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Reconsidering the Ultimate Cramdown: Attempts to Transfer a Portion of Farmland Collateral in Full Satisfaction of a Secured Claim

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RECONSIDERING THE ULTIMATE CRAMDOWN: ATTEMPTS TO TRANSFER A PORTION OF FARMLAND COLLATERAL IN FULL SATISFACTION OF A SECURED CLAIM

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I. INTRODUCTION

The recent economic downturn in the agricultural community has produced a sizable body of bankruptcy law. For example, the enactment of Chapter 12,[1] designed specifically to deal with the crisis, has engendered a number of cases. In many instances, the questions raised have limited applicability beyond farm bankruptcies.[2] However, other issues recently litigated in the agricultural context have raised questions with ramifications extending to reorganizations in general.

One such question involves attempts in Chapter 11 or 12 reorganizations to transfer title to a portion of farmland collateral[3] in full satisfaction of the secured claim of an agricultural lender. Attempts to accomplish such a transfer over the objection of the secured creditor have met with limited success.[4] However, language in certain cases suggests that the technique is possible[5] and a recent attempt to provide a theoretical basis for it has been made.[6] Farm bankruptcies are a likely set-

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1. United States Trustees and Family Farmer Bankruptcy Act, Pub. L. No. 99-554, 100 Stat. 3124 (1986) (codified at 11 U.S.C. §§ 1201-31 (1987)).

2. *See* Flaccus and Dixon, *The New Bankruptcy Chapter 12: A Computer Analysis of If and When a Farmer Can Successfully Reorganize*, 41 ARK. L. REV. 263, 301 (1988).

3. The concept of transferring title to property is distinguishable from that of abandoning the property to a creditor. Abandonment, accomplished pursuant to 11 U.S.C. § 554(a) or (b), is principally a device by which the trustee or debtor-in-possession divests control of property of the estate. "[A]lthough one frequently hears the phrase 'abandon to . . . creditor,' abandonment is not a judicial sale or transfer of title." *In re* Sandy Ridge Dev. Corp., 77 Bankr. 69, 75-76 (Bankr. M.D. La. 1987), *rev'd on other grounds*, 881 F.2d 1346 (5th Cir. 1989); *see also In re* R-B-Co. of Bossier, 59 Bankr 43 (Bankr. W.D. La. 1986). Unlike a transfer, abandonment is not properly used to determine legal possession to property. *See In re* Caron, 50 Bankr. 27, 28-29 (Bankr. N.D. Ga. 1984).

4. *See infra* text accompanying notes 61-82.

5. *See infra* text accompanying notes 18-27 and 33-54.

6. Waas, *Letting The Lender Have It: Satisfaction of Secured Claims By Abandoning a Portion of the Collateral*, 62 AM. BANKR. L.J. 97 (1988) [hereinafter Waas].

ting for attempts to use the technique, because agricultural collateral is often real estate easily divisible into separate tracts. However, if plans containing such provisions are confirmed, the potential for its use in non-farm settings is significant.

The principal thesis of this article is that the transfer of a portion of collateral in full satisfaction of a secured claim can meet the cramdown requirements[7] of Chapters 11 and 12 only where the value of the collateral to be transferred can be ascertained without question. Since the value of farmland collateral cannot be so ascertained, a fully secured agricultural creditor may successfully object to the transfer on the basis of a lack of credible valuation evidence.

This article first examines the statutory requirements of Chapters 11 and 12, the case law, and the legislative history with regard to the theoretical basis for a partial collateral transfer in a plan of reorganization. This article then considers the practical difficulties of valuing farmland collateral and the problems likely to arise after confirmation if such a transfer is allowed. Finally, it considers plan provisions designed to deal with these problems. However, this article finds these plan provisions inadequate where the transfer is to be in full satisfaction of the creditor's claim.

II. THE STATUTORY FRAMEWORK

A. Chapter 11

The confirmation of a Chapter 11 plan over the objection of an impaired secured class,[8] commonly known as a "cramdown,"[9] is accomplished pursuant to sections 1129(b)(1) and 1129(b)(2)(A).[10] Section 1129(b)(1) allows such a confirmation if the plan meets the applicable requirements of section 1129(a),[11] if it does not discriminate unfairly, and if it is "fair and equitable."[12] Section 1129(b)(2)(A) defines the term "fair and equitable" as including the satisfaction of one of the following three tests:

(1) The creditor is to retain his lien and is to receive cash payments

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7. The cramdown requirements of Chapter 11 and Chapter 12 are discussed *infra* text accompanying notes 8-14 and 28-32, respectively.

8. Impairment of claims or interests is defined at 11 U.S.C. § 1124 (1988).

9. 11 U.S.C.] 1129(G)(1) (1982).

10. *See generally* Klee, *All You Ever Wanted To Know about Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133 (1979).

