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Bankruptcy Code Section 362(d)(2): Protecting Turnkey Sale Values in Liquidations under the Bankruptcy Code

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BANKRUPTCY CODE SECTION 362(d)(2): PROTECTING TURNKEY SALE VALUES IN LIQUIDATIONS UNDER THE BANKRUPTCY CODE

I. INTRODUCTION

Suppose a debtor voluntarily[1] files a petition for bankruptcy protection[2] seeking liquidation[3] under Title 11, Chapter 7 of the United States Code.[4] This debtor does not intend to reorganize.[5] Suppose this debtor

1. A debtor may voluntarily file for protection under the Bankruptcy Code or he may be forced into bankruptcy by creditors. Creditors who force an involuntary proceeding seek to have the bankruptcy proceeding dismantle the debtor organization, liquidate available property of the debtor and distribute the proceeds to creditor claims. "A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter." Bankruptcy Reform Act of 1978, 11 U.S.C. § 301 (1982). Involuntary cases are provided for in section 303 of the Code. *See* 11 U.S.C. § 303.

2. Bankruptcy protection provides two havens for the debtor. First, debts are discharged if the debtor qualifies as an individual debtor under Chapter 7. If the debtor has not committed fraud on his creditors and has made good faith efforts to pay his debts, he may be discharged of liability outside of the bankruptcy proceeding. *See* 11 U.S.C. § 727. Secondly, the debtor is relieved of harassment by creditors by virtue of the provision at 11 U.S.C. section 362, which provides an automatic stay on all actions against the debtor as of the commencement of the suit. Relief from this stay, provided at section 362(d), is the principal focus of this Comment.

3. Bankruptcy generally provides a debtor with two choices. First, the debtor may choose to liquidate the property of his estate. The debtor who liquidates simply desires to cease doing business, sell his property, including all forms of available collateral, and pay his debts to the extent possible. Under this option, the debtor does not seek to continue in business. The liquidation option is contained within Chapter 7 of the Code. *See* 11 U.S.C. §§ 701-28.

The second choice available to the debtor is to reorganize his business. This option is available to commercial enterprises through Chapter 11. *See* 11 U.S.C. §§ 1101-74. An individual may choose to reorganize under Chapter 13 of the Code. *See* 11 U.S.C. §§ 1301-30. These chapters are referred to as "reorganization" chapters. Under the reorganization chapters, the debtor obtains temporary relief from his creditors and submits a plan for reorganization to the court. Such a plan specifies a proposed course of action upon which the debtor intends to proceed to resuscitate his business, including arrangements to make payments on his debts. Essentially, the difference between the chapters is that under a Chapter 7 liquidation, the debtor intends to cease operation of the business entirely. Conversely, under Chapters 11 and 13, the debtor intends to continue his business and satisfy his debts according to a plan. The ultimate goal under the reorganization chapters is to enable the debtor to return to profitability.

Because Chapter 13 concerns individual non-commercial debtors, this Comment will not address that section. This Comment will focus on Chapter 7 liquidation plans and Chapter 11 reorganization plans.

4. 11 U.S.C. §§ 701-66.

holds no equity[6] in a certain piece of collateral and this collateral fully secures a debt to a secured creditor[7] who is neither over nor under-secured.[8] Finally, suppose the "turnkey"[9] sale value of the debtor's

5. *See supra* note 3.

6. A discussion of "equity" will comprise a substantial portion of this Comment because a debtor's lack of equity results in the satisfaction of one prong of the relief test of section 362(d). Debtor equity is the surplus value the debtor holds in a given piece of collateral over and above the amount owed to a creditor. For example, if a debtor holds a piece of property worth $100 and this same piece of property secures a debt of $75, the surplus of $25 is the equity belonging to the debtor.

The above calculation may be complicated by the consideration of additional debts secured by the same collateral. Equity may also be determined by adding together all encumbrances on a given piece of collateral and subtracting this total from the value of the collateral. *See infra* note 64 and accompanying text.

7. A secured creditor is one who extends value in exchange for some interest in collateral belonging to the debtor. In some instances the creditor may actually take possession of the collateral and hold it in trust for the debtor until the debtor repays the debt. This is a "pawnshop" approach. For example, in exchange for the possession of a debtor's watch, a creditor loans ten dollars to the debtor. If the debtor fails to repay the loan (usually with interest within a defined period), the creditor will sell the collateral. The creditor will then take for himself the amount owed and repay any amount remaining to the debtor.

In typical business transactions the creditor takes a security interest in the collateral rather than actual possession because of the high cost of actually taking possession of the debtor's goods and the fact that the goods are not useful if in the hands of the creditor. If the debtor fails to pay the debt owed, then the creditor has a right to take possession of the collateral. If the creditor is a supplier of goods, in many instances the collateral may be the goods themselves. *See* U.C.C. § 2-702 (1985). If the creditor is a lending institution that has extended value for the purchase of a particular piece of personal property, such as machinery, the lender may take possession of that property if the debtor defaults.

8. It is important that the secured creditor not be over-secured. If he is over-secured, the debtor holds equity in the collateral and the conditions for relief at section 362 are not met. *See* 11 U.S.C. § 362(d)(2)(A). However, if the secured creditor is substantially under-secured, then he may not seek to foreclose on the collateral, preferring to participate in the potential proceeds of a turnkey sale. *See infra* notes 9-10 and accompanying text.

9. A turnkey sale is a sale of a business or enterprise as one, complete package, rather than selling the individual pieces, piece-by-piece. An example of the difference of likely revenue outcomes might be seen in the difference between selling a contemporary and nicely outfitted restaurant, maybe only suffering from terrible management, as a going business versus taking the furniture, the fixtures and equipment of the restaurant and selling them individually, simply as used merchandise. The liquidation versus turnkey sale distinction is described by one commentator in the following passage:

> The debtor's firm may be worth more as an ongoing entity than if it is chopped up into little bits. . . . If the debtor is liquidated piecemeal, much of the value of [a] corporation may be lost. The expertise the debtor has developed in producing a particular product would disappear, as would all the information gained in research and development and all the goodwill generated by the firm's advertising and by the services it has provided its customers. If it goes out of business, no one may have sufficient incentive to manufacture spare parts for the machines it has already made. These machines may have their life-expectancy shortened. For all these reasons, we may want to encourage some reorganizations (broadly defining the term to include any effort to keep the debtor-firm substantially in one piece). The extra value that the debtor's firm has if it is kept intact is called the excess of its "going concern value" over its "liquidation value."

property exceeds its "piecemeal"[10] sale value and a successful turnkey sale cannot be effectuated without this essential piece of collateral.

A stay on all actions against the debtor is automatically imposed by Bankruptcy Code section 362.[11] Normally, the secured creditor[12] will seek relief from the automatic stay[13] provided by section 362(d) of the

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D. BAIRD & T. JACKSON, CASES, PROBLEMS, AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY 529 (1984).

10. Piecemeal value is the revenue obtained from selling individual pieces of collateral individually, without their being parts of a larger whole. Selling an isolated piece of machinery, and each component or asset individually, would be an example of a piecemeal sale. Conversely, selling machinery, tooling and inventory together as a package is an example of a turnkey sale.

11. 11 U.S.C. § 362.

12. The creditor seeking relief from the bankruptcy stay is necessarily a secured creditor. Although an unsecured creditor is still an interested party in that he is the one most likely to benefit from greater revenues derived from a turnkey or going concern sale, an unsecured creditor has no interest in specific property of the debtor.

Two further clarifications are necessary in developing the hypothetical: (1) whether the creditor is under-secured, over-secured, or perfectly secured and (2) whether the creditor's interest is secured by personal or real property. The hypothetical requires that the creditor be under-secured. This will cause the debtor to have no equity in the collateral. For example, if a secured debt of $100,000 is secured by property worth $75,000, no matter how calculated, the secured creditor is under-secured. This is the relationship examined in this Comment.

If the creditor were over-secured, then the debtor would have equity in the collateral. In the above example, this would be the case if the numbers were reversed. If the debt is only $75,000 and secured by property of $100,000, then there is a surplus or equity. This equity would satisfy the equity prong of the test of section 362(d)(2). Consequently, the creditor would not be entitled to relief from the stay in bankruptcy.

If the creditor were perfectly secured—where the value of the debt is equal to the value of the security—the creditor would likely be granted relief. The creditor's perfectly secured status may change due to waste or depreciation. Because the creditor risks becoming under-secured, unless the creditor can be adequately protected from depreciation of the collateral, courts will grant this type of creditor relief from the stay in bankruptcy much the same as an under-secured creditor.

The question of whether the security takes the form of an interest in real or personal property is not important relative to obtaining relief of the bankruptcy stay. Although the legislative history of the Code indicates that the scope of relief provided in section 362 was intended to respond to problems of bankruptcy filings on the eve of real property foreclosures, many cases apply the provision to personal property cases. *See infra* note 47 and accompanying text.

13. The automatic stay in bankruptcy and relief from the stay are governed by section 362. These are extremely important provisions, not only for purposes of this Comment, but also in terms of the interplay between creditors and the debtor in bankruptcy. The stay provision is one of the principal protections provided to debtors under bankruptcy proceedings. The automatic stay provided by section 362 stops all proceedings against the debtor. Every action already in motion is stopped, and no further actions may be initiated. The stay includes all actions by creditors to collect on outstanding debts and is "automatic" in that it automatically comes into existence upon the debtor's filing of a bankruptcy petition. Section 362(a) sets out the scope of protection which is provided the debtor. That section provides as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of

Bankruptcy Code.[14] The relief provision[15] enables a secured creditor to be excused from the mandate of the stay and enables the secured creditor to proceed with foreclosure[16] on the security for the debt. Section 362(d)(2) will provide relief from the automatic stay if the debtor holds no equity in the property—value remaining over the amount of the debt owed—and if the property is not necessary to an effective reorganization.[17] When section 362(d) is applied to the facts in the hypothetical

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> the Securities Investor Protection Act of 1970 (15 U.S.C. § 78eee(a)(3)), operates as a stay, applicable to all entities, of—
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
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> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
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> (4) any act to create, perfect, or enforce any lien against property of the estate;
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> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
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> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
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> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
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> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

11 U.S.C. § 362(a).

14. *Id.* § 362(d). Subsection (d) provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . , such as by terminating, annulling, modifying, or conditioning such stay—
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> . . . .
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> (2) with respect to a stay of an act against property . . . , if—
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> (A) the debtor does not have an equity in such property; and
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> (B) such property is not necessary to an effective reorganization.

Id.

15. *Id.*

16. A foreclosure occurs when a secured creditor executes his interest in the property of the debtor. This action results in the removal of possession of the property interests of the debtor and precipitates the subsequent sale of the property by the creditor to pay the outstanding debt.

17. 11 U.S.C. § 362(d). See *supra* note 14 for the text of this subsection. The policy behind granting relief in such a situation is that allowing the creditor to foreclose does not cause harm to the bankrupt's estate. The purpose of a bankruptcy proceeding is to bring all of the debtor's available assets together and to distribute them equitably—according to governing priorities—in satisfaction of debts owed. When property is fully encumbered, there is no equity belonging to the debtor. If there is no equity belonging to the debtor, then there is no value left to distribute to remaining creditors. If the trustee in bankruptcy, on behalf of all creditors, were to sell the property rather than allow a sale by a foreclosing creditor, the sale would still produce insufficient funds to pay the foreclosing secured creditor. Therefore, allowing the under-secured creditor relief from the stay in bankruptcy does not harm other

above, relief from the stay will be obtained by the secured creditor. The provision is satisfied because the debtor has no equity in the collateral (the debt secured is greater than the value of the collateral) and the debtor does not intend to reorganize.

If relief from the stay is granted and the secured creditor forecloses on collateral essential to the turnkey sale, the enhanced value will be lost. Presuming that piecemeal liquidation will not produce sufficient funds to satisfy junior and unsecured creditor claims, the loss of the surplus value is suffered by junior[18] secured and unsecured creditors.[19] The only hope of junior secured creditors and unsecured creditors is the surplus value produced by a turnkey sale after payments have been made to senior secured creditors.

