In Re Martin: The Indubitable Equivalence Standard

by

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IN RE MARTIN: THE INDUBITABLE EQUIVALENCE STANDARD

In In re Martin, *the Eighth Circuit Court of Appeals held that indubitable equivalence, under Bankruptcy Code section 361, should be determined under a compensatory standard. The Court's reasoning, however, seems to utilize both a compensatory and protective standard. This note examines the Eighth Circuit's opinion to determine what, if anything, it adds to the understanding of indubitable equivalence and how that standard should be applied by bankruptcy courts.*

INTRODUCTION

Farmers reorganizing under Chapter Eleven of the Bankruptcy Code frequently find themselves cut off from previous sources of credit.[1] After exhausting the search for financing to continue farm operations, the Chapter Eleven farmer has another option. Section 363 of the Bankruptcy Code allows a debtor-in-possession[2] to sell, lease or use the property of the estate which is under lien to secured creditors.[3] This right is subject to the debtor-in-possession providing any party with an interest in the property adequate protection for that interest.[4] Section 361 offers three general methods by which a debtor-in-possession may provide adequate protection of the creditor's interest.[5] This note is concerned primarily with subsection 361(3) which requires that the secured creditor receive the indubitable equivalent of its interest.[6]

Sections 361 and 363 give the courts discretion in determining when and under what circumstances the use of cash collateral is allowed.[7] This discretion is needed to balance the competing interests of both the debtors and the secured creditors in the reorganization of the debtors' farm or business. The court must keep in mind that the purpose behind the provisions is to allow and

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1. *See In re* Sheehan, 38 Bankr. 859, 862 (Bankr. D.S.D. 1984) which stated:
> This Court has literally been inundated with motions for expedited hearings for the use of cash collateral, many brought on by farmers unable to obtain 1984 operating credit, ... The Code's expressed requirement that hearings on the use of cash collateral be scheduled according to the needs of the debtor and acted on promptly by the court is not an accident. It reflects an acute awareness of the necessity of timely obtaining cash from what is often the only source available to operate a business in reorganization bankruptcy.

Id. at 862.

2. Although 11 U.S.C. § 363(b) reads "the trustee," the Chapter Eleven debtor-in-possession has all the duties and powers of the bankruptcy trustee. 11 U.S.C. § 1107 (1983).

3. 11 U.S.C. § 363(b) (1983) provides: The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

4. 11 U.S.C. § 363(c)(4)(e) (1983) provides: Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, . . . by the trustee, the court shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. In any hearing under this section, the trustee has the burden of proof on the issue of adequate protection.

5. 11 U.S.C. § 361, *infra* note 32.

6. 11 U.S.C. § 361(3), *infra* note 32.

7. *See In re* Martin, 761 F.2d 472, 476 (8th Cir. 1985); 2 W. COLLIER, COLLIER ON BANKRUPTCY ¶ 361.01, ¶ 363.04 (15th ed. 1985).

encourage Chapter Eleven debtors to reorganize their debts and continue their business until they are able to eliminate their debts.[8] This goal must be balanced against the need of secured creditors to protect the value of their interest in the property which the debtor seeks to use, sell or lease.[9]

The farmers in *In re Martin*[10] offered adequate protection proposals, each of which substituted a lien on future crops and the assignment of crop insurance proceeds for a present lien on stored grain.[11] The Eighth Circuit Court of Appeals held that the bankruptcy court, in accepting the debtors' proposals, had incorrectly applied the legal standard of section 361.[12] Specifically, the Eighth Circuit found that the requirement of indubitable equivalence was improperly applied. This note will examine the Eighth Circuit's reliance on the compensatory interpretation of indubitable equivalence and the impact this reliance will have on debtors and creditors in the Eighth Circuit.