11. 11 U.S.C. § 1129(a) (1982).

12. 11 U.S.C. § 1129(b)(1) (1982).

> which have a present value equal to the claim;
> (2) The property is to be sold under the plan, and the creditor either receives the sales proceeds or the 'indubitable equivalent' of the sales proceeds; or
> (3) The creditor realizes the 'indubitable equivalent' of his claim.[13]

When the cramdown being attempted is a partial collateral transfer, the requirement of subsection (3) - i.e., indubitable equivalence - must be met.[14] Statutory support in Chapter 11 suggesting that such a transfer can meet the indubitable equivalence requirement can be found in two places. Section 1123(a)(5)(B) states that among the means available to provide for the implementation of a plan is the "transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan."[15] Similarly, section 1123(a)(5)(D) allows for "the distribution of all or any part of the property of the estate among those having an interest in such property of the estate."[16]

It is well established that a Chapter 11 debtor can transfer property in lieu of cash where a collateral lien is to be retained on the remaining indebtedness.[17] Moreover, several Chapter 11 cases support the argument that the Bankruptcy Code allows a partial collateral transfer in full satisfaction of the creditor's claim when it is established that the secured claimholder will realize the indubitable equivalence of its claim. In *In re Walat Farms, Inc.*,[18] the debtor proposed to transfer to a secured creditor approximately 400 acres out of 760 acres held by the creditor as security. Upon tender of a deed, the creditor would be required to release its lien since the acreage conveyed would constitute the equivalent of the creditor's secured debt. The creditor objected on several grounds and the plan was not confirmed. However, on the specific issue of whether such a transfer was theoretically possible, the court stated the following:

> We must agree that if the land being conveyed under the plan to

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13. *In re* Sandy Ridge Dev. Corp., 77 Bankr. 69, 71 (Bankr. M.D. La. 1987) (paraphrasing 11 U.S.C. § 1129 (b)(2)), *rev'd on other grounds*, 881 F.2d 1346 (5th Cir. 1989) (emphasis in original).

14. The concept of indubitable equivalence was derived from the decision of Judge Learned Hand in *In re* Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935); *see also* H.R. Rep. No. 595, 95th Cong., 1st Sess. at 413-18 (1977).

15. 11 U.S.C. § 1123(a)(5)(B) (1982).

16. 11 U.S.C. § 1123(a)(5)(D) (1982).

17. *See, e.g.*, *In re* Sun Country Dev., Inc., 764 F.2d 406, 408 (5th Cir. 1985); *In re* Fursman Ranch, 38 Bankr. 907, 912-13 (Bankr. W.D. Mo. 1984).

18. 70 Bankr. 330 (Bankr. E.D. Mich. 1987).

> [the creditor] is worth the amount of its claim, that the indubitable equivalent test is met and that the other objections raised would lack merit. The problem arises in determining whether the land offered is worth the amount of the claim. This is really more a practical than a theoretical problem.[19]

Similarly, in *In re Sandy Ridge Development Corp.*,[20] the court questioned the practical aspects of such a transfer but concluded that it was permissible if, as a result of the transaction, the creditor realized the indubitable equivalence of its claim. In *In re Wieberg*,[21] the court examined a plan in which the debtor proposed to deed to a creditor a portion of its land collateral, a parcel of land which was not collateral, and to make a one-time cash payment. The court ultimately concluded that the value of the total conveyance was not the equivalent of the secured claim, but acknowledged that "the indubitable equivalent referred to at Section 1129 may contain non-monetary components."[22]

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19. *Id.* at 333.

20. 77 Bankr. 69, 72, (Bankr. M.D. La. 1987), *rev'd on other grounds*, 881 F.2d 1346 (5th Cir. 1989).

21. 31 Bankr. 782 (Bankr. E.D. Mo. 1983).

22. *Id.* at 784; *see also In re* Elijah, 41 Bankr. 348 (Bankr. W.D. Mo. 1984) (where the court was faced with the novel argument that a § 1111(b) election by a fully secured creditor had the effect of preventing a debtor from returning less than all collateral securing the claim to the creditor. 11 U.S.C. § 1111(b) provides:

> (1) A class of claims may not elect application of paragraph (2) of this sub-section if -
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> (i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or
>
> (ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.
>
> 2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

Discussion of § 1111(b) can be found at Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133, 161 n.176 (1979); Stern, *Section 1111(b): Providing Undersecured Creditors with Postconfirmation Appreciation in the Value of the Collateral*, 56 AM. BANKR. L.J. 195 (1982); Pusateri, Swartz, and Shaiken, *Section 1111(b) of the Bankruptcy Code: How Much Does the Debtor Have to Pay and When Should the Creditor Elect?*, 58 AM. BANKR. L.J. 129 (1984).