The loss of the turnkey value is an especially poor result because junior secured creditors and unsecured creditors suffer the loss of the turnkey sale value with little or no offsetting gain to the foreclosing creditor or to anyone else. For example, suppose a senior creditor holds a security interest in a piece of collateral representing the debtor's primary asset to secure a debt of $50,000. The remaining creditors represent additional debt of $75,000. If the collateral securing the senior secured creditor is worth only $35,000 on a piecemeal basis, the senior creditor is undersecured. Once the debtor files bankruptcy, the secured creditor becomes an unsecured creditor as to the amount he is undersecured.[20] In this case, the creditor would be unsecured in the amount of $15,000. If the piecemeal sale of this collateral obstructs or precludes the possibility of a turnkey sale because the particular collateral is essential to a turnkey

creditors. However, this Comment will argue that other creditors *are* harmed where foreclosure impairs the viability of a turnkey sale.

Relief of the stay in bankruptcy where there is no harm to the debtor or remaining creditors furthers creditor expectations. The creditor bargained for the security right to foreclose should the debtor default. Presumably, this bargain was reflected in the interest rate charged by the creditor. Without the security, the creditor may have charged a substantially higher rate of interest for the debtor to borrow the same amount of funds. However, the possibility of the debtor defaulting and protecting himself with an application of bankruptcy is a foreseeable factor that the creditor may have considered when assessing the risk of extending credit.

18. Junior secured creditors are creditors whose security interests are subject to "senior secured" creditors. The senior secured creditor is paid first, then the junior, then subsequent junior creditors, and ultimately unsecured creditors.

19. The loss of the turnkey value is a loss to junior and unsecured creditors because these creditors will receive payment on their claims only after senior secured creditors are fully compensated. Therefore, the junior and unsecured creditors have a vital interest in the manner of sale.

20. A creditor's claim is "an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set-off is less than the amount of such allowed claim." 11 U.S.C. § 506(a).

sale,[21] the junior and unsecured creditors would be left in a poor position. Assuming that the subsequent piecemeal sale of remaining property would yield less than remaining debt, the junior and unsecured creditors would be substantially, if not wholly, uncompensated. However, if a turnkey sale were to generate $200,000, the secured creditor would recover the full value of his debt. Additionally, junior secured and unsecured creditors would participate in the remaining value.

This Comment proposes that when the collective value of the debtor's property exceeds the piecemeal sale value, it makes no sense to allow a secured creditor relief from the stay. A secured creditor should not be granted relief from the automatic stay where such relief and subsequent foreclosure on the collateral by the secured creditor impairs the viability of a turnkey sale. A reasonable period should be preserved during which time junior and unsecured creditors could attempt and pursue a turnkey sale.[22]

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21. The situation would occur where a debtor operates a business which depends on a dominant piece of collateral in order to continue its operation. For example, such situations would include a major printing press in the case of a print business, photographic development equipment in the case of a photo-developer or computer equipment in the case of a data processing organization.

22. A reasonable period might be 90 days from the date the creditor first moved for relief under section 362(d). If a turnkey sale were not accomplished within this period, a presumption could arise that the creditor should be entitled to relief from the stay. During the waiting period, the creditor could be compensated with interest based on the piecemeal value of the property, whether or not the turnkey sale is ultimately successful. Although the compensation to the delayed, relief-seeking secured creditor would be a cost to remaining creditors if the turnkey sale were not successful, fairness to the secured creditor requires that he be compensated for the delay. The secured creditor would have no duty to the remaining creditors, and preventing him relief from the stay would infringe on his pre-existing bargain with the debtor to foreclose subject to the debtor's default. Denying the secured creditor relief from the stay in bankruptcy under these circumstances would deprive the creditor of lost interest on the amount recovered from a piecemeal sale, but also lost opportunity costs. For a discussion of lost opportunity costs, see *In Re* American Mariner Indus., Inc., 734 F.2d 426 (9th Cir. 1984) (under-secured creditor who is stayed by a bankruptcy petition from repossessing its collateral is entitled, under the concept of "adequate protection," to compensation for the delay in enforcing its rights against the collateral); *but see* United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 108 S. Ct. 626 (1988) (undersecured creditor held not entitled to interest on collateral during automatic stay of lien enforcement under § 362(d)(1)).

If the property were ultimately sold as a part of a turnkey sale, then the interest paid to the secured creditor could be based on the amount ultimately obtained by the creditor. Under this scheme, a question arises as to how much a secured creditor is entitled to following a successful turnkey sale. If sufficient funds were generated by the turnkey sale, the secured creditor might argue that he should be entitled to the full amount of the debt owed. Conversely, since the creditor did not bargain for adequate or perfect security, full payment on the debt owed would appear as a windfall unless the creditor could show that he anticipated a turnkey sale, should the debtor liquidate under a bankruptcy proceeding. The secured creditor could be paid only the amount he would have received under a piecemeal sale, plus interest on

Protecting the turnkey sale, however, will be difficult. First, the secured creditor may not be motivated to participate in this process, and section 362(d), in providing relief from the automatic stay, makes his participation strictly voluntary. A secured creditor who stands to become substantially unsecured following a piecemeal sale will presumably willingly participate in a turnkey sale. This will be true if the turnkey sale results in funds sufficient to satisfy the secured creditor's claim and if the incremental difference between compensation from the turnkey sale equals or exceeds any lost opportunity costs associated with the more immediate compensation available through a piecemeal sale. However, where the debt secured is equal or substantially equal to the piecemeal sale value, the secured creditor will not benefit from the turnkey sale and thus will not be motivated to participate.

The second problem associated with effectuating the turnkey sale is the relief of stay provision provided in section 362(d)(2).[23] This provision does not address the issue of the potential value in a turnkey sale. The purpose of the provision is to relieve the secured creditor from the automatic stay. The provision does not require an examination of how relief will affect other creditors, both secured and unsecured, other than by requiring that the property not be necessary for an effective reorganization. As long as the debtor is liquidating, the language of the provision does not consider the impact on the remaining creditors. This Comment proposes that granting relief of the automatic stay should require recognition of the impact this will have on the remaining creditors.

This Comment examines the ways in which a turnkey sale may be pursued by arguments made within the current provisions of section 362(d)(2).[24] The Comment then examines arguments made by secured creditors who do not wish to participate in the turnkey sale and who prefer immediate relief of the stay. Finally, the Comment proposes an amendment to the Bankruptcy Code which would make tactics to pursue the turnkey sale unnecessary.

A. The Purpose and Context of Bankruptcy Law

A basic understanding of the nature of bankruptcy law is necessary to appreciate how debtors and creditors are treated under the Bankruptcy Code. Bankruptcy law, as codified in the Bankruptcy Act,[25] gov-

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that amount, and an additional amount of the surplus generated from the turnkey sale based on his relative position of security to the remaining creditors.

23. 11 U.S.C. § 362(d)(2).

24. *Id.*

25. Bankruptcy Reform Act of 1978, 11 U.S.C. (1982).

erns debtor and creditor relations once bankruptcy proceedings have commenced. However, the bankruptcy rules also operate on a tacit level long before a debtor files for protection under the Bankruptcy Code or is forced into bankruptcy by one or more creditors. Certain transactions between creditors and debtors which transpire shortly before the bankruptcy filing are affected by a debtor's subsequent bankruptcy. A prudent creditor is aware of the potential ramifications of bankruptcy proceedings.[26]

Once a debtor files for bankruptcy protection, all creditors of the debtor become participants in the bankruptcy proceedings. The unsecured creditors are especially interested in quickly obtaining payment or obtaining security before all available assets of the debtor are gone. Secured creditors would like to maneuver for priority, such as by last-minute perfection of security interests. However, the automatic stay provision of section 362 forces all creditors and all parties having claims against the debtor to follow the rules prescribed by the Bankruptcy Code.

Once a debtor files bankruptcy, the court appoints a bankruptcy trustee.[27] The purpose of the trustee is to maximize the value of the debtor's estate by controlling the actions of the creditors who seek satisfaction of the debts owed to them. The trustee tries to enforce an orderly and equitable division of the debtor's estate, or in the case of a reorganization, the trustee acts to negotiate a workable plan. The trustee in bankruptcy attempts to maximize the value of the estate by aggressively undoing transactions which are harmful to the interests of the bankruptcy proceeding. The bankruptcy trustee is given considerable powers to enforce bankruptcy principles.[28]

Equitable principles dominate bankruptcy proceedings. Although bankruptcy law intervenes in the traditional, common-law relationships of debtors and creditors, it does not interfere at the dominant expense of either debtors or creditors.[29] Rather, bankruptcy law seeks an equitable

26. Certain transactions between a creditor and the debtor may be invalidated by the trustee in bankruptcy. The avoiding powers of the bankruptcy trustee are contained in subchapters II and III of the Code. *Id.*

27. The duties of the trustee are defined at 11 U.S.C. § 1106.

28. 11 U.S.C. § 323.

29. A creditor who extends value to a debtor will likely do so in a secured transaction to protect himself in the event of debtor default.

> The law permits a debtor to encumber his assets in order to secure a money debt. If the debtor has a number of creditors, the effect of securing only one, or a few, of his obligations is to give secured creditors priority over those creditors who remain unsecured. Should the debtor become insolvent, his secured creditors have the right to appropriate as much of their collateral as is necessary to satisfy their claims in full before the debtor's unsecured creditors get anything.

distribution of debtor assets according to a schedule of priorities.[30] The equitable scheme protects the interests of all creditors, whether secured or unsecured, while seeking to maintain their respectively bargained-for positions.[31] Although the overwhelming majority of bankruptcies occur by the voluntary act of debtors who seek relief from the demands of their creditors,[32] many of the provisions in the Bankruptcy Code which protect the debtor from creditor actions[33] are, in actuality, principles of fairness which operate to benefit other creditors.[34] For example, the automatic stay freezes the priority positions bargained for prior to a debtor filing bankruptcy. The idea is to protect those creditors from the zeal of other creditors who might exert pressures and receive preferential treatment. Because bankruptcy is a proceeding to assemble the pieces of the debtor's estate and distribute them equitably among the creditors, it is, in a sense, entrepreneurial. Bankruptcy proceedings have as their purpose to gather available resources and maximize the use of these resources to satisfy specific needs. Here, the resources to be gathered are the assets of the debtor, and the needs to be satisfied are the outstanding

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Jackson & Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1147 & n.17 (1978).

30. 11 U.S.C. § 726.

31. "One of the principal advantages of a secured transaction is the protection it provides against the claims of competing creditors. . . . To a considerable extent, the value of a security interest depends upon the degree to which it insulates the secured party from the claims of the debtor's other creditors." Jackson and Kronman, *supra* note 29, at 1143.

32. R. JORDAN & W. WARREN, BANKRUPTCY 20 (1985).

33. Section 547, which addresses the concept of preferences, is an example of a provision designed for the protection of creditors. Section 547 provides that the bankruptcy trustee may recover or invalidate certain transfers between the bankrupt debtor and a creditor, during a defined period. The idea behind this provision is that no creditor should be preferred by the debtor over other creditors during the prescribed period.

34. The principle that bankruptcy proceedings have as their purpose the protection of the rights of both debtors and creditors has been described as follows:

> All bankruptcy law . . . no matter when or where devised and enacted, has at least two general objects in view. It aims, first, to secure an equitable division of the insolvent debtor's property among all his creditors, and, in the second place, to prevent on the part of the insolvent debtor conduct detrimental to the interests of his creditors. In other words, bankruptcy law seeks to protect the creditors, first, from one another and, secondly, from their debtor. A third object, the protection of the honest debtor from his creditors, by means of the discharge, is sought to be attained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law.
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> . . . A special process of collective execution is devised, a process directed against all of the property of the debtor, resorted to for the common benefit and at the common expense of all the creditors.

Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 224-25 (1918). For a discussion on the theme that equitable distribution in bankruptcy means respect and enforcement of underlying pre-existing legal obligations, see H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986).

debts owed to creditors. The purpose of bankruptcy is to maximize the distribution of these assets according to a plan and then to terminate the proceeding.

