code through section 1129(b) of the Bankruptcy Code, there arguably is no statutory basis for requiring a debtor to pay an unimpaired class of secured claims the allowed amount of such claims.

137. 11 U.S.C.A. § 1129(a)(7) (2006); see Matter of Madison Hotel Associates, 749 F.2d 410, 426, 12 Bankr. Ct. Dec. (CRR) 616, 11 Collier Bankr. Cas. 2d (MB) 771 (7th Cir. 1984) ("Prudential's claim is not impaired and thus, pursuant to 11 U.S.C. § 1126(f) Prudential is *deemed* to have accepted the plan, *notwithstanding* any provision to the contrary. In light of this fact, Prudential cannot now reject the plan under 11 U.S.C. § 1129(a)(7).") (emphasis in original); Continental Securities Corp. v. Shenandoah Nursing Home Partnership, 193 B.R. 769, 776 (W.D. Va. 1996), judgment aff'd, 104 F.3d 359 (4th Cir. 1996) ("A threshold finding of impairment is essential, however, because only if the creditor were part of an impaired class would § 1129(a)(7) be implicated—if the creditor was not impaired, then the plan could be confirmed pursuant to § 1129 even if the plan failed the 'best interests of creditors' test of § 1129(a)(7)."); In re Dow Corning Corp., 270 B.R. 393, 406 n.10, 2002-1 U.S. Tax Cas. (CCH) P 50155, 88 A.F.T.R.2d 2001-7262 (Bankr. E.D. Mich. 2001) ("the debtor could, of course, propose a plan which would leave the creditor's contractual rights unimpaired, thereby avoiding the best-interest test altogether"); In re Seatco, Inc., 257 B.R. 469, 480, 45 Collier Bankr. Cas. 2d (MB) 716 (Bankr. N.D. Tex. 2001), opinion modified on reconsideration, 259 B.R. 279, 45 Collier Bankr. Cas. 2d (MB) 1630 (Bankr. N.D. Tex. 2001) ("Class 3 creditors are unimpaired under the Plan and the best interest test is not applicable to them."); In re Sierra-Cal, 210 B.R. 168, 172 n.6, 31 Bankr. Ct. Dec. (CRR) 29, 38 Collier Bankr. Cas. 2d (MB) 562, Bankr. L. Rep. (CCH) P 77467 (Bankr. E.D. Cal. 1997) ("Since § 1129(a)(7) applies only to impaired classes, it can be bypassed entirely by leaving the pertinent class unimpaired."); In re New Valley Corp., 168 B.R. 73, 79, 25 Bankr. Ct. Dec. (CRR) 947

(Bankr. D. N.J. 1994) ("The terms of the subsection are straightforward, and the court concurs with the debtor that a plain and sensible reading of section 1129(a)(7)(A)(ii) yields the conclusion that an unimpaired class is not protected by the 'best interest of creditors' test."); In re Texaco Inc., 84 B.R. 893, 908, 17 Bankr. Ct. Dec. (CRR) 483, Bankr. L. Rep. (CCH) P 72235 (Bankr. S.D. N.Y. 1988) ("Because the Plan leaves all classes of claims and all classes of interests other than that of the Texaco Stockholders unimpaired, the best interests test is inapplicable with respect to those classes."); Lawrence P. King, 7 Collier on Bankruptcy ¶ 1129.03[7][a] (15th rev. ed. 2005) ("Section 1129(a)(7) begins by stating that it applies '[w]ith respect to each impaired class of claims or interests...This restricts its application only to creditors or interest holders who are members of *impaired* classes.") (emphasis in original).

138. 11 U.S.C.A. § 1124 (2006) provides that:

> Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—
>
> (1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or
>
> (2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—
>
> (A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;
>
> (B) reinstates the maturity of such claim or interest as such maturity existed before such default;
>
> (C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;
>
> (D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any pecuniary loss incurred by such holder as a result of such failure; and
>
> (E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

139. 11 U.S.C.A. § 1124(1) (2006). Under section 1124(1) of the Bankruptcy Code, the focus generally is on whether the claim is impaired by the plan as opposed to the operation of the provisions of the Bankruptcy Code. See In re PPI Enterprises (U.S.), Inc., 324 F.3d 197, 204, 41 Bankr. Ct. Dec. (CRR) 16, 49 Collier Bankr. Cas. 2d (MB) 1749, Bankr. L. Rep. (CCH) P 78824 (3d Cir. 2003) ("A closer inspection of the language employed in Section 1124(1) reveals 'impairment by statute' to be an oxymoron. Impairment results from what the *plan* does, not what the statute does.") (emphasis in original); In re Monclova Care Center, Inc., 254 B.R. 167, 177, 45 Collier Bankr. Cas. 2d (MB) 1000 (Bankr. N.D. Ohio 2000), rev'd in part on other grounds, 266 B.R. 792 (N.D. Ohio 2001), aff'd, 59 Fed. Appx. 660, 2003-1 U.S. Tax Cas. (CCH) P 50266, 91 A.F.T.R.2d 2003-1105 (6th Cir. 2003) ("impairment as used by § 1124 simply refers to that part of a debtor's Plan which addresses the treatment of a debtor's claim, and in this regard, a distinction must be drawn between the concept of 'plan impairment' and 'statutory impairment'"); In re American Solar King Corp., 90 B.R. 808, 819, 18 Bankr. Ct. Dec. (CRR) 270, 20 Collier Bankr. Cas. 2d (MB) 547 (Bankr. W.D. Tex. 1988) ("A closer inspection of the language employed in Section 1124(1) reveals 'impairment

by statute' to be an oxymoron. Impairment results from what the *plan* does, not what the statute does.") (emphasis in original); In re A.P.I., Inc., 331 B.R. 828, 862, 45 Bankr. Ct. Dec. (CRR) 141 (Bankr. D. Minn. 2005), order aff'd, 46 Bankr. Ct. Dec. (CRR) 168, 2006 WL 1473004 (D. Minn. 2006) ("Under Class 3-A, covering general unsecured claims, 'holders of these claims shall receive full payment on the Effective Date.' As such, these claims are not 'impaired' by the plan."); In re Mirant Corp., No. 03-46590-DML-11, 2005 Bankr. LEXIS 909, at *15 (Bankr. N.D. Tex. May 24, 2005) ("If the 'impairment' asserted is a consequence of the proper operation of the statute, it is not an impairment entitling the affected class to a vote."); but see In re Valley View Shopping Center, L.P., 260 B.R. 10, 32 (Bankr. D. Kan. 2001) ("[C]laims that are cashed out on the effective date of the plan can nevertheless be impaired within the meaning of § 1124."); In re Crosscreek Apartments, Ltd., 213 B.R. 521, 536, 38 Collier Bankr. Cas. 2d (MB) 1329 (Bankr. E.D. Tenn. 1997) ("if a plan proposed to pay a class of claims in cash in the full allowed amount of the claims, the class would be impaired entitling creditors to vote for or against the plan of reorganization"); In re Park Forest Development Corp., 197 B.R. 388, 395, 36 Collier Bankr. Cas. 2d (MB) 192 (Bankr. N.D. Ga. 1996) ("a class paid in full in cash is an impaired class under the current definition of impairment"); In re Atlanta-Stewart Partners, 193 B.R. 79, 82, 28 Bankr. Ct. Dec. (CRR) 774, 35 Collier Bankr. Cas. 2d (MB) 518 (Bankr. N.D. Ga. 1996) ("if a plan proposed to pay a class of claims in cash in the full allowed amount of the claims, the class would be impaired entitling creditors to vote for or against the plan of reorganization."); In re Willow Creek Apartments, Ltd., 28 Bankr. Ct. Dec. (CRR) 1243, 1996 WL 343450 at *3 (Bankr. M.D. N.C. 1996) (finding that a class of claims that would receive the full amount of their claims on the effective date was impaired under section 1124 of the Bankruptcy Code).