The *Elijah* court first observed that "[t]he purpose of the election is to avoid the splitting of an undersecured creditor's claim into secured and undersecured portions, and to prevent the debtor from depriving the creditor of the benefit of appreciation in value of the asset over time." *In re* Elijah, 41 Bankr. at 351, *citing In re* Pine Gate Assoc., Ltd., 2 Bankr. Ct. Dec. 1478 (Bankr. Ct. N.D. Ga. 1976). The court then concluded that where a partial collateral cramdown is proposed, the effect of the election by a fully secured creditor is to preserve the creditor's interest in the remaining collateral. The debtor could return a portion of the collateral, but "[i]f the creditor sells the surrendered collateral and the sale price is less than the claim, the impact of the election is that the creditor would require the debtor to surrender more collateral or to pay the balance of

The legislative history concerning this issue provides limited insight into the intent of Congress. The original House bill provided that a plan could be crammed down, "if with respect to each class of secured claims . . . each holder of a claim of such class will receive or return under the plan . . . property of a value . . . equal to the allowed amount of such claim . . . ."[23]

The House Judiciary Committee commented on that language as follows:

> Specifically, the court may confirm a plan over the objection of a class of secured claims if the members of that class are unimpaired or if they are to receive under the plan property of a value equal to the allowed amount of their secured claims as determined under proposed 11 U.S.C. section 506(a). The property is to be valued as of the effective date of the plan, thus recognizing the time-value of money. As used throughout this subsection, 'property' includes both tangible and intangible property, such as a security of the debtor or a successor to the debtor under a reorganization plan.[24]

The final version of section 1129(b), however, contained no reference to payment of secured creditors with property. As noted, in the final version, cramdown can be accomplished by cash payments or the realization of "indubitable equivalence."[25]

The bankruptcy court in *Sandy Ridge* reviewed the legislative his-

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the claim as secured." *Id.* There was, however, no authority or rationale given for this conclusion.

The *Elijah* decision is an anomaly and was soundly criticized in a recent article extolling the partial collateral cramdown technique. Waas, *supra* note 6, at 104-06. While that article failed to fully consider the practical problems which prevent use of the technique (see *infra* text accompanying notes 61-82), it correctly analyzed the 1111(b) issue:

> The correct use of § 1111(a) in the context of a plan which seeks to abandon less than all of the collateral to a secured creditor is demonstrated in *In re* Griffiths. The debtor in *Griffiths* proposed to return a portion of the collateral to an undersecured creditor and to pay the value of the retained collateral [not the balance of the claim] in cash.
>
> The creditor made the § 1111(b) election. The court held that, under the circumstances, the plan could not be confirmed since the effect of the election was to render the remaining claim after abandonment secured. Since the plan did not propose treatment of that remaining secured claim which was "fair and equitable" within the meaning of section 1129(b), it could not be confirmed over the creditor's objection. The legislative objective of section 1111(b) is accomplished.

Waas, *supra* note 6, at 105, *citing In re* Griffiths, 27 Bankr. 873 (Bankr. D. Kan. 1983).

While there is nothing in the Bankruptcy Code, the case law, or the legislative history supporting the *Elijah* court's position on the § 1111(b) election, it is nevertheless in accord with the line of cases which find that Chapter 11 allows partial collateral cramdowns.

23. H.R. Rep. 8200, 95th Cong., 1st Sess., as reported by the House Committee on the Judiciary, September 8, 1977.

24. *Id.*

25. *See supra* notes 8-16 and accompanying text.

tory of the provision and considered the deletion of the H.R. Rep. No. 8200 language significant.[26] Nevertheless, the court concluded that payment in property is permissible if indubitable equivalence is realized.[27] Based on the cases which have considered the issue to date, the statutory basis for a partial collateral transfer in full satisfaction of a Chapter 11 claim in certain circumstances appears well-founded.

B. Chapter 12

Chapter 12 contains language which raises questions as to whether a partial collateral transfer in full satisfaction of a secured claim can be accomplished in a family farm reorganization. With regard to allowed secured claims, section 1225(a)(5) requires, in part, that a Chapter 12 plan be confirmed if:

> (A) the holder of such claim has accepted the plan;
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
> (ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; or
> (C) the debtor surrenders the property securing such claim to such holder . . . .[28]

Section 1225(a)(5)(B)(ii) would appear to allow the transfer in a manner similar to the "indubitable equivalence" transfer of Chapter 11.[29] However, subsection (B)(ii) is coupled with the requirement of subsection (B)(i) which requires that the secured creditor retain its lien.[30] Where there is to be a transfer of a portion of the collateral in partial satisfaction of the indebtedness and a lien is to be retained, the dual requirements are clearly met. Furthermore, where it is certain the full value of the claim is being transferred and there is no remaining indebtedness to be secured, the issue of complying with subsection B(i) requirement may be one of form over substance. However, where there

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26. *In re* Sandy Ridge Dev. Corp., 77 Bankr. 69, 72 (Bankr. M.D. La. 1987), *rev'd on other grounds*, 881 F.2d 1346 (5th Cir. 1989).

