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Time Value Compensation As Adequate Protection in 11 U.S.C. Section 361

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TIME VALUE COMPENSATION AS ADEQUATE PROTECTION IN 11 U.S.C. SECTION 361

I. INTRODUCTION

Debtors who file a petition for reorganization under Chapter 11 of the Bankruptcy Code are entitled to an automatic stay pursuant to section 362.[1] This provision freezes creditors' claims and temporarily suspends the filing debtor's obligations to creditors.[2] Currently, the courts are in conflict as to what is to be protected in section 361 during the automatic stay.[3]

Section 361 clearly entitles the secured creditor[4] to compensation for depreciation and deterioration of his secured interest in the collateral.[5] The courts are divided, however, as to whether the adequate protection provision in section 361 allows for time value compensation[6] to a creditor when the creditor is unable to foreclose on his secured interest during the automatic stay.[7]

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1. 11 U.S.C. § 362 (1982 & Supp. III 1985).

2. *Id.* "The automatic stay is one of the fundamental protections provided by the bankruptcy laws . . . . It stops all collection efforts, all harassment, and all foreclosure actions." H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in*, 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6296-97.

3. *See infra* text accompanying notes 35-41.

4. 11 U.S.C. § 362(d) (1982 & Supp. III 1985). There are three types of creditors who may have a secured interest in the debtor's collateral during the automatic stay. They are defined as follows: an undersecured creditor is one whose collateral is worth less than the amount of the debt, United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n (*In re* Timbers of Inwood Forest Ass'n), 793 F.2d 1380, 1381 (5th Cir. 1986); an oversecured creditor is one whose collateral exceeds the amount of the debt. *Id.* Following such logic, an equally secured creditor is one whose collateral equals the debt.

5. 11 U.S.C. § 361(1)(2) (1982 & Supp. III 1985). *See also infra* text accompanying notes 50-59.

6. Time value compensation recoups the amount that a secured creditor foregoes by not being able to foreclose and reinvest his collateral during the automatic stay. *See infra* text accompanying notes 29-32.

7. This note is concerned primarily with undersecured creditors who share an equitable interest with the debtor. Unlike an undersecured creditor, an oversecured creditor, during the automatic stay, is entitled to the contract rate of interest on the debt to the extent his property is oversecured pursuant to 11 U.S.C. § 506(b). *See infra* notes 154-55 and accompanying text. However, under § 506(b) the undersecured creditor is not entitled to the contract rate of interest because his secured interest is less than the actual debt. 11 U.S.C. § 506(b) (1982 & Supp. III 1985). *See infra* notes 154-55 and accompanying text.

The undersecured creditor attempts to obtain and in many jurisdictions receives compensation for his time value interest in secured property as adequate protection pursuant to 11 U.S.C. § 361(3). *See also infra* text accompanying notes 34-35. Such compensation is deter-

The controversy among the courts creates confusion as well as opportunitites to manipulate the Code. One of the purposes of bankruptcy law is to provide a clear interpretation of creditors' rights and debtors' obligations.[8] The current controversy regarding time value compensation confuses these rights and obligations, and futhermore increases litigation costs[9] and opportunities for forum shopping.[10] Therefore, a single meaning of adequate protection is needed to alleviate these problems.

Congress intended to include time value compensation as adequate protection. With the addition of the Family Farmer's Bankruptcy Act in 1986, Congress, through negative implication, clarified the fact that time value compensation is to be included under section 361.[11] Although Congress' intentions are clear, the effects of time value compensation are detrimental to the debtor's reorganization,[12] and inconsistent with the Bankruptcy Code.[13] Therefore, Congress should modify section 361 excluding time value compensation as adequate protection.

This note proposes a statutory change excluding time value compensation as adequate protection. Section II addresses the operation of the automatic stay and the controversy arising from the adequate protection provision in section 361. Section III discusses the different approaches in

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mined on the value of the collateral not on the amount of the debt. *See infra* note 161 and accompanying text. Thus, an undersecured creditor will try to receive time value compensation under 11 U.S.C. § 361 because he is unable to receive compensation pursuant to 11 U.S.C. § 506(b).

This note is also limited to secured interests in which the debtor maintains an equitable interest and/or such secured interest is necessary for reorganization. Property in which the debtor has no equitable interest nor is useful for reorganization may be repossessed by the creditor. 11 U.S.C. § 362(d) (1982 & Supp. III 1985).

8. *See generally* Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 224-25 (1918).

9. Note, *Compensation For Time Value as Part of Adequate Protection During the Automatic Stay in Bankruptcy*, 50 U. CHI. L. REV. 305, 308 n.16 (1983), *citing* Schwartz, *Secured Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEGAL STUD. 1, 24-27 (1981) (where case law conflicts, it increases litigation costs, hence, lowering the value of the debtor's estate).

10. 28 U.S.C. § 1472 reads:

> Venue of cases under title 11 . . . [a] case under title 11 may be commenced in the bankruptcy court for a district —
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> (1) in which the domicile, residence, principal place of business in the United States, or principal assets, in the United States of the person or entity that is the subject of such case have been located for the 180 days immediately preceding such commencement . . . .

28 U.S.C. § 1472 (1982 & Supp. III 1985). A debtor may be able to choose his forum. For example, if the debtor's principal assets and domicile are in different circuits, the debtor can select a forum that does not allow time value compensation within that district.

11. *See infra* text accompanying notes 91-103.

12. *See infra* text accompanying notes 149-50.

13. *See infra* text accompanying notes 141-48.

interpreting section 361, concluding that Congress did intend to include time value compensation as adequate protection. Section IV exhibits the need for a legislative change which will exclude time value compensation as adequate protection.

II. THE AUTOMATIC STAY AND ADEQUATE PROTECTION

A. Section 362 The Automatic Stay

When a debtor files for bankruptcy under Chapter 11 of the Bankruptcy Code, the automatic stay is invoked under section 362.[14] The automatic stay stops all enforcement of liens and collection efforts.[15] The purpose of the stay is to give the debtor a breathing spell during which the debtor can generate cash flow for reorganization and present a reorganization plan to creditors.[16] The automatic stay also allows creditors to file proof of claims against the estate in order to provide an orderly distribution of property.[17]

During the automatic stay, a creditor with a secured interest in the debtor's property is entitled to petition the court to have the automatic stay lifted for lack of adequate protection.[18] The proceeding requires a hearing in which the bankruptcy court decides whether the petitioner is entitled to have the stay vacated.[19] The debtor carries the burden of showing that the creditor's secured interest is adequately protected during the automatic stay.[20] If the debtor does not meet this burden, the stay will be lifted, modi-

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14. 11 U.S.C. § 362 (1982 & Supp. III 1985).

15. *See supra* note 2.

16. H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6297 (one of the purposes of the stay is to relieve the debtor of the financial pressures that drove him to bankruptcy). The relief of the financial pressure allows the debtor to generate a cash flow for reorganization. Kaplan, *Bankruptcy As a Corporate Management Tool*, A.B.A. J., Jan., 1987, at 64-65. *See also* H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6297 (the automatic stay allows the debtor to present a reorganization plan to the creditors).

17. Bankruptcy is designed to provide an orderly liquidation procedure among creditors. *Id.*

18. 11 U.S.C. § 362(d)(1) states:

> On request of a party in interest . . . the court shall grant relief from the stay . . . such as by terminating, annulling, modifying or conditioning such stay —
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> (1) for cause, including lack of protection of an interest in property of such party in interest.

11 U.S.C. § 362(d)(1) (1982 & Supp. III 1985).

19. 11 U.S.C. § 362(d), (e) (1982 & Supp. III 1985).

20. 11 U.S.C. § 362(g) reads:

> In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section —
>
> (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

fied, or annulled according to the bankruptcy court's decision.[21]

B. *Section 361 Adequate Protection*

Section 361 of the Bankruptcy Code provides the adequate protection measures that a debtor must follow to protect the secured creditor's interest during the automatic stay.[22] Section 361 generally provides that a creditor's interest in a debtor's property will be protected to the extent that the maintenance value[23] of his secured interest depreciates or deteriorates during the automatic stay.[24] If the secured interest does decrease in value, then the debtor is required to compensate the creditor for that amount.[25] For example, suppose that a creditor has a secured interest in a building which is depreciating at $450.00 a month. After the debtor's petition for bankruptcy, the automatic stay is invoked and the creditor will require the debtor to compensate[26] the creditor for the depreciating amount of $450.00 or to provide additional liens to account for the depreciation of the collateral.[27] Those payments will accrue or be paid out until the creditors or the courts have approved or disapproved the reorganization or have successfully moved to vacate the stay.[28]

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(2) the party opposing such relief has the burden of proof on all other issues.
11 U.S.C. § 362(g) (1982 & Supp. III 1985).

21. 11 U.S.C. § 362(d) (1982 & Supp. III 1985).