140. See In re L & J Anaheim Associates, 995 F.2d 940, 942, 24 Bankr. Ct. Dec. (CRR) 691, Bankr. L. Rep. (CCH) P 75304 (9th Cir. 1993) ("any alteration of the rights constitutes impairment even if the value of the rights is enhanced") (quoting In re Acequia, 787 F.2d 1352, 1363 (9th Cir. 1986)); In re Union Meeting Partners, 160 B.R. 757, 771 (Bankr. E.D. Pa. 1993) ("'impairment' is a term of art and includes virtually any alteration of a claimant's rights. Impairment therefore occurs even where a creditor's rights are improved by a plan."); Am. Solar King Corp., 90 B.R. at 819 ("even the smallest impairment nonetheless entitles a creditor to participate in voting"); In re Witt, 60 B.R. 556, 560, 14 Collier Bankr. Cas. 2d (MB) 1335 (Bankr. N.D. Iowa 1986) ("even minor impairment of a claim is sufficient and proper to establish that a claim is impaired").

141. See Lawrence P. King, 7 Collier on Bankruptcy ¶ 1124.02[2] (15th rev. ed. 2005) ("Assuming that all payments owing under all other obligations are performed according to their terms, a secured claim that has not been accelerated will not be impaired for purposes of section 1124(1), if the plan does not modify the terms of the underlying obligation or the rights of the holders of the claim with respect to the collateral securing the claim.").

142. 11 U.S.C.A. § 1124(2) (2006) (permitting reinstatement "notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default").

143. See, e.g., Matter of Madison Hotel Associates, 749 F.2d 410, 419, 12 Bankr. Ct. Dec. (CRR) 616, 11 Collier Bankr. Cas. 2d (MB) 771 (7th Cir. 1984) ("Section 1124(2) permits the plan to reverse a contractual or legal acceleration.") (quotation omitted); In re Taddeo, 685 F.2d 24, 28-29, 9 Bankr. Ct. Dec. (CRR) 556, 6 Collier Bankr. Cas. 2d (MB) 1201, Bankr. L. Rep. (CCH) P 68898, 67 A.L.R. Fed. 207 (2d Cir. 1982) ("Having defined impairment in the broadest possible terms, Congress carved out a small exception to impairment in § 1124(2) providing that curing a default, even though it inevitably changes a contractual acceleration clause, does not thereby 'impair' a creditor's claim."); In re PCH Associates, 122 B.R. 181, 198 (Bankr. S.D. N.Y. 1990) ("most courts seem to be in accord that section 1124(2) permits the debtor to deaccelerate any debt that has been accelerated because of a default, and to reinstate the terms of the agreement").

144. See infra section IV.A of this article.

145. See infra sections IV.B & V of this article.

146. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 328, 119 Stat. 23, 100 (2005).

147. See, e.g., In re Southeast Co., 868 F.2d 335, 338, 18 Bankr. Ct. Dec. (CRR) 1519, 20 Collier Bankr. Cas. 2d (MB) 1348, Bankr. L. Rep. (CCH) P 72698 (9th Cir. 1989) (permitting debtor to reinstate pre-default interest rate under section 1124(2) of the Bankruptcy Code); Matter of Madison Hotel Associates, 749 F.2d 410, 423, 12 Bankr. Ct. Dec. (CRR) 616, 11 Collier Bankr. Cas. 2d (MB) 771 (7th Cir. 1984) ("The intended purpose of 11 U.S.C. § 1124(2) is to permit a Chapter 11 debtor to cure the default of an accelerated loan, reinstate the maturity of that loan as it existed before default, and thereby 'reverse a contractual or legal acceleration.'") (quotation omitted); In re Lennington, 288 B.R. 802, 804, 50 Collier Bankr. Cas. 2d (MB) 224 (Bankr. C.D. Ill. 2003) ("Where a Chapter 11 plan provides for the cure of a default, reinstatement of the original terms of the loan, compensation for damages, and does not otherwise alter the rights of the mortgagee, the claim of the mortgagee is unimpaired, as defined by Section 1124(2)."); In re Centre Court Apartments, Ltd., 85 B.R. 651, 656, 18 Collier Bankr. Cas. 2d (MB) 1064 (Bankr. N.D. Ga. 1988) ("A cure and reinstatement under § 1124(2) is deemed to return the parties to their status at a point in time prior to the acceleration."); In re Manville Forest Products Corp., 43 B.R. 293, 298-99, 11 Collier Bankr. Cas. 2d (MB) 735, Bankr. L. Rep. (CCH) P 70062 (Bankr. S.D. N.Y. 1984), order aff'd in part, rev'd in part on other grounds, 60 B.R. 403, 14 Collier Bankr. Cas. 2d (MB) 1312, Bankr. L. Rep. (CCH) P 71107 (S.D. N.Y. 1986) ("Section 1124(2) allows the debtor to return the accelerated claim to its original maturity date and recreate the pre-default setting for all purposes under the contract."); In re Victory Const. Co., Inc., 42 B.R. 145, 153, 12 Bankr. Ct. Dec. (CRR) 349, 11 Collier Bankr. Cas. 2d (MB) 243, Bankr. L. Rep. (CCH) P 70059 (Bankr. C.D. Cal. 1984) ("reinstatement leaves the creditor unimpaired as a matter of law even if the current market rate of its interest is higher than the contract rate"); In re Forest Hills Associates, 40 B.R. 410, 415, 11 Bankr. Ct. Dec. (CRR) 1145, Bankr. L. Rep. (CCH) P 69876 (Bankr. S.D. N.Y. 1984) ("It is thus clear that Code section 1124(2) provides the debtor in distress with the statutory tools necessary to effect a total healing of the scars of contractual default, by placing the parties into the same position they were in immediately before the default occurred."); see also S. Rep. No. 95-989, at 120 (1978) ("[A] claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was brought on or accelerated by the default...Curing of the default and assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.").

148. Madison Hotel Assocs., 749 F.2d at 417 ("[T]he court found that Prudential was not impaired...because MHA's plan of reorganization cures the default of Prudential's accelerated loan, reinstates the maturity of such loan as it existed before the default, compensates Prudential for damages incurred as a result of reasonable reliance, and does not otherwise alter legal, equitable, or contractual rights between MHA and Prudential.").

149. Madison Hotel Assocs., 749 F.2d at 419 ("The [bankruptcy court] found that even though the district court had entered an order of foreclosure, MHA's plan reinstates the maturity of Prudential's accelerated loan as such maturity existed before the default.").

150. Madison Hotel Assocs., 749 F.2d at 427 ("We reverse and remand this case to the district court with instructions to reinstate the July 14, 1982 order of Judge Martin of the Bankruptcy Court for the Western District of Wisconsin, confirming MHA's Chapter 11 plan of reorganization.").

151. Madison Hotel Assocs., 749 F.2d at 420-21. Between the date that the loan was executed and the date that the debtor filed for bankruptcy, the nominal interest rate increased substantially. Accordingly, if the debtor in Madison Hotel Associates had proposed to utilize the First Cramdown Provision, the interest rate on the new loan would have been considerably higher than the interest rate in the original loan.

152. Madison Hotel Assocs., 749 F.2d at 420-21 ("It thus follows that as long as MHA complies with section 1124(2), curing the default of Prudential's accelerated loan and reinstating the original terms of that loan, Prudential's claim is not impaired.").

