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Revisiting the Indubitable Equivalent Standard: Undoubtedly the Same or Close Enough?

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Part I. Introduction

When Judge Learned Hand coined the phrase "indubitable equivalence," he set an extremely high bar for confirming plans of reorganization over the objections of impaired secured creditors. Accordingly, when Congress codified the "indubitable equivalent" concept in section 1129(b)(2)(A)(iii) of the Bankruptcy Code[1] we believe that it intended for courts to apply the provision strictly and only confirm indubitable equivalent plans under indisputable circumstances. Yet, a review of the relevant case law might lead one to conclude that section 1129(b)(2)(A)(iii) is a lenient, catch-all provision for debtors to use when the specified methods for confirming nonconsensual plans are not available or advantageous to them. Our thesis is that some courts have too easily found indubitable equivalence as a path to confirmation in ways that are inconsistent with the plain meaning of the statute and the clear intent of Congress to protect the interests of secured creditors.

In part two of the article, we will explain how the indubitable equivalent concept relates to plan confirmation. We also analyze the plain meaning of the statute, the legislative history to section 1129(b)(2)(A)(iii), and Judge Hand's seminal decision, *In re Murel Holding Corp*.[2] In part three, we will discuss the indubitable equivalent standards for plan confirmation and adequate protection. We focus on the key concepts of value and risk, and the critical distinction between determining value and risk based on a preponderance of the evidence and applying those determinations in the consideration of the indubitable equivalence provision of section 1129. In part four, we will provide a detailed analysis of many notable indubitable equivalent plan cases. We explain how some courts have failed to adhere to the strict approach that Congress intended by confirming plans that provide the dubitable equivalent of secured creditor's claims. In part five, we conclude that while the indubitable equivalent provision can be a tool for creative restructuring professionals, its flexibility is inherently limited, and plan proponents should be mindful of the substantial burden of proof that the indubitable equivalent standard imposes.

Part II. Section 1129(b)(2)(A)(iii)--Providing for Realization of the Indubitable Equivalent to Cram Down Secured Creditors, the Legislative History and *Murel Holding Corp.*

A. Cramming down secured creditors

The many requirements for confirmation of a Chapter 11 plan of reorganization are set forth in section 1129. In order for any plan to be confirmed, the requirements of section 1129(a) must be satisfied. If one or more impaired class of creditors votes to reject a plan, a debtor must also satisfy the requirements set forth in section 1129(b) for confirmation of nonconsensual plans. This process is commonly referred to as "cram down" because so long as the plan does not "discriminate unfairly" and is "fair and equitable" it can be "crammed down the throats of objecting creditors."[3] With respect to the claims of secured creditors that have rejected the plan, section 1129(b)(2)(A) sets forth three cram down methods, providing alternative approaches to plan treatment for the claims in question consisting of: (i) retention of liens and deferred cash payments equal to the present value of claims as of the effective date of the plan; (ii) sale of collateral, subject to the secured creditors' rights to credit bid their claims, with liens attaching to sale proceeds; or (iii) realization of the indubitable equivalent of the claims.[4] Although the focus of this article is on the third cram down method--providing for realization of the indubitable equivalent--the other methods are relevant because they are often part of the analysis of indubitable equivalent plans.

B. Plain meaning of indubitable equivalent

What then does "realization of the indubitable equivalent" mean? According to Black's Law Dictionary, realization means "conversion of non-cash assets into cash assets."[5] Indubitable is not defined by Black's Law Dictionary, but according to the Merriam-Webster online dictionary, indubitable means "too evident to be doubted: unquestionable."[6] Equivalent means

"equal in value, force, amount, effect, or significance."[7] In *Philadelphia Newspapers*, upon consideration of the meaning of these words, the Third Circuit concluded that "the 'indubitable equivalent' under subsection (iii) is the unquestionable value of a lender's secured interest in the collateral."[8]

***C. Legislative history and*Murel Holding Corp.**

The legislative history to section 1129 provides that the indubitable equivalent provision is intended to follow the "strict approach" taken by Judge Hand in *Murel Holding Corp.*[9] In *Murel Holding Corp.*, the Second Circuit determined that the debtor's proposed plan failed to provide adequate protection for the realization of the full value of the secured creditor's claim.[10] The following is a summary of the facts in *Murel Holding Corp.* After Metropolitan Life Insurance Company ("Metropolitan") had commenced a foreclosure proceeding with respect to the debtor's apartment building and had a receiver appointed, the debtor filed a petition under section 77B of the Bankruptcy Act.[11] At the time of the filing, the debtor owed approximately $400,000 on the mortgage and the defaults totaled nearly $100,000.[12] The property was assessed at $540,000 and was generating monthly rentals of $3,600.[13] The debtor filed a plan of reorganization in which it sought to borrow $11,000 from a second mortgagee to remodel some of the apartments and increase rentals.[14] The debtor estimated that during this remodeling period, the expected rental would be $59,346 and the expenses would be $20,400, leaving an annual surplus of $38,946.[15] Against that amount, there would be real estate taxes owing of $14,280 and interest due of $22,027.50, leaving a surplus of $2,638.50, which was enough to discharge existing arrears of real estate taxes and have $4,000 remaining at the end of 10 years.[16] In consideration for the foregoing, Metropolitan would be required to forego amortization payments ($9,000 annually) and extend the maturity date of the loan, but it was to receive payment of current interest and all current real estate taxes were to be paid.[17] Metropolitan refused to consent to the debtor's plan.[18]

In deciding that the lower court was not justified in granting a stay against the foreclosure, Judge Hand observed that unwilling creditors could only be compelled to accept a plan of reorganization if the plan "provide[s] adequate protection for the realization... of the full value of their interest, claims or liens," which could be done in one of four ways: (i) maintain the liens; (ii) sell the collateral; (iii) pay off the liens; or (iv) if the judge could "equitably and fairly... provide... adequate protection when the other methods are not chosen."[19] Judge Hand explained the fourth option as follows:

The last [option] is not, properly speaking, a 'method' at all; it merely gives power generally to the judge 'equitably and fairly' to 'provide such protection,' that is, 'adequate protection,' when the other methods are not chosen. It is this alone which the debtors here invoke. In construing so vague a grant, we are to remember not only the underlying purposes of the section, but the constitutional limitations to which it must conform. 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.[20]

Applying this standard, the Second Circuit reversed the lower court's order, reasoning that:

The amount to be advanced is a mere trifle compared with the debts; its effect is wholly speculative, based upon the expectations of those who have everything to gain and nothing to lose. The mortgagee is to be compelled to forego all amortization payments for ten years and take its chances as to the fate of its lien at the end of that period, though it is now secured by a margin of only ten percent.[21]

When Congress adopted Judge Hand's indubitable equivalent standard, its intention was to require "completely compensatory" adequate protection of the interest of secured creditors in order to assure the realization of the full value of their secured claims without additional risk of recovery. Congress provided the following explanation about several types of treatment that would and would not satisfy the indubitable equivalent standard of section 1129:

Abandonment of the collateral to the creditor would clearly satisfy indubitable equivalence, as would a lien on similar collateral. However, present cash payments less than the secured claim would not satisfy the standard because the creditor is deprived of an opportunity to gain from a future increase in value of the collateral. Unsecured notes as to the secured claim or equity securities of the debtor would not be the indubitable equivalent.[22]

As discussed below, many courts have adhered to Judge Hand's strict approach and accepted the guidance offered by Congress regarding the appropriate application of the indubitable equivalent provision. Other courts, however, have strayed far from the intended narrow path and have applied indubitable equivalence in a way that was clearly not intended. We will consider the general indubitable equivalent standards both under section 1129 with respect to cramming down secured creditors and under section 361 concerning adequate protection generally.

