SECURED CREDITOR CRAM-DOWN AND THE SECTION 1111(b) ELECTION

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I. OVERVIEW OF THE CRAM-DOWN RULES

The cram-down of secured claims is governed by two sets of rules, which for present purposes are characterized as objective[1] and subjective.[2] As relevant here,[3] the objective requirement is that the secured creditor retain its lien and receive deferred payments with a present value equal to the value of its collateral; [4] related to this is the requirement that the plan be "feasible,"[5] that is, that the creditor is likely actually to receive the deferred payments. The subjective rule requires that the treatment of the secured creditor be "fair and equitable."[6]

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[1] The objective requirements are set forth in the three sub-paragraphs of Section 1129(b)(2)(A).

[2] The subjective rule, which mandates that cram-down treatment be "fair and equitable," is set forth in Section 1129(b)(1). That Section also prohibits "unfair discrimination," but ordinarily secured debts are separately classified based on their unique collateral, rights and priorities, rendering "unfair discrimination" an inapplicable concern here. For present purposes the only relevant portion of Section 1129(b)(1) is the requirement that the dissenting class receive "fair and equitable" treatment.

[3] Although Section 1129(b)(2)(A) presents three alternative types of permissible cram-down treatment, only sub-paragraph (i) is relevant for our purposes. Sub-paragraph (ii) involves a sale of the collateral, in which case the Section 1111(b) election is not available; Section 1111(b)(1)(B)(2). The scope of sub-paragraph (iii) (affording the secured creditor the "indubitable equivalent" of its claim) remains unclear, but it does not seem to be an available alternative where a Section 1111(b) election has been made, since substituting alternative collateral eviscerates the very purpose of the Section 1111(b) election. See, In re River East Plaza, LLC, 669 F.3d 826, 833 (7th Cir. 2012) (rejecting use of substitute collateral for Section 1111(b) treatment, explaining that the debtor "was in effect proposing a defective subsection (i) cramdown by way of subsection (iii)"); Sunflower Racing, Inc. v. Mid-Continent Racing & Gaming Co. I (In re Sunflower Racing) 226 B.R. 673, 687 (D. Kan. 1998) (substituting letter of credit for collateral was not "indubitable equivalent"); and see, RADLAX Gateway Hotel v. Amalgamated Bank, 132 S. Ct. 2065 (2012) (among the sub-paragraphs of Section 1129(b)(2)(A), specific sub-paragraphs govern the general "indubitable equivalent" sub-paragraph). Decisional law has not identified a single instance of permissible (iii) ("indubitable equivalence") treatment in the context of a Section 1111(b) election.

[4] Section 1129(b)(2)(A) provides:

(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;

[5] Section 1129(a)(11).

[6] Section 1129(b)(1).

The objective rule affords the plan proponent great latitude in formulating cram-down treatment, since in principle any set of future cash flows could satisfy it, provided only that the present value of those cash flows is at least equivalent to the value of the collateral. Negative amortization[7] and 50-year repayment plans can both satisfy the objective requirement for cram-down.

The subjective test requires that the cram-down treatment be "fair and equitable," and this is ordinarily interpreted as requiring an appropriate balancing or allocation of risk between the secured creditor and the plan proponent.[8] Thus, while negative amortization satisfies the objective test,[9] it ordinarily fails the subjective test,[10] because it generally imposes undue risk on the secured creditor.[11] Likewise, lengthy repayment periods, while permissible under the objective test, ordinarily fail the subjective test, because they are seen as inappropriately imposing on the secured creditor unforeseeable risks of unexpected developments in the distant future.[12] It is the subjective test which collapses the multitude of alternatives which mathematically satisfy the objective test into a much narrower band of confirmable alternatives.[13]

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[7] "Negative amortization refers to 'a provision wherein part or all of the interest on a secured claim is not paid currently but instead is deferred and allowed to accrue,' with the accrued interest added to the principal and paid when income is higher." Great Western Bank v. Sierra Woods Group, 953 F.2d 1174, 1176 (9th Cir. 1992)

[8] In re TCI 2 Holdings, LLC, 428 B.R. 117, 168 (Bankr. D.N.J. 2010) (the "fair and equitable requirement asks "whether the proposed arrangement imposes impermissible risk shifting upon the primary secured creditor")

[9] Great Western, supra, 953 F.2d at 1178.

[10] Great Western, supra, 953 F.2d. at 1177 (collecting cases).