FACTS AND PROCEDURE

Martin is the consolidated appeal of three North Dakota farmers[13] who had made motions to the bankruptcy court for use of cash collateral to finance the next year's planting.[14] Debtors sought to sell their 1983 grain crop, under seal to the Commodity Credit Corporation (C.C.C.) of the Department of Agriculture, and use the cash from the sale.[15] After objection by the C.C.C., appellants offered an adequate protection proposal consisting of a first lien on the 1984 crop and the assignment of federal crop insurance proceeds on that crop.[16]

The C.C.C. objected to the proposals on the grounds that they placed the C.C.C. in the position of a lending institution in conflict with its administrative purpose,[17] and that they did not offer the C.C.C. adequate protection of its interest as a secured creditor.[18] The bankruptcy court allowed the use of the cash proceeds from the sale of the grain, up to the amount of the federal crop insurance proceeds on the 1984 crops.[19] The C.C.C. was granted a first lien on all 1984 crops and was to be assigned the proceeds of appellants' fed-

8. H.R. REP. NO. 595, 95th Cong., 2nd Sess. 220, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6179.

9. H.R. REP. NO. 595, 95th Cong., 2nd Sess. 4-5, *reprinted in* 1978 U.S. CODE. CONG. & AD. NEWS 5963, 5966.

10. 761 F.2d 472 (8th Cir. 1985).

11. *Id.* at 473.

12. *Id.*

13. The case came to the bankruptcy court as *In re* Nikolaisen, 38 Bankr. 267 (Bankr. D.N.D. 1984), then was appealed to the District Court and reversed as *In re* Berg, 42 Bankr. 335 (D.N.D. 1984).

14. *Martin*, 761 F.2d at 473.

15. *Id.*

16. *Id.*

17. *Id.* at 478.

18. *Id.* at 475.

19. Debtor expected to receive a guaranteed minimum of $81,000.00 from his federal crop insurance. The bankruptcy court allowed a lien on 1984 crops of up to $80,000.00 and an assignment of crop insurance proceeds not to exceed $80,000.00. *Nikolaisen*, 38 Bankr. at 268-70. This $80-81,000.00 represented the 75% of crop yields which the Federal Crop Insurance Corporation (F.C.I.C.) can guarantee. *Martin*, 761 F.2d at 475.

eral crop insurance as adequate protection for its interest in the stored grain.[20] The C.C.C. then appealed the bankruptcy court ruling to the District Court.[21] The District Court reversed, holding that the bankruptcy court had made an erroneous determination of fact.[22] The District Court found that appellants' proposal for use of cash collateral did not adequately protect the interest of the C.C.C.[23]

The Eighth Circuit Court of Appeals reversed the district court, finding that the bankruptcy court's error was based on a misunderstanding of the law.[24] The Eighth Circuit set out its interpretation of subsection 361(3)[25] and enumerated several illustrative factors which the lower court might consider in determining whether adequate protection had been proven.[26] The Eighth Circuit remanded the case to the bankruptcy court for a decision consistent with their opinion.[27]

BACKGROUND

Because of increased debt, lower farm prices, and difficulty in acquiring new sources of financing, many farmers are finding reorganization under a Chapter Eleven bankruptcy to be a functional alternative.[28] For example, section 363 of the Bankruptcy Code offers the potential for the use of cash collateral to finance continuing farm operations. Thus, bankruptcy assists a farmer in continuing operations while developing out a reorganization plan.

In accordance with the purposes of Chapter Eleven,[29] section 363 provides the procedure by which a debtor-in-possession may use, sell or lease property of the estate in which a secured creditor has an interest.[30] When the debtor-in-possession desires to use such property he must gain the consent of any entity which has an interest in the property. If the entity will not give its consent, the debtor-in-possession must prove in a court hearing that the interest of the entity will be adequately protected if the property is used, sold or leased.[31]

Section 361 states that adequate protection may be provided by periodic cash payments, additional or replacement liens, or "such other relief . . . as will result in the realization by such entity of the indubitable equivalence of

20. *Martin*, 761 F.2d at 474.
21. *Berg*, 42 Bankr. at 336.
22. *Martin*, 761 F.2d at 475.
23. *Berg*, 42 Bankr. at 338. The District Court found that an existent crop has a greater value than a crop to be grown because: the creditor can inspect, protect and control existing stored grain; stored grain may be liquidated at any time; and other liens may be filed against the future crop. *Id.*
24. *Martin*, 751 F.2d at 475. The Eighth Circuit first stated that the bankruptcy court's findings of fact were not to be overturned unless clearly erroneous, although its conclusions of law are subject to *de novo* review. *Id.* at 474.
25. *Id.* at 476.
26. *Id.* at 477.
27. *Id.* at 478.
28. *See, e.g., Sheehan*, 38 Bankr. at 862; Looney, *The Bankruptcy Reform Act of 1978 and the Farmer: A Survey of Applicable Provisions*, 25 S.D.L. REV. 509, 509-12 (1980).
29. *See supra* notes 7-8 and accompanying text.
30. *See supra* notes 3-4.
31. *See supra* note 4.

such entity's interest in such property."[32] The first two methods seldom become issues in bankruptcy proceedings such as the instant case.