22. 11 U.S.C. § 361 reads:

When adequate protection is required under § 362 . . . 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 statute under § 362 . . . 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, . . . results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief as will result in the realization . . . of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 361 (1982 & Supp. III 1985).

23. The "phrase maintenance" value was derived from Note, *Adequate Protection of the Undersecured Creditor During the Automatic Stay in Chapter 11 Cases: Compensation for Opportunity Cost or Maintenance Value of the Collateral?*, 5 J.L. COM. 259 (1985) [hereinafter, Note, *Maintenance Value*].

24. 11 U.S.C. § 361(1)(2) (1982 & Supp. III 1985). *See also* H.R. REP. NO. 595, 95th Cong., 1st Sess. 339, 340 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6296 (payments to the creditor during the automatic stay would be appropriate where the payments were being used to compensate for the depreciation of the collateral).

25. 11 U.S.C. § 361 (1982 & Supp. III 1985).

26. If the debtor does not agree to pay the adequate protection, the creditor can seek enforcement of such payment or removal of the stay. 11 U.S.C. § 362(d) (1982 & Supp. III 1985).

27. 11 U.S.C. § 361(1)(2) (1982 & Supp. III 1985).

28. 11 U.S.C. § 362(c) (1982 & Supp. III 1985).

In addition to maintaining the value of the collateral, some circuits hold that adequate protection in section 361 includes compensation for the time value[29] amount that a secured creditor foregoes by not being able to foreclose and reinvest his collateral during the automatic stay.[30] To illustrate, suppose a creditor has secured a $50,000 loan with a claim on $30,000 worth of the debtor's property. At the time of the automatic stay, the secured creditor is unable to foreclose on his $30,000 claim and reinvest it in another venture. Thus, the secured creditor would be unable to receive a return on his investment as a result of not being able to reinvest the $30,000 claim. Time value payments supplement this deprived return on investment.[31] The time value payments are calculated on the secured claim, not on the debt.[32] Thus, in this case, the return on investment would be calculated on the $30,000 claim, not on the $50,000 loan.

The circuit courts have developed three different interpretations as to whether time value compensation is an interest to be protected in section 361. Following the enactment of the Bankruptcy Code in 1979, courts held that creditors with a secured interest in a debtor's property were not entitled to time value payments as adequate protection in section 361.[33] In

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29. The phrase "time value" is derived from Note, *Compensation for Time Value as Part of Adequate Protection During the Automatic Stay in Bankruptcy*, 50 U. CHI. L. REV. 305, 309 (1981) [hereinafter, Note, *Adequate Protection*].

30. Crocker Nat'l Bank v. American Mariner Indus., Inc. (*In re* American Mariner Indus., Inc.), 734 F.2d 426 (9th Cir. 1984) (adequate protection included compensating the secured creditor for the time value interest that the secured creditor had foregone due to the secured creditor's inability to foreclose on his collateral); Grundy Nat'l Bank v. Tandem Mining Corp., 754 F.2d 1436, 1441 (4th Cir. 1984) ("an interest in the collateral includes the right after default to take possession of the collateral, sell it and . . . use the proceeds to make another loan"). The courts in *Tandem* and *Mariner* differ regarding the timing of the accrual of time value compensation. The *Tandem* court states that the accrual of time value compensation begins when the secured creditor files for relief from the automatic stay. *Tandem*, 754 F.2d at 1441. The *Tandem* court also takes into account the amount of time that a creditor would take for repossession and reinvestment of the collateral for determining the actual accrual of time value compensation. *Id.* The *Mariner* court holds that time value compensation begins at the time of the filing of the petition for bankruptcy. *Mariner*, 734 F.2d at 435. For purposes of this note, the *Tandem* and *Mariner* decisions will be combined together in determining whether time value compensation exists at all under § 361, not at what point it accrues.

31. *Id.*

32. *Tandem*, 754 F.2d at 1437, 1440-41 (interest is to be computed at the market rate on the liquidation value of the collateral); *In re Vanas*, 50 Bankr. 988, 999 (E.D. Mich. 1985); (time value compensation is determined by applying the market rate of interest to the value of the land). *See also* Note, *Adequate Protection*, *supra* note 29, at 322-23 ("[t]he market rate fully compensates the secured creditor for his loss due to the debtor remaining in possession of the collateral . . . .").

33. *In re* Keller, 45 Bankr. 469 (Bankr. N.D. Iowa 1984); *In re* Sun Valley Ranches Inc., 38 Bankr. 595 (Bankr. D. Idaho 1984); *In re* Agean Fare Inc., 34 Bankr. 965 (Bankr. D. Mass. 1983); First Fed. Sav. & Loan Ass'n of Lima v. Shriver (*In re* Shriver), 33 Bankr. 176 (Bankr. N.D. Ohio 1983); *In re* South Village, Inc., 25 Bankr. 987 (Bankr. D. Utah 1982); *In*

1984, the Ninth Circuit in *In re American Mariner*[34] interpreted section 361 to include time value compensation as adequate protection.[35] However, not every court followed the *Mariner* decision. Some courts continue to hold time value payments invalid as adequate protection.[36] In 1985, the Eighth Circuit in *In re Briggs*[37] only partially followed the *Mariner* decision to allow time value compensation but limited the decision to a case-by-case analysis.[38] *Briggs* allowed time value payments at the court's discretion rather than as a specific inclusion or exclusion in section 361.[39] In 1986 and 1987, the Fifth Circuit in *In re Timbers*[40] reaffirmed the original interpretation disallowing time value payments as adequate protection in section 361.[41] Thus, three conflicting interpretations of section 361 currently exist among the federal courts.

III. INTERPRETING SECTION 361(3)

The central controversy regarding time value compensation centers around section 361(3) and its phrase the "indubitable equivalent."[42] Courts that allow time value compensation interpret the phrase "indubitable equivalent" to include time value compensation.[43] Courts opposed to time

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re Alcuyan Interstate Corp., 12 Bankr. 803 (Bankr. D. Utah 1981).

34. 734 F.2d 426 (1984).

35. *Id.*

36. *In re* Smithfield Estates Inc., 48 Bankr. 910, 914-15 (Bankr. D.R.I. 1985) (provisions for adequate protection may only protect the secured creditor to the extent that there is evidence of a decline in the value of property).

37. Lend Lease v. Briggs Transp. Co. (*In re* Briggs Transp. Co.), 780 F.2d 1337 (8th Cir. 1985).

38. *Id.* at 1340 (adequate protection in § 361 does include time value compensation as a matter of law. However, such interest payments are permissible within the discretion of the bankruptcy court).

39. *Id.*

40. United Sav. Ass'n of Tex. v. Timbers of Inwood Forests Ass'n (*In re* Timbers of Inwood Forests Ass'n), 793 F.2d 1380 (5th Cir. 1986), *reh'g granted*, 802 F.2d 777 (5th Cir. 1986), *aff'd on rehearing, panel op. reinstated*, 808 F.2d 1380 (5th Cir. 1987).

41. *Id.* (Congress did not intend to provide secured creditors with time value compensation as adequate protection in § 361). There has been an immediate following of the *Timbers* decisions. *See In re* Miller Development Corp., 71 Bankr. 460 (Bankr. M.D. La. 1987); Federal Deposit Ins. Corp. v. Mathis (*In re* Mathis), 64 Bankr. 279 (Bankr. N.D. Tex. 1986); *In re* Churchfield, 66 Bankr. 30 (Bankr. E.D. Mich. 1986); John Hancock Mutual Life Ins. Co. v. Pullins (*In re* Pullins), 65 Bankr. 560 (Bankr. S.D. Ohio 1986); *In re* Island Helicopter Corp., 63 Bankr. 515 (Bankr. E.D.N.Y. 1986).

42. 11 U.S.C. § 361(3). *See supra* note 21.

43. Crocker Nat'l Bank v. American Mariner Indus., Inc. (*In re* American Mariner Indus., Inc.), 734 F.2d 426, 432 (9th Cir. 1984) ("Congress intended to change the meaning of . . . subsection [(3)]. Adding the phrase 'indubitable equivalent' . . . encourages if not requires present value analysis [synonymous with time value compensation] in § 361"); *In re* Vanas, 50 Bankr. at 998, 999 (E.D. Mich. 1985) (§ 361(3) provision for "indubitable equivalent" entitles the secured creditor to monthly payments as compensation for foregoing

value compensation disagree, holding that Congress did not intend for such compensation to be granted to secured creditors.[44] In resolving this controversy, this note concludes that Congress did intend to include time value compensation as adequate protection in section 361.