[11] *In re* D & F Const. Inc., 865 F.2d 673, 675 (5th Cir.1989); Great Western, supra, 953 F.2d. 1178 (identifying as a relevant factor for consideration "Are the risks unduly shifted to the creditor?")

[12] In re Valley View Shopping Ctr., L.P., 260 B.R. 10, 37-38 (Bankr. D. Kan. 2001) ("the reasonableness of the term of payment is appropriately evaluated under the 'fair and equitable' test, and what is reasonable may be determined with reference to the term of similar loans in the marketplace"); In re Trenton Ridge Investors, LLC, 461 B.R. 440, 504 (Bankr. S.D. Ohio 2011) (collecting cases for the proposition that "in assessing the reasonableness of a repayment period [relevant factors] include the typical maximum loan period for similar properties and whether the market would bear terms comparable to those proposed in the plan."); Matter of VIP Motor Lodge, Inc., 133 B.R. 41, 45 (Bankr. D. Del. 1991) (duration materially longer than the market for comparable loans was not "fair and equitable"); compare, Matter of Briscoe Enterprises, Ltd., II, 994 F.2d 1160, 1169 (5th Cir. 1993) (approving cram-down with balloon payment even though "[e]stimating property values fifteen years hence is inherently speculative…")

[13] D & F Const., supra, 865 F.2d at 675 ("Section 1129(b)(2) sets minimal standards plans must meet. However, it is not to be interpreted as requiring that every plan not prohibited be approved. A court must consider the entire plan in the context of the rights of the creditors under state law and the particular facts and circumstances when determining whether a plan is "fair and equitable.")

Feasibility performs a similar function. Feasibility requires the court to make a finding that the plan is "not likely" to fail.[14] The purpose of section 1129(a)(11) is to prevent "confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation."[15] Feasibility also collapses the multitude of alternatives which mathematically satisfy the objective test into a much narrower band of confirmable alternatives. [16] As significantly for our purposes, feasibility requires proof of the likelihood of future events, and as those events recede into the more distant future, the ability to prove that they are likely to occur diminishes.

Setting an appropriate cram-down interest rate straddles the objective and subjective cram-down rules.[17] Ordinarily, the cram-down interest rate is to be constructed by applying an external base rate, typically prime, and adjusting it for risk.[18] For these purposes, risk is

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[14] Section 1129(a)(11) requires the court to find that "Confirmation of the plan is not likely to be followed by the liquidation, or need for further financial reorganization, of the debtor or any successor to the debtor under the plan…"

[15] In re Pizza of Haw., Inc., 761 F.2d 1374, 1382 (9th Cir.1985) (quoting 5 Collier on Bankruptcy ¶ 1129.02[11], at 1129–34 (15th ed. 1984)).

[16] Every plan proponent is required to present "ample evidence to demonstrate that the Plan has a reasonable probability of success." In re Acequia, Inc., 787 F.2d 1352, 1364 (9th Cir.1986). In order to determine whether § 1129(a)(11) is satisfied, a court must "scrutinize the plan to determine whether it offers a reasonable prospect of success and is workable." In re Sagewood Manor Assocs. Ltd. P'ship, 223 B.R. 756, 762 (Bankr.D.Nev.1998).

[17] In re Seasons Partners, LLC, 439 B.R. 505, 517 (Bankr. D. Ariz. 2010) order confirmed, 4:09-BK-24017-JMM, 2010 WL 6556774 (Bankr. D. Ariz. Nov. 8, 2010) ("If a Chapter 11 plan proposes payment of an interest rate below the "range of prevailing market rates for loans of comparable risk and duration" or which does not take into account the actual risk of that loan, confirmation must be denied because the deferred payments will not yield the present value of the claim and, therefore, the plan is not "fair and equitable" and will not satisfy § 1129(b)(2)(A)(i)(II). *See, e.g., In re* One Times Square Assocs. Ltd. P'ship, 159 B.R. 695, 706 (Bankr.S.D.N.Y.1993).")