27. *Id.*

28. 11 U.S.C. § 1225(a)(5) (1987).

29. *See supra* text accompanying notes 14-27.

30. *See also In re* Mikkelsen Farms, Inc., 74 Bankr. 280, 290 (Bankr. D. Or. 1987) (where the debtor proposed to transfer to a creditor noncollateral real estate in place of the creditor's collateral with five annual cash payments thereafter. Because the plan did not provide that the creditor would retain its lien until the allowed secured claim was satisfied, the court denied confirmation).

is any doubt as to whether the collateral value can be accurately ascertained,[31] a plan which transfers a portion of the collateral and requires the creditor to release its lien does not meet the requirements of subsection B(i).

Section 1225(a)(5)(C), which permits abandonment of the collateral, and presumably, subsequent action by the creditor to foreclose its lien, may or may not contemplate transfer of title to the collateral.[32] Moreover, even if a transfer is permitted, the requirement that the debtor surrender "the property" appears to mandate the surrender of all the collateral securing the claim. Neither subsection (B) nor (C) of section 1225(a)(5) provides clear authority for a partial collateral cramdown in full satisfaction of a secured claim.

Despite the possible restrictions of section 1225(a)(5), Chapter 12 contains language offering strong support for the technique. Section 1222(b) provides, in part, that a plan may:

> (7) provide for the payment of all or part of a claim against the debtor from property of the estate or the property of the debtor; [or]
> (8) provide for . . . the distribution of all or any part of the property of the estate among those having an interest in such property.[33]

Either subsection (7) or (8) of section 1222(b) would appear to permit the transfer under consideration.

The court in *In re Massengill*[34] was one of several bankruptcy courts that have addressed the interplay between sections 1225(a)(5) and 1222. In *Massengill*, Federal Land Bank (FLB) and Production Credit Association (PCA) creditors objected to plan provisions allowing the debtors to surrender FLB and PCA stock at face value in satisfaction of an equivalent amount of debt owed by the debtors. Citing section 1222(b)(8), the court allowed confirmation and apparently found no limitation in the restrictive language of section 1225(a)(5)(C). It simply observed that "surrender of property securing a claim is specifically recognized in . . . [section 1225(a)(5)(C)] as a proper way to treat a secured claim."[35]

A more complete discussion of the two provisions is provided by *In re Indreland*[36] where the debtor proposed to surrender a portion of the

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31. *See infra* text accompanying notes 61-82.
32. *See supra* note 3.
33. 11 U.S.C. § 1222(b)(7) and (8) (1988).
34. 73 Bankr. 1008 (Bankr. E.D.N.C. 1987), *rev'd on other grounds*, 100 Bankr. 276 (Bankr E.D.N.C. 1988).
35. *Id.* at 1012.
36. 77 Bankr. 268 (Bankr. D. Mont. 1987).

secured creditor's claim. The court first noted, without comment, the creditor's argument that the section 1225(a)(5)(B)(i) requirement that "the" lien retained should be construed to mean the preservation of the entire lien, or in the alternative, the surrender of the entire collateral.[37] The court then acknowledged that on its face, section 1225(a)(5)(C) appeared to require a surrender of all the collateral securing the claim, but also stated that "such [a] reading would not comport with sections 1222(b)(7) and (8), which allows a surrender of part of the property of the estate in payment of the claim."[38]

The court resolved the conflict in favor of the partial transfer.[39] It observed that section 1222(8) was adopted from section 1129[40] and that Chapter 11 cases have allowed the debtor to substitute collateral so long as the indubitable equivalence requirement is met.[41] The courts have allowed the debtor to transfer a portion of collateral and pay remaining real property in cash.[42] The court quoted *Massengill* with approval[43] and stated, "[l]ike the *Massengill* court, I conclude the transfer of property, either in part or in whole to satisfy a secured claim is permitted in Chapter 12, under sections 1222(b)(7) or (8) and sections 1225(a)(5)(B) or (C)."[44]

A recent bankruptcy decision examined the relationship between the section 1225(a)(5)(B)(ii) cramdown requirements[45] and those of Chapter 13.[46] The court in *In re Durr*[47] considered a plan in which the debtors proposed to retain the real property securing a creditor's claim and transfer to the creditors other real property as payment in full satisfaction of its claim. The court observed that the language of section 1225(a)(5) is identical to that of 11 U.S.C section 1325(a)(5).[48] The court quoted from the House of Representatives debate concerning proposed section 1325(a)(5): " '[T]he secured creditor in a case under

37. *Id.* at 272.

38. *Id.*

39. *Id.* at 273.