In bankruptcy proceedings, the process of accumulating the debtor's assets and equitably distributing them among valid creditor claims has few essential rules. There are rules for gathering property into the estate[35] and rules which prescribe the disbursement of those assets.[36] The automatic stay provision, provided by section 362, is the focus of this Comment. The stay has two functions. First, the automatic stay halts any activity by creditors against the debtor instituted prior to the debtor filing for bankruptcy protection.[37] The purpose of the stay is to provide the opportunity to assess the status of the debtor, and to determine the extent of indebtedness and the value of his property in a static context. Congress gave the following reason for adopting the automatic stay provision:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan .... The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence[38] by creditors for the debtor's assets prevents that.[39]

The second function of the automatic stay is to provide a test to determine if a creditor ought to be entitled to relief from the stay and hence be able to continue with his action to foreclose on the security for

35. *See* 11 U.S.C. § 541.

36. *See id.* § 726.

37. *Id.* § 362(a).

38. A race of diligence refers to actions by alert creditors who, upon some notice of potential debtor default or debtor intention to file for bankruptcy protection, run to court to protect their rights. Diligent creditors immediately make claims on the debtor's assets by filing security agreements, obtaining judicial liens or using other court processes. The automatic stay is designed to prevent creditors from obtaining this additional protection at the expense of other creditors.

39. H.R. REP. NO. 595, 95th Cong., 1st Sess. 340, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6296-97.

his claim. It is this second function of the automatic stay provision which is at issue in this Comment.

B. Legislative History of Section 362(d)

The legislative history of the Code is the first place to look to support the proposition that creditors should not always obtain relief from the automatic stay. Ideally, the legislative history would support the proposition that relief from the stay should be denied when relief would impair the estate of the debtor by eliminating or foreclosing the value of the turnkey sale. Relief of the stay in such a circumstance would conflict with the bankruptcy principle of maximizing value.

As originally proposed, the automatic stay provision of section 362 did not contain the present two-prong test now provided at subsection (d)(2).[40] As originally proposed, section 362(d) contained a relief provision only "for cause":[41]

> (d) On request of a party in interest, after notice and a hearing and for cause, including the lack of adequate protection of an interest in property of such party in interest, the court shall grant relief from the stay . . . such as by terminating, annulling, modifying, or conditioning such stay.[42]

The October 1977 Senate version of section 362(d) added the language that would ultimately become section 362(d)(2): "The court shall grant relief from the stay if the court finds that the debtor has no equity in the property subject to the stay and such property is not necessary to an effective reorganization."[43]

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40. H.R. 8200, 95th Cong., 1st Sess. 361 (1977).

41. The "for cause" relief provision remains a test for relief under the present Code. 11 U.S.C. § 362(d)(1). "Under section 362(d)(1) . . . the court may terminate, annul, modify, or condition the automatic stay for cause, including lack of adequate protection of an interest in property of a secured party." 124 CONG. REC. 11,092-93 (1978); 124 CONG. REC. S17,409 (1978). An example of an application of this subsection is where a creditor is adequately secured, but only marginally so, and there exists a strong likelihood that the margin will erode. A creditor may hold a factory building worth $100,000 as security for a debt of $100,000. However, if the building is in dire need of roof repair and the debtor is not able to make such repairs, the value of the building will decrease. The creditor will then become under-secured. In such a situation, the court may grant relief "for cause." *See* 11 U.S.C. § 361. The margin between being perfectly secured and oversecured is an equity cushion. The more minute that cushion, the more likely cause will be found for relief.

42. H.R. 8200, 95th Cong., 1st Sess. 361 (1977).

43. S. 2266, 95th Cong., 2d Sess. 354 (1977). The Senate version also contained this comment:

> [1] For the purpose of this subsection (d), property is not necessary to an effective reorganization of the debtor if it is real property on which no business is being conducted by the debtor other than the business of operating the real property and activities incidental thereto.

Ultimately,[44] the present version of section 362(d)(2) was enacted as Public Law 95-598 on November 6, 1978.[45] According to the accompanying Senate Report:[46]

> Upon the court's finding that the debtor has no equity in the property subject to the stay and that the property is not necessary to an effective reorganization of the debtor, the subsection requires the court grant relief from the stay. To aid in this determination, guidelines are established where the property subject to the stay is real property.[47]

> [2] Where the debtor owns two or more properties for which an established business enterprise has been created for the purpose of managing and leasing such properties, the court may find that *one or more of such properties are essential to the effective reorganization of such real estate management enterprise.*
> [3] Where a request is made to grant relief from the stay *with respect to property not necessary to an effective reorganization of the debtor, and the court determines that the debtor has equity in the property,* the court shall authorize or order the sale of the property pursuant to Section 363.

Id. (emphasis, paragraph numbering and structure added).

Apparently, the intention of these paragraphs was to clarify which debtors should receive the equitable benefits and protection provided by the stay under section 362. Congress decided that those debtors who own property merely for investment purposes and for tax sheltering should not receive this protection. Paragraph [1] indicates that property not protected is property that is *not* essential because no business is being operated on it, other than the mere management of the property itself.

The exception provided in paragraph [2], for the operation of two or more properties owned as part of a property management enterprise, is a policy statement. The class of debtors which Congress intended to benefit by the protection of the stay provision are those debtors who are engaged in a business with that property. The stay is intended to allow them the opportunity to reorganize their business and produce revenue needed to pay their debts. Investors in property, who do not engage in any business with that property, are not members of the class intended to benefit from the stay. Since these investors do not use the property for business purposes, reorganization will not produce value for creditors.

Paragraph [3] provides that if the property is not necessary to a reorganization according to paragraphs (1) and (2), that is, if the property is not owned and operated as part of a business, then even where the debtor holds equity in the property, the creditor should be granted relief from the stay. This provision reiterates the policy of protecting the viability of a debtor's business. If the business can be saved, it ought to be protected. But if the business has no future, then mere equity in the property is not good cause to deny a creditor relief from the stay.

44. In November and December of 1977, an intermediary form of the (d)(2) subsection was proposed. This version did not contain the necessity for reorganization provision:

> (d) On request of a party in interest, after notice and a hearing, and for cause, including the lack of adequate protection of an intereest [sic] in property of such party in interest, the court shall grant relief from the stay . . . if the court finds that the debtor has no equity in the property subject of the stay.

Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in the Judicial Machinery of the Comm. on the Judiciary, 95th Cong., 1st Sess. 56-57 (1977).

45. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

46. S. REP. No. 989, 95th Cong., 1st Sess. 52, 53 (1978).

47. *Id.* at 53. The report continues:

A review of the legislative history of section 362(d) implies that the purpose of this subsection is consonant with the broad policy of bankruptcy. That policy is to protect the balance of equities between debtors and creditors while affording certain debtors the opportunity to reorganize and resurrect their businesses. Section 362(d) is illustrative of the balance between creditor and debtor interests. Although the stay is automatic upon commencement of the bankruptcy proceeding, creditor relief is provided under certain conditions.

Section 362(d)(2) provides a test for granting the creditor relief from the stay. The first part of the test requires that the debtor have no equity in the property.[48] Subsection (d)(2)(A) satisfies the policy of protecting the interests of both creditors and debtors. As long as the debtor does not have equity in the property, foreclosure on this property by the creditor will not cause any harm or loss to the debtor's estate. When the debtor has no equity in property, the property holds no residual or excess value to him over the amount secured to his creditor. Therefore, the creditor ought to be entitled to foreclose on the collateral because the creditor extended credit to the debtor in return for a security interest in the property. To deprive the creditor of this interest, when it would result in no residual gain[49] to the debtor or other creditors,[50] would be unfair. This result is avoided under the Bankruptcy Code.[51]

Section 362(d)(2)(B) provides the second part of the test. The sec-

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> An exception to "the necessary for an effective reorganization" requirement is made for real property on which no business is being conducted other than operating the real property and activities incident thereto. The intent of this exception is to reach the single-asset apartment type cases which involve primarily tax-shelter investments and for which the bankruptcy laws have provided a too facile method to relay conditions, but not the operating shopping center and hotel cases where attempts at reorganization should be permitted.

Id. The subsection's focus on real property as opposed to personal property is immaterial. Many cases discuss the use of personal property, such as automobiles or machinery. "It is true that the legislative history uses real property as an example to show when relief from stay might be warranted. However, the language of the statute is not so limited, and should be read as applying to all property which is encumbered by a creditor's interest, including inventory and accounts receivable." *In re* Matter of Anchorage Boat Sales, Inc., 4 Bankr. 635, 641 (Bankr. E.D.N.Y. 1980).

48. 11 U.S.C. § 362(d)(2)(A).

49. There can be no residual gain to the debtor when he holds no equity in property. Even assuming that the creditor did not foreclose, and the property was instead sold by the bankruptcy trustee, the debtor would still not benefit from the sale. In such a case, the proceeds of the sale would go to the creditor, and not to the debtor.

50. Creditors other than the creditor seeking relief from the stay are considered parties in interest. Their claims will be paid, if at all, from residual revenues found in the debtor's estate after payment of all allowed secured claims. *See* 11 U.S.C. § 506.

51. For a discussion of creditor-debtor bargaining, see Jackson and Kronman, *supra* note 29, at 1143.

ond prong requires that the property, with regard to which a secured creditor seeks relief of the stay, is not necessary for an effective reorganization.[52] This subsection satisfies the policy of protecting the debtor's opportunity to resurrect his business according to a plan. The creditor may not obtain relief from the stay unless the debtor has no equity in the property *and* the debtor does not require the property for reorganization of his business. The purpose of this provision is to prevent creditors from foreclosing on resources which would allow the debtor to continue operating his business. This provision furthers the broad policy of the Bankruptcy Code which is to enable and encourage a debtor to reorganize, rebuild and continue his operation in order to pay his debts. Section 362(d)(2)(B) is helpful to creditors by providing a mechanism through which the debtor can generate some income and pay out on creditor claims.

The test of section 362(d)(2) explicitly provides protection for the value of a debtor's estate as a going concern by limiting relief of the stay to situations where the property is not part of a reorganization plan. Although the legislative history of the section *does not explicitly* discuss reorganization value in terms of a turnkey liquidation, the legislative history does, however, support the theory that reorganization value ought to be protected.

C. Structural Analysis of Section 362(d)

The question addressed in this section is whether a court *must* grant a creditor relief from the stay under section 362(d) if the test under that section is satisfied. In other words, is the creditor *absolutely* entitled to relief from the bankruptcy stay when the debtor has no equity in the property and the property is not necessary to an effective reorganization? Section 362(d) provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) [the automatic imposition of the stay upon filing of bankruptcy by the debtor] of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if—

52. 11 U.S.C. § 362(d)(2)(B).

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

(B) such property is not necessary to an effective reorganization.[53]

The first important proposition is that paragraph (d) clearly must modify both subsections (1) and (2). This conclusion is important because paragraph (d) provides that the court shall grant relief "such as by terminating, annulling, modifying, or conditioning such stay . . . ." Even if it is mandatory for the court to grant relief under subsection (2) when both (A) and (B) are satisfied, the language indicates that the court is *not* required to grant *complete* relief. In such a case, the court may also modify or condition the stay. The "terminate, annul, modify or condition" language is apparently meant to provide judicial flexibility in granting relief of the stay. If flexibility is intended, then this language should allow the court to condition relief upon a limited term during which a turnkey sale may be pursued.[54]

If the court has the flexibility to modify or condition the stay as an

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53. Bankruptcy Reform Act of 1978, 11 U.S.C. § 362(d) (1982).

54. This conclusion is based not only on a common-sense reading of the provision, but also on an analysis of the linguistic and logical structure of the language. Analyzing the statute linguistically, the disjunctive "or" placed after subsection (1) requires that either subsection (1) or subsection (2) applies to the active stipulation provided at (d). Both subsections must be subject to (d). If "or" were read to separate subsection (2) from (d) then (2) would also lack both a subject and a verb: the subject is "the court" and the verb is "shall grant relief." If (2) were separated from (d), (2), having neither a subject nor a verb, would be nonsensical. Therefore, subsection (2) must be modified by (d).