[18] Till v. SCS Credit Corp., 541 U.S. 465, 479-80, 124 S. Ct. 1951, 1962, 158 L. Ed. 2d 787 (2004) "(The prime-plus or formula rate best comports with the purposes of the Bankruptcy Code."); In re Pamplico Highway Dev., LLC, 468 B.R. 783, 792-93 (Bankr. D.S.C. 2012) ("The formula approach uses a national prime rate, which is adjusted for the risk of non-payment" and "has been adopted by a majority of the courts.") Specifically, *Till* instructs the use of the prime rate and a risk adjustment, which the Supreme Court expected to range from 1% to 3%. Pamplico Highway, supra, 468 B.R. at 794-95 (collecting cases). It also places on the creditor the burden to demonstrate that the risk adjustment proposed by the debtor is inadequate. 541 U.S. at 484-85. Most of the courts apply *Till* in Chapter 11 cases.

The leading alternative approach to establishing a cram-down interest rate is the "blended rate" approach approved prior to *Till* by the Bankruptcy Appellate Panel for the Ninth Circuit in *In re Boulders on the River, Inc.*, 164 B.R. 99, 105–06 (BAP 9th Cir. 1994). Following *Till*, the blended rate approach has been best advocated in recent years in an opinion by Judge Albert, favorably described by Judge Marlar as follows: "*In re North Valley Mall, LLC,* 432 B.R. 825, 834–35 (Bankr.C.D.Cal. June 21, 2010)

ordinarily evaluated in terms of the borrower, the collateral and the repayment terms,[19] with terms such as negative amortization or lack of principal amortization, irregular payments or lengthy repayment periods and the absence of an equity cushion[20] resulting in increased risk adjustments to the cram-down interest rate.

Thus, where possible, plan proponents will attempt to propose cram-down treatment with moderate, "normal" and "market" terms both in order to satisfy the "fair and equitable" requirement and in order to obtain the lowest available cram-down interest rate; let us call this type of "normal" "market" treatment a "readily confirmable cram-down treatment." An example of readily confirmable cram-down treatment in most real estate contexts would call for monthly payments of interest and principal, based on some meaningful principal amortization rate (e.g., a 20 year amortization), with a comparatively short repayment term (e.g., 5 years).

II. OVERVIEW OF SECTION 1111(b) TREATMENT

On its face, a Section 1111(b) election simply treats the secured creditor's entire gross claim as secured, notwithstanding the fact that the value of the collateral is some lesser amount.[21] The practical consequence of the election is supplied not by Section 1111(b), but by the objective cram-down rule, which provides that the creditor's lien must be retained[22] and will secure repayment of the "secured claim" – that is, the entire gross claim – if the Section 1111(b) election is made. Thus, if the Section 1111(b) election is made, the creditor must receive

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(Albert, J.) (reviewing and analyzing *Till* and then utilizing the blended rate approach with three "tranches" or tiers: a "senior tranche" covering the debt up to the first 65% of value, a "mezzanine tranche" covering the debt up to the next 20% of value, and an "equity tranche" covering the last 15% of value);" *In re* Linda Vista Cinemas, L.L.C., 442 B.R. 724, 749 (Bankr. D. Ariz. 2010). The practical effect of the "blended rate" approach is substantially to increase the cram-down interest rate (since the lowest tranche is assigned a rate comparable to the *Till* rate, while the upper tranches, including the equity-like upper-most tranche, command extraordinarily high rates of return). The blended rate approach is favored by expert witnesses who cater to secured creditors, but does not seem reconcilable with *Till* or the substantial majority of courts that follow it.

[19] Till v. SCS Credit Corp., 541 U.S. 465, 479, 124 S. Ct. 1951, 1961, 158 L. Ed. 2d 787 (2004) ("The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan."); In re Bloomingdale Partners, 155 B.R. 961, 977 (Bankr. N.D. Ill. 1993) ("[A] "fair and equitable" rate of interest under § 1129(b)… should be an appropriate risk-free rate plus an adjustment that compensates for the inherent risks imposed on the secured creditor by the Debtor's plan.")

[20] In re Bloomingdale Partners, 155 B.R. 961, 986 (Bankr. N.D. Ill. 1993) (increased initial cram-down interest rate due to absence of equity cushion in the first years of the plan)

[21] Section 1111(b)(2) only provides "If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed."