40. *See supra* text accompanying notes 8-14.

41. *In re* Indreland, 77 Bankr. at 272, *citing In re* Sun Country Dev., Inc., 764 F.2d 406, 409 (5th Cir. 1985).

42. *Id.*, *citing In re* Fursman Ranch, 38 Bankr. 907, 908-909 (Bankr. W.D. Mo. 1984).

43. *In re* Indreland, 77 Bankr. at 273.

44. *Id.*

45. *See supra* text accompanying notes 27-30.

46. *See generally* 11 U.S.C. §§ 1301-30 (1982). Chapter 12 was "closely modeled after existing Chapter 13." H.R. Rep. No. 958, 99th Cong., 2d Sess. 48, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5227, 5246, 5249.

47. 78 Bankr. 221 (Bankr. D.S.D. 1987).

48. *Id.* at 223.

Chapter 13 may receive *any property* of a value as of the effective date of the plan equal to the allowed amount of the creditor's secured claim rather than being restricted to receiving deferred cash payments.' "[49] The court concluded that an "asset payment" plan was theoretically permissible in Chapter 12.[50]

Only one reported Chapter 12 case has held that the language of section 1225(a)(5)(C) prohibits a partial collateral transfer. In *In re Townsend*,[51] the debtors proposed to turn over to a secured creditor two of five parcels of land securing its claim. The indebtedness remaining after an offset for the value of the two parcels was to be paid with interest over 25 years. The court found the plan could not be confirmed under section 1225(a)(5)(B). By the court's calculations, the value of the property to be distributed, including the present value of deferred payments, was less than the allowed secured claim. With regard to section 1225(a)(5)(C), the court concluded that because "[t]he debtors do not propose surrender of *all* of the property securing the claim . . ." the plan could not be confirmed.[52]

In all likelihood, *In re Townsend* will be of little precedential value. The court acknowledged that section 1222 allows for the payment of all or part of a claim from property of the estate or the debtor,[53] but with no analysis of the legislative history or prior case law, gave section 1225(a)(5)(C) a restrictive reading. It is more likely that bankruptcy courts considering the issue in the future will construe the provisions of section 1222(b)(7) and (8) as being more reflective of the intent of Congress and will allow transfers such as that proposed in *Townsend* if the requisite value is to be distributed.[54]

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49. *Id.*, *quoting* 124 Cong. Rec. 11, 107 (daily ed. Sept. 28, 1978) (emphasis added).

50. *In re* Durr, 78 Bankr. at 224. The court also referred to *In re* Simmons for the proposition that "[o]ther property may be conveyed to the secured creditor, in lieu of further payments, to meet the § 1325(a)(5)(B)(ii) standard." *In re* Simmons, 756 F.2d 547, 554 (5th Cir. 1985). Chapter 13 cases are frequently used to aid in interpreting Chapter 12 provisions because of the similar or identical language in each. *In re* Janssen Charolais Ranch, Inc., 73 Bankr. 125, 126 (Bankr. D. Mont. 1987).

51. 90 Bankr. 498 (Bankr. M.D. Fla. 1988).

52. *Id.* at 502 (emphasis in original).

53. *Id.*

54. The court in *In re* Massengill observed that Chapter 12 "is emergency legislation which suspends a number of creditor protections which are available in chapter 11 to facilitate family farmer reorganizations. The essence of Chapter 12 reorganization is the debtor's ability to deal with secured claims. In that regard, the debtor has great flexibility and many options." *In re* Massengill, 73 Bankr. 1008, 1012 (Bankr. E.D.N.C. 1987), *rev'd on other grounds*, 100 Bankr. 276 (Bankr. E.D.N.C. 1988). It is incongruous to suggest, as does the *Townsend* court, that a reading of §§ 1222 and 1225(a)(5) would result in a more restrictive approach to dealing with secured claims than that available in Chapter 11.

III. The Practical Application—Valuation And Transfers of Farmland Collateral

Real estate valuation issues are a principle focus of litigation in farm reorganizations. In both Chapters 11 and 12, when a farmer proposes to keep his land, ascertaining its value is the first step in determining what the farmer will be required to repay.[55] When the land is to be transferred to a creditor, the value assigned to the property represents the amount of indebtedness to be offset.[56] However, there is a crucial difference in one aspect of these proposals. When the farmland is to be retained, the farmer generally proposes to repay its value over time at an appropriate interest rate. The creditor is to release its lien upon completion of the payments. Failure to make the required payments - i.e., failure to deliver to the creditor the value of its claim - can result in relief from the automatic stay for the creditor[57] or dismissal of the bankruptcy.[58] In either case, the creditor will be free to pursue normal collection methods to realize the value of its claim.