153. 11 U.S.C.A. § 1124(2)(C) (2004). Damages under this section are limited to actual expenses incurred by a secured creditor pursuing its right to accelerate as a result of a prepetition default under state law. See In re Phoenix Business Park Ltd. Partnership, 257 B.R. 517, 523, 37 Bankr. Ct. Dec. (CRR) 81 (Bankr. D. Ariz. 2001) ("[T]o be compensable [under section 1124(2)(C) of the Bankruptcy Code], the damages should arise from damages incurred as a result of actions taken in reliance upon the existence of an acceleration clause (such as legal fees, foreclosure notice fees, court costs, and the like) not merely the existence of a contractual right to some remedy, such as compound interest."); Matter of Arlington Village Partners, Ltd., 66 B.R. 308, 316, 15 Bankr. Ct. Dec. (CRR) 37 (Bankr. S.D. Ohio 1986) (finding that, to qualify for compensation under section 1124(2)(C) of the Bankruptcy Code, "a creditor presumably must show that he suffered damages from engaging in some course of conduct on the assumption that payment of the debt would be accelerated as a result of a default"); In re Masnorth Corp., 36 B.R. 335, 338, 11 Bankr. Ct. Dec. (CRR) 782 (Bankr. N.D. Ga. 1984) ("This Court holds that the attorney's fees and expenses incurred by Midland are not compensable under § 1124(2)(C) because those costs were not incurred in *reliance* upon the acceleration provision of the contract.") (emphasis in original); In re Rolling Green Country Club, 26 B.R. 729, 9 Bankr. Ct. Dec. (CRR) 1195, Bankr. L. Rep. (CCH) P 68939 (Bankr. D. Minn. 1982) (finding that attorney's fees incurred incident to foreclosure sale incurred prepetition in reliance upon right to accelerate constituted damages under section 1124(2)(C) of the Bankruptcy Code).

154. Formerly, section 1124(2) of the Bankruptcy Code provided that:

> (2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—
>
> (A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title;
>
> (B) reinstates the maturity of such claim or interest as such maturity existed before such default;
>
> (C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; and
>
> (D) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

(11 U.S.C.A. § 1124(2) (2004).)

155. See In re Entz-White Lumber and Supply, Inc., 850 F.2d 1338, 1340, 18 Bankr. Ct. Dec. (CRR) 83, Bankr. L. Rep. (CCH) P 72380, 98 A.L.R. Fed. 831 (9th Cir. 1988) ("The Code does not define 'cure.'"); In re Liberty Warehouse Associates Ltd. Partnership, 220 B.R. 546, 548 (Bankr. S.D. N.Y. 1998) ("The Bankruptcy Code does not define 'cure.'").

156. 11 U.S.C.A. § 1124(2) (2006) (permitting reinstatement "notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default").

157. Compare supra sections IV.C, IV.D, and IV.E of this article.

158. For example, assume that the debtor is obligated to repay $1 million over 30 years at an interest rate of 7% per annum. Also assume that in the event of a default the interest rate automatically increases to 9% per annum. Under section 1124(2) of the Bankruptcy Code, if this obligation is reinstated, this obligation will be binding on the reorganized debtor under the pre-default terms (i.e., 30 year maturity at an interest rate of 7% per annum). The issue is whether the debtor must pay interest at the 9% default rate post-default and pre-emergence in order to effect a cure.

159. See In re Southeast Co., 868 F.2d 335, 338, 18 Bankr. Ct. Dec. (CRR) 1519, 20 Collier Bankr. Cas. 2d (MB) 1348, Bankr. L. Rep. (CCH) P 72698 (9th Cir. 1989) ("FPC is incorrect in claiming that a cure of default under section 1124(2) cannot include the setting aside of a default interest rate imposed without an acceleration."); Entz-White, 850 F.2d at 1342 ("[B]y curing the default, Entz-White is entitled to avoid all consequences of the default—including higher post-default interest rates."); In re Udhus, 218 B.R. 513, 518, 32 Bankr. Ct. Dec. (CRR) 376, 39 Collier Bankr. Cas. 2d (MB) 1139 (B.A.P. 9th Cir. 1998) ("CityBank was paid in full by receiving its contract interest at the non-default rate."); In re Johnson, 184 B.R. 570, 574-75, 27 Bankr. Ct. Dec. (CRR) 723, 34 Collier Bankr. Cas. 2d (MB) 72 (Bankr. D. Minn. 1995) ("Because the payment under the Plan is a full cure, it nullifies all consequences of the default, and accordingly Prudential is unable to be [sic] accrue interest postpetition at the default rate."); In re Chateaugay Corp., 150 B.R. 529, 542, 23 Bankr. Ct. Dec. (CRR) 1579, Bankr. L. Rep. (CCH) P 75121 (Bankr. S.D. N.Y. 1993), order aff'd, 170 B.R. 551, Bankr. L. Rep. (CCH) P 76087 (S.D. N.Y. 1994) ("'Secured creditors treated in accordance with section 1124(2) are not entitled to post-petition default rate interest."); In re PCH Associates, 122 B.R. 181, 200 (Bankr. S.D. N.Y. 1990) ("The Third Mortgagee received the benefit of its bargain. Accordingly, PCH has cured all defaults and deaccelerated the debt and is entitled to be relieved from paying interest at the post-default rate."); In re Countrywood Inv. Group, Ltd., 117 B.R. 338, 339 (Bankr. M.D. Tenn. 1990) ("This courts adopts the view of the Ninth Circuit...that the curing of defaults at confirmation of a Chapter 11 plan eliminates the consequences of default, including a higher interest rate that was triggered by the debtor's failure to pay installments when due"); In re Singer Island Hotel, Ltd., 95 B.R. 845, 848, 20 Collier Bankr. Cas. 2d (MB) 436 (Bankr. S.D. Fla. 1989) ("I reach the foregoing conclusion in reliance upon the apparently consistent existing precedent holding that chapter 11 mortgage default cure and reinstatement does not require payment of default interest."); In re Forest Hills Associates, 40 B.R. 410, 415, 11 Bankr. Ct. Dec. (CRR) 1145, Bankr. L. Rep. (CCH) P 69876 (Bankr. S.D. N.Y. 1984) ("It is thus clear that Code section 1124(2) provides the debtor in distress with the statutory tools necessary to effect a total healing of the scars of contractual default, by placing the parties into the same position they were in immediately before the default occurred. This healing is accomplished by paying the creditor whatever monies he would have received under the contract had the debtor not defaulted."); but see case cited infra note 170.

160. 11 U.S.C.A. § 1123(a)(5)(G) (2006) ("[Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall provide adequate means for the plan's implementation, such as] curing or waiving of any default[.]").

161. Entz-White, 850 F.2d 1338.

162. Entz-White, 850 F.2d at 1339 ("Entz-White did not pay the amount due, and filed a Chapter 11 bankruptcy petition on August 17, 1984.").

163. Entz-White, 850 F.2d at 1339 ("On February 25, 1985, the bankruptcy court confirmed Entz-White's reorganization plan. Pursuant to the plan, Entz-White paid Great Western $3,492,471 on April 26, 1985. This amount included the full principal balance owed as well as interest accrued at the rate of 1.5% in excess of Great Western's prime.").

164. Entz-White, 850 F.2d at 1341 ("Great Western points to the 'notwithstanding' clause of subsection (2) to support its claim that 'cure' is applicable only to obligations that have been accelerated due to default.'").

165. Entz-White, 850 F.2d at 1341 ("Section 1123 speaks of 'any default' while the notwithstanding clause of section 1124 refers to 'a default.' The natural reading of these sections is that plans may cure all defaults without impairing the creditor's claim, and that such defaults include, but are not limited to, those defaults resulting in acceleration.").