Part III. Indubitable Equivalent Standards for Plan Confirmation and Adequate Protection

A. The indubitable equivalent standard for plan confirmation

Numerous courts have attempted to articulate the indubitable equivalent standard under section 1129(b)(2)(A)(iii). For example, the court in *In re Sparks* reiterated the famous "indubitable equivalence" quote from *Murel Holding Corp.* and stated that:

In the context of the "fair and equitable" standard, courts have explained that a particular plan meets the "indubitable equivalent" requirement if the plan "(1) provides the creditor with the present value of its claim, and (2) insures the safety of its principle [sic]." Said another way, "a court must examine (1) whether the substituted security is completely compensatory and (2) the likelihood that the secured creditor will be paid."
Two attributes of the substituted collateral, its *value* and the degree of *risk* that it imposes on the secured creditor, determine whether the new collateral is sufficiently "safe" and "completely compensatory." New collateral with a value less than the value of the original collateral cannot be "completely compensatory." Similarly, new collateral with a value projected to be equal to, or even more than, the original collateral is not "completely compensatory" if the new collateral is so much riskier than the original collateral that there is a substantially greater likelihood that the secured creditor will not be paid.23
The court in *Sparks* denied confirmation of a plan to pay an undersecured creditor 100% of its secured claim, with interest, in the form of 48 monthly installments, including a balloon payment of unpaid interest and principal at the end of four years on the basis that it did not satisfy the indubitable equivalent standard.24 The court found that the value of the debtor's partially converted condominium project (as contemplated by the proposed plan) would probably be equal to or greater than the value of the property as an apartment complex (its current status); however, the risk that the conversion would impose on the secured creditor was significantly greater than the current risk because the income stream of a condominium project was less predictable than that of an apartment complex.25 Furthermore, the creditor's right to foreclose would be complicated by the need to deal with new entities and ownership.26 Even though the condominium project had a reasonable chance of long-term success, uncertainty regarding the anticipated rate of condominium sales and capital expenditures meant significantly greater risk to the secured creditor.27
In *Sparks*, the court relied upon the Seventh Circuit's explanation of the interrelationship between value and risk in *Matter of James Wilson Associates.* In *James Wilson*, the Seventh Circuit approved confirmation of a nonconsensual plan that provided for payments to the secured creditor over seven years based on a 25-year amortization of the loan at an interest rate of 2.5% above the yield on seven-year U.S. Treasury notes with a balloon payment for the balance within two years of the end of the term.28 The court expressed skepticism about the bankruptcy court's determination that a seven-year Treasury bill rate plus 2.5% compensated the creditor for the opportunity cost of its money and the risk of default over the seven-year life of the loan, but ultimately deferred to the bankruptcy court's determination based on evidence regarding the substantial equity cushion and the appropriateness of the interest rate.29

In *James Wilson*, the Seventh Circuit explained the interrelationship between value and risk as follows:
It might appear that if the security is worth much more than the loan (almost twice as much here), the risk of default will be negligible and the interest bonus was therefore superfluous. But the appearance is misleading. The risk of default may be great. The borrower may use the difference between the value of the security and the loan secured by it to secure other loans. Nor is the risk of default a costless one to the secured creditor merely because his lien is oversecured. More important than the expenses of foreclosure (should there be a default) is the possibility that the security will decline in value over the life of the loan, here seven years, to the point where it is no longer adequate. Nevertheless the testimony of experts that the judge was authorized to credit confirmed that the value of the building is far in excess of [the secured creditor's] lien, giving [the secured creditor] a considerable cushion against the impact of a default.30

Value and risk are the key concepts in the indubitable equivalent analysis. Value and risk are fact-intensive issues that generally require expert analysis and testimony. Every case involves different types of property with different manners and degrees of risk. As with any valuation dispute, experts play a critical role in providing an evidentiary basis for the bankruptcy judge, as fact-finder, to determine whether the relative values and risks warrant a particular outcome. As evidenced by some of the indubitable equivalent cases discussed in the next section, value and risk determinations also create the potential for outcomes that are contrary to Judge Hand's strict approach and congressional intent.

In *In re Sandy Ridge Development Corp.*, the bankruptcy court made the following observations regarding the indubitable equivalent standard:
Not only must the Court conclude that the equivalent will be "realized," but that conclusion must be "indubitable." One is impressed with the burden that such a test involves when one considers that "indubitable" connotes a conclusion more certain than proof by a preponderance of the evidence and even "a reasonable doubt"; the conclusion must be *in* dubitable. 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."[31]

The bankruptcy court in *Sandy Ridge* questioned whether property that involves serious valuation questions can ever be transferred in satisfaction of secured claims under the indubitable equivalent standard.[32] The bankruptcy court stated that "It is hard to imagine an appraisal that is 'indubitable"' and explained that section 1129(b)(2)(A)(ii) is much less meaningful if the cramdown can be achieved by a battle of the appraisers at the confirmation hearing instead of through an actual sale of collateral.[33] The bankruptcy court in *Sandy Ridge* contrasted real estate to highly liquid property regularly trading in efficient markets, the value of which might be easily and precisely ascertained.[34] Although the bankruptcy court's decision was ultimately reversed by the Fifth Circuit, as discussed below, the bankruptcy court adhered to Judge Hand's strict approach by recognizing that "if there is even a little doubt then the conclusion is not indubitable."[35] The bankruptcy court in *Sandy Ridge* correctly distinguished between the preponderance standard that pertains to value and risk determinations, and the stringent indubitable equivalent standard that courts must apply to conclude that a secured creditor will realize the full value of its secured claim. The bankruptcy court also recognized the inherent difficulty in satisfying the indubitable equivalent standard. If any doubt exists, the plan should not be confirmed.

B. The Indubitable equivalent standard for adequate protection

The only other use of the phrase "indubitable equivalent" in the Bankruptcy Code is in section 361(3) as an example of adequate protection.[36] Section 361 sets forth three nonexclusive methods by which adequate protection may be afforded to an entity with an interest in property.[37] Under section 361, adequate protection may be provided by: (1) requiring a trustee or debtor in possession to make cash payments to the affected entity to the extent its interest decreases in value; (2) providing the entity with a replacement lien to the extent its interest in its collateral decreases in value; or (3) granting some other relief that will allow the entity to realize the indubitable equivalent of its interest.[38]

As the Eighth Circuit explained in *In re Martin*,[39] the inclusion of the indubitable equivalent concept in section 361 occurred as the result of legislative compromise:
The original House and Senate versions of section 361 differed in certain important respects. Both bills offered in identical form the two subsections that presently are codified at 361(1) and 361(2). The House version, however, contained two additional methods of providing "adequate protection." The first method granted to the secured creditor an administrative expense priority to the extent of his loss. The Senate, however, deleted this provision, recognizing that "such protection is too uncertain to be meaningful." The House bill also permitted the courts to provide other forms of protection "that will result in the realization by the [secured party] of the value of its interest in the property involved." The Senate bill did not contain such a provision. Subsection 3, in its final form, allows the courts discretion to grant other forms of "adequate protection" to a secured creditor. Although the final draft of section 361(3) is similar to the original House version, the additional requirement that these other forms of adequate protection provide the secured creditor with the "indubitable equivalent" of its present interest is conspicuous.[40]

In *Timbers*, the Supreme Court linked the indubitable equivalent provisions of sections 361 and 1129, stating that:
It is obvious (since §§ 361 and 362(d)(1) do not entitle the secured creditor to immediate payment of the principal of his collateral) that this "realization" is to "result" not at once, but only upon completion of the reorganization. It is *then* that [the secured creditor] must be assured "realization... of the indubitable equivalent" of his collateral.[41]

The only illustration of indubitable equivalence for purposes of adequate protection in the legislative history (regarding the final version of the bill) is the "special instance where there is a reserve fund maintained under the security agreement, such as in the typical bondholder case, [in which] indubitable equivalent means that the bondholders would be entitled to be protected as to the reserve fund, in addition to the regular payments needed to service the debt."[42] The legislative history regarding the original House version of section 361(3) that used the term value instead of indubitable equivalent indicates that:
For example, another form of adequate protection might be the guarantee by a third party outside the judicial process of compensation for any loss incurred in the case. Adequate protection might also, in some circumstances, be provided by permitting the secured creditor to bid in his claim at the sale of the property and to offset the claim against the price bid in.[43]

The legislative history indicates that section 361(3) most clearly defines the general concept of adequate protection.[44] "It is the general category, and as such, is defined by the concept rather than any particular method of adequate protection."[45] The purpose of section 361 is to insure that the secured creditor receives in value essentially what it bargained for even though the creditor might not receive its bargain in kind.[46] In determining whether the indubitable equivalent standard has been met under section 361(3), courts generally consider the very same "completely compensatory" and risk concepts expressed by

Judge Hand in *Murel Holding Corp*.[47] In *Martin*, the Eighth Circuit explained that:
Although the adequate protection standard and its requirement of indubitable equivalence remains constant, whether adequate protection exists in a given case depends upon the nature of the collateral and the nature of the debtor's proposed use of that collateral.