The disagreement in interpreting the term "indubitable equivalent" stems from the court's methodology in interpreting section 361. A court must interpret the words of a statute in light of the purposes Congress sought to serve when enacting the statute.[45] When deciphering congressional intent, courts interpreting section 361 have primarily relied on two interpretive methods, the plain meaning rule[46] and the persuasive evidence rule.[47]

The plain meaning rule requires that a statute's interpretation be consistent with the very language in which the statute was designed.[48] The persuasive evidence rule provides that where convincing evidence exists to persuade the court that Congress did not intend the words be given a common meaning, the court will interpret the statute outside the sphere of the plain meaning rule.[49] In deciding which rule to apply, the court should choose the rule which most closely adheres to congressional intent.[50]

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the right to reinvest his liquidated interest in the collateral). *See also* Molbert, *Adequate Protection for the Undersecured Creditor in a Chapter 11 Reorganization: Compensation for the Delay in Enforcing Foreclosure Rights*, 60 N.D.L. REV. 515, 521-23 (1984).

44. United Sav. Ass'n of Tex. v. Timbers of Inwood Forests Ass'n (*In re* Timbers of Inwood Forests Ass'n), 793 F.2d 1380, 1402 (5th Cir. 1986); First Fed. Sav. & Loan Ass'n of Lima v. Shriver (*In re* Shriver), 33 Bankr. 176, 183 (Bankr. N.D. Ohio 1983) ("[i]n sum, this court holds that § 361(3)'s 'indubitable equivalent' standard should not be interpreted to require a secured creditor to be compensated for the use value of its money in the period between the filing of the Chapter 11 petition and confirmation of a plan . . . .").

45. Gonzalez v. Young, 441 U.S. 600 (1979); Dickerson v. New Banner Inst. Inc., 460 U.S. 103 (1983).

46. *See infra* text accompanying note 48.

47. *See infra* text accompanying note 49.

48. United Sav. Ass'n of Tex. v. Timbers of Inwood Forests Ass'n (*In re* Timbers of Inwood Forest Ass'n), 793 F.2d 1380, 1384-85 (5th Cir. 1986), *citing* Caminetti v. United States, 242 U.S. 470, 485 (1917). "[T]he meaning of the statute must, in the first instance, be sought in the language in which the act was framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Id.*

49. Crocker Nat'l Bank v. American Mariner Indus., Inc. (*In re* American Mariner Indus., Inc.), 734 F.2d 425, 429-30 (9th Cir. 1984), *citing* Watt v. Alaska 451 U.S. 259, 265-66 (1981). "The plain meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Mariner*, 734 F.2d at 429-30.

50. *See, e.g.*, Dickerson v. New Banner Inst., Inc., 460 U.S. 103 (1983); Gonzalez v. Young, 441 U.S. 600 (1979).

A. The Plain Meaning Rule

Courts opposed to time value compensation have applied the plain meaning rule when interpreting section 361, precluding time value compensation as adequate protection.[51] These courts have held that time value payments are incompatible with the statutory structure in section 361.[52] Subsection (1) of section 361 requires the trustee to make periodic cash payments to the extent that the creditor's collateral decreases in value.[53] The legislative history provides that such compensation should account for the depreciation (i.e., maintenance value) of the collateral.[54] Subsection (2) of section 361 applies the same concept allowing compensation with additional liens rather than cash payments.[55] The final section, subsection (3) of section 361, requires such compensation "as will result in the indubitable equivalent."[56]

According to the design and continuity of the statute, subsection (3) represents a substitute for a cash or lien payment congruent with subsections (1) and (2) maintaining the value of the collateral.[57] The legislative history in subsection (3) of section 361 supports the limiting of adequate protection to the collateral's maintenance value.[58] This section provides an

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51. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n (*In re* Timbers of Inwood Forest Ass'n), 793 F.2d 1380, 1388-99 (5th Cir. 1986); *In re* Sun Valley Ranches, Inc., 38 Bankr. 595, 597 (Bankr. D. Idaho 1984); Barclays Bank of N.Y. v. Saypol (*In re* Saypol), 31 Bankr. 796, 802 (Bankr. S.D.N.Y. 1983); First Fed. Sav. & Loan Ass'n of Lima v. Shriver (*In re* Shriver), 33 Bankr. 176, 183-84 (Bankr. N.D. Ohio 1983).

52. *Id.*

53. 11 U.S.C. § 361(1) (1982 & Supp. III 1985). *See also supra* note 22.

54. H.R. REP. NO. 595, 95th Cong., 1st Sess. 339 (1977), *reprinted in* 1978 U.S. CONG. CODE & ADMIN. NEWS 5963, 6296.

55. 11 U.S.C. § 361(2) (1982 & Supp. III 1985). *See also supra* note 22.

56. 11 U.S.C. § 361(3) (1982 & Supp. III 1985). *See also supra* note 22.

57. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n (*In re* Timbers of Inwood Forest Ass'n), 793 F.2d 1380, 1388 (5th Cir. 1986) ("Congress simply intended subsection (3) to permit a bankruptcy judge to fashion methods of protection against a decline in value of collateral alternative to those set forth in subsections (1) . . . and (2) [of § 361]."); *In re* Sun Valley Ranches, Inc., 38 Bankr. 595, 597 (Bankr. D. Idaho 1984) (subsections 361(1) and (2) make clear that only the collateral's maintenance value should be protected); First Fed. Sav. & Loan Ass'n of Lima v. Shriver (*In re* Shriver), 33 Bankr. 176, 183 (Bankr. N.D. Ohio 1983) ("[Time value payments] miss the mark: they violate the nonprescriptive character of section 361, and may simply exchange one imponderable for another"); Barclay Bank of N.Y. v. Saypol (*In re* Saypol), 31 Bankr. 796, 802 (Bankr. S.D.N.Y. 1983) (the "indubitable equivalent" was intended to be used interchangeably with § 361(1) and (2)). *See also* Note, *Adequate Protection of the Undersecured Creditor During the Automatic Stay in Chapter 11 Cases: Compensation for Opportunity Cost of Maintenance of the Value of the Collateral*, 5 J.L. COM. 259, 270-272 (1985).

58. 124 CONG. REC. S17,406 (daily ed. Oct. 6, 1978) (statements of Sen. DeConcini), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6505, 6513; *See* Note, *Adequate Protection Becomes a Creditor's Tool: In re American Mariner Industries, Inc.*, 21 WILLAMETTE

example requiring the debtor to support the reserve fund of a creditor's interest in bonds.[59] Without compensation for the reserve, the bonds' value would diminish and thus require the maintenance value protection under section 361. According to the plain meaning rule, time value compensation is clearly incompatible with the statutory structure in section 361.[60] Hence, utilizing the plain meaning rule alone would eliminate time value compensation as adequate protection in section 361.

B. The Persuasive Evidence Rule

Although the plain meaning rule precludes time value compensation, Congress intended to go beyond its scope to utilize time value compensation as adequate protection in section 361.[61] The persuasive evidence in the legislative history and in the application of the term "indubitable equivalent" signifies Congress' intent to include time value compensation under section 361.[62]

The persuasive evidence rule begins with the application of the term "indubitable equivalent" and its use in the cram-down provisions in section 1129.[63] Here Congress intended to apply the term "indubitable equivalent" synonymously with the cram-down provisions provided in section 1129[64] of

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L. REV. 149, 161-62 (1985).

59. *Id.*

60. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n (*In re* Timbers of Inwood Forest Ass'n), 793 F.2d 1380, 1388 (5th Cir. 1986) ("Congress simply intended subsection (3) to permit a bankruptcy judge to fashion methods of protection against a decline in value of collateral alternative to those set forth in subsections (1) . . . and (2) [of § 361]."); *In re* Sun Valley Ranches, Inc., 38 Bankr. at 595, 597 (Bankr. D. Idaho 1984) ("[s]ubsections 361(1) and (2) make clear that only the collateral's maintenance value should be protected"); First Fed. Sav. & Loan Ass'n of Lima v. Shriver (*In re* Shriver), 33 Bankr. 176, 183 (Bankr. N.D. Ohio 1983); Barclay Bank of N.Y. v. Saypol (*In re* Saypol), 31 Bankr. 796, 802 (Bankr. S.D.N.Y. 1983). *See also* Note, *Maintenance Value*, *supra* note 23, at 270-72.

61. Crocker Nat'l Bank v. American Mariner Indus., Inc. (*In re* American Mariner Indus., Inc.), 734 F.2d 425, 430 (9th Cir. 1984). The *Mariner* court admits that time value compensation conflicts with the statutory structure in § 361. *Id.* at 430. However, the *Mariner* court held that because there was such persuasive evidence in the legislative history and in the use of the term "indubitable equivalent," Congress intended to use time value compensation as adequate protection in § 361. *Id.*

62. *Id.*

63. *See infra* note 64.