One of the first definitional references to indubitable equivalence is found in Judge Learned Hand's opinion in *In re Murel Holding Corp.*[33] Explaining the concept of adequate protection, Judge Hand defined indubitable equivalence to be a substitute which must be completely compensatory, providing the creditor with present value that will insure the safety of its principal.[34]

In re Hollanger[35] and *In re Sheehan*[36] are two recent cases critical of the *Murel* definition.[37] The court in *Hollanger* found that *Murel*, which involved an extremely difficult financial situation, merely enunciated "a bottom line which cannot be passed if the creditor is to receive an indubitable equivalence."[38] *Sheehan* echoed the *Hollanger* decision, but called indubitable equivalence a legal conclusion rather than a legal test,[39] and offered its own test.[40]

The *Murel* construction of indubitable equivalence has been the basis for numerous other decisions since 1935,[41] including *In re American Mariner Industries, Inc.*[42] which concluded that Congress had the *Murel* decision in mind

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32. 11 U.S.C. § 361 (1983) states:

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

(1) requiring the trustee to make periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

33. 75 F.2d 941 (2d Cir. 1935). *Murel* involved the owners of an apartment house who filed for bankruptcy under the Bankruptcy Act of 1898. The owners proposed a reorganization plan which would have required the creditors to forego amoritization payments and extend the due date of the mortgage while the apartment house was remodeled. *Id.* at 941-42.

34. *Id.* at 942. Judge Hand stated:

> It is plain that "adequate protection" must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most indubitable equivalence.

Id.

35. 15 Bankr. 35, 46 (Bankr. W.D. La. 1981).

36. 38 Bankr. 859, 867 (Bankr. D.S.D. 1984).

37. *In re* Murel, however, was decided under the 1898 Act, while *Hollanger* and *Sheehan* were decided pursuant to the 1978 Bankruptcy Code enactment.

38. *In re* Hollanger, 15 Bankr. 35, 46 (Bankr. W.D. La. 1981).

39. *Sheehan*, 38 Bankr. at 867.

40. *Id.* at 868. To prove adequate protection, "a party proposing to use cash collateral must prove by clear and convincing evidence that an entity claiming an interest in cash collateral will realize the value of its bargain in the light of all the facts and circumstances of the case." *Id.*

41. *See In re* Monroe Park, 17 Bankr. 934 (D. Del. 1982); *In re* Anchorage Boat Sales, Inc., 4 Bankr. 635 (Bankr. E.D.N.Y. 1980); *In re* Langley, 30 Bankr. 595 (Bankr. D.N.D. 1983); *In re* Virginia Foundry Co., 9 Bankr. 493 (W.D. Va. 1981).

42. 734 F.2d 426 (9th Cir. 1984).

when adopting the language of section 361.[43] The court in *Mariner* was convinced that Congress included the phrase "indubitable equivalence" to emphasize the compensatory nature of adequate protection.[44] The Ninth Circuit assumed that the adoption of a completely compensatory standard in section 1129(b) meant that Congress "intended to adopt or at least encourage the same approach to adequate protection in sections 361 and 362."[45] The *Mariner* court, however, failed to note statements by the two main congressional proponents which tend to indicate that adequate protection was intended "to protect a creditor's allowed secured claim."[46]

The significance of the difference between *Mariner*'s interpretation of section 361 and the interpretation suggested in the legislative history is, simply, the difference between the application of a *compensatory* versus a *protection* interpretation. The *compensatory* interpretation results in a creditor-oriented stance which requires the court to consider the future as well as the present value of the collateral. The *protection* interpretation, on the other hand, is more consistent with the flexibility inherent in Chapter Eleven,[47] in that it requires the court to consider only what adequate protection is necessary to protect the value of the creditor's present secured claim.