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In any given case, the bankruptcy court must necessarily (1) establish the value of the secured creditor's interest, (2) identify the risks to the secured creditor's value resulting from the debtor's request for use of cash collateral, and (3) determine whether the debtor's adequate protection proposal protects value as nearly as possible against risks to that value consistent with the concept of indubitable equivalence.[48]
In *In re Pacific Lifestyle Homes, Inc.,* the court applied the Eighth Circuit's three-step approach in ruling on a contested cash collateral motion and determining whether the proposed adequate protection provided the secured creditor with the value of its bargained for rights.[49] First, the court determined the present value of the creditor's interest in the cash collateral.[50] Next, the court assessed whether the proposed adequate protection, in the form of projected increases in value of the creditor's non-cash collateral through continued construction of a real estate development, compensated the creditor for the present value of its cash collateral, and whether the proposed continued construction protected the safety of the creditor's interest in the cash collateral.[51] The court considered evidence regarding the condition of the housing and financial markets and concluded that the debtor's projections were too speculative to compensate the creditor for the use of its cash collateral.[52] The court found that the debtor's proposal did not protect the safety of the creditor's interest in the cash collateral.[53] The court explained that the proposed release prices were unpredictable and the proposed distributions to the creditor after payment of operating expenses and insider salaries shifted too much risk onto the creditor.[54] Furthermore, if the reorganization were to fail, the creditor would only receive its collateral (unsold or partially completed homes and unfinished lots) after the repayment of a DIP loan and professional carve-outs.[55] Accordingly, the court denied the debtor's motion to use cash collateral.[56]
One of the most common forms of adequate protection--and one not specifically enumerated in section 361--is reliance on an equity cushion.[57] Since the purpose of providing adequate protection is to safeguard the secured creditor from a diminution in the value of its interest in the collateral during the Chapter 11 reorganization,[58] if the property is worth substantially more than the secured creditor's interest therein, a decrease in the property value (or an increase in the creditor's claim) may not threaten the integrity of that interest.[59] While a few courts have considered the equity cushion as a means of providing adequate protection under the indubitable equivalent prong of section 361,[60] the more common view is that a sufficient equity cushion is an independent basis for adequate protection (remembering that the list in section 361 is nonexclusive). Courts generally hold that an equity cushion of 20% or more constitutes adequate protection and that an equity cushion under 11% is insufficient to constitute adequate protection; courts are divided on whether a cushion of 11% to 19% constitutes adequate protection.[61] With respect to all forms of adequate protection, courts generally grant relief on an interim basis and allow secured creditors to seek additional relief during the course of the bankruptcy case based on the passage of time, changed circumstances, or property values.[62]

Given the more comprehensive and conclusive nature of plan confirmation under the indubitable equivalent provision of section 1129, the authors would expect courts to apply a more stringent standard under section 1129 than section 361. As demonstrated below, the extent and sufficiency of equity cushions is a significant component of many courts' section 1129 indubitable equivalence analysis, usually arising in the context of considering potential risks to secured creditors. However, it appears as though many courts have confirmed plans that provide substantially less protection to secured creditors than is generally required under section 361 during the pendency of a case.

Part IV. Noteworthy Indubitable Equivalent Plan Cases

Much like the catch-all provision of the Bankruptcy Act that Judge Hand described as a vague grant of power to the judge,[63] the indubitable equivalent provision of section 1129 is open-ended. Thus, indubitable equivalent plans have taken on a variety of forms. The most common feature of indubitable equivalent plans is abandonment of collateral. As will be discussed further below, the concept of complete abandonment (i.e., surrendering all of a creditor's collateral in satisfaction of its secured claim) is uncontroversial. However, partial abandonment (the return of some, but not all, of the collateral) implicates debatable valuation issues and a more complicated indubitable equivalent analysis. Consistent with the legislative history, some indubitable equivalent plans grant secured creditors liens on "similar" collateral. However, courts must consider whether such substitute collateral is sufficiently similar to meet the indubitable equivalent standard. Despite the fact that Congress clearly indicated in the legislative history that equity securities of the debtor would not constitute the indubitable equivalent, some courts have considered this possibility and whether equity securities of a third party can be the indubitable equivalent. Congress clearly chose not to identify all of the options of providing for the realization of the indubitable

equivalent of a secured creditor's claim. Congress intended to provide some flexibility, but within the limits of the words "indubitable equivalent" (i.e., undoubtedly the same) and the intent to protect the interest of secured creditors. The outcomes in many of the indubitable equivalent cases are difficult to reconcile with these well-expressed limitations and the related concept of adequate protection.

A. Complete abandonment, partial abandonment and similar collateral cases

Prior to lending money, a secured creditor bargains for the benefits of certain collateral that it will receive to secure the loan. In the event the debtor defaults, the secured creditor is entitled to realize on the collateral for which it bargained. If a debtor therefore proposes a plan to transfer to the secured creditor all of its bargained for collateral, it logically follows that the secured creditor is getting the indubitable equivalent of its secured claim, as the secured creditor is receiving the exact remedy for which it bargained.

In *Sandy Ridge*, the Fifth Circuit reversed the bankruptcy court's denial of plan confirmation.[64] The Fifth Circuit, in determining whether the debtor's plan satisfied the indubitable equivalent standard, stated that the key is to determine whether the debtor is providing the secured creditor with the appropriate "substitute."[65] The debtor in *Sandy Ridge* sought to abandon all of the secured creditor's collateral to the secured creditor.[66] The Fifth Circuit concluded that the plan satisfied the indubitable equivalent standard because "common sense tells us that property is the indubitable equivalent of itself."[67] The Fifth Circuit indicated that the specific value of the collateral was irrelevant to the indubitable equivalent analysis, though valuation of the collateral would have to be determined to ascertain the secured creditor's deficiency claim under the plan.[68] The court stated, "The transfer on plan approval of all its collateral to a secured creditor, at a value properly fixed by the bankruptcy court, gives that creditor the indubitable equivalent of its secured claim."[69]

It is important to note that some courts have held (correctly, we believe) that a debtor cannot simply transfer collateral to a secured creditor in full satisfaction of such creditor's entire claim. Courts have held that unless a secured creditor is given its collateral *and* is permitted to maintain a deficiency claim (to the extent that it is entitled to one), the plan does not satisfy the indubitable equivalent standard. In *In re Hardy Machinery*, the debtor tried to abandon industrial equipment to the secured creditor in full satisfaction of its total (secured and unsecured) claim.[70] The secured creditor's total claim was $28,000.[71] The debtor estimated that the fair market value of the equipment was between $37,000 and $38,000, while the secured creditor estimated the fair market value to be $16,500.[72] After considering the evidence, the court held that the fair market value of the equipment was $16,500, and because that amount was less than the amount of the secured creditor's claim, the debtor's plan to abandon the equipment in full satisfaction of the claim did not meet the requirements of 11 U.S.C.A. § 1129(b)(2)(A)(iii).[73] Accordingly, as set forth in *Hardy Machinery*, indubitable equivalent does not mean that a secured creditor can be forced to take its collateral in full satisfaction of its claim and be forced to waive its deficiency claim.[74]

It seems noncontroversial that the complete abandonment of a secured creditor's collateral would provide that secured creditor with the indubitable equivalent of its secured claim (leaving it with any applicable deficiency claim). It would be difficult to argue that providing the secured creditor with exactly the collateral that it bargained for was not the indubitable equivalent of its secured claim. However, the analysis is not the same and the outcome is not as clear-cut when addressing situations where the debtor purports to abandon only a portion of the secured creditor's collateral.

In *In re Arnold & Baker Farms*, the debtor's secured creditor was granted a mortgage on 1,320 acres of land.[75] The debtor sought to confirm a plan pursuant to which it would transfer a portion of the land to the secured creditor in satisfaction of its secured claim.[76] The debtor and the secured creditor each presented evidence of vastly different values of the property.[77] In holding that the plan did not provide the secured creditor with the indubitable equivalence of its secured claim, the Ninth Circuit recognized that a partial distribution of 566.5 acres to the secured creditor did not provide the secured creditor with the safety that it bargained for.[78] The court reasoned that the secured creditor originally lent funds to the debtor secured by 1,320 acres of land, and in the event of a default, it had the ability to foreclose on, and realize the value from, all of that land.[79] However, under the debtor's plan, if the secured creditor subsequently sold the property for less than the value of the land as determined by the court, the secured creditor's remedies were limited to realizing on the 566.5 acres of land.[80] If the secured creditor subsequently was only able to sell the property for an amount less than the value as determined by the court, it would have had no recourse to the remaining land (formerly its collateral) to satisfy the resulting deficiency.[81] Consequently, the Ninth Circuit held that the debtor's plan did not provide the secured creditor with the indubitable equivalent of its claim.[82] The court stated, "To the extent a debtor seeks to alter the collateral securing a creditor's loan, providing the 'indubitable equivalent' requires that the substitute collateral not increase the creditor's risk of exposure."[83]

Another partial abandonment case is *In re Bannerman Holdings, LLC*,[84] which illustrates the significant valuation issues that complicate the indubitable equivalent analysis. In *Bannerman*, the debtor proposed in its plan to transfer to its senior secured lender a portion of the secured creditor's collateral, i.e., 11 of the 15 unsold condominium units in Bannerman Station

Condominium and a parking lot, in full satisfaction of its debt.[85] The secured lender argued that the plan's treatment of its claim was not fair because the debtor's proposed surrender of a portion of its collateral would not provide the secured lender with the indubitable equivalent of its secured claim and would subject the lender to competition with the debtor in the marketing and disposition of the surrendered units.[86] The court concluded that the creditor held a claim in the amount of $4,642,660.44 and, based on the evidence presented to the court, the present value of the property proposed to be surrendered was $4,779,925.[87] The court held that the existence of the "excess value" of over $137,000 satisfied the indubitable equivalent standard of § 1129(b)(2)(A)(iii).[88] The court explained in *Bannerman* that:

All cases are fact specific, some more so than others. This is a 'more so' case. Any cramdown scenario involving the partial surrender of collateral, especially real property, and especially real property in a down market, poses challenges in the crucial process of valuation. Whether excess valuation constitutes value sufficient to satisfy the indubitable equivalent standard of cramdown is an especially case specific determination. This case offers a textbook example of the need to present, in any dirt for debt case and especially in a 'partial dirt' for debt case like this one, evidence focused on the value of the specific property to be surrendered. With that in mind, litigants involved in partial dirt for debt cases are encouraged to precisely focus evidentiary presentations on the value of the surrendered property. Such focus will simplify the valuation process and the ultimate determination of indubitable equivalence.[89]

The court in *Bannerman* raised the correct question and then appears to have failed to properly analyze that question as it relates to the indubitable equivalence standard for confirmation. While valuation evidence and the ultimate determination of valuation are critical components of the indubitable equivalence analysis, it is not the same as merely valuing a secured claim for allowance purposes. First, a determination of value (and accordingly, the amount of the secured claim) must be made. Second, the court must engage in the determination that the value to be conveyed to the secured creditor under the plan is unquestionably the equivalent of the value of the secured creditor's claim. The court must take all applicable variables into account, including things like fluctuating market prices and foreclosure costs (expenses and time value of money), and determine that in spite of the risks, it is beyond dispute that the secured creditor will have the same likelihood of payment in full on its secured claim as it would if it retained all of its collateral. The approximate 3% margin of error ($4,779,925 as compared to $4,642,660) allowed for in *Bannerman,* when considered against the substantial cushion (margin of error) that existed prior to the plan confirmation, simply does not meet that test. The 3% margin of error in *Bannerman* is also difficult to reconcile with the generally accepted standards for equity cushions in the adequate protection context. If 11% or more is generally required for adequate protection, it is hard to imagine how 3% could suffice for plan confirmation.

Similarly, in *Matter of May*, the court failed to engage in an appropriate two-step analysis of determining value under a preponderance standard and separately applying the indubitable equivalent standard. In *May*, the bank was the owner and holder of a balloon note secured by a senior secured interest in 14 apartment duplexes.[90] It was stipulated by the parties that the balance of the note was $573,507.32.[91] The debtor's plan valued each apartment duplex at $52,500, and proposed to surrender 11 of the 14 apartment duplexes to the bank in full satisfaction of the bank's claim.[92] The court held that the debtor's partial surrender of property valued at $577,500 (11 x $52,500=$577,500) provided the secured creditor with the indubitable equivalent of its secured claim of $573,507.32.[93] The bank argued that the debtor's unreasonably high valuation of $52,500 per unit failed to provide the bank with the "indubitable equivalent" of its claim.[94] The court reasoned that "a debtor need only prove that its proposal provides a creditor with the 'indubitable equivalence' of its claim by a preponderance of the evidence"[95] and that "it is difficult to imagine a more compelling set of circumstances for finding that a debtor has sustained its burden of proving that the partial surrender of an oversecured creditor's collateral in full satisfaction of the creditor's claim provides that creditor with the 'indubitable equivalent' of its claim."[96]

In reaching the decision, the *May* court conceded that determining value is a challenging task. The court noted, "Of course, this risk is present in any case in which a court is required, under section 506(a), to make a judicial determination of value. A court cannot be the guarantor of the values it sets during the course of a bankruptcy case."[97] While the secured creditor may have been oversecured (and thereby reasonably insulated from risk of loss) before the confirmation of the plan, it seems likely that after plan confirmation its status changed to undersecured. The *May* court confuses a valuation under section 506(a) with a determination that "X" is the undisputed equivalent of "Y." Once again, when considered against the secured creditor's preconfirmation collateral (and corresponding exposure to risk), it is hard to accept the outcome in *May*, where the margin of error was less than 1% ($577,500 as compared to $573,507).

Some courts have also struggled with properly applying the indubitable equivalent standard in cases where the secured creditor is given a lien on substitute collateral. Specifically, some courts have adopted a lenient approach in determining whether substitute collateral is sufficiently similar to satisfy the indubitable equivalent standard. For example, in *B.M. Brite v. Sun Country Development, Inc. (Matter of Sun Country Development, Inc.)*, the secured creditor possessed a first mortgage on 200 acres of land owned by the debtor, securing a claim of $153,520.87.[98] The debtor's proposed plan purported to release the secured creditor's first mortgage on the 200 acres in exchange for a new security interest in 21 specified notes secured by 21 separate lots which the debtor sold to various individual purchasers.[99] The secured creditor argued that in the event of one

or more defaults on the notes, it would be forced to bring as many as 21 separate foreclosure actions at a much greater expense, and that the bankruptcy court had determined too high of a value for the notes.[100] The debtor presented evidence that the value of the notes was $153,777.06 ($200 more than the secured creditor's claim).[101] The debtor also presented evidence that the value of the lots securing the notes was $287,500. The secured creditor presented evidence that the notes could be sold for only 30 to 50% of their face value ($46,133.12 to $76,888.53) as a result of the history of the underlying obligors on the notes failing to keep their payments current.[102]

In rejecting the secured creditor's argument and finding that the secured creditor was receiving the indubitable equivalent of its secured claim, the court stated, "To the extent that Brite [secured creditor] attacks the findings of the bankruptcy court, we reject his complaints, as the findings were supported by the evidence. We further believe that Brite's other concerns do not render the twenty-one notes dubitable equivalent of the original first lien."[103] While the secured creditor presented evidence that the underlying obligors on the notes had a history of making late payments, the court noted that since the secured creditor took over collection of the notes, the obligors "generally" kept their payments current.[104] The court also noted that if the obligors did default on their notes, "the value of the land securing the notes, as found by the bankruptcy court, *appears* sufficient to cover the additional expense of foreclosing on twenty-one separate properties."[105]

It is difficult to understand how the Fifth Circuit in *Sun Country* could have concluded that 21 separate notes secured by 21 separate parcels of real property constituted the indubitable equivalent of the secured creditor's original secured claim. The court itself had expressed doubt as to the value of the notes and the risks associated with collecting payment on the underlying obligations. Furthermore, the court did not rule out the possibility that the value of the land would not be sufficient to cover foreclosure expenses. Given the associated uncertainty, risk and costs, notwithstanding the value of the underlying collateral, it does not seem that a lien on 21 separate notes collateralized by 21 separate mortgages was sufficiently similar collateral under the indubitable equivalent standard.

In *Woods v. Pine Mountain, Ltd. (In re Pine Mountain, Ltd.)*, the court found that the debtor could satisfy the indubitable equivalent standard even in the context of subordinating the secured creditor's note.[106] The secured creditor possessed a note in the amount of $244,000 secured by certain real property.[107] The underlying note allowed the debtor to subordinate the secured creditor's lien to a deed of trust securing a construction loan from an institutional lender, provided that the debtor was not in default under the note.[108] Pursuant to the debtor's plan, the debtor was to obtain a new construction loan of $820,000 to develop the property, while paying the secured creditor interest only on its note for up to 46 months, and then paying off the note in full no later than 46 months from the effective date of the plan.[109] The secured creditor argued that the plan was wholly speculative, and that by subordinating its secured claim, it was losing security while the debtor speculated with the property.[110] The court overruled the secured creditor's objection and reasoned as follows:

Currently, the Woods' claim is for approximately $275,000. The property is valued at $1,200,000. Therefore, even after an $820,000 construction loan is obtained, the Woods would still be fully secured. Moreover, once the construction loan is obtained and physical development of the property begins, it is likely that the value of the property will likely increase.[111]

It is unclear how the court reached the conclusion that the secured creditor received the indubitable equivalent of its secured claim. Under the debtor's plan, the real estate market risks, the risks involved in unanticipated construction costs and delays and the costs and expenses of the senior lender (including accrued interest, real estate taxes, and attorney's fees) were solely borne by the secured creditor. The secured creditor was forced to bear all of the risks involved with the debtor's construction project, while the debtor enjoyed all of the benefits. While prior to the debtor's bankruptcy filing the secured creditor had contemplated the subordination of its lien, the secured creditor certainly did not agree to the subordination of its lien pursuant to a Chapter 11 plan where the economic and legal conditions had changed dramatically as a result of the treatment provided by the confirmed plan.

Although abandonment of collateral and granting liens on similar collateral are methods that Congress identified in the legislation history to section 1129, they often involve disputes about value and risk. We question whether the foregoing cases were properly decided, but more importantly, we use these cases to highlight the challenges that the indubitable equivalent standard presents. Once the value of a secured claim is established, one must demonstrate that the value to be realized under a proposed plan, in light of the attendant risks, is free of doubt. The cases discussed next illustrate the unique challenges associated with using equity securities to provide for realization of the indubitable equivalent of a secured creditor's claim.