On the other hand, the creditor is left unprotected after being given title to only a portion of its collateral in full satisfaction of its debt and releasing its lien on the remaining collateral. For example, Farmer Doe owes Little Town Bank $100,000. The indebtedness is secured by two parcels of land, Parcel A and Parcel B. The court examines the appraisals presented by both parties and concludes that each parcel is worth $100,000. The court confirms Farmer Doe's plan to transfer Parcel A to Little Town Bank in full satisfaction of the debt. As required, Little Town Bank files a release of the lien on Parcel B. However, after utilizing marketing techniques appropriate for the area and the parcel to be sold, the highest sales price Little Town Bank is able to obtain for the property is $85,000. Because its indebtedness has been "satisfied" and its lien released pursuant to the bankruptcy plan, the creditor is without recourse to recover the $15,000 shortfall.

The treatment accorded Little Town Bank, which entered the bankruptcy as a secured creditor with a sizable equity cushion, may actually be less favorable than that given an undersecured creditor in the same proceeding. For example, suppose a third parcel, Parcel C, was the only collateral securing a $100,000 indebtedness to Small City Bank and the parties agreed it was worth $85,000. In that case,

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55. 11 U.S.C. § 1129(b)(2)(A)(i) (1982); 11 U.S.C. § 1225(a) (5)(B) (1987).
56. 11 U.S.C. § 1129(b)(2)(A)(iii) (1982); 11 U.S.C. § 1225(a)(5)(C) (1987).
57. 11 U.S.C. § 362(d) (1982).
58. 11 U.S.C. § 1112(b)(8) (1982); 11 U.S.C. § 1208(b)(6) (1987).

Farmer Doe would be required to repay the value of the secured claim, $85,000, and make some provision for the unsecured portion of the claim. Because Farmer Doe has an unencumbered parcel (B), worth $100,000, he will probably be required to pay the unsecured claim in full.[59] Small City Bank would realize a greater return than Little Town Bank, its fully secured counterpart.

A crucial issue underlies the inequity demonstrated in the above example. If partial collateral transfers in full satisfaction of a secured claim are theoretically possible,[60] it is necessary to consider whether cramdown requirements can be met by the transfer of farmland collateral. The appropriate inquiry is whether appraisal evidence of farm real estate value is unquestionably determinative of the value to be realized by a creditor upon acquisition of the collateral.[61] If not, plan confirmation should be denied. Several cases, holding that a partial collateral transfer is theoretically possible,[62] have gone on to consider the real estate valuation issue and have refused confirmation on that basis.

The court in *In re Walat* examined the issue of real estate valuation at length.[63] It observed that certain commodities have a readily ascertainable value. In such cases, a plan which proposes to transfer property of a value equivalent to the secured claim is confirmable.[64] However, the court found that the same was not true of real estate:

> As has been recognized in other areas of law and at all times in history, real estate is a unique commodity. A purchaser of land may forswear damages and have a court compel conveyance of land by a breaching seller; and *vice versa*. Why? Because the value of land is difficult (some say 'impossible') to fix . . . . Similarly, we concede to doubts about our ability to fix the 'value' of the land in question.[65]

The court did not go so far as to say that a plan utilizing the techniques at issue could never be confirmed. However, it was clear

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59. This scenario assumes that all unsecured debt owed by Farmer Doe is less than $100,000 and that Parcel B is his only unencumbered asset. Chapters 11 and 12 cramdown requirements with regard to unsecured creditors are found at 11 U.S.C. § 1129(b)(2)(B) and § 1225(a)(4) (1988), respectively.

60. *See supra* text accompanying notes 8-54.

61. It is beyond the scope of this article to determine whether the conclusions reached with regard to the valuation of farmland are applicable to other forms of real estate. Although the decisions may refer to general "real estate" valuation issues, the cases discussed herein deal specifically with agricultural collateral and without further analysis should not be presumed to have unrestricted application to all real estate.

62. *See supra* text accompanying notes 8-52.

63. *In re* Walat Farms, Inc., 70 Bankr. 330, 330 (Bankr. E.D. Mich. 1987).

64. *Id.* at 333-34.

65. *Id.* at 334 (emphasis in original).

that the valuation question prevented confirmation of the plan before it:

> Suffice it to say, however, that no matter how hot the market for real estate may become in the future, the market for farm real estate here and now is not such which would permit us to hold that the value of the land being offered is the indubitable equivalent of [the creditors] claim. 'Indubitable' means 'too evident to be doubted.'[66]

The court professed doubts about its ability to forecast what the land would bring and concluded the debtors' proposal did not provide the creditor the indubitable equivalent of its claim.[67] Therefore, confirmation of the plan was denied.