64. Section 1129(b) reads:

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

(2) For the purpose of this subsection, the condition that a plan be fair and equitable

the Bankruptcy Code.[65] The cram-down provision takes effect after the expiration of the automatic stay.[66] It is a court-forced plan (cram-down) allowing for reorganization to occur even if the plan is rejected by the secured creditors.[67] In order for the court to enforce the plan, however, the debtor must meet the requirements specified in section 1129.[68] One of these conditions requires that the dissenting creditors receive compensation for the "indubitable equivalent" of their secured claims.[69] This compensation requires that the "indubitable equivalent" include the present value (time value compensation) that the creditor foregoes by not being able to foreclose on his secured claim in the debtor's property.[70]

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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 lien securing such claims, whether the property subject to such lien 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 § 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(1) (1982 & Supp. III 1985).

65. *Mariner*, 734 F.2d at 434 ("Congress understood the term ['indubitable equivalent'] to represent a 'strict approach' to adequate protection in the context of the cram-down provisions"). *See also* Note, *supra* note 29, at 317 (adequate protection should include time value compensation similar to the standard in the cram-down provisions in 11 U.S.C. § 1129(b)(2)(A)(iii)).

66. 11 U.S.C. § 362(c)(2)(C) (1982 & Supp. III 1985) (the stay continues until a reorganization is granted under Chapter 11).

67. 11 U.S.C. § 1129 (1982 & Supp. III 1985).

68. 11 U.S.C. § 1129 (a) (1982 & Supp. III 1985).

69. 11 U.S.C. § 1129(b)(2)(A)(iii) *supra* note 64 ("for the realization by such holders [of secured claims] of the indubitable equivalent of such claims").

70. 124 CONG. REC. S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6505, 6544. ("[p]resent 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"); 124 CONG. REC. S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6505, 6544, *citing* Metropolitan Life Ins. Corp. v. Murel Holding Corp. (*In re* Murel), 75 F.2d 941 (2d Cir. 1935). Justice Hand states:

> adequate protection must be completely compensatory; and that payment . . . 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

Section 1129 follows *In re Murel* which applies the rationale that payment now is not the equivalent of payment later.[71] A creditor who is deprived of foreclosing on his interest will be deprived of his present value interest in such collateral.[72] Section 1129 requires that the creditor be compensated for denial of foreclosure with the present value interest.[73]

In using the term "indubitable equivalent" as adequate protection in section 361, Congress intended to apply the same rationale to protect a secured creditor's time value interest during the automatic stay as during the cram-down reorganization provision in section 1129.[74] Both the automatic stay and the cram-down provision prevent the creditor from foreclosing on his secured interest in property.[75] Both provisions contain the compensation requirement that the debtor reimburse the secured creditor with the "indubitable equivalent" of the creditor's interest in such property.[76] The similarities between these two provisions evidence legislative intent to compensate the secured creditor for his present value interest (time value compensation) since he was deprived of the opportunity to foreclose on his collateral.[77] In

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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 . . . unless by a substitute of the most indubitable equivalence.

Murel, 75 F.2d at 941.

71. *Id.*

72. *Id.*

73. *See supra* note 64.

74. Crocker Nat'l Bank v. American Mariner Indus., Inc. (*In re* American Mariner Indus., Inc.), 734 F.2d 429, 437 (9th Cir. 1984).

75. *Compare* 11 U.S.C. § 362 and 11 U.S.C. § 1129. Under § 362, when the automatic stay is invoked the secured creditor is unable to foreclose on the property. 11 U.S.C. § 362 (1982 & Supp. III 1985). Under § 1129 during the reorganization the secured creditor is again deprived of this collateral by being forced to comply with the reorganization. 11 U.S.C. § 1129 (1982 & Supp. III 1985).

76. *Compare* 11 U.S.C. § 361(3) (1982 & Supp. III 1985) ("granting such other relief . . . as will result in the realization by such entity of the indubitable equivalent of such entity's interest in property"), *and* 11 U.S.C. § 1129(b)(2)(A)(iii) (1982 & Supp. III 1985) ("for the realization by such holders of the indubitable equivalent of such claims").

77. *Mariner*, 734 F.2d at 434 (Congress knew of the meaning of the term "indubitable equivalent" in the cram-down provision and intended to adopt the same approach to adequate protection in § 361). *See also* Molbert, *supra* note 43, at 522-23; *Yrazabel, "Adequate Protection, Undersecured Creditors and Time Value Compensation:" A Comment*, in ANNUAL SURVEY OF BANKRUPTCY LAW 299, 306 (W. Norton ed. 1986) ("§ 361(3) indicates congressional intent to expand the use and application of adequate protection so that it corresponds to the standard applied by Judge Hand in *Murel*"). *But see* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n (*In re* Timbers of Inwood Forest Ass'n), 793 F.2d 1380, 1402 (5th Cir. 1986); First Fed. Sav. & Loan Ass'n of Lima v. Shriver (*In re* Shriver), 33 Bankr. 176 (Bankr. D. Utah 1982): "[In sum . . . , § 361(3), the] 'indubitable equivalent' standard, should not be interpreted to require a secured creditor to be compensated for the use value of its money . . . [during the automatic stay]. To do so improperly confuses adequate protection, a method protecting the secured over the short term during the continuance of the automatic stay, with the requirement for 'cram-down' under § 1129(2)(a)(iii) of providing the 'indubita-

addition, Congress specifically added the term "indubitable equivalent" when it was creating section 361(3).[78]

In addition to the "indubitable equivalent" correlation, there is persuasive evidence in the legislative history of section 361 supporting time value compensation.[79] The history of section 361 shows that adequate protection

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ble equivalent' of such claims . . ." *Id.* at 183. The essential distinction between the cram-down provision and adequate protection during the automatic stay is the time element. The automatic stay, during which adequate protection is required, is only a temporary restriction on the creditor. H.R. REP. NO. 595, 95th Cong., 1st Sess. 341 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6297. Contrary to the automatic stay, the cram-down provision in § 1129 is a court-implemented reorganization plan which indefinitely deprives the creditor of his collateral as a result of being forced to comply with the plan. *Shriver*, 33 Bankr. at 177, 182. Since the automatic stay is only temporary, courts adverse to time value compensation have held that Congress did not intend to apply the two provisions synonymously. *Id. See also Timbers*, 793 F.2d at 1389, *citing* Metropolitan Life Ins. Corp. v. Murel Holding Corp. (*In re* Murel), 75 F.2d 941, 943 (2d Cir. 1935) ("less will be required when the creditor is deprived of his interest for a short time"). The *Timbers* analysis creates considerable uncertainty in defining adequate protection in 11 U.S.C. § 361, which alludes to the disparity between the courts. However, where the favorable argument for time value compensation is coupled with the analysis in the Farmer's Bankruptcy Act, *see infra* text accompanying notes 92-111, the argument favoring time value compensation becomes persuasively sound in supporting time value compensation as adequate protection in § 361.

78. *Mariner*, 739 F.2d at 439 (Congress knew of the meaning of the term "indubitable equivalent" in the cram-down provision and intended to adopt the same approach to adequate protection in § 361). *See also* Molbert, *supra* note 43, at 521-23; *Yrazabel*, *supra* note 77, at 306. Prior to the construction of § 361 Congress modified the House's proposal which previously entitled the creditor to receive such other relief as will result in the "realization of the value of his interest." H.R. REP. NO. 595, 95th Cong., 1st Sess. 339 (1977), *reprinted in* 1978 U.S. CODE CONG. ADMIN. NEWS 5963, 6295. Congress replaced this term with the phrase, "[a]s will result in the indubitable equivalent of such entity's interest in such property." 124 CONG. REC. H32356 (daily ed. Sept. 28, 1978). Some courts adverse to time value compensation have held that the purpose of replacing the House's proposal was to exclude adequate protection as an administrative expense. *See, e.g., Timbers*, 793 F.2d at 1396, 1397. There was no direct testimony indicating that Congress had intended to include the term "indubitable equivalent" as it was used in § 1129. But, there was direct testimony as to the removal of the House's proposal in order to avoid adequate protection as an administrative expense. H.R. REP. NO. 595, 95th Cong., 1st Sess. 339 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6295.

However, Congress' intention to apply the indubitable equivalent standard similarly to the cram-down provisions manifests itself in the use of the term "indubitable equivalent." Had Congress not intended to compensate creditors similarly to the cram-down provision they would have adopted another phrase. *See, e.g.*, United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n (*In re* Timbers of Inwood Forest Ass'n), 808 F.2d 363 (5th Cir. 1987) (Jones, J., dissenting) [hereinafter *Timbers II*]. "A sounder and more logical view would be to interpret the phrase to require reorganization for delay in both sections of the statute. Consistency in the meaning of language in a statute — and most certainly that of words of art — is not only a virtue, it is a hallmark of faithful statutory construction." *Id.* at 378.