B. Equity securities cases

Notwithstanding the admonition in the legislative history that the substitution of the equity securities of the debtor for other collateral cannot constitute the indubitable equivalent, at least one court has considered the issue. In *In re Future Energy Corp.*, the court denied confirmation of a plan that proposed to transfer stock of the reorganized debtor to a class of secured

creditors in satisfaction of their claims.[112] The court explained that:

if the stringent indubitable equivalent standard is to be met, a debtor proposing to transfer intangible property in satisfaction of a secured claim must establish that such property is a fungible commodity which is traded in an established liquid market.[113]

The court found that the stock at issue was listed in the "Pink Sheets" rather than an established stock exchange, and thus there was no liquid market for the stock.[114] Accordingly, the *Future Energy* court concluded that it was "beyond cavil" that the secured creditor would not realize the indubitable equivalent of their claims by receiving the stock.[115]

The authors are not aware of any cases in which a court confirmed a plan that provides for the transfer of equity securities of a reorganized debtor as the indubitable equivalent. However, one court confirmed a plan that provided equity securities of a third party to a secured creditor as the indubitable equivalent of its secured claim. In *In re San Felipe @ Voss, Ltd.*, the district court drew a distinction between equity securities of a debtor and equity securities of a third party. The court affirmed an order of the bankruptcy court confirming a plan of reorganization under the indubitable equivalent provision that provided for the secured creditor, that originally had a lien on the debtor's office building complex, to receive, in lieu thereof, a combination of: (i) $750,000 in cash, (ii) restricted and unrestricted stock of the proposed purchaser of the debtor's office building valued at approximately $8.37 million, (iii) other stock valued at $836,979,[116] and (iv) a $1 million limited, third-party guaranty.[117] The court rejected the secured creditor's contention that securities can never constitute the indubitable equivalent of allowed secured claims.[118] The court explained that the admonition in the legislative history regarding the use of equity securities refers to equity securities in the reorganized debtor, but not equity securities of a third party.[119] The court equated third-party equity securities to any other form of substitute collateral and opined that:

When securities to be used in a reorganization plan have a history of stable value, and when the plan provides a sufficient margin between the value of the securities and the creditor's allowed secured claim, the plan proponent can meet its burden of showing indubitable equivalence.[120]

The *San Felipe* court agreed with the bankruptcy court's determination that the stock in question was sufficiently stable and liquid, notwithstanding certain six-month restrictions on its resale.[121] Furthermore, the court agreed that there was a sufficient margin between the value of the "payment package" and the allowed amount of the secured claim to satisfy the indubitable equivalent standard.[122] The bankruptcy court determined that, even without considering the $1 million third-party guaranty, there was a 32.8% margin based on an allowed secured claim of $7,577,000.[123] The total value of the "payment package" appears to have been just under $11 million.[124] The secured creditor raised an argument that the amount of its secured claim should have been $11.1 million based on the proposed purchase price for the debtor's office building, but the court refused to consider that argument, relying instead on a stipulation by which the secured creditor apparently conceded that the highest allowed amount of its claim was $9,123,000.[125] The district court concluded that, even if the secured creditor's claim was $9,123,000, the "payment package," including the limited, third-party guaranty, provided the secured creditor with a 21% cushion and satisfied the indubitable equivalent standard.[126]

While the *San Felipe* court was correct in concluding that there is no per se prohibition against the use of third-party equity securities to provide the indubitable equivalent of an allowed secured claim, equity securities are generally riskier than other types of collateral. Unless stock is absolutely stable and liquid, it is hard to imagine how it could possibly provide for the realization of the indubitable equivalent of a claim secured by a lien on real estate. Further, by the court's own admission, the "restrictions on a large portion of the securities at issue" called into doubt whether the payment package provided the secured creditor with the present value of its secured claim.[127] The court explained that the secured creditor: (i) could not sell the restricted stock for six months; (ii) could only trade the stock on the London International Stock Exchange with a brokerage firm designated by the purchaser; (iii) could not sell the stock to U.S. citizens; and (iv) could not realize any appreciation in value of the stock.[128] Under these circumstances, it is difficult to understand how the indubitable equivalent standard was met.

The indubitable equivalent cases involving equity securities are uncommon and relatively straightforward. As with any other substitute collateral, the key is fungibility and liquidity. Somewhat more common are cases where plan proponents attempt to alter a secured creditor's preconfirmation collateral with a combination of cash, deferred payments, and/or substitute collateral.

C. Cases involving combination of methods

In indubitable equivalent cases where the proposed plan provides treatment of a secured creditor's claim through a combination of methods, the value and risk issues are more numerous and therefore typically more complex. In several recent cases discussed below, courts confirmed such plans under arguably questionable circumstances.

In *In re Bryant*, the debtors were lifelong farmers who proposed to fund their plan with their future wages and farm income.129 One of the debtors' secured creditors held a junior lien on a 50 acre tract of land where the debtors' home and shop was located, and a first lien on approximately 283 acres of land, the debtors' crops and farming equipment.130 By agreed order, the secured creditor's claim was fixed at $425,180.131 In order to satisfy the indubitable equivalent standard, the debtors proposed to strip the secured creditor of its junior lien, and satisfy its $425,180 claim by: (i) making a partial lump sum payment, (ii) abandoning to it certain equipment, and (iii) providing for repayment of the remaining balance over a five-year period.132 This combination of collateral was valued by the court at $425,292.133 Under these circumstances, the court held that the indubitable equivalent standard was satisfied.134 The court noted, "There is no prohibition on a debtor using several methods to provide a secured creditor with the indubitable equivalent of its claim. Courts have routinely allowed combinations of cash payments, payments over time, abandonment of collateral, and substitution of collateral."135

The land on which the secured lender held a junior lien was valued at $205,627.31.136 The secured creditor with a first lien on that property had a claim of $155,105.79. Accordingly, there appeared to be equity in that real estate for the junior lienholder in the approximate amount of $50,000. However, by stripping the secured creditor of its junior lien, the plan eliminated this equity as a source of repayment for the junior lienholder. Instead, the secured creditor was forced to accept a stream of future cash payments from the debtors. If the debtors defaulted on any of the future payments, the secured creditor no longer was secured by its junior lien on the debtors' land, and instead only had a collateral cushion of $112. While courts have routinely permitted combinations of cash payments over time, abandonment of collateral and substitution of collateral, it is unclear how the court could have found that the secured creditor was receiving the indubitable equivalent where the value of the substituted collateral only exceeded the secured creditor's claim by less than .03%, or $112, a substantially riskier situation for the secured creditor than its preconfirmation status. What is clear from the facts of this case is that the secured creditor undoubtedly did not receive the equivalent of its secured claim.

In *In re DBSD North America, Inc.*, the court confirmed a plan of reorganization after designating the dissenting secured creditor's vote pursuant to section 1126(e).137 However, because the designation ruling involved an issue of first impression in the Second Circuit,138 the bankruptcy court also considered whether the plan satisfied the cram down requirements of section 1129(b)(2)(A) and also held that the plan could be crammed down on the secured creditor under the indubitable equivalent prong of section 1129(b)(2)(A).139 On appeal, the Second Circuit affirmed the bankruptcy court's order confirming the plan based on the designation of the secured creditor's vote and did not reach the bankruptcy court's alternative holding regarding the appropriateness of the indubitable equivalence cram down in this case.140 Despite its limited precedential value, the bankruptcy court's opinion in *DBSD* is a significant decision because it substantially departs from the strict approach by holding that a plan providing for payment-in-kind interest for four years, no principal payments for those same four years, and no identifiable source of payment for the indebtedness at the end of the four years satisfies the indubitable equivalent standard. As discussed below, the court's conclusions regarding the protection that the plan treatment afforded the secured creditor and the appropriateness of the interest rate generate doubt.