The court in *Sandy Ridge* reached a similar conclusion.[68] The court first observed that pursuant to the section 1129(b)(2)(A)(iii) concept of the creditor realizing full value, "it is apparently not enough that the property be appraised or valued as equal to the amount of the claim; the creditor must 'realize' the equivalent of his claim."[69] Moreover, that conclusion must be unquestionable: "If reasonable people can differ on the valuation of property, the valuation might be proved by a preponderance of the evidence but the conclusion would not be 'indubitable.' "[70] The court cited *Walat* with approval and denied confirmation.[71]

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66. *Id.* (citations and footnotes omitted).

67. *Id.*; *accord In re* Thronbrook Dev. Corp., 96 Bankr. 350 (Bankr. N.D. Fla. 1989).

68. *In re* Sandy Ridge Dev. Corp., 77 Bankr. 69, 69 (Bankr. M.D. La. 1987), *rev'd on other grounds*, 881 F.2d 1346 (5th Cir. 1989). The Fifth Circuit Court of Appeals began its discussion of *Sandy Ridge* by stating that the bankruptcy court had incorrectly concluded that the plan proposed to transfer a portion of the creditor's security in full satisfaction of the entire claim. The Fifth Circuit then went on to examine the application of the Bankruptcy Code to the plan as it interpreted it. 881 F.2d at 1349. In essence, the Fifth Circuit did not reject the conclusions of law of the lower court, but their application to the facts as it found them. The precedential value of the lower court's decision is weakened as a result, but its underlying reasoning is sound and should prevail in an applicable fact situation.

69. *Id.* at 73, *citing In re* Sun Country Dev., Inc., 764 F.2d 406 (5th Cir. 1985) as an example of a case in which a non-real estate property transfer was allowed in full satisfaction of a creditor's claim after the court determined there was no probability of loss to the creditor. *But see In re* Walat Farms, Inc., 70 Bankr. at 336, n.7 (which reports the post-confirmation history of the *Sun Country* property and suggests that even "indubitable" property values may result in losses to the recipient creditor).

70. *In re* Sandy Ridge Dev. Corp., 77 Bankr. at 73. The court observed, "[b]ecause real estate is involved, it is simply unthinkable that a portion can be carved out that will be worth *exactly* the amount of the secured claim." *Id.* at 80 (emphasis in original).

71. *Id.* at 74-75. *Sandy Ridge* contains a worthwhile discussion of several cases cited by the debtor in support of its position that asset payment plans can be confirmed. In each case the court found the issue decided to be distinguishable from that being considered in *Sandy Ridge*. *Id.* at 77-79. The decision also points out a variety of other potential problems with such plans. It observes that a cramdown provision for forced payment in property, which is generous enough to

Both *Walat* and *Sandy Ridge* involved Chapter 11 proposals to transfer a portion of the real estate collateral in full satisfaction of a creditor's claim. These cases represent cogent authority for the proposition that such a proposal is not confirmable under section 1129(b)(2)(A)(iii). *In re Durr*[72] provides similar authority on Chapter 12. The court in *Durr* cited both *Walat* and *Sandy Ridge*, discussed the issues raised by them and concluded:

> The value of the real property to be distributed to [the creditor] on account of its secured claim cannot be calculated with any certainty until the property is actually sold. Thus, the plan fails to meet the requirements for confirmation pursuant to 11 U.S.C. section 1225(a)(5)(B)(ii), because the Court must determine, as of the effective date of the plan, whether [the creditor] will receive 'not less than the allowed amount of its secured claim.'[73]

Therefore, under section 1225(a)(5)(B)(ii), concern about the ability to predict the realizable value of farm real estate should prevent plan confirmation in Chapter 12 as it will in Chapter 11.

Other cases in Chapter 11 and 12 illustrate from another viewpoint the rationale underlying the *Walat*, *Sandy Ridge*, and *Durr* decisions. The cases suggest that if a creditor is sufficiently protected, plans may be confirmed which transfer property for less than the full indebtedness claimed by the creditor. However, the protection necessary invariably involves retention by the creditor of the lien securing the remaining indebtedness. That, of course, is precisely what a property transfer in full satisfaction of the indebtedness does not do.

For example, in *In re Fursman Ranch*,[74] the court considered a

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satisfy the indubitable equivalence requirement, would necessarily have a margin for valuation error which may result in an overpayment to the secured creditor. Such an overpayment could not be confirmed over the objection of junior dissenting creditors. *Id.* at 74. Furthermore, under the state law applicable to the case, the transfer proposed would be subject to all liens and encumbrances, including those inferior to the receiving creditor: "[A] plan provision, without more, is apparently not enough to avoid liens, at least absent some special notice to the parties whose liens are to be avoided and possibly an adversary hearing on that issue." *Id.* at 76. Finally, the court suggests that such a transfer may bar the creditor from asserting deficiency rights against guarantors. *Id.* at 76-77.

72. 78 Bankr. 221 (Bankr. D.S.D. 1987).

