Adequate Protection: A New Hope, or Perhaps, the Empire Strikes Back

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The Fifth Amendment

Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 518 (1938):

> "Property rights do not gain any absolute inviolability in the bankruptcy court because they are created and protected by state law. Most property rights are so created and protected. But if Congress is acting within its bankruptcy power, it may authorize the bankruptcy court to affect these property rights, provided the limitations of the due process clause are observed."

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Section 361 of the Bankruptcy Code states that . . .

[A]dequate protection may be provided by—

(1) requiring the trustee to make a cash payment or periodic cash payments to [an entity with interest in the debtor's property], 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.

The items listed in section 361 of the Bankruptcy Code are non-exclusive examples of adequate protection.

In re Briggs Transp. Co., 780 F.2d 1339, 1344 (8th Cir. 1985) (holding that § 361 is not an exclusive list of means of providing adequate protection); *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984) (same); *In re Grant Broadcasting of Philadelphia, Inc.*, 75 B.R. 819 (E.D. Pa. 1987) (same); *see also* 3 Collier on Bankruptcy ¶ 361.03 (16th ed. 2018) ("Adequate protection may take many forms, only some of which are illustrated in section 361.").

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When adequate protection matters

The Bankruptcy Code requires a debtor to provide adequate protection to a secured creditor in at least three circumstances:

(1) when the automatic stay is in effect;

(2) when the debtor uses, sells or leases a secured creditor's collateral; or

(3) when the debtor proposes to prime a secured creditor's lien with an additional lien.

Additionally, the concepts underpinning adequate protection also exist when a debtor considers its retention and use of leased property under section 365.

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Adequate Protection and Cash Collateral

- Adequate protection is actually triggered as a requirement when the debtor seeks to use cash collateral.
- The burden and obligation lie on the **debtor** to first seek permission before use is permitted.
- The debtor would be obligated to avoid dissipation of cash collateral unless the court grants permission, and in that process, the debtor offers adequate protection.

In re Big Rivers Elec. Corp., 284 B.R. 580, 587 n.8 (Bankr. W.D. Ky. 2002); *In re Cain*, 86 B.R. 506, 512 (Bankr. W.D. Mich. 1988); *In re EES Lambert Associates*, 62 B.R. 328, 343 (Bankr. N.D. Ill. 1986); § 363(c)(2); *In re Vienna Park Properties*, 976 F.2d 106, 114 (2nd Cir. 1992); *In re Gasel Transp. Lines, Inc.*, 326 B.R. 683, 691 n. 7 (6th Cir. B.A.P. 2005).

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