In *DBSD*, the plan provided for a new credit facility to satisfy the senior secured creditor's approximately $51 million claim.141 The secured claim arose under the debtors' prepetition revolving working capital facility, which had a 13-month term (already matured at the filing date) and 12.5% annual interest due and payable at maturity and was secured by substantially all of the debtors' assets.142 Under the plan, the new credit facility would be secured by a first lien on substantially all of the reorganized debtors' assets, significantly excluding certain "auction rate securities" that were part of the secured creditor's prepetition collateral, a four-year maturity date, payment-in-kind interest at a rate of 12.5% per annum, and "as a result, no cash payments of principal or interest until maturity."143 The court recognized that the plan "provide[d] for the Debtors to continue to operate as a pre-revenue enterprise, implementing cost-saving initiatives until the Debtors obtain strategic partnerships with entities that are able to complement the Debtors' satellite offerings or obtain additional capital to continue funding the enterprise."144 There was no current funding for expanding operations and no present alternatives in place for deriving revenue, and any means of generating substantial revenue other than the leasing of the spectrum had significant costs.145 In fact, the debtors only had a two-year financing commitment and would have to find a strategic investor or additional financing for the last two years of the period of repayment under the plan.146 The court explained that:

Although the developmental nature of the Debtors' business and absence of present revenue would at first blush suggest uncertainty as to repayment under the Amended Facility, I find that the risk is not new, or increased, to warrant awarding DISH an interest rate higher than the one proposed under the Amended Facility. Rather, the risks associated with the Debtors' business existed (to a substantially similar degree) at the time the original holders of the First Lien Debt entered into the Prepetition Facility--and certainly in July 2009, when DISH purchased the First Lien Debt at par.147

The bankruptcy court in *DBSD* opined that the secured creditor's risk would actually be reduced under the terms of the plan by the substantial debt reduction and deleveraging of the debtors' balance sheet.148 With regard to the indubitable equivalent

standard, the court determined that the plan protected the secured creditor's principal and previously accrued interest.149 The court relied heavily on the notion that the secured claim was sufficiently oversecured based on an enterprise value between $492 million and $692 million, which the court explained was at least 9.6 times the secured creditor's $51 million claim and at least 6 times the $80 million that would be due upon maturity of the new credit facility in four years time.150 The court adopted the debtors' expert valuation opinion, which was substantially higher than DISH Network's expert valuation range of $270 million to $340 million, and the $113 million to $153 million liquidation value provided by the debtors' expert, which included the auction rate securities.151 The court also found that by reason of the interest of strategic purchasers and those who can be expected to provide financing, there was little risk of default on the new credit facility or any material risk that the secured creditor would not ultimately receive payment in full.152

Instead of requiring the plan to provide the unquestionable value of the secured creditor's claim (i.e., the indubitable equivalent), the *DBSD* court appears to have adopted a "material risk" standard. The court's reliance on potential strategic purchasers and refinancing possibilities, while not absurd or necessarily even unreasonable, was still clearly speculative. Furthermore, the court's reliance on the debtor's enterprise value to measure the secured creditor's protection improperly assumed a successful outcome that was far from certain. Given the endless list of unknowns, including the possibility that a strategic investor would not surface, the potential inability to obtain necessary refinancing or the idea that the debtors' satellite technology might become obsolete in four years, the *DBSD* court should have assessed the secured creditor's protections over the life of the plan in relation to the debtors' liquidation value--$113 million to $153 million, less the value of the auction rate securities that were removed from the secured creditor's collateral. This would seem to comport with the value and risk assessment that the indubitable equivalent analysis demands.153 Under this rubric, it is possible that the secured creditor's equity cushion was inadequate and the court's indubitable equivalent determination was flawed.

The bankruptcy court in *DBSD* found the debtors' valuation expert to be more persuasive and relied on his conclusions accordingly. However, the court did not determine that the secured creditor's expert valuation was incredible. The mere existence of two differing, credible valuation outcomes, coupled with the possibility that the competing expert's conclusions were correct calls into question the satisfaction of the "too evident to be questioned" standard that is required to reach the court's indubitable equivalent finding.
The bankruptcy court in *DBSD* also determined that that the proposed interest rate--12.5% PIK--provided for the present value of the secured claim.154 The court relied on case law regarding the appropriate interest rate for cramdown under section 1129(b)(2)(A)(i) "where the creditor keeps *all* of its prepetition collateral," and explained that courts look to (i) the market interest rate for loans with similar terms, quality of security and risk of repayment or financial condition of the borrower; or (ii) or the prepetition contract rate.155 The court considered market interest rates without sufficient analysis of the terms, security or risks, and primarily relied on the 12.5% prepetition credit facility interest rate.156 The court found that the 12.5% rate was appropriate because it was set when the debtors were significantly more leveraged and the national prime rate was lower.157 Despite the extension of the term of the loan, the court found that the risk of nonpayment of the new credit facility had not increased so as to make the 12.5% interest rate, even as PIK interest, insufficient to give the secured creditor the present value of its secured claim.158

The *DBSD* court's reliance on the prepetition contract interest rate for purposes of satisfying the indubitable equivalent standard seems inappropriate. The court recognized that the prepetition contract rate applies under section 1129(b)(2)(A)(i) when the creditor keeps all of its prepetition collateral and did not account for the fact that the auction rate securities were removed from DISH Network's collateral pool. The extension of the loan term from 13 months to four years was substantial, and despite the court's comfort with the debtors' ability to attract strategic investors or other financing sources, the risk of nonpayment was not insignificant. Under the circumstances, permitting the 12.5% prepetition contract interest rate (thereby, apparently, attributing no additional risk based on the four extension of the loan term) seems questionable and may not have satisfied the indubitable equivalent standard as Congress intended for courts to apply it.

D. Selling collateral without credit bidding

Two recent circuit court decisions have extended the concept of indubitable equivalence to plans that provide for the sale of a secured creditor's collateral without permitting the secured creditor to credit bid.159 The *Pacific Lumber* and *Philadelphia Newspapers* decisions are the subject of extensive commentary and will not be discussed at length. Suffice it to say, these courts concluded as a matter of law that the indubitable equivalent provision does not require credit bidding, unlike section 1129(b)(2)(A)(ii), which is expressly subject to section 363(k). The dissent in *Philadelphia Newspapers* argued somewhat persuasively that section 1129(b)(2)(A)(iii) is a general catch-all that should not be used when subsection (ii) would be applicable.

Significantly, neither of the cases decided whether the sales without credit bidding actually satisfied the indubitable equivalent standard. In *Philadelphia Newspapers*, the court stressed that the secured creditor could still object to confirmation of the plan on the grounds that the absence of an ability to credit bid did not provide it with the indubitable equivalence of its claim. The court explained as follows:

We are asked here not to determine whether the "indubitable equivalent" would necessarily be satisfied by the sale; rather, we are asked to interpret the requirements of § 1129(b)(2)(A) as a matter of law. This distinction is critical. The auction of the Debtors' assets has not yet occurred. Other public bidders may choose to submit a cash bid for the assets. The value of the real property that the Lenders will receive, in addition to cash, under the terms of the proposed plan has not yet been established. And the secured claim itself has not yet been judicially valued under § 506(a). We are simply not in a position at this stage to conclude, as a matter of law, that this auction cannot generate the indubitable equivalent of the Lenders' secured interest in the Debtors' assets.[160]

Neither of these cases ultimately answered the question of whether a sale without credit bidding can provide for realization of the indubitable equivalence. Presumably, as long as the sale protects the secured creditor's principal and provides for the present value of the secured claim, the fact that the secured creditor does not have the right to credit bid at the sale should not matter. If, however, the secured creditor's ability to credit bid could possibly enhance the value of the collateral then the loss of that protection should preclude a court from concluding that the indubitable equivalent standard has been met.

Part V. Conclusion

Courts have repeatedly confirmed nonconsensual Chapter 11 plans under the indubitable equivalent provision that impose far greater risks on secured creditors. What is evident from our review of the case law is that courts often fail to engage in a determination that the value the secured creditor can realize under the plan is undoubtedly the same as the secured creditor's preconfirmation secured claim. Many courts have departed from the plain meaning of the words "indubitable equivalent" and have adopted a more lenient approach, finding indubitable equivalence in situations where it is arguably close enough.

There is a meaningful and appropriate role for the indubitable equivalent provision as a mechanism for cramming down impaired secured creditors. The indubitable equivalent provision is a tool for confirming plans of reorganization when neither a sale of a secured creditor's collateral nor a traditional deferred stream of payments is possible. However, the indubitable equivalent standard is, by congressional intent, extremely difficult to satisfy. Its applicability is intended to be governed by careful risk and value analysis, leading to a determination by the court that the substitute treatment proposed for the secured creditor under the plan clearly and unmistakably leaves that secured creditor with an equally valuable and protected interest. This is the clear import of the phrase "indubitable equivalent" and what Congress intended when it adopted Judge Hand's strict approach in section 1129(b)(2)(A)(iii).

1 11 U.S.C.A. §§ 101 et seq. is hereinafter referred to as the "Bankruptcy Code" and references in this article to sections are to sections of the Bankruptcy Code unless otherwise noted.

2 In re Murel Holding Corp., 75 F.2d 941 (C.C.A. 2d Cir. 1935).

3 Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1359, 20 Bankr. Ct. Dec. (CRR) 1305, 23 Collier Bankr. Cas. 2d (MB) 1118, Bankr. L. Rep. (CCH) P 73565 (7th Cir. 1990).

4 Section 1129(b)(2)(A) of the Bankruptcy Code provides:
For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
(A) With respect to a class of secured claims, the plan provides--
(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the process of such sale, and the treatment of such liens on the proceeds under clause (i) or (iii) of this subparagraph; or
(iii) for the realization by such holders of the indubitable equivalent of such claims.

5 Black's Law Dictionary (9th ed. 2009).

6 http://www.merriam-webster.com/dictionary/indubitable (last visited April 17, 2011).