73. *Id.* at 224. The court criticizes an earlier Chapter 12 case which authorized the transfer of an unencumbered parcel of land in partial satisfaction of a creditor's claim: In *Mikkelson*, the court "found no prohibitions against this transfer in kind, but failed to consider the practical consequences of the variable farm real estate market and the effect of this market on the requirements of § 1225(a)(5)(B)." *Id.* at 224 n.7, *citing Mikkelson.* Therefore the court in *Durr* concluded that *Mikkelson* "is not helpful in determining how to protect a secured claim of a creditor." *Id.*

74. 38 Bankr. 907 (Bankr. W.D. Mo. 1984).

Chapter 11 plan which proposed a transfer for less than the full indebtedness in which the creditors retained their liens. The court indicated its willingness to evaluate the real estate and not require sale by the debtor or creditors before the value was fixed.[75] However, the court made it clear that its valuation of the farmland to be transferred was not etched in stone: "If a commercially reasonable sale by the creditors does not result in payment approximating the values set here, the creditors may ask for reconsideration of their claims."[76] Similarly, the court in the Chapter 12 case of *In re Indreland*[77] considered such a plan and cited *Fursman*. The *Indreland* court held that "since the Debtor's appraiser felt the tracts could be marketed within two years, well within the term of the Debtor's [five] year Plan, the Bank, upon sale, may seek redetermination of its claim if the parcels do not bring at fair sale the value fixed by this Order."[78]

Implicit in both *Fursman* and *Indreland* is the consideration that if it is necessary for the creditor to ask for a redetermination of its claim, the lien upon the collateral retained by the debtor will still be in place and the redetermined claim will be secured by it. In the event of default, under the terms of the plan, the creditor will have recourse to its original collateral.

Recourse to the original collateral is the key safeguard that is not available to the creditor required to accept a portion of the collateral in full satisfaction of the debt. Where the sale of the real estate fails to produce proceeds equal to the indebtedness "satisfied," the formerly fully-secured creditor is left with the choice of absorbing the loss or mounting a legal battle to resurrect its debt, reinstate its lien, and obtain a provision for repayment in the bankruptcy court. Since plan modifications after confirmation may be proposed only by the debtor in Chapter 11,[79] and only by the debtor, the trustee, or the holder of an allowed unsecured claim in Chapter 12,[80] the likelihood of success in the latter course is minimal.[81] Moreover, in the intervening period the

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75. *Id.* at 909.

76. *Id.* at 910; *see also In re* Elijah, 41 Bankr. 348, 351-52 (Bankr. W.D. Mo. 1984) ("[w]hile the court [in *Fursman*] suggested reconsideration of the value of the surrendered property if the sale price did not match the appraisals, the basis for such reconsideration would be equitable principles of unjust enrichment rather than the [11 U.S.C. § 1111(b)] election").

77. 77 Bankr. 268 (Bankr. D. Mont. 1987).

78. *Id.* at 274. Plan payments in Chapter 12 may exceed three years only if the court for cause approves a longer period not to exceed five years. 11 U.S.C. § 1222(c) (1988).

79. *See* 11 U.S.C. § 1127(b) (1988).

80. *See* 11 U.S.C. § 1229(a) (1987).

81. Revocation of the order of confirmation is unlikely as well because in both chapters

bankruptcy may have been dismissed, the land may have been further encumbered, other settlements may have been reached based on the assumed state of the title, or the land may have been sold.

The concern underlying the reconsideration of the claims safeguard established in *Fursman* and *Indreland* is the same concern which led to the denial of confirmation in *Walat*, *Sandy Ridge*, and *Durr*. That concern is whether the realizable value of a parcel of real estate can be determined with sufficient accuracy to satisfy the cramdown requirements of Chapters 11 and 12. In each case the court's ruling was based on a recognition that it could not. While a partial transfer of collateral may be possible in certain circumstances,[82] the nature of the farm real estate sales market restricts the practicality of the technique if farmland is the collateral to be transferred.

IV. CONCLUSION

The two bankruptcy reorganization chapters commonly used by farmers, Chapters 11 and 12, provide a number of options to the farmer with regard to the treatment of secured creditors. However, coupled with the flexibility that comes with those options are limitations designed to provide some protection to secured creditors. This article has focused on one of those limitations. Bankruptcy courts generally recognize that estimates of value are inadequate predictors of realizable value of farmland. Because of that inadequacy, a creditor without recourse to its original lien or the equivalent is insufficiently protected where a transfer of farmland collateral is required. Accordingly, plans in which the debtor proposes to transfer a portion of the farmland collateral in full satisfaction of secured claim of an objecting creditor may not be confirmed under the cramdown provision of Chapter 11 or 12.

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revocation is possible only if the order was procured by fraud. 11 U.S.C. §§ 1144, 1230 (1988).

82. *See supra* text accompanying notes 8-54.