79. Grundy Nat'l Bank v. Tandem Mining Corp., 754 F.2d 1436, 1441 (4th Cir. 1985); Crocker Nat'l Bank v. American Mariner Indus., Inc. (*In re* American Mariner Indus., Inc.), 734 F.2d 426, 430 (9th Cir. 1984) (the legislative history clearly expresses Congres-

includes a creditor's bargained-for right to recover property that is secured.[80] Section 361 precludes the creditor from enforcing his bargained-for right to recover his exact collateral property during the automatic stay.[81] However, the legislative history expressly provides that the creditor is entitled to at least a substitute which is equivalent to his foregone right to enforce his bargain.[82] This substitute includes the creditor's right to receive compensation for not being entitled to foreclose on the collateral.[83]

The legislative history further supports time value compensation by not limiting adequate protection to the collateral's maintenance value.[84] The fifth amendment property protection is based on *Wright v. Union Central Life Insurance Co.* and *Louisville Joint Stock Land Bank v. Radford*.[85] Both cases protect the creditor to the extent that the debtor at least maintains the value of the secured creditor's collateral.[86] Congress' intention was to go beyond the fifth amendment standards and allow time value compensation.[87] The legislative history states that the measures of adequate protec-

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sional intention to include time value compensation as adequate protection in § 361). *In re* Vanas, 50 Bankr. 988 (Bankr. E.D. Mich. 1985), *citing Mariner*, 734 F.2d at 430-32. *See also* Note, *Adequate Protection*, *supra* note 29, at 312; Molbert, *Adequate Protection for the Undersecured Creditor in a Chapter 11 Reorganization: Compensation for the Delay In Enforcing Foreclosure Rights*, 60 N.D.L. REV. 515, 519-21 (1984). *See also infra* notes 80-82 and accompanying text.

80. H.R. REP. NO. 595, 95th Cong., 1st Sess. 339 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6295.

> Secured creditors should not be deprived of the benefit of their bargain. There may be situations in bankruptcy where giving a secured creditor an absolute right to his bargain may be impossible or seriously detrimental to the bankruptcy law. Thus, this section recognizes the availability of alternative means of protecting a secured creditor's interest. Though the creditor might not receive his bargain in kind, the purpose of this section is to insure that the secured creditor receives in value essentially what he bargained for.

Id.

81. *Id.*

82. *Id.*

83. *Mariner*, 734 F.2d at 431 (Congress has recognized that a secured creditor is entitled to time value compensation which effectively recognizes that the secured creditors' rights to repossession and sale are included in the bargain). *Tandem*, 754 F.2d at 1441, *citing Mariner*, 734 F.2d at 435. Adequate protection includes the right to foreclose and take possession of the collateral and sell it. Such right is the benefit of the bargain rationale appearing in the legislative history of § 361. *See also* Note, *supra* note 29 at 312; Molbert, *supra* note 43 at 519-21; *Yrazabel*, *supra* note 77, at 305.

84. *See infra* notes 85-89 and accompanying text.

85. H.R. REP. NO. 595, 95th Cong. 1st Sess. 339 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6295, *citing* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Wright v. Union Central Life Ins. Co., 311 U.S. 273 (1940).

86. *Id.*

87. *Mariner*, 734 F.2d at 431. "The concept is derived from the Fifth Amendment protection of property interests. . . . It is not intended to be confined strictly to the constitutional protection required, however." H.R. REP. NO. 595, 95th Cong., 1st Sess. 339 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6295.

tion are not limited to the constitutional requirements set forth in *Wright* and *Louisville*.[88] Under these circumstances, a creditor is entitled to both the maintenance and time value compensation of the collateral.[89] Hence, time value compensation as adequate protection does not violate the fifth amendment and is consistent with the legislative history of section 361 of the Bankruptcy Code.[90]

The introduction of the Family Farmer Bankruptcy Act solidified Congress' intent to include time value compensation as adequate protection in section 361. The Family Farmer Bankruptcy Act (Chapter 12), passed by Congress in October, 1986,[91] offers a special advantage to family farmers to reorganize their debts.[92] Unlike the other bankruptcy chapters, Chapter 12 contains its own separate adequate protection provision in section 1205.[93]

Congress' primary purpose in formulating adequate protection in section 1205 was to extinguish time value compensation in Chapter 12.[94] By

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88. *Id.*

89. Under § 361(1) or (2) a secured creditor would be entitled to compensation for depreciation of collateral as required by the 5th Amendment. 11 U.S.C. § 361(1)(2). Also, a secured creditor would be entitled to time value compensation under § 361(3). 11 U.S.C. § 361(3) (1982 & Supp. III 1985). As long as the depreciation of the collateral is compensated for, the constitutional protection will be upheld. *See generally supra* notes 85-87 and accompanying text.

90. *Id.*

91. Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088.

92. H.R. REP. NO. 764, 99th Cong., 2nd Sess. 48, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5227, 5249.

93. 11 U.S.C. § 1205 provides:

> (a) Section 361 does not apply in a case under this chapter.
>
> (b) In a case under this chapter, when adequate protection is required under sections 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 lien under section 364 of this title results in a decrease in the value of property securing a claim or of an entity's ownership interest in 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 property securing a claim or of an entity's ownership interest in property;
>
> (3) paying to such entity for the use of farmland the reasonable rent customary in the community where the property is located, based upon the rental value, net income, and earning capacity of the property; or
>
> (4) 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 adequately protect the value of property securing a claim or of such entity's ownership interest in property.

Id.

94. H.R. REP. NO. 764, 99th Cong., 2nd Sess. 49-50, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5227, 5250-51, provides:

eliminating time value compensation in section 1205, Congress clarified its intentions to include time value compensation in section 361. The majority in *In re Timbers* cites *Russello v. United States* to support this conclusion.[95] "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion."[96]

Under current law, the filing of a bankruptcy petition operates as an automatic stay against any act to create, perfect, or enforce a lien against property of the estate. The secured creditor must file a motion to have the stay lifted in order to proceed with foreclosure. The primary basis for lifting the stay is a lack of adequate protection. This term is not defined in the Bankruptcy Code, but examples of adequate protection are set out in 11 U.S.C. 361.

The Fourth and Ninth Circuits have held that adequate protection requires the debtor to compensate the secured creditor for so-called "lost opportunity costs" in those cases where the value of the collateral is less than the amount of debt secured by the collateral. *In re* American Mariner Indus., Inc., 734 F.2d 426 (9th Cir. 1984); Grundy Nat'l Bank v. Tandem Mining Corp., 754 F.2d 1436 (4th Cir. 1985). The payment of lost opportunity costs requires the periodic payment of a sum of cash equal to the interest that the undercollateralized secured creditor might earn on an amount of money equal to the value of the collateral securing the debt.

Lost opportunity costs payments present serious barriers to farm reorganizations, because farmland values have dropped so dramatically in many sections of the country — making for many undercollateralized secured lenders. Family farmers are usually unable to pay lost opportunity costs. Thus, family farm reorganizations are often throttled in their infancy upon motion to lift the automatic stay.

Accordingly, § 1205 of the conference report provides a separate test for adequate protection in Chapter 12 cases. It eliminates the need of the family farmer to pay lost opportunity costs, and adds another means for providing adequate protection for farmland — paying reasonable market rent. Section 1205 eliminates the "indubitable equivalent" language of 11 U.S.C. 361(3) and makes it clear that what needs to be protected is the value of property, not the value of the creditor's "interest" in property.

It is expected that this provision will reduce unnecessary litigation during the term of the automatic stay, and will allow the family farmer to devote proper attention to plan preparation.

Id.

95. 793 F.2d 1380, 1402 (5th Cir. 1986), *citing* United States v. Wong Kim Bo, 472 F.2d 720 (5th Cir. 1972), *quoted with approval in* Russello v. United States, 464 U.S. 16 (1963).