7 Black's Law Dictionary (9th ed. 2009); see also In re Philadelphia Newspapers, LLC, 599 F.3d 298, 310, Bankr. L. Rep. (CCH) P 81719 (3d Cir. 2010), as amended, (May 7, 2010) ("Indubitable" means "not open to question or doubt," while equivalent means one that is "equal in force or amount" or "equal in value.") (quoting Webster's Third New Int'l Dictionary 769, 1154 (1971)).

8 Philadelphia Newspapers, 599 F.3d at 310.

9 S. Rep. No. 95-989, 95th Cong., 2d Sess. 127-128 (1978).

10 Murel Holding Corp., 75 F.2d at 942.

11 Murel Holding Corp., 75 F.2d at 941.

12 Murel Holding Corp., 75 F.2d at 942.

13 Murel Holding Corp., 75 F.2d at 942.

14 Murel Holding Corp., 75 F.2d at 942.

15 Murel Holding Corp., 75 F.2d at 942.

16 Murel Holding Corp., 75 F.2d at 942.

17 Murel Holding Corp., 75 F.2d at 942.

18 Murel Holding Corp., 75 F.2d at 942.

19 Murel Holding Corp., 75 F.2d at 942.

20 Murel Holding Corp., 75 F.2d at 942.

21 Murel Holding Corp., 75 F.2d at 942-43.

22 124 Cong. Rec. H 11,103 (Sept. 28, 1978); S 17,420 (Oct. 6, 1978).

23 In re Sparks, 171 B.R. 860, 866, 25 Bankr. Ct. Dec. (CRR) 1752, 32 Collier Bankr. Cas. 2d (MB) 329, Bankr. L. Rep. (CCH) P 76130 (Bankr. N.D. Ill. 1994) (internal citations omitted).

24 Sparks, 171 B.R. at 862.

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25 Sparks, 171 B.R. at 867.

26 Sparks, 171 B.R. at 867.

27 Sparks, 171 B.R. at 867.

28 Matter of James Wilson Associates, 965 F.2d 160, 172-73, 26 Collier Bankr. Cas. 2d (MB) 1673, Bankr. L. Rep. (CCH) P 74636 (7th Cir. 1992).

29 James Wilson, 965 F.2d at 172-73.

30 James Wilson, 965 F.2d at 172.

31 In re Sandy Ridge Development Corp., 77 B.R. 69, 73, 16 Bankr. Ct. Dec. (CRR) 340, 17 Collier Bankr. Cas. 2d (MB) 1351, Bankr. L. Rep. (CCH) P 71966 (Bankr. M.D. La. 1987), subsequently rev'd, 881 F.2d 1346, 18 Bankr. Ct. Dec. (CRR) 13, 19 Bankr. Ct. Dec. (CRR) 1237, Bankr. L. Rep. (CCH) P 73070 (5th Cir. 1989); see also In re Walat Farms, Inc., 70 B.R. 330, 333, 15 Bankr. Ct. Dec. (CRR) 758, Bankr. L. Rep. (CCH) P 71721 (Bankr. E.D. Mich. 1987) (discussing the debate inherent in establishing a value for real estate and denying plan confirmation under indubitable equivalent provision in light of competing appraisals).

32 Sandy Ridge, 77 B.R. at 74.

33 Sandy Ridge, 77 B.R. at 74.

34 Sandy Ridge, 77 B.R. at 74.

35 Sandy Ridge, 77 B.R. at 75.

36 When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by--
(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; 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.
Sections 362, 363 and 364 require the court to determine whether the interest of a secured creditor or co-owner of property is adequately protected in connection with maintaining the automatic stay, the sale or use of property by a trustee or debtor in possession, and debtor in possession financing arrangements. 11 U.S.C.A. §§ 362(d)(1), 363(e), 364(d).

37 In re Blehm Land & Cattle Co., 859 F.2d 137, 139, 19 Collier Bankr. Cas. 2d (MB) 933 (10th Cir. 1988).

38 Blehm Land & Cattle Co., 859 F.2d at 139.

39 In re Martin, 761 F.2d 472, 12 Collier Bankr. Cas. 2d (MB) 974, Bankr. L. Rep. (CCH) P 70543 (8th Cir. 1985).

40 Martin, 761 F.2d at 476 (internal citations omitted); see also In re Saypol, 31 B.R. 796, 10 Bankr. Ct. Dec. (CRR) 1057, Bankr. L. Rep. (CCH) P 69333 (Bankr. S.D. N.Y. 1983) ("It thus appears [from the legislative history] that the term 'indubitable equivalent' was added merely to afford the court with flexibility to prevent the secured creditor from being unduly harmed by erosion of the value of the collateral during the stay.").

41 United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740, 16 Bankr. Ct. Dec. (CRR) 1369, 17 Collier Bankr. Cas. 2d (MB) 1368, Bankr. L. Rep. (CCH) P 72113 (1988).

42 124 Cong. Rec. H 11,092 (Sept. 28, 1978); S 17,408-9 (Oct. 6, 1978).

43 124 Cong. Rec. H 11,092 (Sept. 28, 1978); S 17,408-9 (Oct. 6, 1978); see also In re Swedeland Development Group, Inc., 16 F.3d 552, 564, 25 Bankr. Ct. Dec. (CRR) 486, 30 Collier Bankr. Cas. 2d (MB) 1034, Bankr. L. Rep. (CCH) P 75803 (3d Cir. 1994) ("Among the ways a debtor may demonstrate the existence of adequate protection is by supplying the prepetition lender with a new third-party guarantee or with substitute collateral.").

44 124 Cong. Rec. H 11,092 (Sept. 28, 1978); S 17,408-9 (Oct. 6, 1978).

45 124 Cong. Rec. H 11,092 (Sept. 28, 1978); S 17,408-9 (Oct. 6, 1978); see also Swedeland, 16 F.3d at 564 (3d Cir. 1994) (explaining that section 361(3) is regarded as a catch all, allowing courts discretion to fashion the protection provided to a secured party).

46 H.R. No. 95-595, 95th Cong., 1st Sess. 338-40 (1977); Swedeland, 16 F.3d at 564 ("the whole purpose of adequate protection for a creditor is to ensure that the creditor receives the value for which he bargained prebankruptcy") (quoting In re O'Connor, 808 F.2d 1393, 1396, 15 Bankr. Ct. Dec. (CRR) 735, Bankr. L. Rep. (CCH) P 71571 (10th Cir. 1987)).

47 Murel Holding Corp., 75 F.2d at 942.

48 Martin, 761 F.2d at 476-77 (remanding for the bankruptcy court to determine the value of the secured creditor's interest and to assess the risks to the secured creditor's value associated with the debtor's proposed use of collateral).

49 Pacific Lifestyle Homes, 2009 WL 688908 at *10.

50 Pacific Lifestyle Homes, 2009 WL 688908 at *10.

51 Pacific Lifestyle Homes, 2009 WL 688908 at *11.

52 Pacific Lifestyle Homes, 2009 WL 688908 at *12.

53 Pacific Lifestyle Homes, 2009 WL 688908 at *13.

54 Pacific Lifestyle Homes, 2009 WL 688908 at *13.

55 Pacific Lifestyle Homes, 2009 WL 688908 at *13.

56 Pacific Lifestyle Homes, 2009 WL 688908 at *14.

57 Pacific Lifestyle Homes, 2009 WL 688908 at *14 (citing In re Indian Palms Associates, Ltd., 61 F.3d 197, 207, 34 Collier Bankr. Cas. 2d (MB) 79, Bankr. L. Rep. (CCH) P 76575 (3d Cir. 1995) ("in determining whether a secured creditor's interest is adequately protected, most courts engage in an analysis of the property's 'equity cushion'- the value of the property after deducting the claim of the creditor seeking relief from the automatic stay and all senior claims."); see, e.g., In re Mellor, 734 F.2d 1396, 1400, 12 Bankr. Ct. Dec. (CRR) 147, 10 Collier Bankr. Cas. 2d (MB) 1353, Bankr. L. Rep. (CCH) P 69899 (9th Cir. 1984) ("Although the existence of an equity cushion as a method of adequate protection is not specifically mentioned in § 361, it is the classic form of protection for a secured debt justifying the restraint of lien enforcement by a bankruptcy court."); 2 Bankruptcy Desk Guide § 21:39 (An "equity cushion" has been defined as the value of the property above the amount owed to the secured creditor that will protect that interest from loss due to any decrease in the value of the property.).

58 In re Mosello, 195 B.R. 277, 288 (Bankr. S.D. N.Y. 1996); see also Saypool, 31 B.R. 796 ("the legislative history confirms that adequate protection centers on protection of a secured creditor from suffering a decline in the value of the collateral during the bankruptcy proceeding. As such, it is interim protection, designed not as a purgative of all creditor ailments, but as a palliative of the worst: reorganization, dismissal or liquidation will provide the final relief.") (internal quotation omitted).