Stylistically, the same result is obtained. The purpose of indenting the sub-parts is to show that they are sub-parts of a larger section. Subsections (1) and (2) are shown as equal sub-parts of (d). If (2) were not intended as an equal sub-part, it would not be so indented and would have been written differently with a separate modifying clause.

Diagrammatically, the entire subsection must read as follows:

IF upon a request of a party in interest and after notice and a hearing
AND
IF there is "cause" including the lack of adequate protection of an interest in property of such party in interest
OR
IF with respect to a stay of an act against property under subsection (a) of this section
AND
IF the debtor does not have an equity in such property
AND
IF such property is not necessary to an effective reorganization
THEN the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay.

This analysis of logical and linguistic structure is based on analytic tools presented in Benson, *Up a Statute with Gun and Camera: Isolating Linguistic and Logical Structures in the Analysis of Legislative Language*, 8 SETON HALL 279 (1984-85).

interim measure against complete termination, then the court may deny the creditor immediate relief of the stay. This result would enable the pursuit of a turnkey sale. However, the legislative history of section 362(d) and its judicial interpretation render illusory the flexibility indicated by the structural analysis above. Neither the legislative history nor judicial interpretation of the section indicate that any flexibility was intended.

The Report of the Committee on the Judiciary, which accompanies the originally proposed Code states:

> Subsection (d) requires the court, on request of a party in interest, to grant relief from the stay, such as by terminating, annulling, modifying, or conditioning the stay, for cause. The lack of adequate protection of an interest in property of the party requesting relief from the stay is *one cause for relief,* but is not the only cause. As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. For example, a divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case. In that case, *it should not be stayed.* A probate proceeding in which the debtor is the executor or administrator of another's estate usually will not be related to the bankruptcy case, and *should not be stayed.* Generally, proceedings in which the debtor is a fiduciary, or involving post-petition activities of the debtor, need *not be stayed* because they bear no relationship to the purpose of the automatic stay, which is debtor protection from his creditors. The facts of each request will determine whether relief is appropriate under the circumstances.[55]

The passage apparently defines relief of the automatic stay as meaning *complete* relief, not something less. The passage begins by stating that the court shall grant relief, *such as by terminating, annulling, modifying or conditioning the stay.* However, in all of the examples given, the language simply says that the action *should not be stayed.* The examples in the legislative history passage indicate complete relief of the stay. In

55. H.R. REP. NO. 595, 95th Cong., 1st Sess. 343-44 (1977) (emphasis added). Note that the report states nothing regarding lack of equity and necessity of property for reorganization. As originally proposed, the Code did not contain this second test, later section 362(d)(2). However, as discussed in *supra* note 54 and accompanying text, the same analysis and discussion of subsection (1) applies equally to subsection (2) because both subsections are equally subject to the stipulations in the "parent" section, namely (d).

no example does the passage indicate that the "stay should be lifted or modified."[56]

Commentary in the Congressional Record on the passage of the final version of the Code supports the interpretation that "relief" at section 362(d)(2) means "complete relief" of the stay:

> Under section 362(d)(1) . . . the court may terminate, annul, modify, or condition the automatic stay for cause, including lack of adequate protection of an interest in property of a secured party. . . . Under section 362(d)(2) the court may alternatively terminate, annul, modify, or condition the automatic stay for cause including inadequate protection for the creditor. The court shall grant relief from the stay if there is no equity and it is not necessary to an effective reorganization of the debtor.[57]

Although this passage is unclear, since it refers to the "for cause" relief of subsection (d)(1) as also being a component of (d)(2), the passage does, nonetheless, indicate that the court *shall grant complete*, unconditional, immediate relief if there is no equity and if the property is not necessary to an effective reorganization. Therefore, it would seem that little direct support exists in the legislative history for *conditioning* immediate relief of the bankruptcy stay to a creditor who satisfies section 362(d). Relief from the automatic stay is apparently available, despite any consideration of the potential value derived from the possibility of a turnkey sale.

D. *Judicial Interpretation of Section 362(d)*

The test of section 362(d) as shown above provides limited flexibility in granting a creditor relief from the automatic stay. From the point of view of interpreting the statutory language, the first main paragraph of section 362(d) was shown to govern the two-part test contained in subsection (d)(2). A court applying the test *should* be able to either terminate, annul, modify or condition the stay. The legislative history, however, has not clarified or elaborated these alternatives. In fact, the history tends to indicate that when the conditions of the test at section

56. *See also Bankruptcy Reform Act of 1978: Hearing on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 95th Cong., 1st Sess., on S. 2266 and H.R. 8200, Nov. 28, 29 and Dec. 1, 1977, pt. 1 at 57 (1978) ("The court shall grant relief from the stay if the court finds that the debtor has no equity in the property subject of the stay").

57. 124 CONG. REC. 32,395-96 (1978).

362(d) are met, complete relief from the stay is intended. The issue, then, is how the relief provision has been interpreted judicially.

Relief from the automatic stay, as provided by section 362(d)(2), has tended to be absolute. Where the conditions at (2)(A) and (B) are satisfied, the court will grant "complete" relief.

In *In re Matter of Anchorage Boat Sales, Inc.*,[58] a secured creditor sought relief from the stay under subsection (d)(2). The court held that:

> subsection (d)(2) represents the view of Congress that a creditor is entitled to relief from stay in every case in which the two-pronged test of this subsection is met: relief from stay should be granted if there is no equity in the collateral, *and* the collateral is not essential to an effective reorganization. Congress has thereby taken away a certain amount of the discretion which formerly rested with Bankruptcy Judges under Bankruptcy Rule 11-44, and replaced it with its own value judgment that such facts warrant relief from stay in every instance.[59]

Similarly, in *In re Stewart*,[60] the court stated that it was

> compelled to grant relief from the stay . . . where the debtor is without equity in the property *and* the same is not necessary to a reorganization. Thus, whatever latitude the Court might have in assessing and dealing with 'clause' [sic] under the first test of § 362(d), it would appear that § 362(d)(2) requires the Court in liquidations to determine whether an equity exists in the debtor and, if not, to grant relief.[61]

These passages indicate that judicial interpretation of section 362(d) is harmonious with the legislative history, but not with the statutory analysis presented above. The flexibility in granting the relief of the stay does not find judicial support. Cases exist where the equitable powers of the court have been used to modify or condition the stay when the facts of the case have shown cause.[62] However, reliance on the equitable pow-

58. 4 Bankr. 635 (Bankr. E.D.N.Y. 1980) (secured creditor entitled to have automatic stay lifted where debt exceeded value of collateral and encumbered property was not essential to a reorganization plan).

59. *Id.* at 641 (emphasis in original).

60. 3 Bankr. 24 (Bankr. N.D. Ohio 1980) (bank entitled to relief from stay where debtor held no equity in an automobile in which bank held security interest).

61. *Id.* at 25. *See also In re* Penny, 52 Bankr. 816 (Bankr. E.D.N.C. 1985) (property was needed for an effective reorganization, and thus automatic stay would not be lifted, although the debtor held no equity in property).

62. *See* Bankruptcy Reform Act of 1978, 11 U.S.C. § 105(a) (1982): "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." This power was demonstrated in *In re* Francis, 42 Bankr. 760 (Bankr. E.D. Mo. 1984), where the debtor did not have equity in the property and the property was not necessary

ers of the court alone, without a statutory basis, would not provide the protection of the turnkey sale potential that this Comment advocates. A structural basis for the protection of the turnkey sale is preferable to reliance on the equitable discretion of the bankruptcy court. Preservation of the turnkey sale opportunity requires a showing that either one of the section 362(d)(2) prongs is not satisfied. Either—

(A) the debtor *does* have equity in the property; or

(B) the property *is* necessary for an effective reorganization.

II. SATISFYING SECTION 362(d) TO ENABLE A TURNKEY SALE

A. The Debtor has "Equity" in the Property

Assuming that reliance on the discretion of the court is not a basis for securing the turnkey sale, the basis for the sale must be found, if at all, in a statutory argument, made on the basis of section 362(d) itself. One argument is that the debtor does hold "equity" in the property.

The term "equity" is neither defined by the Bankruptcy Code nor is it discussed in the Code's legislative history.[63] Thus, the only source for interpreting this term is found in the case law. A broad construction of "equity" is most desirable in view of the goal of the hypothetical presented by this Comment. This interpretation would require a view of equity which is almost abstract—abstract enough to encompass the potential equity value of a turnkey sale over the value of a piecemeal sale. A broad, expansive conception of equity will further the goal by allowing

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for a reorganization. The debtor intended to liquidate the property to pay secured and unsecured creditors. However, rather than allowing complete relief of the stay, the court conditioned the stay by continuing it for five months during which time the debtor was able to pursue a sale. If the property had not been sold within the five month period, the stay would have been lifted, and the creditor would have been permitted to foreclose. This limited holding is contrary to the cases noted above which held that relief must be granted if the debtor has no equity in the property and if the debtor fails to satisfy the reorganization prong of the test at section 362(d).

Although the court did not expressly state its reasoning in the opinion, the court may have reasoned that the debtor would have a greater interest in deriving the highest possible revenue for the sale of the property than would the secured creditor. The creditor, accordingly, would be more likely to seek out the buyer who was willing only to pay a value equal to the value of the debt.

63. Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 (1982). It would be desirable for the purposes of satisfying the equity test at section 362(d)(2)(A) if the term "debtor" could be construed, with authority, to include all parties who have an interest in the estate. Thus, unsecured creditors, who would benefit by the proceeds of a turnkey sale, could be said to have an equitable interest in the property. However, no such abstract authority is available. "Debtor" is defined in the Code to mean a "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(12).

a showing that the debtor has "equity" in the property. If the debtor holds equity in the property, his interest will satisfy the first prong of the test.

No direct authority exists for such a philosophical construction of the term "equity." The court in *In re Faires*[64] held that "equity" refers to the "difference between the value of the property and all encumbrances against it."[65] A substantial divergence of opinion exists, however, as to whether a court should subtract the encumbrance of a single creditor seeking relief from the value of the property to determine debtor equity, or whether the court should add *all* encumbrances together and subtract this sum from the resale value of the property.[66]

Defining equity as the sum value of *all* encumbrances on the property *is* a broad construction of "equity" since the interest of other creditors is at least implicitly acknowledged. Courts that have so held have not viewed the relief of stay in an isolated context, merely in terms of the debtor and the single, particular, creditor seeking relief of the automatic stay. Rather, they have viewed the relief provision in the total context of the debtor relative to all creditors who have a security interest in the collateral. If the court adds together all encumbrances on a piece of property to determine whether the debtor holds any residual equity, then the court ought to consider the beneficial value of the property to the collective set of creditors. This value would be the "equity" value obtainable in the turnkey sale versus a piecemeal sale.

For example, suppose the debtor holds property with a piecemeal sale value of $100,000. Suppose there are three creditors who hold security interests in such property, creditor *A* having first priority, creditor *B*

64. 34 Bankr. 549 (Bankr. W.D. Wash. 1983) (equity refers to difference between value of property which is subject to relief of automatic stay and all encumbrances against it).

65. *Id.* at 552.

66. For example, suppose a given piece of property belonging to the debtor secures several creditors, and this property has a resale value of $100,000. If the creditor seeking relief has a claim of $90,000, and his claim alone is subtracted from the $100,000 value, the debtor will have an equity of $10,000. Alternatively, if the same property has three encumbrances against it, (e.g., creditor *A* has a secured interest of $90,000, creditor *B* $25,000 and creditor *C* $35,000), if these three encumbrances are added together, and if the sum of these encumbrances is subtracted from the value of the property, the debtor has no equity. A deficit of $50,000 exists.

As described in the court's opinion in *In re* Koopmans, 22 Bankr. 395 (Bankr. D. Utah 1982),

> [t]here is a divergence of opinion over what constitutes 'equity' within the meaning of Section 362 (d)(2)(A). The statute refers to the equity of the debtor which suggests the difference between the value of the property and all encumbrances against it. This is the predominant view. . . . Some, however, see equity as the difference between the value of the property and the lien which is the subject of relief.