[22] In re River East Plaza, LLC, 669 F.3d 826, 833 (7th Cir. 2012) (rejecting use of substitute collateral for Section 1111(b) treatment, explaining that the debtor "was in effect proposing a defective subsection (i) cramdown by way of subsection (iii).")

payments aggregating the amount of its entire gross claim, although those payments need only have a present value equivalent to the value of the creditor's collateral.[23]

The Bankruptcy Appellate Panel for the Ninth Circuit[24] presented a leading explanation of the effect of a Section 1111(b) election:

> On the other hand, when an undersecured creditor makes the § 1111(b)(2) election, its allowed secured claim is equal to its total claim rather than the value of the collateral. In order for a reorganization Plan to now comply with the cram down requirements of § 1129(b)(2)(A)(i)(I), the electing creditor must retain a lien equal to the total amount of its claim. The lien is not stripped down by § 506(d). Subsection (II) of § 1129(b)(2)(A)(i) guarantees an electing creditor a stream of payments equal to its total claim. However, the stream of payments need only have a present value "of at least the value of such holder's interest in the estate's interest in such property," i.e., the value of the collateral. 11 U.S.C. § 1129(b)(2)(A)(i)(II). In other words, the present value of the electing creditor's stream of payments need only equal the present value of the collateral, which is the same amount that must be received by the nonelecting creditor, but the sum of the payments must be in an amount equal at least the creditor's total claim.

Stated simply, if the Section 1111(b) election is made, the secured creditor must retain its lien and receive a collection of payments over time which (a) have a present value equal to the value of the collateral, but (b) aggregate the gross amount of the secured creditor's claim. [25]

Decisional law provides for an alternative articulation of the requirements for Section 1111(b) treatment, structured in the form of a traditional promissory note rather than a stream of payments. Under that articulation, the principal amount of the note is the value of the collateral and the interest rate and the other terms are manipulated so as to ensure that the aggregate

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[23] Section 1129(b)(2)(A)(i). Although the provisions of Section 1111 have been praised for its "brilliant" draftsmanship; Keating, Daniel "RadLAX Revisited: A Routine Case of Statutory Interpretation, or a *Sub Rosa* Preservation of Bankruptcy Law's Great Compromise" 20 Am. Bankr. Inst. L. Rev. 465, 474 (2012); as this article suggests, this brilliance also led the courts to enforce the electing undersecured creditor's non-existent "right" to payment in full, rather than, as Congress had intended, its right to retain its lien for a protracted period of time and potentially enjoy any future appreciation in collateral value.

[24] First. Fed. Bank of Cal. v. Weinstein (In re Weinstein), 227 B.R. 284, 294 (BAP 9th Cir. 1998).

[25] In re Bloomingdale Partners, 155 B.R. 961, 974 (Bankr. N.D. Ill. 1993) ("So, the same payments under the plan must satisfy two requirements: (1) the simple, arithmetic total of the stream of payments must at least equal the total claim, and (2) those payments must have a present value equal to the value of the collateral.")

payments under the note (principal and interest) will equal the amount of the creditor's gross claim.[26]

This alternate articulation is helpful as a way of identifying one significant constraint on Section 1111(b) treatment: the prohibition on negative amortization. Negative amortization involves the accrual of interest without payment, such that the principal amount of the obligation increases.[27] In the ordinary context, negative amortization will be permissible only where the creditor's ultimate repayment is fully protected by a substantial equity cushion.[28] Since Section 1111(b) elections are only made where the creditor is undersecured and hence has no equity cushion, negative amortization always unduly increases the creditor's exposure and hence should never be permissible in Section 1111(b) treatment; at least, absent some extraneous backstop protecting the creditor; e.g., additional collateral or a valuable guarantee.

The first articulation of permissible Section 1111(b) treatment – a collection of cash flows aggregating the entire amount of the debt, with a present value equal to the value of the collateral – does not readily identify whether negative amortization is at stake. The alternative articulation, however, does so: if the principal amount of the note is the value of the collateral and the interest rate of the note is set at the cram-down interest rate, it becomes easy to determine whether currently accruing interest is being paid or if the proposed treatment relies on negative amortization.

Although the note approach imposes some additional complexity – it requires the insertion of a complex prepayment premium, sometimes referred to as the "Section 1111(b) premium," to ensure that the creditor's lien is retained until it has received payments aggregating the entirety of its gross claim[29] – it provides the easiest and clearest mechanism to identify

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[26] General Elec. Credit Equities, Inc. v. Brice Road Dev. (In re Brice Rd. Developments, L.L.C.), 392 B.R. 274, 287 (B.A.P. 6th Cir. 2008); Matter of IPC Atlanta Ltd. P'ship, 163 B.R. 396, 400 (Bankr. N.D. Ga. 1994).