96. *Id.* The majority in *Timbers* cited this standard when comparing § 361 to the cram-down provision in § 1129. *Timbers*, 793 F.2d at 1402. The majority in *Timbers* stated that there was direct evidence for legislative history in including time value compensation in the cram-down provisions in § 1129. *Id.* The majority opinion in *Timbers* held that since there was no direct evidence to include time value compensation in § 361, Congress did not intend to include it as they did in the cram-down provisions of § 1129. *Timbers*, 793 F.2d at 1402. Note, however, that the *Russello* standard clearly supports time value compensation in § 361 when compared to the farmer's adequate protection provision in § 1205. *Compare* 11 U.S.C. § 361, quoted in full, *supra*, at note 22; and 11 U.S.C. § 1205, quoted in full, *supra* at note 93. In its rehearing attempts to counteract the *Russello* standard, the *Timbers* court held that due to the emergency nature of the Family Farmer Bill the analysis of adequate protection in § 1205

The standard set forth in *Russello* capsulates Congress' intent in section 361 to include time value compensation as adequate protection.[97] Since Congress' primary purpose in section 1205 was to exclude time value compensation, Congress intended a different meaning in section 361 allowing time value compensation. Had Congress not intended to include time value compensation as adequate protection, Congress would have clarified section 361 and would never have established a separate standard in section 1205.[98]

Congress' intent to include time value compensation in section 361 is further evidenced by congressional intent to shorten the filing time of a repayment plan in Chapter 12. Currently, section 1221[99] permits a debtor ninety days to file a plan for readjustment of debts.[100] However, section 1121[101] permits the debtor 120 days to file a reorganization plan under Chapter 11.[102] The shorter period in section 1221 reduces the time during the automatic stay, thereby decreasing the amount of time during which a secured creditor is deprived of his property or continued repayment. Since Congress intended to permit a shorter time span in section 1221, it acted in conjunction with section 1205 which deprives a secured creditor of time value compensation as adequate protection.[103] The disparity in filing times

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is limited solely to Chapter 12; Congress had no intentions of defining any interpretation in § 361. *Timbers II*, 808 F.2d 363, 369 (5th Cir. 1987). *But see* Singer v. United States, 323 U.S. 338 (1945) ("[i]n the absence of a clear legislative purpose to the contrary, a construction that makes a statute wholly redundant will not be adopted where another construction is permissible"). Following the *Singer* standard, to disallow time value compensation as adequate protection in § 361, would in fact make § 1205 wholly redundant to § 361 in regards to eliminating time value compensation as adequate protection. *See also Timbers II*, 808 F.2d at 376 (Jones, J., dissenting): "If Congress had wanted to limit adequate protection to a decline in value of the collateral, it could have done so, but it did not." *Id.*

97. *Id.*

98. *Id.*

99. 11 U.S.C.A. § 1221 (West Supp. 1987).

100. 11 U.S.C. § 1221 provides, "The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if an extension is substantially justified." 11 U.S.C.A. § 1221 (West Supp. 1987).

101. 11 U.S.C. § 1121 (1982 & Supp. III 1985).

102. 11 U.S.C. § 1121 provides:

> (a) The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.
>
> (b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.

103. Originally, H.R. 2211 proposed that a family farmer would be entitled to 240 days to file a plan. 131 CONG. REC. H4768 (daily ed. June 24, 1985). The purpose of the 240 day period was to give farmers an accurate forecast of the upcoming harvest. 131 CONG. REC. H4771 (daily ed. June 24, 1985) (statement by Rep. Synar citing H.R. 211 Judiciary report). However, when Congress finally adopted the Family Farmer's Bankruptcy Bill, the provision was reduced to ninety days and eliminated time value compensation as adequate protection in § 1205. 11 U.S.C.A. §§ 1205, 1221 (West Supp. 1987). Hence, Congress was aware of time value compensation in § 361 and avoided it in § 1205.

evidences Congress' intent to treat the adequate protection provisions in sections 361 and 1205 differently, allowing time value compensation as adequate protection in section 361.

Interpreting section 361 to exclude time value compensation as adequate protection places an unfair burden on the farmer who files a Chapter 12 proceeding. A debtor filing for bankruptcy pursuant to Chapter 12 is required to provide rental payments to the secured creditor for the reasonable fair market rental of the debtor's land.[104] A debtor pursuant to a Chapter 11 proceeding is not required to provide such rental payments.[105] In a circuit excluding time value compensation, the debtor's liability for adequate protection is limited to the collateral's maintenance value.[106] In addition, the debtor under Chapter 11 is permitted a longer time to file his plan than a debtor under Chapter 12.[107] Thus, in a circuit excluding time value compensation, the Chapter 12 debtor is unfairly burdened in both providing additional compensation and having a lesser amount of time in which to file a plan.[108]

Had Congress intended to exclude time value compensation as adequate protection in section 361, they would never have drafted section 1205 creating a greater burden on the farm debtor during the automatic stay. The purpose of Chapter 12 was to provide family farmers with an advantage in readjusting their debts.[109] This advantage included relief from time value compensation in section 361.[110] In a circuit allowing time value compensation in section 361, a farmer-debtor is afforded the relief by not having to pay time value compensation in section 1205 but is required to pay rent on the land.[111] To determine that section 361 excludes time value compensation is to mock Congress' intent to provide support for the family farmer in section 1205, since the Chapter 12 debtor would have a greater burden to secured creditors than the Chapter 11 debtor.

The persuasive evidence rule is to be applied in allowing time value compensation as adequate protection in section 361. Although the plain meaning of section 361 inherently excludes time value compensation,[112] the legislative history outweighs the effect of the plain meaning rule.[113] The Family Farmer Bankruptcy Act, in section 1205, clarifies Congress' intent

104. 11 U.S.C.A. § 1205(b)(3) (West Supp. 1987).
105. 11 U.S.C. § 361 (1982 & Supp. III 1985).
106. *See supra* text accompanying notes 40-41.
107. *See supra* notes 99-102 and accompanying text.
108. *See supra* notes 99-102 and accompanying text.
109. *See supra* note 92 and accompanying text.
110. *See supra* note 94.
111. *See supra* note 94.
112. *See supra* text accompanying notes 51-60.
113. *See supra* text accompanying notes 62-103.

to use the term "indubitable equivalent" in section 361(3) similar to the cram-down provisions in section 1129.[114] Congress supports its intentions by allowing a debtor in a Chapter 12 proceeding less time to file a plan than in a Chapter 11 proceeding where section 361 adequate protection applies.[115] Hence, section 361 does permit time value compensation as adequate protection in section 361.

Since Congress has intended to include time value compensation as adequate protection, the question becomes one of application. Did Congress intend to include time value compensation as a mechanical inclusion in the Code, or should it be determined on a case-by-case basis?

C. *The Compromise Interpretation*

The final approach in interpreting adequate protection in section 361 is to allow the courts to decide whether time value compensation should be awarded to secured creditors rather than mechanically including or excluding time value compensation within the Code.[116] The court will generally consider such factors as the value of the foreclosure right, the intended use of the collateral, the quality of the collateral, and the length of the stay to determine whether or not a creditor should be entitled to time value payments as adequate protection.[117]

Proponents of the case-by-case approach state that the "indubitable equivalent" is a value that is to be determined on an individual basis.[118] There is no specific method in the Bankruptcy Code that determines value.[119] Because of the unique circumstances involved in computing value, Congress left this determination to the judiciary.[120] The courts favoring the case-by-case approach hold that the "indubitable equivalent" in section 361(3) is an alternative means of calculating value.[121] Hence, these courts hold that the decision as to whether time value compensation is derived from this section depends on judicial discretion in a particular case.[122]

Congress does not recognize the case-by-case approach as an interpre-

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114. *See supra* text accompanying notes 91-103.

115. *See supra* text accompanying notes 99-103.

116. Lend Lease v. Briggs Transp. Co. (*In re* Briggs Transp. Co.), 780 F.2d 1339, 1340 (8th Cir. 1985).

117. *Id.* at 1349.

118. *Briggs*, 780 F.2d at 1346.

119. *Briggs*, 780 F.2d at 1345 *citing* H.R. REP. NO. 595, 95th Cong., 1st Sess. 339 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6295.

120. "The section [361] does not specify how value is to be determined nor does it specify when it is to be determined. These matters are left to case-by-case interpretation and development." *Id.*

121. *Briggs*, 780 F.2d at 1346.

122. *Id.*

tation of adequate protection in section 361. The legislative history of the Family Farmer Bankruptcy Act's adequate protection provision specifically cites *In re American Mariner*[123] and *Grundy Nat'l Bank v. Tandem Mining Corp.*[124] The decisions in both of these cases directly refer to time value compensation as a specific inclusion in section 361.[125] Congress referred to *Tandem* and *Mariner* because of their application to section 361.[126] Congress, however, did not cite the *In re Briggs*[127] decision which held that time value compensation in section 361 should be determined on a case-by-case approach.[128] The legislature's non-acknowledgement of the *Briggs* decision exhibits Congress' intent not to apply time value compensation on an individual basis.[129]

In addition, a case-by-case determination would not adequately determine a creditor's rights prior to the engagement of a bargain, which would result in higher litigation costs at the time of the proceeding.[130] A secured creditor would not know whether to oversecure his property if he did not know prior to contracting how he would be compensated for his time value loss on the property during a possible bankruptcy.[131] Thus, the creditor could not effectively bargain for his risk of loss prior to the bankruptcy proceeding.[132] At the time of the proceeding, litigation fees would be wasted in determining a type of protection which should have been known at the time the bargain was made. Since the Bankruptcy Code has set no standards for a case-by-case basis in determining when time value compensation is to be awarded, these standards would have to be set by case law.[133] Setting the parameters of such standards would require many years of litigation.[134] Hence, a case law approach would encourage litigation rather

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123. 734 F.2d 427 (9th Cir. 1984).