Id. at 396 n.2 (citations omitted).

having second priority and creditor *C* having third priority.[67] Suppose creditor *A* has a claim of $75,000, creditor *B* a claim of $50,000 and creditor *C* a claim of $50,000. If the court adds the value of all three encumbrances, a total of $175,000 will result. The debtor will be said to have no equity in the property because it is worth only $100,000. If, however, the court were to look only to the value of creditor *A*, the party seeking relief, the debtor would have equity of $25,000, and hence relief from the stay to creditor *A* would be denied. But by looking at the value of all three encumbrances, if the court then grants relief, secured creditor *A* will proceed with foreclosure and sale of the property. However, creditor *A* will be interested in obtaining through this sale only enough revenue to satisfy his claim. Creditor *A* has no motivation to sell the collateral for any amount over the amount of his claim because any surplus value would be returned to the debtor's estate for disbursement to remaining creditors.[68]

The argument could then be made that by adding the value of all encumbrances, the benefit directly accrues to secured creditor *A*, who is thus able to obtain relief that he otherwise would have been denied. With the relief, he benefits by foreclosing and satisfying his claim. Creditors *B* and *C*, whose encumbrances made the relief from the bankruptcy stay possible, have their interests jeopardized. Neither creditor *B* nor *C* will have any control over the sale conducted by creditor *A*.[69] It will be very important to creditors *B* and *C* to sell the property in the manner generating the highest possible revenue, as it will also be to any creditors junior[70] to secured creditor *C*. The highest possible revenue outcome also is a concern of all unsecured creditors, who are paid by any surplus value remaining after payment to senior or priority creditors.

A court which adds all encumbrances together to determine debtor

67. Priority is determined on the basis of a number of factors including "attachment" and "perfection" of liens. These mechanisms are beyond the scope of this Comment. Their technical operations are not necessary for understanding the discussion of the hypothetical and are therefore avoided in the discussion. For an excellent discussion, see Jackson and Kronman, *supra* note 29, at 1143.

68. 11 U.S.C. § 541.

69. Creditors *B* and *C* may choose to purchase the property at the foreclosure sale and transfer it to the debtor's estate in an attempt to preserve the turnkey sale. Since this would be a contemporaneous transfer, they would not be subject to a preference attack under section 547 of the Code. However, expecting junior secured creditors to extend additional revenue in the interest of preserving a turnkey sale is unrealistic. The burden on creditor *B* and *C* is considerably more onerous than the denial of relief to creditor *A* for a reasonable period to pursue a turnkey sale.

70. Junior secured creditors are those creditors who have a security interest in a given piece of property, but who hold such interest subject to prior claims of other secured parties. The junior secured creditor will receive payment only after the senior creditors are paid in full.

equity implicitly addresses the interests of the "pool" of creditors. It is arguable, therefore, that this interest of all creditors whose encumbrances are added together in the determination of equity is an "equity" in the property held by the debtor on behalf of the collective creditors. The equity is the beneficial interest to the pool of creditors, which has an interest in maximizing the revenue from the sale of the property. The pool of creditors has an interest in pursuing the turnkey sale because it will maximize the potential revenue of the sale of the debtor's property. The potential value of a turnkey sale over a piecemeal sale is then an equity value, if only a potential value. This argument, if it had support, would successfully satisfy the first prong of the test for relief under section 362(d). The debtor would hold equity in the property.[71]

An alternative argument may be made in support of the finding that the debtor has equity in the property. This argument is based on an expansive reading of Bankruptcy Code section 541,[72] which defines the property belonging to the debtor's estate.[73] This argument suggests that the turnkey value of the sale of the debtor's estate is "property" which belongs to the estate, just as other intangible properties, such as causes of action,[74] are considered property of the estate. Section 541 provides in part:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) [A]ll legal or equitable interests of the debtor in

71. The persuasive value of the argument is clearly threatened by a lack of authority. Authority only exists for the premise that the value of all encumbrances is to be considered in determining debtor equity in the property or collateral. Obviously, the argument fails entirely when the court holds that equity is only the difference between the sale value of the property and the individual encumbrance of the creditor seeking relief from the stay. *See supra* note 66 and accompanying text.

Many courts have recognized the value of a going concern or turnkey sale over piecemeal liquidation. "[P]roperty standing alone may have no equity, but when sold as a package, may bring a better price for other assets, as for example, workings for watches yet to be assembled, or contiguous parcels of real property." *Koopmans*, 22 Bankr. at 407. The hypothetical proposed in this Comment presumes that in no possible, non-turnkey sale could there be revenue remaining over the amount of all claims, thus foreclosing any argument that the debtor has equity in the property. Such a situation would focus on principles of valuation. For a discussion of turnkey versus piecemeal valuation, see Fortgang & Mayer, *Valuation in Bankruptcy*, 32 UCLA L. REV. 1061 (1985).

72. 11 U.S.C. § 541.

73. "Estate" refers to the collection of various property belonging to the debtor. *Id.*

74. Tignor v. Parkinson, 729 F.2d 977 (4th Cir. 1984) (debtor's personal injury claim whether unliquidated or settled is property of debtor's estate as of commencement of case).

> property as of the commencement of the case.[75]

Section 541(a)(6) further provides that property of the estate also includes, "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case."[76]

The phrase "property of the estate" is intended to be construed broadly.[77]

> [Section] 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced.[78]

In light of section 541 and the legislative and judicial mandate that section 541 be read broadly, it is arguable that the turnkey value locked in the collective nature of the debtor's property is property of the estate. The right to sell the property for its highest value is a right of the debtor at the time of commencement of the case. Therefore, relief from the stay via a creditor's action under section 362(d) will be a deprivation of a property right of the debtor. The debtor can be said to have equity in the property since this right to sell on a turnkey basis is vested in the property itself at the commencement of the bankruptcy. This property interest belongs to the debtor as a distinct interest from the security interest in the collateral held by the creditor. In this sense, the "equity" prong is again satisfied because this interest represents an equity in the property. Additionally, the relief action under section 362(d) would violate the principles of section 541. Section 541 seeks to define and maintain the property of the debtor on behalf of the estate.[79]

The problem with the above "equity" and "property" analysis is twofold. First, this analysis is entirely lacking in judicial authority. No

75. 11 U.S.C. § 541(a)(1).

76. *Id.* § 541(a)(6).

77. "The scope of . . . paragraph [(a) of section 541] is broad. It includes all kinds of property, including tangible or intangible property, causes of action, and all other forms of property currently specified in section 70a of the Bankruptcy Act." S. REP. NO. 989, 95th Cong., 2d Sess. 82, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5868 (citation omitted).

78. United States v. Whiting Pools, Inc., 462 U.S. 198, 205 (1983) (citations omitted) (property seized by Internal Revenue Service (IRS) immediately prior to filing of debtor's Chapter 11 petition is property of estate, since debtor, and not IRS, retains ownership interest in property).

79. Section 542 of the Code provides for the turnover of property removed from the estate. 11 U.S.C. § 542.

court has so broadly construed "equity" or "property."[80] Second, it has serious impact on creditor expectations concerning rights of foreclosure. A creditor may argue that he bargained for the right to foreclose on property securing the debt and that he owes no duty to remaining creditors, regardless of the potential value that may be generated on their behalf by a turnkey sale. Enabling the turnkey sale on behalf of other creditors, especially those who did not bargain for any security, is accomplished at the expense of the secured creditor. Denying relief of the stay *is* unfair since the secured creditor bargained for a security interest in the property. The foreclosure interest, bargained for by the secured creditor, most likely did not include consideration for beneficial interests of other creditors.

The secured creditor could, however, be compensated for the lost opportunity costs associated with a delay in foreclosure.[81] This Comment proposes that such a delay would be short term. Perhaps a period of ninety days would be given to pursue and effectuate a turnkey sale. Compensating the creditor with interest on his security and lost opportunity costs would be outweighed by the increase in value generated by a turnkey sale. Junior secured creditors also bargained for rights to foreclose on security interests. It makes little sense to impair the value of the junior creditors' security interests by enabling the senior secured creditor to unilaterally wipe out the potential turnkey sale value. Although the junior secured creditors may not have relied on the turnkey sale value of their collateral any more than the senior secured creditor, junior secured creditors would not have expected needless destruction of their equity.[82]

B. Satisfying Prong Two: The Property is Necessary for an Effective Reorganization

This Comment has pursued an argument in support of a turnkey sale under the first prong of the test at section 362(d). The focus has

80. Property has been construed abstractly and broadly in the sense that it has been held to encompass causes of action. A cause of action is a property right of the estate and may be pursued by the Trustee on behalf of the estate. *See* 11 U.S.C. § 544.

81. *See supra* note 22 and accompanying text.

82. Consider, for example, the common-law creditor's right of marshalling:

> Marshalling is an equitable doctrine developed historically and traditionally used to prevent a junior lienholder with a security interest in a single property from being squeezed out by a senior lienholder with a security interest not only in that property, but in one or more additional properties. The doctrine requires the senior lienholder to first resort to assets free of the junior lien to avoid the inequity which would otherwise result from the unnecessary elimination of the junior lienholder's security with the increased likelihood the junior creditor will be unable to satisfy its claim.

Shedoudy v. Beverly Surgical Supply Co., 100 Cal. App. 3d 730, 733, 161 Cal. Rptr. 164, 166 (1980) (citations omitted).

been whether the debtor has equity in the property. However, there is no judicial authority for the broad and expansive interpretations of equity and property. Turning to the equitable powers of the court to delay relief from the stay is unsatisfactory since it amounts to a mere plea for the mercy of the court. Although it might be effective, such a plea seems a last resort and is less satisfactory than an argument based on the Bankruptcy Code and judicial authority.

A method exists, however, by which the debtor can prevent a creditor from obtaining relief from the automatic stay. This tactic will enable a turnkey sale. The tactic is based upon both the language of the Code and judicial authority. Although previous arguments have been based on the "equity" prong of section 362,[83] this argument is based on the second prong of section 362, namely subsection 362(d)(2)(B). That subsection asks whether the property is necessary to an effective reorganization.[84] A way exists in which the debtor can, in fact, show that the property *is* necessary to an effective reorganization.

A debtor who does not desire to reorganize his business need not necessarily file under Chapter 7 of the Bankruptcy Code, even if the debtor desires only to liquidate his business.[85] A Chapter 7 liquidation was used in the hypothetical introducing this Comment because it was important to clarify or emphasize that the debtor did not intend to continue in business. In fact, the debtor himself may be largely disinterested in a turnkey sale.[86] However, the turnkey sale that this Comment advocates is for the benefit of junior and unsecured creditors. It is not intended for the benefit of the debtor himself. The turnkey liquidation is provided by the bankruptcy reorganization provisions contained in Chapter 11. Section 1123(b)(4) of Chapter 11[87] explicitly provides:

> (b) Subject to subsection (a)[88] of this section, a plan may—
>
> . . . .
>
> (4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of

83. Bankruptcy Reform Act of 1978, 11 U.S.C. § 362(d)(2)(A) (1982).

84. *Id.* § 362(d)(2)(B).

85. *See supra* note 3 and accompanying text.

86. Throughout this Comment, the term "debtor" has been used to designate the actor seeking to prevent the relief and foreclosure action of the creditor. In reality, a debtor seeking to liquidate without rehabilitating his business may not actually care a great deal about the satisfaction of his debts to junior secured or unsecured creditors, as the debtor himself will likely be discharged from his debts in any case. *See* 11 U.S.C. § 727.

87. *Id.* § 1123(b)(4).

88. Subsection (a) states: "Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall . . . ." *Id.* § 1123(a).

such sale among holders of claims or interests[.][89]

The Chapter 11 reorganization allows the *total* sale of the entire debtor estate. Liquidation, then, can be accomplished within the reorganization chapter. A turnkey sale, with certain property indicated as essential to a successful turnkey sale, will qualify as a reorganization plan. In this way, the debtor satisfies the second—reorganization—prong of the section 362. The property *is* necessary for an effective *liquidating* reorganization, as liquidation is expressly identified as a form of reorganization. Further, the debtor himself need not implement such a plan. Even if the debtor were to file under Chapter 7, as in the opening hypothetical of this Comment, the debtor's plan under Chapter 7 may be converted to a plan under Chapter 11 by a party in interest.[90]

A liquidating reorganization[91] *is* supported by judicial authority.[92] In *In re W.S. Sheppley & Company*,[93] the creditors moved to lift the automatic stay imposed by the debtor, Sheppley, filing Chapter 11 bankruptcy.[94] In this case, the debtor had not yet actually proposed a liquidating reorganization plan. In fact, the debtor had not yet proffered any plan, but only various options it was considering, *including* a liquidating

89. *Id.* § 1123(b)(4).