[27] Great Western Bank v. Sierra Woods Group, 953 F.2d 1174, 1176 (9th Cir. 1992)

[28] *In re* Pikes Peak, 779 F.2d 1456, 1459 (10th Cir.1985) (no interest or principal payments for up to three years justified by substantial equity cushion); In re Pine Mountain, Ltd., 80 B.R. 171 (BAP 9th Cir 1987) (interest accrual without payment for up to three years warranted by substantial equity cushion); "Only where it is clear that a negative amortization plan does not unduly shift the risk of loss to the creditor, should the Court find that it is fair and equitable." In re Consolidated Properties Limited Partnership, 170 B.R. 93, 99 (D. Md. 1994).

[29] General Elec. Credit Equities, Inc. v. Brice Road Dev. (In re Brice Rd. Developments, L.L.C.), 392 B.R. 274, 287 (B.A.P. 6th Cir. 2008) ("In order to insure that GE will receive payments totaling its allowed claim and that its lien will remain in place until full payment has been received, it is necessary for the Note to be restructured in one of two ways. The first is to specifically provide in the Note for payment of the so-called § 1111(b) premium, as previously discussed. The second is to provide for a Note in the face amount of the electing creditor's allowed claim, in this case $16,453,965.74, but with a below-market rate of interest such that the present value of the Note would still only be the present value of the collateral."); Matter of IPC Atlanta Ltd. P'ship, 163 B.R. 396, 400 (Bankr. N.D. Ga. 1994) (collecting cases); Joel L. Tabas, The S 1111(b) Election: A Decision-Making Framework, Am. Bankr. Inst. J., December/January 2004, at 48

whether the treatment satisfies a minimum requirement for permissible Section 1111(b) treatment: the proscription of negative amortization.

III. CONSTRUCTING EXAMPLES OF CONFIRMABLE TREATMENT

A. Confirmable Cram-Down Treatment

Assume a simple case, in which the creditor is owed $1.2 million, but the collateral which secures the debt has a fair market value of $1 million, as determined by the court. Thus, the creditor's gross claim amounts to 120% of its collateral value, for our purposes, a moderately undersecured claim.

In the ordinary case, absent a Section 1111(b) election, the claim will be bifurcated into a $1 million secured claim and a $200,000 unsecured claim.[30] Absent a Section 1111(b) election, the unsecured claim is not relevant for present purposes.[31]

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[30] Section 506(a) provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest…, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property… and is an unsecured claim to the extent that the value of such creditor's interest… is less than the amount of such allowed claim.

[31] The unsecured deficiency claim is the tactical counter-weight to Section 1111(b). In many cases, the unsecured deficiency claim can be voted so as to cause the unsecured creditor class to reject the plan, and without the unsecured creditors' class' acceptance, often Section 1129(a)(10) cannot be satisfied. *In re* Outlook/Century, Ltd., 127 B.R. 650, 653 (Bankr. N.D. Cal. 1991).

Decisional law and academic analysis address at length gerrymandering designed to prevent the unsecured deficiency claim from dominating the unsecured creditor class and causing the plan to fail. Boston Post Rd. Ltd. P'Ship v. Fed. Deposit Ins. Corp. (In re Boston Post Rd. Ltd. P'ship), 21 F.3d 477, 483 (2d Cir. 1994) (separate classification of unsecured deficiency claim solely to create an impaired assenting class to effectuate cram down is impermissible); John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs., 987 F.2d 154, 161 (3d Cir. 1993) (classification method designed solely to affect the outcome of the voting in a "cram down" situation is improper); Lumber Exch. Bldg. Ltd. P'ship v. Mut. Life Ins. Co. of New York (In re Lumber Exch. Bldg. Ltd. P'ship), 968 F.2d 647, 649 (8th Cir. 1992) (unsecured portion of undersecured creditor's claim could not be classified separately from claims of unsecured trade creditors based solely on fact that undersecured creditor's claim arose by operation of law under § 1111(b)); Travelers Ins. Co. v. Bryson Props., XVIII (In re Bryson Props., XVIII, 961 F.2d 496, 502 (4th Cir.) (court rejected debtor's argument that statutory, rather than contractual, basis for creditor's unsecured claim warranted separate classification); Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture) 995 F.2d 1274 (5th Cir. 1991) (rejecting gerrymandering); but see, *In re* Loop 76, LLC, 465 B.R. 525 (B.A.P. 9th Cir. 2012) aff'd, 578 F. App'x 644 (9th Cir. 2014) (approving separate classification of deficiency claim on the grounds that it was guaranteed).