The Ninth Circuit's decision in *Mariner* emphasized the prevalent understanding of indubitable equivalence as compensatory, but other courts have been less impressed by this *Murel* interpretation.[48] In a well reasoned analysis of adequate protection, the court in *In re Alyucan Interstate Corp.*[49] found that reliance on a showing of indubitable equivalence was inappropriate in light of the non-prescriptive character of section 361. As the court stated: "Indubitable equivalence is not a method; nor does it have substantive content. Indeed, something 'indubitable' is more than 'adequate;' 'equivalent' is more than 'protection;' hence, the illustration may eclipse the concept. At best, it is a semantic substitute for adequate protection. . . ."[50]

Thus, the law on indubitable equivalence as the Eighth Circuit found it, consisted of two different interpretations. One line, founded in *Murel*, holds indubitable equivalence to be a compensatory standard, requiring bankruptcy courts to evaluate adequate protection proposals in terms of how adequately the proposal will compensate the secured creditor. This line has been adhered to through a line of cases which, to date, has peaked in the Ninth Circuit decision in *Mariner*.

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43. *In re* American Mariner Indus. Inc., 734 F.2d 426, 432 (9th Cir. 1984).

44. *Id.*

45. *Id.* at 434.

46. This statement was made by both Sen. DeConcini and Rep. Edwards. 124 CONG. REC. § 17406 (statement of Sen. DeConcini), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6505, 6513; 124 CONG. REC. H11089 (statement of Rep. Don Edwards), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6436, 6444.

47. *See supra* note 7.

48. *Sheehan*, 38 Bankr. 859; *Hollanger*, 15 Bankr. 35; *In re* Alyucan Interstate Corp., 12 Bankr. 803 (Bankr. D. Utah 1981).

49. 12 Bankr. 803 (Bankr. Utah 1981).

50. *Id.* at 809.

The other line, of more recent origin, rejects the static requirements of indubitable equivalence in favor of a more flexible standard which holds that debtors' proposals need only show a reasonable protection of the present value of the creditor's interest. Risk assessment here becomes indispensable to the determination of whether the creditor's interest is adequately protected. This flexible standard has appeared more frequently since the 1978 enactment of the new Bankruptcy Code. It has been vigorously enunciated in such cases as *Alyucan, Hollanger*, and *Sheehan*.

There may be situations where the distinction between the compensation and the protection interpretations is merely semantic. In cases like *In re Martin*, however, where the collateral at issue is variable in value, the distinction is an important one.

ANALYSIS

The Eighth Circuit in *In re Martin*, after looking to indubitable equivalence as the key to adequate protection, had to interpret this phrase in order to determine if the bankruptcy court had correctly applied the adequate protection standard of section 361.[51] The court traced the phrase from its origin in *Murel* to its inclusion in this code section as part of a legislative compromise.[52] The Eighth Circuit gave much deference to the *Murel/Mariner* interpretation of indubitable equivalence without explaining the phrase beyond citing Judge Hand's oft-cited quote.[53] It seems clear that the Eighth Circuit used this phrase with little or no understanding of its meaning; if it can even be said that indubitable equivalence has a substantive meaning.[54]

Besides muddying the waters of interpretation, the court's use of indubitable equivalence may be moot as it was able to propose a three-pronged adequate protection test without use of the phrase. The court states that in any individual case, a bankruptcy court must first, establish the value of the secured creditor's interest; then, identify the risks to the secured creditor's value resulting from the debtor's request for the use of the cash collateral; and finally, decide if the adequate protection proposal will *protect* the secured creditor's value as nearly as possible against the identified risks.[55]

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51. *Martin*, 761 F.2d at 476-77.

52. *Id.* at 476. Both House and Senate bills carried identical versions of sections 361(1) and 361(2), but the House bill originally had two additional methods of providing adequate protection. One granted the secured creditor an administrative expense priority to the extent of his loss and the other method allowed other forms of protection which would result in the realization of the value of the creditor's interest. The Senate deleted the first method and did not include the second. The final version was a compromise version of the original House bill. H.R. REP. No. 595, 95th Cong., 2nd Sess. 340, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6296. S. REP. No. 989, 95th Cong., 2nd Sess. 54, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5840.

53. *Martin*, 761 F.2d at 476.

54. It is, however, important to note that the Court seems to have assumed (through its use of the term "indubitable equivalence" with all its interpreted history) that the adequate protection question will be viewed in terms of compensation rather than protection.

55. *Martin*, 761 F.2d at 477.