90. *Id.* Bankruptcy Code section 706(b) provides: "[o]n request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time." *Id.* § 706(b). "The decision whether to convert is left in the sound discretion of the court, based on what will most inure to the benefit of all parties in interest." S. REP. NO. 989, 95th Cong., 2d Sess. 94, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5880.

91. 11 U.S.C. § 1123(b)(4). The liquidating reorganization is also expressly supported by 11 U.S.C. § 1129(a)(11). This section concerns the confirmation of the reorganization of the plan. Subsection (a)(11) provides: "Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, *unless such liquidation or reorganization is proposed in the plan.*" *Id.* (emphasis added).

92. *In re* Coastal Equities, Inc., 33 Bankr. 898 (Bankr. S.D. Cal. 1983), concerned a debtor who originally filed under Chapter 7 and converted to a liquidating Chapter 11 plan. *Id.* at 899. Creditors objected to the liquidating plan which called for the liquidation of all of the assets of the estate. *Id.* at 904. The court held that:

> [a]ny objection based upon such a liquidation [was], however, without merit. Although Chapter 11 is titled "Reorganization," Code Section 1123(b)(4) specifically provides for the sale of all or substantially all of the assets of a debtor and the distribution of the proceeds among the creditors. The legislative history of this Section leaves no doubt as to what was intended. The House Report to accompany the Code ("House Report") labeled a plan proposing the sale of the debtor's assets under Section 1123(b)(4) a "liquidating plan." Clearly the term "reorganization," as used in Chapter 11 of the Code, encompasses the systematic liquidation of a debtor.

Id. at 904 (citations omitted).

93. 45 Bankr. 473 (Bankr. N.D. Iowa 1984).

94. *Id.* at 475.

plan.[95] The property at issue in the relief action was a commercial property site and building, virtually the sole property owned by the debtor.[96] The period during which the debtor had to propose a plan had not yet expired.[97] The *Sheppley* court acknowledged that "an effective reorganization can include a liquidation."[98] The court held that the property held by the debtor was necessary for an effective reorganization and refused to lift the stay because any plan that the debtor would ultimately propose would require the use of the property.[99]

Hence, under *Sheppley*, even the mere possibility that the debtor may propose a liquidation under Chapter 11 is sufficient to defeat a creditor relief action. The impact under *Sheppley* is startling in the degree to which it protects the debtor's reorganization prospects from the destructiveness of creditor foreclosure.[100] Under the *Sheppley* ruling, any sole asset case filing under Chapter 11 will defeat a creditor relief action under section 362. While this ruling may be limited to facts where the debtor has not yet proposed a definite plan and where several alternative plans appear viable to the court, a debtor holding a single asset may propose a reorganization plan and defeat a creditor's relief from stay action.

On the basis of two Code provisions, the turnkey sale of a debtor's estate is possible, even where the debtor holds no equity in a given piece of collateral and where the debtor does not intend to reorganize. The liquidating plan provided in Chapter 11 and the conversion action by parties in interest make the pursuit of the turnkey sale possible. Abstract arguments based on "equity" and "property" are not necessary. The argument is in fact quite simple. As long as a liquidating plan calling for the liquidation of some or all of the debtor's assets is recognized in the

95. *Id.* at 478.

96. *Id.* at 480.

97. *Id.* at 478. Section 1121(b) provides the debtor with a 120 day period in which to file a plan after seeking bankruptcy protection: "(b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter." 11 U.S.C. § 1121(b).

98. *Sheppley*, 45 Bankr. at 479 (quoting *In re* Keller, 45 Bankr. 469, 476 (Bankr. N.D. Iowa 1984)).

99. *Id.* at 477.

100. The *Sheppley* court declined to follow commentary in the legislative history of the Code that "[i]n cases where the single asset of the debtor is *real* property, the court shall grant relief from the stay if the debtor has no equity in the collateral, thereby allowing the creditor to proceed with his foreclosure." *Id.* at 480 (quoting S. REP. NO. 989, 95th Cong., 1st Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS, 5787, 5791). If the legislative history had been followed, relief from the stay would have been granted. The *Sheppley* court held that relief would not be in compliance with the purpose of the Bankruptcy Code, "which is to favor reorganization wherever realistically feasible." *Id.*

reorganization chapter, then any significant asset of the debtor may be deemed a necessary part of a turnkey liquidation plan.

III. Creditor Response to the Chapter 11 Liquidation Plan

A. *Level 1: The Rehabilitation Test*

If the debtor files under Chapter 11, or if a party in interest successfully converts a Chapter 7 proceeding into a proceeding under Chapter 11, the creditor will not obtain relief from the stay. The reason for this result is that a showing will have been made that the debtor's property is necessary for an effective reorganization. A creditor who is being denied relief may argue that the liquidation plan under Chapter 11 should fail. The creditor may argue that the property is *not* necessary to an effective reorganization of the debtor under section 362(d)(2)(B). The creditor's argument will be based on a split of opinion among courts as to the meaning of section 362(d)(2)(B).

Some courts have read a "feasibility" or "likelihood of [successful] rehabilitation" test into section 362(d)(2)(B).[101] The creditor seeking to prevent a conversion to Chapter 11 will rely on this test. Other courts have held that the proper test is a narrow "necessity test."[102] That test simply requires that the property be *necessary* to an effective reorganization. Courts which follow this view will prohibit the creditor relief of the stay at section 362, even when the debtor proposal is a liquidation plan.[103]

101. *See In re* Saypol, 31 Bankr. 796 (Bankr. S.D.N.Y. 1983) (debtor held no equity in stock serving as security collateral and did not show that stock was necessary to effective reorganization); *In re* Anchorage Boat Sales, Inc., 4 Bankr. 635 (Bankr. E.D.N.Y. 1980) (automatic stay lifted where debtor held no equity in property, and property was nonessential because no possibility of effective reorganization existed); *In re* Rogers Dev. Corp., 2 Bankr. 679 (Bankr. E.D. Va. 1980) (creditor not entitled to relief because property was necessary for effective reorganization); *In re* Mikole Dev., Inc., 14 Bankr. 524 (Bankr. E.D. Pa. 1981) (debtor did not have equity in property and the property was not necessary for effective reorganization under rehabilitation test); *In re* Terra Mar Assoc., 3 Bankr. 462 (Bankr. D. Conn. 1980) (automatic stay lifted where debtor held no equity in property, and no successful reorganization could have been effected within reasonable time); *In re* Dublin Properties, 12 Bankr. 77 (Bankr.·E.D. Pa. 1981) (reasonable likelihood test or reorganization applied to 362(d) hearing); *In re* Greiman, 45 Bankr. 574 (Bankr. N.D. Iowa 1984) (debtor did not show reasonable possibility of successful reorganization within reasonable time).

102. *In re* Independence Village, Inc., 52 Bankr. 715 (Bankr. E.D. Mich. 1985) (effective reorganization includes complete liquidation pursuant to Bankruptcy Code); *In re* Sunstone Ridge Assoc., 51 Bankr. 560 (Bankr. D. Utah 1985) (test of whether property is necessary for effective reorganization does not require determination of feasibility of successful reorganization); *In re* Keller, 45 Bankr. 469 (Bankr. N.D. Iowa 1984) (necessity of property for effective reorganization does not require proof that rehabilitation plan can be confirmed).

103. The holding in *In re* Koopmans, 22 Bankr. 395 (Bankr. D. Utah 1982), is therefore supportive of the debtor defeating the creditor's action for relief of the automatic stay. The

The issue to be resolved in this section is whether an effective reorganization may encompass a liquidation plan under section 1123(b)(4) or whether feasibility of successful reorganization is a requirement of the test. Also, if the feasibility of a successful reorganization test is required, does this test prevent a holding that a liquidation plan satisfies the requirement? In other words, may the debtor argue that the property is essential in making the liquidating plan feasible?

In re Koopmans[104] concerned a relief of stay action by a creditor seeking to foreclose on real property held by the debtor who had filed for Chapter 11 protection.[105] The debtor was in the business of buying and selling real estate. He owned fourteen homes which he had converted into apartments for rental purposes.[106] The creditor held a lien on one of the homes.[107] Having found that the debtor had no equity in the property,[108] the issue before the court was the meaning of section 362(d)(2)(B). The court had to determine whether it was required to grant "relief from the stay when there [was] no prospect of rehabilitation."[109]

The *Koopmans* court made independent arguments to support its finding that "rehabilitation" should not be read into the necessity for reorganization test of section 362(d). These arguments were based on the plain language of the Code as analyzed in isolated elements, on analysis of the language of the Code provisions construed in light of other sections or provisions of the Code[110] and also on a thorough analysis of the statutory history[111] of section 362(d).

The *Koopmans* court first distinguished the meaning of a "reorgani-

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Koopmans court held that when a Chapter 11 liquidation action is filed, the property may be necessary to an effective reorganization. *Id.* at 407. Thus the test at section 362(d)(2)(B) is satisfied.

104. 22 Bankr. 395.

105. *Id.*

106. *Id.*

107. *Id.* Although the creditor held a lien for less than the value of the property, other liens encumbering the property added to the creditor's lien resulted in a lack of equity in the debtor. *Id.*

108. *See supra* note 107.

109. *Koopmans*, 22 Bankr. at 396. "Not every asset will be necessary for an *effective* reorganization. The reference to an 'effective' reorganization should require relief from the stay if there is no reasonable likelihood of reorganization due to creditor dissent or feasibility considerations." *Id.*

110. The analysis was made by the court with reference to the conversion provisions of section 1112(b); *see infra* text accompanying notes 151-54.

111. The *Koopmans* court provided the following analysis of the legislative history of section 362(d) of the Bankruptcy Code:

> As proposed, Section 362(d) of H.R. 8200 and Section 362(d) of S. 2266 did not contain a necessity test. The former permitted relief for cause including a lack of

zation" from "rehabilitation." Reorganization "is concerned with whether an asset may be instrumental in the continued operation or ultimate sale of the business. The latter is concerned with whether the business, viewed as a bundle of assets, liabilities, management, markets, and the economy at large, can stay alive."[112] Whereas rehabilitation imposes an expectation of vitality, reorganization does not.

The difference in meaning between these two concepts is important. If reorganization did *not* include complete liquidation, then only a feasible rehabilitation could qualify as an effective reorganization for purposes of the test at section 362(d)(2)(B). If it were not for the inclusion of liquidation in the reorganization chapter of the Code, the *only* purpose of reorganization would be rehabilitation. However, since section

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adequate protection. The latter allowed relief where debtor had no equity in the property.

The necessity test was the brainchild of insurance industry representatives who testified at hearings on S. 2266. They believed "that the basic concept of Section 362(d) which authorizes the court to lift the automatic stay where the debtor has no equity in the property is sound," but "in order to permit reorganization to go forward *where the property is essential to an ongoing business*, an exception must be provided for such situation." In their view, "[i]n the case of a piece of real property . . . which is the security for a real estate mortgage *and not part of a business* that should be reorganized for the benefit of all parties in interest, the stay should be lifted." They argued that "whatever changes are made to Section 362(d) . . . to accommodate to corporate reorganizations [sic] not affect the real estate mortgage transactions which warrants [sic] different treatment. This can be accomplished by providing in Section 362(d) that relief from the automatic stay is limited to a situation where the debtor has no equity in the property and the property is not necessary to an effective reorganization of the debtor, *and that property shall be deemed not necessary to the reorganization if it is real property on which no business is being conducted by the debtor other than the business of operating the real property and activities incidental thereto.*"

These proposals, including guidelines explaining "necessary to an effective reorganization," were added to Section 362(d) and were elucidated in the Senate Report: Section 362(d) is intended "to reach the single-asset apartment type cases which involve primarily tax-shelter investments and for which the bankruptcy laws have provided a too facile method to relay [sic] conditions, but not the operating shopping center and hotel cases where attempts at reorganization should be permitted."