Ordinarily, creditors turn to the Section 1111(b) election when voting the unsecured deficiency claim is not expected to prevent confirmation of the plan of reorganization.

In an effort to satisfy the subjective "fair and equitable" test and to reduce the cram-down interest rate, the plan proponent will attempt to provide "readily confirmable cram-down treatment" for the $1 million secured claim. That can be expected[32] to consist of monthly payments of interest and of principal based on, say, a 20 year amortization, with the debt fully due in, say, 5 years; provisions which may be comparable to market loans and are unlikely to be considered "aggressive" by the court. Five years may be seen as sufficient time to sell or refinance the property, especially since the principal amortization will result in a 25% equity cushion by the end of that period, even if the value of the property does not increase.[33]

Assuming the property generates adequate funds for debt service, in this case a court setting the cram-down interest rate might conclude that a modest risk adjustment is appropriate, especially since the loan will develop a material equity cushion over its term due to principal amortization. Let us assume the court sets a 175 basis point risk adjustment to the prime interest rate (currently 3.25%) resulting in a cram-down interest rate of 5%.[34]

Thus, "readily confirmable cram-down treatment" treatment of the $1 million secured debt in this hypothetical might involve payments of about $6,599 per month, representing interest at 5% and principal based on a 20 year amortization, fully due in 5 years. In 5 years, the outstanding balance owed would be about $750,000, less than the current $1 million value, presumably enabling the plan proponent to sell or refinance the property at that time.

Note that this cram-down treatment is entirely unaffected by the gross amount of the claim: it is driven exclusively by the secured amount of the claim, that is, the collateral value. The same treatment would be proposed whether the creditor's total claim was $1.2 million, as in the example, or $2 million, so long as the collateral value is only $1 million.

B. Confirmable Section 1111(b) Treatment

Now assume that the secured creditor makes a Section 1111(b) election: as a consequence, it must receive payments over time aggregating $1.2 million, but with a present value of at least $1 million.

Since negative amortization should never be permissible in Section 1111(b) treatment, [35] minimum Section 1111(b) treatment should require payments of at least interest only (based on

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[32] Readily confirmable cram-down treatment will be affected by the borrower, the collateral and the local economy, but the foregoing would seem generally to be appropriate for most real estate cases.

[33] In re Bloomingdale Partners, 155 B.R. 961, 986 (Bankr. N.D. Ill. 1993) (applying decreasing interest rates during the term of the plan as the equity cushion increased from zero).

[34] In the spring of 2013, the Fifth Circuit approved a cram-down interest rate utilizing a risk adjustment of 1.75% over a 3.25% prime, or 5%. *In re Texas Grand Prairie Hotel Realty, L.L.C*, 710 F.3d 324, 335 (5th Cir. 2013).

[35] In the Matter of D & F Construction Inc., 865 F.2d 673 (5th Cir. 1989) (negative amortization for first 4 years such that balance of the debt did not return to confirmation level for 12 years was fatal, treatment was not fair and equitable and could not be confirmed); In re Executive House Associates, 99

the $1 million value of the collateral) for a period of years, followed by a balloon payment amounting to the value of the collateral (the "balloon approach").[36] In this type of moderate example in which the undersecured portion of the claim is comparatively small, the Section 1111(b) election affords the creditor an enhanced recovery in only the first few years after confirmation.[37] In our example the debtor will have made $200,000 of interest payments after 48 months, which coupled with the balloon payment ($1 million) then or thereafter will satisfy the requirements of Section 1111(b). In our moderate example, after the 48th month, the creditor's treatment is determined exclusively by the ordinary cram-down rules, and the Section 1111(b) election has no impact. On the other hand, in this example Section 1111(b) perfectly "solves" the *Pine Gate* problem: If the debtor tries to profit from the low judicial valuation by selling the property within the first four years after emerging from bankruptcy, the election will require the debtor to repay the creditor's total debt, severely limiting the impact of the valuation.