166. Several courts have criticized Entz-White for permitting the debtor to reinstate a matured claim. See, e.g., In re Route One West Windsor Ltd. Partnership, 225 B.R. 76, 84, 40 Collier Bankr. Cas. 2d (MB) 1069 (Bankr. D. N.J. 1998) ("There is no way to change the event which triggered maturation. A post-maturity date 'reinstatement' is therefore in reality an involuntary extension of

the loan term and of the agreed matured date...The interpretation of Code section 1124(2) employed by Entz-White distorts the plain meaning of that section."); In re Liberty Warehouse Associates Ltd. Partnership, 220 B.R. 546, 549 (Bankr. S.D. N.Y. 1998) ("Contrary to Entz-White and Johnson, we read the plain language of § 1124(2) to apply where a debtor seeks to cure a default under an accelerated obligation and reinstate its original terms, but not where the underlying claim has matured by its own terms."); In re Ace-Texas, Inc., 217 B.R. 719, 727, 32 Bankr. Ct. Dec. (CRR) 459 (Bankr. D. Del. 1998) ("[Entz-White] appears to be in error. Section 1124(2) applies only to the curing of defaults that have accelerated the debt.") (quotation omitted); In re PCH Associates, 122 B.R. 181, 198 (Bankr. S.D. N.Y. 1990) ("If this Court were to adopt the view espoused by the Ninth Circuit, the fact that the Note was not accelerated would not bar PCH from utilizing the cure provisions found in the Code. Since the grounds upon which the 9th Circuit decisions are based are subject to much attack, this Court chooses not to rely on those lines of cases.").

167. The secured creditor also argued that it was entitled to default rate interest under section 506(b) of the Bankruptcy Code because it was oversecured. The Ninth Circuit, however, rejected this argument. Entz-White, 850 F.2d at 1343 ("The more natural reading of sections 506 and 1124 is that the interest awarded should be at the market rate or at the pre-default rate provided for in the contract.").

168. Entz-White, 850 F.2d at 1342.

169. Entz-White, 850 F.2d at 1342 ("just as the debtor need not pay the post-default accelerated debt, he need not pay the post-default interest rate on the accelerated debt") (quoting In re Forest Hills Assocs., 40 B.R. 410, 415 (Bankr. S.D. N.Y. 1984); see also In re 139-141 Owners Corp., 306 B.R. 763, 770, 42 Bankr. Ct. Dec. (CRR) 148 (Bankr. S.D. N.Y. 2004), aff'd in part, vacated in part on other grounds, remanded, 313 B.R. 364, 43 Bankr. Ct. Dec. (CRR) 146 (S.D. N.Y. 2004) ("A few courts have treated the statutory right to de-accelerate as giving rise to a statutory right to nullification of the default interest rate, ignoring the clear language of subsection (D) of Section 1124(2), and without regard to equitable considerations. See, In re Entz-White Lumber and Supply, Inc., 850 F.2d 1338, 1342 (9th Cir. 1988)[.]").

170. See 139-141 Owners Corp., 313 B.R. at 368 (affirming the bankruptcy court's decision to require the debtor to pay default rate interest as a condition to reinstatement pursuant to section 1124(2)(D) of the Bankruptcy Code); 139-141 Owners Corp., 306 B.R. at 770-71 ("[T]his Court takes the view that the authority to nullify a secured creditor's contractual right to default rate interest cannot be found as a statutory right in Section 1124(2), given the express constraint in subsection (D) thereof—rather, such authority rests upon the federal common law equitable power of the court"). Former section 1124(2)(D) was moved to section 1124(2)(E) as a part of changes made by BAPCPA. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 328, 119 Stat. 23, 100 (2005).

171. See 139-141 Owners Corp., 306 B.R. at 771.

172. 139-141 Owners Corp., 306 B.R. at 765 ("In September 2002 the debtor defaulted under both mortgages and made no further payments under either mortgage[.]").

173. 139-141 Owners Corp., 306 B.R. at 765-66 ("GAMC sent a 'NOTICE OF DEFAULT'...concluding that 'the loan may now be accelerated and the Mortgage securing this loan foreclosed'...DSC wrote to the debtor serving 'formal notice that you are presently in default under the terms of your Note and Mortgage' and that 'Your payment for the entire unpaid balance of the loan has been accelerated").

174. 139-141 Owners Corp., 306 B.R. at 765-66 ("Two weeks [after the petition date], by application dated June 6, 2003, the debtor sought authority to sell the portion of the mortgaged premises").

175. 139-141 Owners Corp., 306 B.R. at 765-66 ("On June 30, 2003 the debtor filed a plan...providing...for payment in full of all unsecured debts together with interest at the statutory rate of 9%, and payment in full of all amounts due under both mortgages, with interest to be calculated at the non-default rate provided in each mortgage note.").

176. 11 U.S.C.A. § 1124(2)(D) (2004).

177. See 139-141 Owners Corp., 306 B.R. at 771.

178. See also Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) P 72186 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); In re Kmart Corp., 359 F.3d 866, 871, 42 Bankr. Ct. Dec. (CRR) 166, 51 Collier Bankr. Cas. 2d (MB) 1076, Bankr. L. Rep. (CCH) P 80054 (7th Cir. 2004) ("[T]he power conferred by § 105(a) is one to implement rather than override."); In re Dairy Mart Convenience Stores, Inc., 351 F.3d 86, 92, 51 Collier Bankr. Cas. 2d (MB) 223 (2d Cir. 2003) ("This Court has long recognized that 'Section 105(a) limits the bankruptcy court's equitable powers, which must and can only be exercised within the confines of the Bankruptcy Code.'") (quotation omitted); Official Committee of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 585, 41 Bankr. Ct. Dec. (CRR) 98, Bankr. L. Rep. (CCH) P 78861 (3d Cir. 2003) ("The Code is the law here and equity cannot be used to change the clear and plain language of a Code provision."); Gouveia v. Tazbir, 37 F.3d 295, 300, 26 Bankr. Ct. Dec. (CRR) 123, 31 Collier Bankr. Cas. 2d (MB) 1698, Bankr. L. Rep. (CCH) P 76143 (7th Cir. 1994) ("The Supreme Court has taught that any grant of authority given to the bankruptcy courts under § 105 must be exercised within the confines of the bankruptcy code."); In re SPM Mfg. Corp., 984 F.2d 1305, 1311, 23 Bankr. Ct. Dec. (CRR) 1529, 28 Collier Bankr. Cas. 2d (MB) 451, Bankr. L. Rep. (CCH) P 75090 (1st Cir. 1993) ("the bankruptcy court has no equitable power to deprive creditors of rights or remedies available to them under the Code."); In re Middleton Arms, Ltd. Partnership, 934 F.2d 723, 725, 21 Bankr. Ct. Dec. (CRR) 1314, Bankr. L. Rep. (CCH) P 74014 (6th Cir. 1991) ("This Court has held that bankruptcy courts 'cannot use equitable principles to disregard unambiguous statutory language.'") (quotation omitted).

179. See supra section II.E of this article.

180. See 139-141 Owners Corp., 306 B.R. at 770-71:

> [T]his Court takes the view that the authority to nullify a secured creditor's contractual right to default rate interest cannot be found as a statutory right in Section 1124(2), given the express constraint in subsection (D) thereof—rather, such authority rests upon the federal common law equitable power of the court exercising bankruptcy jurisdiction to balance and harmonize the rights of both secured and unsecured creditors. I agree that in most circumstances it is appropriate for the bankruptcy court or superior court exercising bankruptcy jurisdiction to limit a secured creditor to its non-default contract rate of interest in order to provide a distribution to unsecured creditors. But this result is an exercise of the court's equitable discretion.