As enacted, Section 362(d)(2) dropped the guidelines explaining "necessary to an effective reorganization," but floor leaders commented upon its purpose: Section 362(d)(2) "is intended to solve the problem of real property mortgage foreclosures of property where the bankruptcy petition is filed on the eve of foreclosure. The section is not intended to apply if the business of the debtor is managing or leasing real property, such as a hotel operation, even though the debtor has no equity if the property is necessary to an effective reorganization of the debtor."

Section 362(d)(2)(B), by its terms and in light of its history, contains a necessity not a rehabilitation test. Congress was concerned with the need for property, according to the type of property and its relation to the business. If lenders were correct in their conclusion that Chapter 11 is inappropriate for certain tax-sheltered, single-asset real estate projects, "[t]his limitation on stays, by its very nature, would not conflict with the goal of debtor rehabilitation."

22 Bankr. at 399-400 (footnotes and citations omitted).

112. *Id.* at 397.

1123(b)(4) explicitly provides for a liquidation plan as a plan of reorganization, then rehabilitation cannot be a requirement of reorganization.

The *Koopmans* opinion showed by comparison that rehabilitation cannot be part of the test of section 362(d)(2)(B). The opinion stated that "[i]f the [entire] business rather than [the secured collateral] were the focus under sub-part (2)(B), then net worth of the business rather than equity in the [secured collateral] might be considered under sub-part (2)(A)."[113] According to the *Koopmans* analysis, since the determination of debtor equity is directed only to the equity held by the debtor in the particular piece of property, *not* the equity held by the debtor in the entire business of which the property is only a part,[114] the focus of reorganization must be on the piece of property in *relationship to the whole.* The secured collateral, therefore, does not take on the value of the entire enterprise. Rather, the collateral is viewed as only one part of the whole, and the *value* of that part is in the relationship or contribution of that part to the whole. Thus under *Koopmans,* the focus is whether the *relationship* of the collateral to an organization is such that the collateral is a necessary ingredient. If the relationship of the particular collateral to the whole of the debtor's estate is such that no reorganization may be pursued without it,[115] then this collateral is "necessary" to an effective reorganization.[116]

According to the *Koopmans* court, the incorrect focus on the *business* rather than the *piece of property* and its *relationship to the business* resulted in improper application of a rehabilitation test. "[C]ourts which apply the rehabilitation test . . . look to the condition of the business rather than the need for [the] asset, [and] will give relief from the stay

113. *Id.*

114. For example, consider that a given piece of secured collateral is a piece of real property worth $100,000. On this property stands a factory building storing $500,000 worth of vintage automobiles. The test of equity at section 362(d)(2) is directed only to the equity held by the debtor in the property, that is, the value of the particular property—in this example, $100,000 minus the total of all encumbrances secured against that piece of property. The test of equity is *not* the total value of the business—total assets of $600,000 minus total liabilities, minus the encumbrances against the property.

115. This situation may exist when the collateral at issue is fungible raw material inventory which could be easily replaced. Compare the above to a situation where the collateral is specialty equipment. Without this equipment, the business would need to restart rather than reorganize.

116. The opinion cites the Bankruptcy Act, the body of bankruptcy law preceding the Code, for support of its view. "Under the Act, relief from stay was possible, even where property had equity, if there was no prospect of rehabilitation." *Koopmans,* 22 Bankr. at 397 n.5a. The Code requires the satisfaction of *both* prongs before a creditor may have relief: as long as the debtor has equity in the property or the property is necessary for an effective reorganization, the creditor will be denied relief of the stay.

where there is no prospect of rehabilitation, whether or not the asset is necessary for an effective liquidation."[117] Section 1123(b)(4) of the Code expressly provides that reorganization may be a liquidation.[118] Therefore, the rehabilitation test begs the question by requiring more of the debtor's plan than does section 1123(b)(4). An effective reorganization need not rehabilitate the debtor; it may instead call for the sale of "all or some of the debtor's assets."[119]

An effective reorganization may require a given piece of collateral even though the debtor holds no equity in it, especially where the collateral is a primary asset, such as a major piece of manufacturing machinery, without which the business has no viability. Even though rehabilitation of the debtor's business may be impossible, if a turnkey liquidation *requires* the property for an effective turnkey sale, then the test at 362(d) is satisfied.[120] Thus, section 362(d)(2), when read in conjunction with section 1123(b)(4), makes it unlikely that actual rehabilitation of the debtor is a requirement of the relief test.

After deciding that section 362(d)(2) did not include a rehabilitation test, the court in *Koopmans* fashioned its version of a necessity test. The court looked for a "simple, workable test, which is faithful to the language of Section 362(d)(2)(B), and which implements the policy of maximum value for creditors."[121] Accordingly, the court decided that the appropriate test for determining whether property is necessary to an effective reorganization was whenever the property was "*necessary, either in the operation of the business or in a plan, to further the interests of the estate through rehabilitation or liquidation.*"[122] The examples the court provided are supportive of the turnkey sale presented as the focus of this Comment:

> The property may be important to the liquidation of other property, as for example a warehouse or refrigerator which, although over-encumbered, may be needed to store inventory or groceries pending sale. The property standing alone may have no equity, but when sold as a package, may bring a better

117. *Id.* at 398. Additionally, "where Congress meant to employ a rehabilitation test, as in 11 U.S.C. Section 1112(b)(1), it knew how to say so. The negative implication may be that no similar meaning was attached to sub-part (2)(B)." *Id.*

118. *See* Bankruptcy Reform Act of 1978, 11 U.S.C. § 1123(b)(4) (1982). "[P]roperty may be necessary either to an 'effective' rehabilitation or to an 'effective' liquidation." *Koopmans*, 22 Bankr. at 398.

119. 11 U.S.C. § 1123(b)(4).

120. This model is identical to the hypothetical proposed at the outset of this Comment.

121. *Koopmans*, 22 Bankr. at 407.

122. *Id.* (emphasis added).

> price for other assets, as for example, workings for watches yet to be assembled, or contiguous parcels of real property.[123]

Ultimately, the court held that the property at issue in the case was necessary for an effective reorganization and maintained the stay, despite the fact that the debtor had no equity in the property.[124]

The opinion in *Koopmans* recognizes the value in preserving potential turnkey sale value. The turnkey value may be preserved by the debtor filing for bankruptcy protection under Chapter 11. Alternatively, interested parties may convert the Chapter 7 liquidation into a Chapter 11 turnkey liquidation plan. Under either alternative, if the liquidation plan stipulates that the plan is to be a turnkey sale and identifies various collateral essential for such a sale, the relief of the bankruptcy stay should be denied.[125]

Many courts, however, have declined to follow *Koopmans*.[126] These courts have required a minimal showing of either the feasibility of a reorganization or that the debtor can be rehabilitated, before denying a secured creditor relief from the stay. These cases are reconcilable with *Koopmans*.

The court in *In re Jug End in the Berkshires, Inc.*[127] distinguished *Koopmans*.[128] *Jug End* concerned a hotel resort in southwest Massachusetts.[129] The property was over-encumbered and the debtor held no equity in it.[130] The creditor sought relief of the automatic stay under section 362(d)(2).[131] With regard to the second prong of the relief test at section 362(d), the *Jug End* court held that for the debtor to "meet that burden, the debtor must do more than merely assert that the property is

123. *Id.*

124. *Id.* at 407, 408.

125. *See also In re* Independence Village, Inc., 52 Bankr. 715, 723 (Bankr. E.D. Mich. 1985) ("We are persuaded by the reasoning of *In re Koopmans*, . . . and therefore hold that even a plan of complete liquidation of the facility pursuant to 11 U.S.C. § 1123(b)(4) may be an effective reorganization for purposes of § 362(d)(2)(B)."); *In re* Sunstone Ridge Assoc., 51 Bankr. 560, 561-62 (Bankr. D. Utah 1985) ("This court is convinced by the reasoning contained in the case of *In re Koopmans*. . . . [R]eading a feasibility test from the words effective reorganization is simply reading something that is not there."); *In re* Keller, 45 Bankr. 469, 471 (Bankr. N.D. Iowa 1984) (The term 'necessary for an effective reorganization' does not require proof that a plan of rehabilitation can be confirmed. This conclusion is borne out by the fact that an effective reorganization can include a liquidation.).

126. *See supra* note 101.

127. 46 Bankr. 892 (Bankr. D. Mass. 1985).

128. *Id.* at 902.

129. *Id.* at 894.

130. *Id.* at 901. The court followed the majority view which "defines equity as the difference between the property value and the total amount of liens against it." *Id.*

131. *Id.* at 894.

necessary to an effective reorganization."[132] The *Jug End* court quoted *In re Clark Technical Associates, Ltd.*:[133]

> It is not enough for a debtor to argue that the automatic stay should continue because it needs the secured property in order to propose a reorganization. If this were the test all property held by debtors could be regarded as necessary for the debtor's reorganization. The keyword under 11 U.S.C. § 362(d)(2)(B) is "effective[.]"
>
> If all the debtor can offer at this time is high hopes without any financial prospects on the horizon to warrant a conclusion that reorganization in the near future is likely, it cannot be said that the property is necessary to an "effective" reorganization.[134]

When the underlying policy of decisions like *Clark Technical* and *Jug End* is made explicit, these cases are more easily reconciled with *Koopmans*.[135] The reason a minimal showing of rehabilitation is required is simply to protect creditors from frivolous claims of rehabilitation made by debtors in an attempt to prevent creditor relief and foreclosure. There must be some minimal and credible showing that the property is important and that reorganization has more than a mere hope of success.

This policy is sound because it recognizes the rights of creditors who bargained for security interests. If frivolous claims of necessity and successful reorganization defeat the creditor relief from stay actions, then creditors will have to expect long delays in foreclosure on property belonging to debtors who file bankruptcy. Creditors will be encouraged to foreclose prior to a debtor filing for the bankruptcy protection.[136] The legislative history of section 362(d) indicates that one of the congressional concerns and intentions in providing a relief from stay provision was to protect the interests of real property lenders from the harshness of

132. *Id.* at 902.

133. 9 Bankr. 738 (Bankr. D. Conn. 1981).

134. 46 Bankr. at 902 (quoting *In re* Clark Technical Assoc., Ltd., 9 Bankr. 738, 740 (Bankr. D. Conn. 1981)).

135. *See supra* notes 151-54 and accompanying text. The difference lies in determining *where* the rehabilitation test should arise. Courts following *Jug End* require the showing of rehabilitation at section 362(d). Cases following *Koopmans* require the minimal likelihood of rehabilitation be shown at section 1112(b), the provision enabling conversion of a Chapter 11 action into a Chapter 7 action.

136. Because the Bankruptcy Code seeks to discourage creditors from stripping away assets of the debtor during the period prior to the debtor's filing for bankruptcy protection, it is in fact difficult for a creditor to foreclose on property during a "preference" period. That period begins 90 days prior to the debtor's filing. *See* 11 U.S.C. § 547.

the stay where bankruptcy was filed on the eve of foreclosure.[137] Consequently, creditors should not be denied relief from the stay unless the reorganization plan has merit.

However, the court in *Jug End* went further. First, the court declined to follow the "liberal test in *In re Koopmans* which states that 'property in which the debtor has no equity is necessary to an effective reorganization whenever it is necessary, either in the operation of the business or in a plan, to further the interests of the estate through rehabilitation or liquidation.' "[138] Second, the court in *Jug End* did not hold "reorganization" to encompass both rehabilitation and liquidation. Rather, the court required that for the debtor to show that the property was necessary to an effective reorganization, the debtor must show that an effective reorganization was possible and that the property would contribute to it.[139] Although the policy behind the *Jug End* opinion may be sound, the requirement the court imposed is not in the rule. A review of the statute shows that the court is wrong. Section 362(d)(2)(B) expressly requires only that the property is not necessary to an *effective reorganization*.[140] Under section 1123(b)(4), reorganization encompasses liquidation. Therefore, section 362(d)(2) does not, on its face, require rehabilitation.