The same incentives that would lead the debtor to propose "readily confirmable cram-down treatment" in the ordinary case, might lead the debtor to propose the same treatment in the context of a Section 1111(b) election: that is payments based on a 20 year amortization of the collateralized claim. In addition to making the treatment more readily confirmable, these increased monthly payments will shorten the period in which the Section 1111(b) treatment alters the creditor's recovery: the Section 1111(b) election will have an impact only in the first 30 months, rather than the first four years. [38]

Now assume an extreme case in which the creditor is substantially undersecured: assume on the same collateral value the creditor's aggregate claim is $2 million rather than $1.2 million; thus, the total debt is 200% of the collateral value. In this case, the Section 1111(b) election has a dramatic effect. If the debtor adopts the balloon payment approach and funds only interest payments, by the 12th year after confirmation, while the balloon required by the cram-down rules will remain $1 million, the balloon imposed by the Section 1111(b) election at that juncture would be $1.6 million; the balloon payments required by the cram-down rules and the Section 1111(b) election will converge only in the 44th year after confirmation. Even with the greater payments under the amortized approach, the two balloons will not converge until about the 18th year after confirmation. [39]

B.R. 266, 282 (Bankr. E.D. Pa. 1989) (payments for 15 years of 65% of the accruing interest "places virtually all of the risks associated with this plan upon the secured creditor" and is not confirmable without creditor's consent); and see, In re S.E.T. Income Properties, III, 83 B.R. 791 (Bankr. D. Okla. 1988) (since property could not fund payment of currently accruing interest at the rate set by the Court, Plan could not be confirmed.)

[36] Note that one court, likely an outlier, objected to two years of interest only payments followed by seven years of amortized payments, characterizing the interest only payments for the first two years as "similar to negative amortization" and thus not "fair and equitable." Sunflower Racing, Inc. v. Mid-Continent Racing & Gaming Co. I (In re Sunflower Racing) 226 B.R. 673, 689 (D. Kan. 1998)

[37] This is graphically and numerically presented in the Appendix.

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Thus, where the creditor is only modestly undersecured, it should be fairly easy to construct confirmable Section 1111(b) treatment, and that treatment will likely not differ much from confirmable cram-down treatment.[40] As the creditor becomes increasingly undersecured, the treatment required in order to satisfy a Section 1111(b) election becomes increasingly protracted. The question is whether such protracted repayment terms can be found to be "feasible" and "fair and equitable."

IV. APPLYING THE CRAM-DOWN RULES TO SECTION 1111(b) TREATMENT

As noted, if the creditor is materially undersecured, Section 1111(b) repayment terms will necessarily be protracted. As the creditor's treatment becomes more protracted, it may become increasingly difficulty to demonstrate that the Plan is "feasible" or the treatment "fair and equitable." Indeed, this has led some commentators to advocate making the Section 1111(b) election *because* it will provoke unconfirmable treatment, leading to a failure of the reorganization effort and permission to foreclose on the property,[41] a result seemingly at odds with the purpose of Section 1111(b).

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[40] For example, In re TCI 2 Holdings, LLC, 428 B.R. 117, 168 (Bankr. D.N.J. 2010) involved the reorganization of the Trump casinos in Atlantic City. The secured creditors, who made a Section 1111(b) election, were owed $483 million, but their collateral was worth only $459 million; the gross debt amounted to slightly more than 105% of the collateral value. The Debtor proposed a $125 million pay-down upon Plan confirmation, monthly payments of interest and a slight principal amortization, with the debt fully due in 5 years. The Court readily found the treatment satisfied Section 1111(b), was feasible and was "fair and equitable" to the secured creditor.

Likewise, In re Star Trust, 237 B.R. 827, 837 (Bankr. M.D. Fla. 1999) involved commercial property in Florida.[40] The secured creditor, who made a Section 1111(b) election, was owed $1,301,731, but its collateral was worth only $1,250,000; the gross debt amounted to slightly more than 104% of the collateral value. The Debtor proposed a Plan under which the creditor would receive monthly payments of interest and principal, based on a 20 year amortization, with the debt fully due in 3 years. The Court readily found the treatment satisfied Section 1111(b), was feasible and was "fair and equitable" to the secured creditor.