59 Collier on Bankruptcy, ¶ 361.03[1].

60 See, e.g., In re Park West Hotel Corp., 64 B.R. 1013, 1018, 14 Bankr. Ct. Dec. (CRR) 1355, 15 Collier Bankr. Cas. 2d (MB) 905 (Bankr. D. Mass. 1986); Matter of Lipply, 56 B.R. 524, 527, 13 Bankr. Ct. Dec. (CRR) 1226, 14 Collier Bankr. Cas. 2d (MB) 309 (Bankr. N.D. Ind. 1986).

61 In re Kost, 102 B.R. 829, 832 (D. Wyo. 1989) (collecting authorities); In re Franklin Equipment Co., 416 B.R. 483 (Bankr. E.D. Va. 2009) (accord).

62 See, e.g., In re Juhasz, 208 B.R. 32, 34 U.C.C. Rep. Serv. 2d 212 (Bankr. S.D. Tex. 1995); In re 499 W. Warren Street Associates, Ltd. Partnership, 142 B.R. 53, 59, 27 Collier Bankr. Cas. 2d (MB) 696 (Bankr. N.D. N.Y. 1992).

63 Murel Holding Corp., 75 F.2d at 942.

64 Matter of Sandy Ridge Development Corp., 881 F.2d 1346, 18 Bankr. Ct. Dec. (CRR) 13, 19 Bankr. Ct. Dec. (CRR) 1237, Bankr. L. Rep. (CCH) P 73070 (5th Cir. 1989).

65 Sandy Ridge, 881 F.2d at 1350.

66 Sandy Ridge, 881 F.2d at 1348-49.

67 Sandy Ridge, 881 F.2d at 1348-49.

68 Sandy Ridge, 881 F.2d at 1348-49.

69 Sandy Ridge, 881 F.2d at 1354.

70 In re Hardy Machinery, 1994 WL 722084 (Bankr. N.D. Ala. 1994).

71 Hardy Machinery, 1994 WL 722084 at *1.

72 Hardy Machinery, 1994 WL 722084 at *1.

73 Hardy Machinery, 1994 WL 722084 at *1.

74 Hardy Machinery, 1994 WL 722084 at *1.

75 In re Arnold & Baker Farms, 85 F.3d 1415, 29 Bankr. Ct. Dec. (CRR) 223, 35 Collier Bankr. Cas. 2d (MB) 1681, Bankr. L. Rep. (CCH) P 76975 (9th Cir. 1996).

76 Arnold & Baker Farms, 85 F.3d at 1418.

77 Arnold & Baker Farms, 85 F.3d at 1422.

78 Arnold & Baker Farms, 85 F.3d at 1423.

79 Arnold & Baker Farms, 85 F.3d at 1422.

80 Arnold & Baker Farms, 85 F.3d at 1422.

81 Arnold & Baker Farms, 85 F.3d at 1422.

82 Arnold & Baker Farms, 85 F.3d at 1423.

83 Arnold & Baker Farms, 85 F.3d at 1422 (citations omitted).

84 In re Bannerman Holdings, LLC, 2010 WL 4260003 (Bankr. E.D. N.C. 2010).

85 Bannerman, 2010 WL 4260003 at *2.

86 Bannerman, 2010 WL 4260003 at *6.

87 Bannerman, 2010 WL 4260003 at *8.

88 Bannerman, 2010 WL 4260003 at *8.

89 Bannerman, 2010 WL 4260003 at *8.

90 Matter of May, 174 B.R. 832, 834 (Bankr. S.D. Ga. 1994).

91 May, 174 B.R. at 834.

92 May, 174 B.R. at 834.

93 May, 174 B.R. at 834.

94 May, 174 B.R. at 835.

95 May, 174 B.R. at 840.

96 May, 174 B.R. at 840.

97 May, 174 B.R. at 839-40.

98 Matter of Sun Country Development, Inc., 764 F.2d 406, 408, Bankr. L. Rep. (CCH) P 70633 (5th Cir. 1985).

99 Sun Country, 764 F.2d at 408.

100 Sun Country, 764 F.2d at 409.

101 Sun Country, 764 F.2d at 409.

102 Sun Country, 764 F.2d at 409.

103 Sun Country, 764 F.2d at 409.

104 Sun Country, 764 F.2d at 409.

105 Sun Country, 764 F.2d at 409 (emphasis added).

106 In re Pine Mountain, Ltd., 80 B.R. 171, 174-75 (B.A.P. 9th Cir. 1987).

107 Pine Mountain, 80 B.R. at 172.

108 Pine Mountain, 80 B.R. at 172.

109 Pine Mountain, 80 B.R. at 174.

110 Pine Mountain, 80 B.R. at 174.

111 Pine Mountain, 80 B.R. at 175.

112 In re Future Energy Corp., 83 B.R. 470, 496, 17 Bankr. Ct. Dec. (CRR) 159 (Bankr. S.D. Ohio 1988).

113 Future Energy, 83 B.R. at 496 (citing *Sandy Ridge*).

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114 Future Energy, 83 B.R. at 496.

115 Future Energy, 83 B.R. at 496.

116 The court did not explain what this stock was other than noting that it would otherwise accede to the liquidating trustee under the plan. Future Energy, 83 B.R. at 496 n.1.

117 In re San Felipe @ Voss, Ltd., 115 B.R. 526, 527-528 (S.D. Tex. 1990).

118 San Felipe, 115 B.R. at 529.

119 San Felipe, 115 B.R. at 529.

120 San Felipe, 115 B.R. at 531.

121 San Felipe, 115 B.R. at 530.

122 San Felipe, 115 B.R. at 531.

123 San Felipe, 115 B.R. at 530-31.

124 San Felipe, 115 B.R. at 527.

125 San Felipe, 115 B.R. at 532. Inexplicably, the court also declined to address the secured creditor's arguments that the plan was not proposed in good faith, that it unfairly discriminated against the secured creditor and that it did not comply with the absolute priority rule based solely on the court's determination that the plan satisfied the indubitable equivalent standard.

126 San Felipe, 115 B.R. at 531.

127 San Felipe, 115 B.R. at 531.

128 San Felipe, 115 B.R. at 528.

129 In re Bryant, 439 B.R. 724 (Bankr. E.D. Ark. 2010).

130 Bryant, 439 B.R. at 729.

131 Bryant, 439 B.R. at 731.

132 Bryant, 439 B.R. at 748.

133 Bryant, 439 B.R. at 749.

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134 Bryant, 439 B.R. at 747-48.

135 Bryant, 439 B.R. at 747.

136 Bryant, 439 B.R. at 731.

137 In re DBSD North America, Inc., 419 B.R. 179, 205-07 (Bankr. S.D. N.Y. 2009), aff'd, 2010 WL 1223109 (S.D. N.Y. 2010), judgment aff'd in part, rev'd in part, 627 F.3d 496 (2d Cir. 2010), opinion issued, 634 F.3d 79, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011); see also In re DBSD North America, Inc., 421 B.R. 133, 137, 52 Bankr. Ct. Dec. (CRR) 137, 62 Collier Bankr. Cas. 2d (MB) 1833 (Bankr. S.D. N.Y. 2009), order aff'd, 2010 WL 1223109 (S.D. N.Y. 2010), judgment aff'd in part, rev'd in part, 627 F.3d 496 (2d Cir. 2010), opinion issued, 634 F.3d 79, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011) (finding that DISH Network Corporation, as a competitor of the debtors, was voting "not as a traditional creditor seeking to maximize its return on the debt it holds, but... to establish control over [a] strategic asset.").

138 DBSD, 419 B.R. at 187 at 207.

139 DBSD, 419 B.R. at 207-09.

140 In re DBSD North America, Inc., 634 F.3d 79, 106, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011).

141 DBSD, 419 B.R. at 188.

142 DBSD, 419 B.R. at 186-87.

143 DBSD, 419 B.R. at 188-89.

144 DBSD, 419 B.R. at 187.

145 DBSD, 419 B.R. at 187.

146 DBSD, 419 B.R. at 189.

147 DBSD, 419 B.R. at 189.

148 DBSD, 419 B.R. at 189-90.

149 DBSD, 419 B.R. at 208-09.

150 DBSD, 419 B.R. at 208.

151 DBSD, 419 B.R. at 199-201.

152 DBSD, 419 B.R. at 208.

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153 See, e.g., James Wilson, 965 F.2d at 172-73 (discussed supra, Part III).

154 James Wilson, 965 F.2d at 208-209.

155 James Wilson, 965 F.2d at 209 (italics in original).

156 James Wilson, 965 F.2d at 190, 209.

157 James Wilson, 965 F.2d at 209.

158 James Wilson, 965 F.2d at 190.

159 In re Philadelphia Newspapers, LLC, 599 F.3d 298, Bankr. L. Rep. (CCH) P 81719 (3d Cir. 2010), as amended, (May 7, 2010); In re Pacific Lumber Co., 584 F.3d 229, 52 Bankr. Ct. Dec. (CRR) 46, Bankr. L. Rep. (CCH) P 81642 (5th Cir. 2009).

160 Philadelphia Newspapers, 599 F.3d at 302. 11

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