181. 139-141 Owners Corp., 306 B.R. at 772 ("In this case the facts do not justify the exercise of equitable discretion by a court to nullify the secured creditor's contract right to interest at the default rate.").

182. See In re 139-141 Owners Corp., 313 B.R. 364, 368, 43 Bankr. Ct. Dec. (CRR) 146 (S.D. N.Y. 2004) (affirming the bankruptcy court's award of default rate interest).

183. 11 U.S.C.A. § 1124(2)(A) (2004); Lawrence P. King, 7 Collier on Bankruptcy ¶ 1124.03[2] (15th rev. ed. 2005) ("It has been suggested that section 1124(2)(a) permits the plan to reinstate the maturity of a claim or interest without curing defaults with respect to the financial condition of the debtor that are included in the section 365(b)(2)(A) ipso facto clauses. This interpretation of section 1124(2) is correct."). Section 1124(2)(A) of the Bankruptcy Code, as amended by the BAPCPA retains essentially the same language and reiterates that the defaults specified in section 365(b)(2) of the Bankruptcy Code need not be cured. See 11 U.S.C.A. § 1124(2)(a) (2006).

184. 11 U.S.C.A. § 365(b)(2) (2004):

> Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to —
>
> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title;
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
>
> (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

185. See 11 U.S.C.A. § 1124(2)(A) (2006) ("cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured").

186. In re Phoenix Business Park Ltd. Partnership, 257 B.R. 517, 37 Bankr. Ct. Dec. (CRR) 81 (Bankr. D. Ariz. 2001).

187. Phoenix Business Park, 257 B.R. at 518 ("The Debtor will cure all arrearages due under the obligation prior to the Effective Date by making a cash payment equal to the number of monthly payments in arrears times the regular monthly payment (not including default interest) less any payments already received pursuant to the Court's order regarding modification of the Automatic Stay.").

188. Phoenix Business Park, 257 B.R. at 518 ("The Trust objects to its treatment under the Plan, in particular Debtor's attempt to avoid all consequences of its default, including the payment of default interest as called for under the Note.").

189. Phoenix Business Park, 257 B.R. at 520 (finding default interest not enforceable under *Entz-White* and stating, "The Ninth Circuit has uniformly followed the Entz-White interpretation of 'cure' since 1998 and it remains the law of the circuit today.").

190. Phoenix Business Park, 257 B.R. at 520 ("[The Trust's] argument is that Congress legislatively overruled Entz-White and its progeny with the Bankruptcy Reform Act of 1994's addition of a new section 1123(d).").

191. 11 U.S.C.A. § 1123(d) (2006).

192. See Grant T. Stein and Ralph S. Wheatly, The Impact of Cure and Reinstatement on Default Interest, 16-6 Am. Bankr. Ins. J. 1 (July/August 1997) ("Under § 1123(d), the amount necessary to cure a default is to be determined in accordance with the underlying agreement and applicable non-bankruptcy law. Thus, in determining the amount necessary to effect a cure, the interest entitlement should be determined by the terms of the underlying contract, including the application of the default rate provided therein."); Thomas J. Salerno, et al., 2 Adv. Chapter 11 Bankr. Practice § 10.79, 176 (John Wiley & Sons, Inc. 2d ed. 1996) ("[S]ection 1123(d) effectively overrules In re Entz-White."); see also Matter of Southland Corp., 160 F.3d 1054, 1059, 33 Bankr. Ct. Dec. (CRR) 681, Bankr. L. Rep. (CCH) P 77849 (5th Cir. 1998) ("Apart from the doubtfulness of adopting Entz-White or extending its reasoning in this circuit, we note that Congress, in bankruptcy amendments enacted in 1994, arguably rejected the Entz-White denial of contractual default interest.").

193. The House Report associated with section 305 of the Bankruptcy Reform Act of 1994 provides, in relevant part:

> This section will have the effect of overruling the decision of the Supreme Court in *Rake v. Wade*, 113 S.Ct. 2187 (1993). In that case, the Court held that the Bankruptcy Code required that interest be paid on mortgage arrearages paid by debtors curing defaults on their mortgages. Notwithstanding State law, this case has had the effect of providing a

> windfall to secured creditors at the expense of unsecured creditors by forcing debtors to pay the bulk of their income to satisfy the secured creditors' claims. This had the effect of giving secured creditors interest on interest payments, and interest on the late charges and other fees, even where applicable laws prohibits such interest and even when it was something that was not contemplated by either party in the original transaction. This provision will be applicable prospectively only, i.e., it will be applicable to all future contracts, including transactions that refinance existing contracts. It will limit the secured creditor to the benefit of the initial bargain with no court contrived windfall. *It is the Committee's intention that a cure pursuant to a plan should operate to put the debtor in the same position as if the default had never occurred.*

(H.R. Rep. No. 103-835, at 55 (1994) (emphasis added).) Section 305 of the Bankruptcy Reform Act of 1994 added, among other things, section 1123(d) of the Bankruptcy Code. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 305, 108 Stat. 4106, 4134 (1994).

194. Phoenix Bus. Park, 257 B.R. at 522 ("The foregoing analysis compels the conclusion that Congress did not legislatively overrule Entz-White, that Entz-White remains good law in the Ninth Circuit and that, therefore, a debtor need pay interest only at the contract rate, and not the default rate, and need not pay late charges in order to effectuate a cure under section 1124(2).").

195. Indeed, section 506(b) refers to "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." 11 U.S.C.A. § 506(b). Accordingly, just as the reference to applicable law under section 506(b) does not necessitate the application of the default rate under the contract, see cases cited supra note 37, the reference to "applicable law" in section 1123(d) does not necessitate the application of the default rate under the contract.

196. Phoenix Bus. Park, 257 B.R. at 520 ("[Section 365(b)(2)] deals with certain enumerated kinds of defaults that need not be cured as part of the assumption of an executory contract. Its relevance to this case derives from the provision in section 1124(2) that defaults of the kind specified in section 365(b)(2) need not be cured in order for a claim to be 'unimpaired' under section 1124.").

197. 11 U.S.C.A. § 365(b)(2) (2004). The changes made by BAPCPA to section 365(b) of the Bankruptcy Code do not affect sections 365(b)(2)(A) through (C) of the Bankruptcy Code. See 11 U.S.C.A. § 365(b)(2) (2006).

198. See In re Yates Development, Inc., 241 B.R. 247, 255, 35 Bankr. Ct. Dec. (CRR) 52, 43 Collier Bankr. Cas. 2d (MB) 195, Bankr. L. Rep. (CCH) P 78056 (Bankr. M.D. Fla. 1999), subsequently aff'd, 256 F.3d 1285, 38 Bankr. Ct. Dec. (CRR) 30 (11th Cir. 2001) ("the exceptions found in subparagraphs (b)(2)(A)(B) and (C)] to the general rule requiring the cure of defaults furthers the bankruptcy policy of preventing the enforcement of ipso facto or bankruptcy termination clauses").

199. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 219, 108 Stat. 4106, 4128 (1994).

200. 11 U.S.C.A. § 365(b)(2)(D) (2004).

201. Compare case cites infra notes 202 and 203.

202. 11 U.S.C.A. § 365(b)(2)(D) (2004); See In re BankVest Capital Corp., 360 F.3d 291, 298, 42 Bankr. Ct. Dec. (CRR) 210, Bankr. L. Rep. (CCH) P 80062 (1st Cir. 2004) (finding that section 365(b)(2)(D) frees a debtor "from lease provisions requiring the payment of penalty rates" and "non-monetary defaults"); Matter of GP Exp. Airlines, Inc., 200 B.R. 222, 233-34, 38 Collier Bankr. Cas. 2d (MB) 1725, 30 U.C.C. Rep. Serv. 2d 583 (Bankr. D. Neb. 1996) ("[A] debtor is not required to cure or satisfy any penalty rate obligation and the debtor is not required to cure any defaults in nonmonetary obligations.").