Establishing the Value of the Creditor's Interest

The Eighth Circuit found that the bankruptcy court did not apply the first step of this test because the bankruptcy court never established the value of the C.C.C.'s interest.[56] In holding that the $80,000.00 in federal crop insurance proceeds, which the C.C.C. would receive in the event of a crop failure, would insure the creditor's interest, the bankruptcy court simply made the assumption that these proceeds were the bottom line value of the C.C.C.'s interest.[57] There is no evidence in the bankruptcy court opinion that the court was aware of, or calculated, the market price of the stored grain.[58] The bankruptcy court did not even refer to a method or formula to adduce the value of the C.C.C.'s interest, either by looking to the value of the collateral or the value of the lien itself.[59]

Section 361 does not specify how or when value is to be determined.[60] This is consistent with the flexible case-by-case analysis which Congress sought to implement within this section.[61] But under the Eighth Circuit's test, value must be determined at a point early on in the bankruptcy court's determination of adequate protection. At least one court has stated that the secured creditor's collateral should be valued as of the effective date of the plan.[62] This method, particularly in situations similar to the instant case, is reasonable in light of the potential fluctuation in the market price of a commodity.

Identifying the Risks to the Creditor's Interest

The Eighth Circuit held that the bankruptcy court also failed to meet the second prong of the test because it did not identify the risks to the C.C.C. incumbent in the debtors' proposed use of the collateral.[63] In the proposed exchange of a future lien on non-existent crops for a present lien on existent, stored crops, the most obvious and readily apparent risks involved are those generally associated with farming: the weather and market price.[64] Appellants here did what they could about the risk from weather by planning to purchase federal crop insurance and assign the proceeds to the C.C.C. In listing the availability of crop insurance as one of the illustrative factors to consider in evaluating risk, the Eighth Circuit gave its tacit approval to this

56. *Id.*
57. *Nikolaisen*, 38 Bankr. at 270.
58. *Martin*, 761 F.2d at 477.
59. *Id.*
60. H.R. REP. NO. 595, 95th Cong. 2d Sess. 339, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6295, provides: Section 361 does not specify how value is to be determined. These matters are left to case-by-case interpretation and development. It is expected that the courts will apply the concept in light of facts of each case and general equitable principles. It is not intended that the courts will develop a hard and fast rule that will apply in every case.
61. *Id.*
62. *In re* Fulcher, 15 Bankr. 446 (Bankr. D. Kans. 1981).
63. *Martin*, 761 F.2d at 477.
64. *See, e.g., In re* Berens, 41 Bankr. 524, 528 (Bankr. D. Minn. 1984); *In re* Berg, 42 Bankr. 335, 338 (D.N.D. 1984); First Bank of Miller v. Wieseler, 45 Bankr. 871, 876 (D.S.D. 1985).

method of dealing with the weather risk.[65]

Although federal crop insurance covers the risks associated with crop failure resulting from weather, the Eighth Circuit was cognizant of the fact that federal crop insurance will not protect the creditor from the farmer's neglect or poor husbandry.[66] The bankruptcy court was either unaware of this limitation on federal crop insurance or just did not take it into consideration.[67] The Eighth Circuit thought the risk of crop failure from poor husbandry or neglect significant enough to include it in its non-exclusive list of factors a bankruptcy court should consider when determining adequate protection under section 361(3).[68] *In re Berens*,[69] examined in light of the *Martin* decision, might provide one method for dealing with the risk associated with neglect and poor husbandry: documentation that even poor future yields would result in a recovery sufficient to protect the creditor's interest.[70]

It was proof of future market price which the Eighth Circuit found lacking in the instant case. Although the debtors, in their motion before the bankruptcy court, had stated that the value of their 1984 crops would exceed the value of the amount of cash collateral requested,[71] no documentary evidence was presented as to the expected market price in 1984.[72] Substantially the same situation occurred in *First Bank of Miller v. Wieseler*.[73] The farmer there also proposed an exchange of a present lien for a lien on future crops.[74] The farmer presented estimates of future crop yields based on past crop yields.[75] Yet, the *Miller* court noted that there was no official verification of past yields and no evidence as to how the average yields per acre and price per bushel were calculated.[76] Thus, the Eighth Circuit's finding that the bankruptcy court did not sufficiently determine the risk, and the *Wieseler* holding, show that the estimated value of future crops must be verified as to future market price and past crop yields with market price being an essential component of the formula. Determination of market price must remain of concern because of the danger in a flexible, even volatile, market, that prices may drop substantially.