An alternative reading of *Jug End* may reconcile the court's opinion with *Koopmans*. The *Jug End* court asks only for a demonstration by the debtor of "a reasonable probability that [the debtor] will be able to propose a plan for a successful reorganization within a reasonable time. A reasonable probability cannot be grounded solely on speculation, however, and a 'mere financial pipe dream' is insufficient . . . ."[141] If the question is whether a turnkey liquidation plan could satisfy such a test, the answer ought to be "yes." *Jug End* does not require a showing of a feasible rehabilitation, only a feasible reorganization. As long as the debtor's turnkey liquidation plan is feasible, the test is satisfied. In this way, the policy of *Jug End* and the rule of *Koopmans* are reconcilable. *Jug End* sought to protect the creditor from frivolous claims of necessity and reorganization. *Koopmans* sought to focus on the relationship of the property to a reorganization. It is sufficient that there is a sound basis of necessity and that the property is an integral part of a reorganization,

137. *See supra* note 43 and accompanying text.

138. *Jug End*, 46 Bankr. at 902 (citing *In re* Koopmans, 22 Bankr. 395, 396-408 (Bankr. D. Utah 1982)).

139. *Id.* (citations omitted).

140. 11 U.S.C. § 362(d)(2)(B).

141. *Id.* (citations omitted).

whether the reorganization is a rehabilitation or a liquidation. A turnkey liquidation plan, having a viable basis of success, would satisfy both courts.

The court in *In re Saypol*[142] distinguished *Koopmans* and required the debtor to show both that an effective reorganization was possible and that the property would contribute to it.[143] "The debtor need only prove that there is a reasonable probability that it will be able to propose a plan that will result in a successful reorganization within a reasonable time."[144] The *Saypol* opinion followed the policy of *Jug End* in protecting creditors from the burden of stays based on speculative reorganization plans.[145]

The opinion in *Saypol* is consistent with the opinion of the *Koopmans* court because the *Saypol* opinion recognized that the importance of the property is not its inherent value, but the value of the property in *relation to* the other property. The opinion in *Koopmans* made the same argument, that the relationship is the important focus regardless whether the plan calls for rehabilitation or liquidation. The important aspect to consider is always the relationship of the property to the possibility of an effective reorganization. In other words, is the property necessary to accomplish the goal?

In *Saypol,* a debtor sought to maintain a stay on a security agreement consisting of stock in the bankrupt debtor's corporation.[146] The debtor believed the stock would rise in value and would be worth more in a future liquidation.[147] The court held that there was no basis for presuming the stock would rise in value and, in any case, the stock had no relationship to the effectiveness of a reorganization or liquidation.[148] Consequently, the debtor made no showing of necessity. The court stated:

> The conceded lack of any rational basis for the premise that the stock will increase in value [is] hardly proof that the stock is necessary for an effective reorganization.
>
> Moreover, *the stock lacks any particular attribute contributing either to funding of a liquidation plan or to debtor rehabilitation.* Certain assets by their income producing nature, by

142. 31 Bankr. 796 (Bankr. S.D.N.Y. 1983).
143. *Id.* at 803.
144. *Id.*
145. *Id.*
146. *Id.* at 797.
147. *Id.* at 798, 803.
148. *Id.* at 803.

their relationship to other assets, by the benefits they contribute to the debtor, or, as in the case of a factory, by their very essence, can be recognized as essential to an effective plan.[149]

The *Saypol, Koopmans* and *Jug End*[150] opinions, viewed together, present a simple test. Under 362(d)(2)(B), "necessary to an effective reorganization" means that the property holds some attribute or characteristic which in relation to the other property of the debtor makes the whole more valuable. Reorganization is effective, either in the form of rehabilitation or liquidation, if the plan is minimally feasible. The plan cannot be pure speculation, fantasy, or the mere assertion of necessity on the part of the debtor. The cases which follow the *Jug End* point of view and read into section 362(d)(2) a feasibility test are reconcilable with *Koopmans* because even if they do use a feasibility test, a liquidation plan under section 1123(b)(4), which has a feasible chance of success, fulfills the test. A turnkey sale of an enterprise that has genuine turnkey marketability satisfies the *Jug End* and *Saypol* test because these courts require only a feasible reorganization, not a feasible rehabilitation.

The tactic of filing for bankruptcy protection under a Chapter 11 liquidating plan is a successful method of preserving the value of a turnkey sale. The policy in favor of granting relief where liquidation, rather than rehabilitation, is intended is a valid consideration in determining the feasibility of a turnkey sale, but not determinative. Consequently, creditor expectations are not impaired by plans where the only intent is delay. Plans which propose feasible turnkey liquidating plans should be upheld under the above analysis.

B. Level 2: Creditor Conversion of the Chapter 11 Liquidation to Chapter 7

This Comment has shown that a turnkey sale may be preserved and creditor relief from the bankruptcy stay denied. This result is accomplished by filing the liquidation plan under section 1123(b)(4) of Chapter 11. If no rehabilitation test is read into section 362(d), which might otherwise negate a showing of necessity for an effective reorganization, the creditor may still seek relief from the stay. The creditor may seek relief from the stay by attempting to convert the debtor's Chapter 11 plan into a Chapter 7 liquidation. The creditor may base such an action on section 1112(b) of the Code.[151] If the creditor is successful in converting

149. *Id.* (emphasis added).

150. See *supra* note 101 for similar case holdings.

151. Section 1112(b) provides: "on request of a party in interest, . . . the court may convert a case under [Chapter 11] to a case under chapter 7 . . . or may dismiss a case . . . whichever is

the plan from Chapter 11 to Chapter 7, then the creditor may again move for relief of the stay under section 362(d)(2)(B).

However, if the creditor is successful at converting the plan from Chapter 11 to Chapter 7, the test of 362(2)(B) will be satisfied *de jure*. The debtor will absolutely be within Chapter 7, *not* Chapter 11. Reorganizations do not exist in Chapter 7, either rehabilitating or liquidating. Therefore, if the debtor has no equity in the property, and if the creditor is successful in converting the bankruptcy plan from Chapter 11 to Chapter 7, then the result under section 362(d)(2) will be relief from the stay.

Under this analysis, the rehabilitation test that was read into section 362(d) by some courts re-emerges at section 1112(b). One of the factors for the court to consider in the creditor's action to convert the plan from Chapter 11 to Chapter 7 is whether the plan proposed by the debtor is the "absence of a reasonable likelihood of a rehabilitation[.]"[152] However, important differences exist between a rehabilitation test at section 362(d) and a rehabilitation *consideration* at the conversion provision under section 1112(b)(1). First, the likelihood of rehabilitation consideration is *expressly* provided by the Code at section 1112(b)(1). This rehabilitation consideration is *not* provided for at section 362(d). Second, the language of section 1112(b)(1) provides that the court shall convert or dismiss the case *for cause*, including the factors listed, "whichever is in the best interest of creditors and the estate."[153] In *In re Koopmans* the court stated:

> Whether or not rehabilitation is "probable" or even "possible" may be imponderable. How much "delay" and "prejudice" are tolerable is a matter of degree. The "best interests" of creditors and the estate, for better or for worse, must be measured by the length of the chancellor's foot. . . . In short, the rehabilitation test must be applied with discretion, not compulsion. It is amenable to ultimate, complex issues such as dismissal, but not to interim, abbreviated contests over the stay. It is workable given the procedures of Section 1112(b)(1), but not of Section 362(d)(2)(B).[154]

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in the best interest of creditors and the estate[.]" Bankruptcy Reform Act of 1978, 11 U.S.C. § 1112(b) (1982).

152. *Id.* at 1112(b)(1).

153. *Id.* at 1112(b).

154. *Koopmans*, 22 Bankr. at 401. *See also In re* Keller, 45 Bankr. 469, 471 (Bankr. N.D. Iowa 1984) (imposition of a rehabilitation test on section 362(d)(2)(B) would make meaningless the provisions of section 1112(b)(1)).

The likelihood of a creditor succeeding with a conversion action at section 1112(b) under the conditions where significant turnkey sale value is lost would seem to be extremely low. It would be very unlikely for a bankruptcy court to convert a feasible turnkey liquidation plan under Chapter 11 to a Chapter 7 liquidation. That conversion from Chapter 11 to Chapter 7 would destroy the possibility of substantial increase in revenue generation for the benefit of all creditors. A Chapter 7 liquidation would enable the creditor to obtain relief from the bankruptcy stay and foreclose on the property.

The use of this tactic by the debtor—filing for bankruptcy protection under Chapter 11 rather than Chapter 7—should be successful. The liquidation provision of section 1123(b)(4) allows him to propose a feasible turnkey liquidation. The policy of protecting all creditors is served by preserving turnkey sale value. Where the debtor makes a valid showing that a turnkey sale is feasible, the test imposed under section 362(d)(2) is met. Further, the likelihood of a secured creditor successfully converting the Chapter 11 liquidating plan to a Chapter 7 plan, only for the purpose of gaining relief from the automatic stay, will be extremely low, especially when relief of the stay results in the loss of demonstrated turnkey value. The benefits of the turnkey sale outweigh the benefits to the foreclosing creditor. The benefits will outweigh the detriment especially where the foreclosing creditor can be compensated for a delay in granting relief from the stay.

IV. A Proposed Amendment to Code Section 362(d)(2)

The beneficial value of a turnkey sale would be protected from a relief of stay action if the Code were amended as follows:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> . . . .
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if—
>
> (A) the debtor has no equity in the property, and
>
> (B) *the property is not necessary to an effective reorganization, where such reorganization has prima facie feasibility as either a rehabilitation or liquidation plan.*

The amendment addresses the concerns expressed in cases such as

Jug End[155] and *Saypol*,[156] namely, protecting creditors from frivolous plans filed by debtors which only delay foreclosure on security. The amendment would also protect the interests of junior secured and unsecured creditors by identifying and recognizing the value of property in the context of liquidation. The potential value of a turnkey sale should and would be protected, as long as the turnkey liquidation has prima facie viability.

V. CONCLUSION

This Comment has established that a creditor's ability to obtain relief from the automatic stay in bankruptcy may be delayed or conditioned so that a turnkey liquidation may be pursued. The means of accomplishing this result is a tactical maneuver by a debtor or any party in interest. The tactic requires only that a turnkey liquidation plan be proposed under Chapter 11. If the plan stipulates that the plan is intended as a turnkey liquidation, and describes how the turnkey sale is feasible, then the plan will have a strong likelihood of approval by the bankruptcy court. Approval of the plan will especially be likely where the plan describes the difference in total revenue that may be obtained if the property is successfully sold under a turnkey sale rather than under piecemeal sale. Under such a plan, a secured creditor will be denied relief where the debtor's plan identifies the creditor's collateral as being necessary to an effective turnkey liquidation.

The remaining issue to be considered is whether preventing or delaying relief of the automatic stay is a good result. Secured creditor expectations are damaged to the extent that a secured creditor would have expected relief from the stay. If secured creditors are not able to rely on their expectation of relief from the stay, at least where the debtor has no equity in the collateral and where the debtor is not reorganizing, then denying these creditors relief may have a detrimental effect on the availability of credit. Secured creditors will likely adjust their lending practices to compensate for the potential, and perhaps likely, delay in obtaining relief from the stay.

However, clear benefits of preserving the turnkey sale value exist to both secured and unsecured creditors. Clearly the whole point of the turnkey sale and the maximization of revenue is to benefit junior and unsecured creditors, who benefit from the generation of additional revenue. The debtor himself may even benefit if there is revenue remaining

155. *In re* Jug End in the Berkshires, Inc., 46 Bankr. 892 (Bankr. D. Mass. 1985).
156. *In re* Saypol, 31 Bankr. 796 (Bankr. S.D.N.Y. 1983).

after payment of all claims. These benefits should outweigh the harm to the secured creditor who seeks relief of the stay, especially if the secured creditor is provided with compensation for the delay and as long as the delay is not an unreasonable period in length. Ideally, such a secured creditor would agree that the benefits outweigh the detriment to him and indeed admit that, were he one of the junior or unsecured creditors, he would advocate the same result.

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