203. 11 U.S.C.A. § 365(b)(2)(D) (2004); See In re Claremont Acquisition Corp., Inc., 113 F.3d 1029, 1034, 30 Bankr. Ct. Dec. (CRR) 1045, Bankr. L. Rep. (CCH) P 77469 (9th Cir. 1997) (finding that the term "penalty" modifies both "rate" and "provision" thus creating one "exception con-

cerning those provisions of a contract which impose a penalty for a debtor's failure to perform a nonmonetary obligation."); Beckett v. Coatesville Housing Associates, 2001 WL 767601 (E.D. Pa. 2001) (affirming the bankruptcy court's decision to lift the automatic stay where the debtor's nonmonetary default was material and, thus, could not be cured under section 365 of the Bankruptcy Code); In re Williams, 299 B.R. 684, 686 (Bankr. S.D. Ga. 2003) (following Ninth Circuit's decision in Claremont Acquisition Corp.); In re New Breed Realty Enterprises, Inc., 278 B.R. 314, 321 (Bankr. E.D. N.Y. 2002) (same); In re Vitanza, 1998 WL 808629 (Bankr. E.D. Pa. 1998) (same).

204. Claremont Acquisition Corp., Inc., 113 F.3d at 1034-35.

205. In re Claremont Acquisition Corp., Inc., 186 B.R. 977, 980 (C.D. Cal. 1995), aff'd, 113 F.3d 1029, 30 Bankr. Ct. Dec. (CRR) 1045, Bankr. L. Rep. (CCH) P 77469 (9th Cir. 1997)) ("Debtors operated Cadillac, Pontiac/GMC Truck...dealerships at the Claremont Auto Center in Claremont, California.").

206. Claremont Acquisition Corp., 186 B.R. at 989 ("The franchise agreements provide that the manufacturer may terminate the franchise for failure to operate the business for seven consecutive business days.").

207. Claremont Acquisition Corp., 186 B.R. at 980 ("On March 31, 1995, the bankruptcy court approved Worthington as purchaser of the Debtors' assets, including the dealer franchises, for $1,700,000.").

208. Claremont Acquisition Corp., 186 B.R. at 989 ("Ford and GM argue that the debtors' failure to operate the franchises constitutes an incurable default, rendering the franchises nonassignable.").

209. Claremont Acquisition Corp., 186 B.R. at 990 ("The bankruptcy court held that the failure to operate the dealerships was a nonmonetary default which, according to § 365(b)(2)(D), did not have to be cured before the franchise agreements could be assumed and assigned. This Court agrees with the bankruptcy court's interpretation and, accordingly, affirms with regard to this issue.").

210. In re Claremont Acquisition Corp., Inc., 113 F.3d 1029, 1035, 30 Bankr. Ct. Dec. (CRR) 1045, Bankr. L. Rep. (CCH) P 77469 (9th Cir. 1997) ("We find that the bankruptcy court erred in its interpretation of § 365(b)(2)(D), and that this section does not relieve Debtors of their obligation to cure their default. Because this default cannot now be cured, the GM Dealer Agreement cannot be assumed and assigned under 11 U.S.C. § 365(b).").

211. Claremont Acquisition Corp., 113 F.3d at 1034 ("A proper reading of subsection (D) requires that the adjective 'penalty' modify *both* the words 'rate' and 'provision,' not just the word 'rate.'") (emphasis in original).

212. Claremont Acquisition Corp., 113 F.3d at 1034-35 ("Debtors' failure to operate the franchises for seven consecutive days is not a default of a contractual provision relating to the satisfaction of a penalty rate or the payment of a penalty. Accordingly, Debtors' obligation to cure their default is not excused. Because Debtors are unable to now cure their default, the GM Dealer Agreements may not be assumed and assigned.").

213. In re BankVest Capital Corp., 360 F.3d 291, 293, 42 Bankr. Ct. Dec. (CRR) 210, Bankr. L. Rep. (CCH) P 80062 (1st Cir. 2004) ("The Ninth Circuit, in the only court of appeals opinion to address this question, held that non-monetary defaults must be cured before assumption. In re Claremont Acquisition Corp., 113 F.3d 1029, 1034-35 (9th Cir. 1997). In the proceedings below, the bankruptcy court and the Bankruptcy Appellate Panel (BAP) reached the opposite conclusion. We disagree with the Ninth Circuit and affirm.").

214. In re Bankvest Capital Corp., 270 B.R. 541, 542, 38 Bankr. Ct. Dec. (CRR) 206 (Bankr. D. Mass. 2001), decision aff'd, 290 B.R. 443, 41 Bankr. Ct. Dec. (CRR) 14 (B.A.P. 1st Cir. 2003), judgment aff'd, 360 F.3d 291, 42 Bankr. Ct. Dec. (CRR) 210, Bankr. L. Rep. (CCH) P 80062 (1st Cir. 2004) ("On or about May 27, 1999 Eagle and Newark entered into separate but substantially similar Master Equipment Lease Agreements (the 'Lease Agreements') with LandVest Capital

Corp. ('LandVest') and Bankvest Capital Corp. (the 'Debtor') whereby LandVest and the Debtor were to lease certain computer equipment to the Claimants.").

215. Bankvest Capital Corp., 270 B.R. at 542. ("In or about August 1999 the items were delivered with the loaner equipment delivered in place of the not yet manufactured items.").

216. Bankvest Capital Corp., 360 F.3d at 294 ("The plan provides that every equipment lease in which BankVest is the lessor shall be deemed assumed by the estate under 11 U.S.C. § 365").

217. See Bankvest Capital Corp., 270 B.R. at 541 ("The Claimants allege that the breach is such that it cannot be cured.").

218. Bankvest Capital Corp., 270 B.R. at 541 ("The plain language of Section 365(b)(2)(D) supports the *GP Express Airlines* interpretation that penalty rate obligation and a nonmonetary default are two separate types of breaches which a debtor is not required to cure prior to assumption of a contract.").

219. Bankvest Capital Corp., 360 F.3d at 297 ("BankVest, on the other hand, argues that the word 'penalty' describes only the term 'rate,' and that the second half of subparagraph (2)(D) creates a distinct exception for non-monetary defaults.").

220. Bankvest Capital Corp., 360 F.3d at 298 ("[Section 365(b)(2)(D) of the Bankruptcy Code] as written is ambiguous"). The First Circuit also found the legislative history concerning section 365(b)(2)(D) of the Bankruptcy Code equivocal on this issue. Bankvest Capital Corp., 360 F.3d at 298 ("The legislative history of § 365(b)(2)(D) is not instructive."); see also H.R. Rep. No. 103-835, at 50 (1994) ("Finally, section 365(b) is clarified to provide that when sought by a debtor, a lease can be cured at a nondefault rate (i.e., it would not need to pay penalty rates.").

221. Bankvest Capital Corp., 360 F.3d at 299 ("The best approach to interpreting § 365(b)(2)(D) focuses on practical considerations of bankruptcy policy and Congress's overarching purposes in the Bankruptcy Code.").

222. Bankvest Capital Corp., 360 F.3d at 299 ("Requiring a debtor to cure such incurable defaults is tantamount to barring the debtor from assuming any lease or contract in which such a default has occurred—no matter how essential that contract might be to the debtor's reorganization in bankruptcy.").

223. Bankvest Capital Corp., 360 F.3d at 301 ("We hold that under § 365(b)(2)(D), BankVest need not cure non-monetary defaults before assuming its equipment leases with Eagle and Newark.").