124. 754 F.2d 1436 (4th Cir. 1985). *See* H.R. REP. NO. 554, 99th Cong., 2d Sess. 49-50, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5250, 5251.

125. *Tandem*, 754 F.2d at 1437; *Mariner*, 734 F.2d at 427.

126. *See supra* note 124.

127. Lend Lease v. Briggs Transp. Co. (*In re* Briggs Transp. Co.), 780 F.2d 1339 (8th Cir. 1985).

128. *Id.* at 1346.

129. N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267 (1974) (stating that subsequent legislation which declares the intent of an earlier statute is entitled to significant weight). *Id.*

130. This problem is similar to the situation where three interpretations of adequate protection exist. *See supra* text accompanying notes 8-9. In both situations, a full-blown court proceeding will be required to determine when time value compensation is required, causing a delay during the automatic stay and inefficiency in the bargaining process. *See supra* text accompanying notes 8-9.

131. *See supra* note 9.

132. *See supra* note 9.

133. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n (*In re* Timbers of Inwood Forest Ass'n), 793 F.2d 1380, 1416 (5th Cir. 1986).

134. "Further, the Eighth Circuit's opinion in *Briggs* gives the bankruptcy courts very little guidance and likely will require several years of litigation at the bankruptcy and appel-

than out-of-court settlements.[135]

Time value compensation in section 361 is not to be determined on a case-by-case basis. Congress does not recognize this approach as an interpretation of the "indubitable equivalent" and thus, recognizes time value compensation as a specific inclusion in the Bankruptcy Code.[136] Further, the case-by-case approach is not a practical alternative to time value compensation as adequate protection.[137]

IV. A Statutory Change Necessary to Permit Elimination of Time Value Compensation as Adequate Protection in Section 361

Although Congress intended to include time value compensation as adequate protection in section 361, such compensation is detrimental to the Bankruptcy Code and bankruptcy proceedings. When interpreting that time value compensation exists as adequate protection in section 361, the courts create inconsistencies within the Bankruptcy Code,[138] severely hamper the debtor's attempt to reorganize,[139] and improperly place the risk on the unsecured creditor to pay time value compensation as adequate protection.[140]

A. Section 362, The Automatic Stay: Incompatible With Time Value Compensation

Time value compensation is inconsistent with the automatic stay provisions in section 362.[141] The policy behind section 362 provides for the automatic stay, which entitles the debtor to a period in which he is allowed to be temporarily free from creditors' claims.[142] This provision also allows a creditor to generate cash flow for a reorganization.[143] Time value compensation would violate this policy.[144] First, time value compensation hinders a

late court levels before the parameters of the rule announced in *Briggs* become clear." *Id.*

135. *In re* Island Helicopter Corp., 63 Bankr. 515, 521 (Bankr. E.D.N.Y. 1986) ("[a] case-by-case analysis of adequate protection . . . for lost opportunity cost appears to encourage litigation rather than out-of-court settlement").

136. *See supra* text accompanying notes 123-29.

137. *See supra* text accompanying notes 130-35.

138. *See infra* text accompanying notes 141-50, 159-77.

139. *See infra* text accompanying notes 146-150.

140. *See infra* text accompanying notes 171-75.

141. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n (*In re* Timbers of Inwood Forest Ass'n), 793 F.2d 1380, 1408-09 (5th Cir. 1986).

142. H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S. Cong. & Admin. News 5963, 6296-97.

143. The automatic stay may improve cash flow and the ability of the debtor to obtain credit. Kaplan, *Bankruptcy as a Corporate Management Tool*, A.B.A. J., Jan., 1987, at 64, 66.

144. *Timbers*, 793 F.2d at 1409.

debtor's right to be temporarily free from creditors' harassment.[145] This harassment includes the debtor bearing the excessive burden and cost in adequately protecting creditors' time value interests.[146] Unlike maintaining the collateral's value, time value compensation will always be required to pay the creditor.[147] In contrast, a debtor who is liable only for the creditor's maintenance value is required to compensate the creditor only if the collateral is depreciating or deteriorating in value.[148] In addition, the continued compensation for time value interest would considerably decrease the debtor's ability to raise a significant cash flow.[149] Hence, the lower cash flow inhibits the debtor's ability to effectively reorganize.[150]

B. Time Value Compensation Incompatible With Sections 506(b) and 502(b)(2)

There is a discrepancy among the courts as to whether time value compensation is prohibited as post-petition interest pursuant to section 502(b)(2).[151] Section 502(b)(2) determines what claims or interests are to be allowed during the bankruptcy proceeding.[152] Section 502(b)(2) clearly excludes claims for interest that has accrued after the debtor has filed a petition for bankruptcy.[153]

The exception to the disallowance of unmatured interest during the

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145. *Id.*

146. The Court in *Timbers* stated that since the *Mariner* decision, there have been substantially more filings of § 362 motions. The *Timbers* court states:

> [T]he following [are] statistics on the number of § 362 motions filed during August 1983 through March 1986. . . . In the last five months of 1983, 1,175 § 362 motions were filed as compared with 1,273 new Chapter 11 and 13 cases; that is the equivalent to a rate of 92 motions for relief from the stay per 100 new cases. In 1984, the year that *American Mariner* was decided, 4,392 motions for relief from the stay were filed . . . [at] a rate of 135 motions per 100 new cases. . . . In the first three months of 1986, the rate grew to 163 motions for relief from the stay per 100 new cases. . . . [T]hese statistics make it clear that the increase is not due simply to an increase in new bankruptcy filings.

Timbers, 793 F.2d at 1408-09 n.49.

147. *Timbers*, 793 F.2d at 1408.

148. *Id.*

149. *Id.*

150. *Id.*

151. *See infra* text accompanying notes 152-66.

152. Section 502(b)(2) states:

> [I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that — . . .
>
> (2) such claim is for unmatured interest. . . .

11 U.S.C. § 502(b)(2) (1982 & Supp. III 1985).

153. *Id.*

automatic stay is section 506(b) which permits secured creditors to receive interest payments only to the extent of the oversecured portion of their collateral.[154] For example, suppose that a creditor oversecures a lien valued at $100,000 on the debtor's property in return for a $75,000 loan. When the debtor petitions for bankruptcy, section 506(b) permits the creditor to receive interest payments, including expenses and fees, not exceeding the oversecured amount of $25,000.[155]

Courts adverse to time value compensation treat the concept as post-petition interest, not as adequate protection in section 361.[156] These courts hold that since time value compensation accrues after the filing of the bankruptcy petition, it violates section 502(b)(2).[157] Hence, courts opposed to time value compensation only permit a secured creditor to recover such compensation if he is oversecured pursuant to section 506(b).[158]

Courts favoring time value compensation have established that such payments are not post-petition interest[159] because post-petition interest differs from time value compensation.[160] First, post-petition interest in section 502(b)(2) is regarded as interest that accrues on a contracted debt.[161] In

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154. Section 506(b) reads:

> To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges . . . under which such claim arose.

11 U.S.C. § 506(b) (1982 & Supp. III 1985).

155. 11 U.S.C. § 506(b), quoted in full, *supra* note 154.

156. *See infra* notes 157-58 and accompanying text.

157. *Timbers*, 793 F.2d at 1382 n.1. ("[t]ime value compensation is simply postpetition interest in sheep's clothing"); John Hancock Mutual Life Ins. Co. v. Pullins (*In re* Pullins), 65 Bankr. 560, 563 (Bankr. S.D.W.D. 1986) ("[t]ime value compensation is in fact postpetition in interest and forbidden by 11 U.S.C. § 502(b)(2)"); Barclay's Bank of N.Y. v. Saypol (*In re* Saypol), 31 Bankr. 796, 800 (Bankr. S.D.N.Y. (1983); First Fed. Sav. & Loan v. Shriver (*In re* Shriver), 33 Bankr. 176, 185 (Bankr. N.D. Ohio 1983).

158. *Id.*

159. *See infra* note 160.

160. Crocker Nat'l Bank v. American Mariner Indus., Inc. (*In re* American Mariner Indus., Inc.), 27 Bankr. 1004, 1009 (9th Cir. 1983), *rev'd on other grounds*, 734 F.2d 426 (9th Cir. 1984); Note, *Adequate Protection*, *supra* note 29, at 321 & nn. 70-71. Some critics of time value compensation have also agreed that such payments cause no negative implications from § 502(b)(2) or 506(b). *See* Note, *Maintenance Value*, *supra* note 23, at 259.