Debtors might counter the concern over low market prices at harvest time of the future crop by the argument that the creditor is receiving what he bargained for—a certain amount of harvested and stored commodity. With an interest in the future crop, the creditor retains the same option he had with

65. *Martin*, 761 F.2d at 477.
66. *Id.* at 475.
67. The bankruptcy court never mentioned this limitation. *Nikolaisen*, 38 Bankr. 267.
68. *Martin*, 761 F.2d at 477.
69. 41 Bankr. 524 (Bankr. D. Minn. 1984).
70. *Id.* at 526-27. The court found that the potential yields from the home farm would result in a profit even if 1984 was a bad year and crop yields were as low as 15 bushels per acre. In an average year, the debtor's projected profit was over two times the cost of planting and harvesting. *Id.*
71. *Martin*, 761 F.2d at 474.
72. *Id.* at 477.
73. 45 Bankr. 871 (D.S.D. 1985).
74. *Id.* at 872.
75. *Id.* at 873.
76. *Id.* at 877.

the present stored crop—that of holding the commodity until the market price rises.

Eight non-exclusive, illustrative factors presented in the *Martin* opinion deal with the risks of weather, market price, past yield production, neglect, poor husbandry and other potential risks.[77] Because the Eighth Circuit emphasized the illustrative nature of these factors,[78] debtors need not passively accept their individual application in every case. Nevertheless, together they render a good picture of what the Eighth Circuit believes a bankruptcy court must take into consideration in weighing the risks associated with an adequate protection proposal based on a lien on future crops. Debtors' attorneys should be prepared to advise their clients as to what documentation is likely necessary in proving such a proposal to the bankruptcy court. This would include items such as: documentation of past yields, verified by an independent source; itemization of all liens on machinery, present and future crops and any other liens or conditions which might impinge upon future planting and harvesting; testimony as to the debtor-farmer's reliability and proven ability; and evidence of purchase or intent to purchase federal crop insurance.

Protecting the Value Against the Risk

Considering the Eighth Circuit found that the bankruptcy court did not fix the value of the C.C.C.'s interest, nor identify potential risks to that interest, it is not surprising that the Court found that the bankruptcy court did not accomplish the third step of the test either—the evaluation of the risks to the secured creditor's value to determine whether adequate protection was proved.[79] What is surprising is the Eighth Circuit's third step directive that the proposed adequate protection plan should *protect* the creditor's interest.[80] This phraseology is glaringly inconsistent with the *compensation* foundation which the Court laid out as the backdrop for its opinion. This inconsistency can only be resolved by the conviction that the Court chose to rely on the wide-spread usage of indubitable equivalent as a substitute for its own interpretation of this phrase. Either the Court did not fully appreciate the difference between a compensation and a protection interpretation or the Court chose to blend the two interpretations into one. In either case, it is fortunate for the courts within the Eighth Circuit that the Court's opinion in *Martin* has

77. *Martin*, 761 F.2d at 477. The eight factors are:
[1] the anticipated yield in light of the productivity of the land; [2] the husbandry practices of the farmer, including his proven crop yields from previous years; [3] the health and reliability of the farmer; [4] the condition of the farmer's machinery; [5] whether there are encumbrances on the machinery which may subject it to being repossessed before the crop is harvested; [6] the potential encumbrances on the present or future crop by other secured creditors; [7] the availability of crop insurance and the risk of crop failure not covered by the crop insurance; and [8] the anticipated fluctuation in market price of the farmer's crop.
Id.

78. *Id.*

79. *Id.*

80. *Id.*

produced a workable test for adequate protection, albeit without clarifying or defining adequate protection under section 361(3).

CONCLUSION

In re Martin may appear to add little to the legal application of the adequate protection standard. The Eighth Circuit's misplaced reliance on *Murel* and *Mariner* may result in confusion within the Circuit as lower courts attempt to reconcile the dogma of the *compensation* standard of indubitable equivalence with the flexibility of the *protection* standard which the Congress and the Eighth Circuit mandate. On the other hand, bankruptcy courts may find that the *Martin* opinion provides a good compromise between the two standards and the best practical test for determining adequate protection.

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