224. See Bankvest Capital Corp., 360 F.3d at 297 ("the word 'penalty' describes only the term 'rate,' and that the second half of subparagraph (2)(D) creates a distinct exception for non-monetary defaults").

225. See In re Phoenix Business Park Ltd. Partnership, 257 B.R. 517, 521, 37 Bankr. Ct. Dec. (CRR) 81 (Bankr. D. Ariz. 2001) ("if a default interest rate is a 'penalty rate,' then it does not need to be paid as part of a section 1124(2) cure. Here, the Court has little difficulty concluding that a default rate of 24% —against a contract rate of 10.75%—as well as monthly late charges of $1,056.00, should be construed as 'penalty rate [s]' within the meaning of this statute"); Matter of GP Exp. Airlines, Inc., 200 B.R. 222, 234, 38 Collier Bankr. Cas. 2d (MB) 1725, 30 U.C.C. Rep. Serv. 2d 583 (Bankr. D. Neb. 1996) ("The statutory term 'rate' [in section 365(b)(2)(D) of the Bankruptcy Code] refers to interest rate").

226. See 11 U.S.C.A. §§ 1124(2)(A) & 365(b)(2)(D); Bankvest Capital Corp., 360 F.3d at 297 ("the word 'penalty' describes only the term 'rate,' and that the second half of subparagraph (2)(D) creates a distinct exception for non-monetary defaults").

227. See Grant T. Stein and Ralph S. Wheatly, The Impact of Cure and Reinstatement on Default Interest, 16-6 Am. Bankr. Ins. J. 1 (July/August 1997) ("Section 365(b)(2)(D) is now clear that part of cure under § 1124(2) requires the payment of default interest associated with monetary defaults. Failure to pay a debt that has matured without acceleration is a monetary default. Thus, even if there is a cure of a monetary default now under § 1124(2), such cure will require payment of any penalty rate or provision such as default interest."); but see Phoenix Bus. Park,

257 B.R. at 521 ("The [Ninth Circuit] did not suggest in any way that the secondary modifier ('relating to a default arising from any failure of the Debtor to perform nonmonetary obligations') also modified the first clause ('penalty rate').").

228. See In re Claremont Acquisition Corp., Inc., 113 F.3d 1029, 1034, 30 Bankr. Ct. Dec. (CRR) 1045, Bankr. L. Rep. (CCH) P 77469 (9th Cir. 1997) (finding that the term "penalty" modifies both "rate" and "provision" thus creating one "exception concerning those provisions of a contract which impose a penalty for a debtor's failure to perform a nonmonetary obligation"); but see Phoenix Bus. Park, 257 B.R. at 521 ("The [Ninth Circuit] did not suggest in any way that the secondary modifier ('relating to a default arising from any failure of the Debtor to perform nonmonetary obligations') also modified the first clause ('penalty rate').").

229. Nonmonetary defaults have been described as involving defaults other than the failure to make a payment. See Bankvest Capital Corp., 270 B.R. at 544 ("Common sense dictates that the failure to deliver certain items is a quintessential example of a nonmonetary default. The Debtor was not required to make any payments."); see also Bankvest Capital Corp., 360 F.3d at 301 ("Like defaults based on breaches of ipso facto clauses, non-monetary defaults are often a product of the debtor's very financial distress.").

230. See 11 U.S.C.A. §§ 1124(2)(A) & 365(b)(2)(D); Claremont Acquisition Corp., Inc., 113 F.3d at 1034.

231. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 328, 119 Stat. 23, 100 (2005).

232. 11 U.S.C.A. § 365(b)(1)(A) (2006) provides that:

> (A) cures or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph[.]

In the context of unexpired real property leases, a debtor now need only cure nonmonetary defaults, if possible, through performance on a going forward basis and payment of any "pecuniary losses" resulting from the nonmonetary default. See 11 U.S.C.A. § 365(b)(1)(A) (2006) Notably, section 365(b)(1)(B) also imposes an obligation to compensate for "pecuniary losses" upon the debtor in connection with nonmonetary defaults that the debtors must nonetheless cure under section 365(b)(1)(A).

233. 11 U.S.C.A. § 365(b)(2)(D) (2006).

234. 11 U.S.C.A. § 365(b)(2)(D) (2006). Although ambiguity remains in new section 365(b)(2)(D), BAPCPA changes clarify that nonmonetary defaults are subject to cure unless they are tied to a penalty provision or related to an unexpired real property lease, as discussed above.

235. 11 U.S.C.A. § 365(b)(2)(D) (2006).

236. H.R. Rep. No. 109-31, pt. 1, at 83 (2006). The connotation of the word "clarify" is that "penalty" was always intended to modify both rate and provision.

237. See Bankvest Capital Corp., 360 F.3d at 299 ("The best approach to interpreting § 365(b)(2)(D) focuses on practical considerations of bankruptcy policy and Congress's overarching purposes in the Bankruptcy Code.").

238. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 328, 119 Stat. 23, 100 (2005).

239. 11 U.S.C.A. § 1124(2)(D). New subsection (D) of section 1124(2) of the Bankruptcy Code provides, in full:

> [I]f such claim or interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure[.]

240. 11 U.S.C.A. §§ 1124(2)(A) & 365(b)(2)(D).

241. 11 U.S.C.A. § 1124(2)(D).

242. As noted in the previous section, whether cure is excused for any penalty rate or just those relating to nonmonetary defaults remains unclear under sections 365(b)(2)(D) and 1124(2).

243. See, e.g., In re Shangra-La, Inc., 167 F.3d 843, 849, 33 Bankr. Ct. Dec. (CRR) 999, Bankr. L. Rep. (CCH) P 77879 (4th Cir. 1999) ("Attorneys' fees incurred in attempting to collect sums due from debtors following default may be recovered as pecuniary loss under § 365(b)(1)(B) if such monies were expended as the result of a default under the contract or lease between the parties and are recoverable under the contract and applicable state law."); In re Crown Books Corp., 269 B.R. 12, 18, 38 Bankr. Ct. Dec. (CRR) 107, 46 Collier Bankr. Cas. 2d (MB) 1287 (Bankr. D. Del. 2001) ("Attorneys' fees are recoverable under section 365(b)(1) only if they are reasonable."); In re Entertainment, Inc., 223 B.R. 141, 154 (Bankr. N.D. Ill. 1998) (finding attorneys' fees arising under assumed lease due as part of cure); In re Ryan's Subs, Inc., 165 B.R. 465, 467, 25 Bankr. Ct. Dec. (CRR) 649 (Bankr. W.D. Mo. 1994) ("Attorney's fees incurred in attempting to collect sums due from debtors following default are defined as a pecuniary loss."); In re Child World, Inc., 161 B.R. 349, 354, 24 Bankr. Ct. Dec. (CRR) 1450 (Bankr. S.D. N.Y. 1993) (finding attorney's fees related to the debtor's failure to make timely payments under the lease due under section 365(b)(1) of the Bankruptcy Code); In re Westview 74th Street Drug Corp., 59 B.R. 747, 756, 14 Bankr. Ct. Dec. (CRR) 333, 14 Collier Bankr. Cas. 2d (MB) 909, Bankr. L. Rep. (CCH) P 71204 (Bankr. S.D. N.Y. 1986) ("The cases considering claims such as the landlord's here have consistently recognized that an express contractual provision for attorney's fees gives rise to a right to obtain a reasonable attorney's fee as part of curing the debtor's default and in compensation for the landlord's actual pecuniary loss under section 365 of the Code.").