161. The legislative history in § 502(b)(2) seems to limit such interest to contractual debts and present value clauses in contracts. S. REP. NO. 5989, 95th Cong. 2nd Sess. 63, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5849; *Timbers II*, 808 F.2d at 380 (Jones, J., dissenting): " '[u]nmatured interest' proscribed by § 502 or allowed under § 506(b) accrues at the contract rate on the entire amount owed by the debtor. Adequate protection, however, is based on a . . . valuation of the collateral only whether for depreciation purposes or for lost opportunity cost purposes." *Id. See also* Note, *Adequate Protection*, *supra* note 29, at 321 & nn. 70-72.

contrast, time value interest accrues on the secured collateral.[162] For example, suppose a creditor loaned a debtor $50,000 securing $30,000 in collateral. The secured creditor is entitled to time value compensation at the market rate of interest on the $30,000 worth of collateral.[163] The secured creditor would not be entitled to interest on the $50,000 debt because such debt is a contractual debt and not oversecured to fall within section 506(b).[164] However, since the collateral is worth $30,000, a creditor would only be receiving the time value amount on the $30,000 secured interest as adequate protection, not as a post-interest claim in section 502.[165] Hence, proponents of time value compensation have held that since such compensation does not have the form of being a contractual debt, it is not considered post-petition interest under sections 502(b)(2) and 506(b).[166]

Although, there may be some discrepancy in form as to whether time value compensation is post-petition interest, the effect of this compensation is clearly incompatible with the coupled provisions of sections 502(b)(2) and 506(b). Time value compensation nullifies the overall effectiveness of section 506(b) which would otherwise place the risk on the unsecured creditor to compensate time value interest through the debtor's unencumbered assets.[167] Absent any depreciation in collateral, a secured creditor not liable for time value compensation during an automatic stay will only require a minimum amount of security against his loan.[168] A pertinent analogy is that a person who knows that he will not be liable in an accident will tend not to purchase insurance to compensate for possible accidents that may arise.[169] Likewise, if an undersecured creditor were entitled to time value compensation in section 361, there would be no need to oversecure the debt when he could receive compensation from another source. Thus, section 506(b) becomes a relatively ineffective part of the Code.[170] However, if the secured

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162. *Id.*

163. *Supra* note 32.

164. 11 U.S.C. § 506(b), quoted in full, *supra* note 154.

165. *See supra* note 31.

166. *See supra* note 153.

167. *See supra* notes 163-66 and accompanying text.

168. This analogy is pertinent to the Coasian analysis which states that property rights are governed by the liabilities accorded to such property. COASE, *The Problem of Social Cost*, 3 J. LAW & ECON. (1960), *reprinted in* ECONOMIC FOUNDATIONS OF PROPERTY LAW 17-20 (B. Ackerman ed. 1975). Coase goes on to say that a person who is liable for another's property will compensate the other person to the extent the property is impaired. *Id.* at 17. Like the Coasian analysis, the secured creditor is not liable for time value compensation. Therefore, he will not have to reserve any compensation in case of a bankruptcy proceeding; such interest is provided by the unsecured creditor. *See infra* notes 171-75 and accompanying text.

169. *See supra* note 168.

170. Section 506(b) would only be effective to the extent an undersecured creditor is denied compensation for charges and fees related to the bankruptcy proceedings. 11 U.S.C. § 506(b) (1982 & Supp. III 1985). A creditor may oversecure his interest to the extent these charges may accrue in the future. *Id.*

creditor was liable for his time value interest, section 506(b) becomes an integral part in encouraging creditors to oversecure their loans to protect against a time value loss during the automatic stay.

Removing time value compensation as adequate protection permits section 506(b) to compensate only for the loss of those rights which had been bargained.[171] Time value compensation, if allowed, places the risk on the unsecured creditor to compensate the secured creditor with time value payments.[172] To illustrate, suppose a creditor has secured $20,000 in collateral for $30,000 debt. Since the creditor's collateral is worth less than the debt, time value compensation will be distributed through the unencumbered assets of the estate.[173] In most cases, the unencumbered assets would be distributed or claimed by the unsecured creditor.[174] However, time value compensation would deplete such assets to the detriment of a third party who has never bargained with the creditor.[175] Limiting post-petition compensation to section 506(b) would effectively limit the bargained rights between the debtor and the creditor. Where the secured creditor is required to oversecure his interest, he has effectively reserved his own portion of the estate in case of a bankruptcy proceeding which does not result in a later punitive deduction to an unbargaining party.

Placing the risk on the unsecured creditors to compensate the secured creditor's time value interest may discourage creditors from becoming actively involved during the automatic stay and thereby prolong what would otherwise be a short proceeding.[176] To illustrate, a creditor who has secured collateral in the amount of $20,000 for a $20,000 loan will be entitled to the market rate of interest on the collateral rather than the contract rate on the debt. Where the market rate of interest exceeds the contract rate, a secured creditor will be entitled to more money than if the bankruptcy had never been filed. Hence, a creditor will be encouraged to prolong the auto-

171. This analysis is consistent with the cases which deny an oversecured creditor post-petition interest if his security interest is a result of a nonconsensual lien. *In re* Dan-ver Enterprises, Inc., 67 Bankr. 951 (Bankr. W.D. Pa. 1986); *In re* Russo, 63 Bankr. 335 (Bankr. D. Mass. 1986); *In re* Churchfield, 62 Bankr. 399 (Bankr. E.D. Mich. 1986), *reconsideration denied*, 66 Bankr. 30 (1986); Matter of Benson, 65 Bankr. 148 (Bankr. W.D. Mo. 1986).

172. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n (*In re* Timbers of Inwood Forest Ass'n), 793 F.2d 1380, 1411 (5th Cir. 1986).

173. *Id.* The *Timbers* court does not recognize that maintenance value compensation for undersecured creditors is also distributed from the unencumbered assets. *Id.* at 1411. However, the *Timbers* argument is valid to the extent that an elimination of time value compensation will greatly reduce the burden on the unsecured creditor to compensate the undersecured creditor the time value of the collateral. Unlike time value compensation, maintenance value compensation will be required only where the collateral is depreciating or deteriorating in value. *Timbers*, 793 F.2d at 1410-11.

174. *Id.*

175. *Timbers*, 793 F.2d at 1410-11.

176. *Id.* at 1406-07.

matic stay to the debtor's detriment in order to receive the higher rate of interest.[177]

Congress' proposal should eliminate time value payments as adequate protection and thereby limit the accrual of interest only to the extent that a claim is oversecured pursuant to section 506(b). This act would place the burden on secured creditors to insure against a time value loss and encourage them to oversecure loans in contemplation of the risk of a borrower's bankruptcy. To act otherwise would undercut the policies supporting Sections 362, 502(b)(2) and 506(b) of the Bankruptcy Code.

C. *Removal of Time Value Compensation as Adequate Protection*

In order effectively to remove time value compensation as adequate protection, sections 361 and 1205 should be combined. Section 361 should adopt the words of section 1205. In doing so, the term "indubitable equivalent" is removed, and any relationship to the cram-down provision in section 1129 is eliminated.[178] Thus, Congress' intent to exclude time value compensation is clearly expressed.

Section 1205 should be modified, however, in order to afford farmers an equal ground for compensating secured creditors during the automatic stay. Currently, section 1205(3) permits a secured creditor to receive reasonable rent for the use of the farmland.[179] Such a provision creates an unfair burden on the farmer whose primary asset is land. Debtors whose debts are secured primarily by machines or buildings are not required to compensate secured creditors for the reasonable rental value.[180] The solution is to remove section 1205(b)(3) and thus eliminate any disparity between landowner and nonlandowner.

Assessing rental payments to other types of collateral should not be considered. An equal alternative, assessing rental payments against other types of collateral, creates the same problems as time value compensation in section 361. Assessing rental payments on all collateral would considerably deplete a debtor's cash flow for reorganization[181] and shift the burden to the unsecured creditor to compensate the secured creditor for the automatic stay.[182]

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177. *Id.*
178. *See supra* notes 64-78 and accompanying text.
179. 11 U.S.C.A. § 1205(b)(3) (West Supp. 1987).
180. 11 U.S.C.A. § 1205 (West Supp. 1987); 11 U.S.C. § 361 (1982 & Supp. III 1987).
181. *See supra* text accompanying notes 141-52.
182. *See supra* text accompanying notes 171-77.

V. CONCLUSION

Congress intended to include time value compensation as adequate protection in section 361. The court's purpose in interpreting a statute is to determine congressional intent. In the interpretation of section 361, Congress did intend to include time value compensation and thus, the court's role is to clarify section 361 accordingly. Although the plain meaning of section 361 does not permit time value compensation, the persuasive evidence rule most clearly reflects Congress' true purpose in section 361. The persuasive evidence in the legislative history and in the use of the term "indubitable equivalent" accurately depicts the interpretation in section 361 which includes time value compensation as adequate protection.

Time value compensation's impact, however, creates serious inconsistencies in the Bankruptcy Code. Its effect severely hampers the debtor's ability to reorganize and places the risk of bankruptcy on the unsecured creditor. Therefore, Congress should modify section 361, excluding time value compensation as adequate protection.

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