244. See Valley View Shopping Ctr., 260 B.R. at 26 ("Section 2.06 of the Lease requires Debtor to pay interest at the rate of 10% per annum accrued from the due date on any unpaid rent until paid. Thus, to make ANICO whole pursuant to § 365(b)(1), the Debtor in assuming the Lease is required to make payment of interest at the contract rate on the prepetition unpaid rent installment."); Entm't, Inc., 223 B.R. at 150 (finding postpetition interest at the base rate provided for in the lease enforceable under section 365 of the Bankruptcy Code); In re Eagle Bus Mfg., Inc., 148 B.R. 481, 482-83 (Bankr. S.D. Tex. 1992) ("[T]he Debtors' failure to make rent payments resulted in a loss to the Port Authority. Had the Debtors not defaulted on their rent payments, the Port Authority would have had the use of the payments. The primary way to compensate a creditor for its loss of use of money is interest. Simple logic, therefore, would dictate that interest should be included as part of a landlord's actual pecuniary loss."); In re Skylark Travel, Inc., 120 B.R. 352, 355 (Bankr. S.D. N.Y. 1990) ("If the debtor wishes to assume the ARC Agreement it must first cure the default as required by 11 U.S.C. § 365(b) and compensate ARC for the loss of interest on the past-due amounts, at the contract rate for late payments."); see also In re S & F Concession, Inc., 55 B.R. 68, 6919, 13 Bankr. Ct. Dec. (CRR) 1119, 13 Collier Bankr. Cas. 2d (MB) 1454 (Bankr. E.D. Pa. 1985) ("We granted no extension to the debtor under § 365(d)(3) and the payment of rent sought by Feld was not triggered by § 365(b)(2). Thus, the clear language of § 365(d)(3) mandates that the trustee immediately pay all postpetition rent and remain current on future rent payments as they come due.").

245. See In re Airlift Intern., Inc., 761 F.2d 1503, 1508, 12 Collier Bankr. Cas. 2d (MB) 1266, Bankr. L. Rep. (CCH) P 70585, 92 A.L.R. Fed. 151 (11th Cir. 1985) (stating that upon assumption, the estate becomes liable for performance of the entire contract as if bankruptcy had never intervened); In re Valley View Shopping Center, L.P., 260 B.R. 10, 25 (Bankr. D. Kan. 2001) (same); Yates Dev., Inc., 241 B.R. at 253 (same); In re Emerald Forest Const., Inc., 226 B.R. 659, 664 (Bankr. D. Mont. 1998) (same); Matter of First American Health Care of Georgia, Inc., 219 B.R. 324, 327 (Bankr. S.D. Ga. 1998) (same); In re Rachels Industries, Inc., 109 B.R. 797, 803 (Bankr. W.D. Tenn. 1990) (holding modified by, In re Diamond Mfg. Co., Inc., 164 B.R. 189, Bankr. L. Rep. (CCH) P 75759 (Bankr. S.D. Ga. 1994)) (same); In re Diamond Head Emporium, Inc., 69 B.R. 487, 495 (Bankr. D. Haw. 1987) (same).

246. See H.R. Rep. No. 103-835, at 50 (1994) ("Finally, section 365(b) is clarified to provide that when sought by a debtor, a lease can be cured at a nondefault rate, i.e., it would not need to pay penalty rates.").

247. Courts have found prepayment premiums enforceable to the extent that such premiums are a measure of actual damages. See supra section II.F of this article.

248. See supra section IV.A of this article.

249. See 11 U.S.C.A. § 1124(2) (2006).

250. See cases cited supra note 159.

251. See supra section IV.C of this article.

252. See cases cited supra note 170.

253. See supra section IV.E of this article.

254. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 328, 119 Stat. 23, 100 (2005).

255. See supra section V.B of this article.

256. See cases cited supra note 245.

257. See supra section II.H of this article.

258. See supra section IV of this article.

259. See supra section IV.E of this article.

260. See cases cited supra note 159.

261. See cases cited supra note 159.

262. This likely is true irrespective of the allowed amount of the senior secured creditor's claim under section 506(b) of the Bankruptcy Code because there is no statutory basis for applying section 506(b) of the Bankruptcy Code under section 1129(a) of the Bankruptcy Code when such claim is reinstated. See 11 U.S.C.A. § 1129(a)(8) (2006) ("With respect to each class of claims or interests—(A) such class has accepted the plan; or (B) such class is not impaired under the plan."); 11 U.S.C.A. § 1129(b)(1) (2006) (applying when "all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan").

263. See, e.g., In re Onco Inv. Co., 316 B.R. 163, 43 Bankr. Ct. Dec. (CRR) 219 (Bankr. D. Del. 2004), appeal dismissed, 45 Bankr. Ct. Dec. (CRR) 136, 2005 WL 2401908 (D. Del. 2005), aff'd, 2007 WL 173779 (3d Cir. 2007) (holding that senior noteholders whose claims were reinstated under section 1124(2) of the Bankruptcy Code were not entitled to collect default rate interest or a prepayment premium from the junior creditor pursuant to the terms of the subordination agreement and section 510(a) of the Bankruptcy Code).

264. 11 U.S.C.A. § 502(b)(1) (2006) (providing for the disallowance of claims that are unenforceable other than by reason solely that such a claim may be contingent or unmatured").

265. See In re Bank of New England Corp., 364 F.3d 355, 367-68, 42 Bankr. Ct. Dec. (CRR) 243, 51 Collier Bankr. Cas. 2d (MB) 1634, Bankr. L. Rep. (CCH) P 80079 (1st Cir. 2004) (finding that senior creditor could receive postpetition interest under section 510(a) of the Bankruptcy

Code notwithstanding section 502(b)(2) of the Bankruptcy Code); see also supra section II.H of this article.

266. In re Entertainment, Inc., 223 B.R. 141, 151 (Bankr. N.D. Ill. 1998) ("The cure of a default under an unexpired lease pursuant to 11 U.S.C. § 365 is more akin to a condition precedent to the assumption of a contract obligation than it is to a claim in bankruptcy."); In re Diamond Head Emporium, Inc., 69 B.R. 487, 495 (Bankr. D. Haw. 1987) (same); In re J.W. Mays, Inc., 30 B.R. 769, 772 (Bankr. S.D. N.Y. 1983) (same); see also In re Valley View Shopping Center, L.P., 260 B.R. 10, 25 (Bankr. D. Kan. 2001) ("By contrast, assumption of an unexpired lease or executory contract does not give rise to a 'claim'"). Additionally, upon reinstatement, the secured creditor no longer has a "right to payment" under the security agreement for the default rate interest. See 11 U.S.C.A. § 101(5)(A) (defining a "claim" to including "a right to payment").

267. See, e.g., In re Onco Inv. Co., 316 B.R. 163, 43 Bankr. Ct. Dec. (CRR) 219 (Bankr. D. Del. 2004), appeal dismissed, 45 Bankr. Ct. Dec. (CRR) 136, 2005 WL 2401908 (D. Del. 2005), aff'd, 2007 WL 173779 (3d Cir. 2007) (finding that the "roll-back [under section 1124(2) of the Bankruptcy Code] should be read to be a roll-back as to all parties" including junior creditors in addition to the debtor).

268. See 11 U.S.C.A. § 506(a)(1) (2006); see also supra section II.C of this article.

269. See cases cite supra note 33.

270. See supra section IV.A of this article.

271. See supra section III.A of this article.

272. See supra section IV.A of this article.

273. See supra section II.E of this article.

274. See supra section II.F of this article.

275. See supra section II.G of this article.

276. See supra section V.C of this article.

277. See 11 U.S.C.A. § 1126(f) (2006) ("Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.").

278. Compare supra section III of this article with section IV of this article.

279. See supra section VI of this article. Items or amounts found to be outside the scope of section 506(b) could be enforced under a subordination agreement under the Cramdown Statute but be unenforceable under the Reinstatement Statute.