[41] Keating, Daniel "RadLAX Revisited: A Routine Case of Statutory Interpretation, or a *Sub Rosa* Preservation of Bankruptcy Law's Great Compromise" 20 Am. Bankr. Inst. L. Rev. 465, 477 (2012) (explaining the "strategic benefit" as follows: the undersecured "creditor might make the section 1111(b) election as a way to force the debtor either to give the creditor a larger total payout in the plan than the present-value test would require, or to propose a plan that was so long as to fail the feasibility requirement for plan confirmation"); Joel L. Tabas, The Section 1111(b) Election: A Decision-Making Framework, Am. Bankr. Inst. J., December/January 2004, at 48, 49-80 ("Furthermore, employing the § 1111(b) election may create an insurmountable barrier to plan confirmation, thereby resulting in conversion or dismissal, thus enabling the undersecured creditor to recover its collateral."); Steven R. Haydon, The 1111(b)(2) Election: A Primer, 13 Bankr. Dev. J. 99, 132 (1996) (Noting that an advantage associated with making a Section 1111(b) election "is that the longer the term of the plan, the more difficult it is for the debtor to prove that the plan is feasible. If the Bank seeks to block confirmation of the plan, electing the 1111(b)(2) election may force the debtor to lengthen the loan term enough to render the question of feasibility so speculative that the bankruptcy court will decline to confirm the plan."); *In re Mallard*

A. Feasibility

The Bankruptcy Code specifically provides that a plan of reorganization can be confirmed only if the court finds that it is "not likely" to fail in the future; that is, that the plan is feasible.[42] Although certainty of success is not required, bankruptcy judges tend to approach the feasibility requirement with a healthy dose of skepticism, so as to avoid confirming "visionary schemes."[43] Would the Section 1111(b) treatment we hypothesized survive a traditional feasibility analysis?

In our extreme example, under the most favorable payment approach (amortized), it would still be at least 16 years before the amount of the balloon payment required by Section 1111(b) dropped to the value of the collateral (assuming no appreciation). Is it likely that the debtor will fund payments on underwater property for such a long time? And if the plan proposes an earlier balloon payment, how will it be funded? [44] Under ordinary circumstances, courts tend to be reluctant to predict economic conditions ten years into the future, let alone thirty or more years, rendering it difficult to obtain a feasibility finding where Section 1111(b) treatment requires a lengthy repayment period.[45] As one court noted, "The longer the

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Pond Ltd., 217 B.R. 782, 786 (Bankr. M.D. Tenn. 1997) (citing Haydon with approval and concluding that feasibility of 59 year plan necessitated by Section 1111(b) election was so speculative as to bar confirmation).

[42] Section 1129(a)(11) requires the court to find that "Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."

[43] In the Matter of Pizza of Hawaii, Inc., 761 F.2d 1374, 1382 (9th Cir. 1985); In re Patrician St. Joseph Partners Ltd., 169 B.R. 669, 674 (D. Ariz. 1994) (While proponent need not guarantee success, it must prove a "reasonable prospect of success.")

[44] The "ordinary" application of the feasibility requirement contemplates proof by credible evidence of the reasonable likelihood of a sale or refinance to fund the balloon payment; In re Seasons Partners LLC, 439 B.R.505 (Bankr. D. Az. 2010); which is difficult to demonstrate for a date decades in the future; In re Trenton Ridge Investors, LLC, 461 B.R. 440, 491-494 (Bankr. S.D. Ohio 2011).

[45] In re 222 Liberty Associates, 108 B.R. 971, 995 (Bankr. E.D. Pa. 1990) (rejecting Section 1111(b) treatment on other grounds, but noting with respect to its 10 year term that "we are also troubled by the length of time for which [principal] payments are deferred under this Plan."); In re Reid Park Properties, LLC, 2012 WL 5462919 Bankr. D. Az. 2012) (23 year term was too long); In re Triple R Holdings, L.P., 134 B.R. 382 (Bankr. N.D. Cal. 1991) (remarking that "the plan outlined by the debtor arguably imposes a hardship upon First Republic by requiring that the restructured loan be maintained for eighteen years."); *In re* Mallard Pond Ltd., 217 B.R. 782, 786 (Bankr. M.D. Tenn. 1997) (59 year plan necessitated by Section 1111(b) election was too long). and see, In the Matter of D & F Construction Inc., 865 F.2d 673 (5th Cir. 1989) (rejecting plan on other grounds, but expressing concern that creditor who was otherwise entitled to immediate payment in full could be stretched out for 15 years).

[repayment] term… the more doubtful the projections and the more likely a court will be to deny confirmation" on feasibility grounds.[46]

Thus, some courts identify the Section 1111(b) election as a species of litigation advantage enjoyed by the electing creditor:

> It is also true, however, "that proof of feasibility is an easier task when the payout is done over a shorter period of time" and that "[t]he § 1111(b) electing creditor, therefore, gains a statutorily granted advantage because the longer the proposed plan, the more difficult it is for the debtor to prove feasibility."[47]

In that case, Section 1111(b) treatment involved a 30 year repayment term and the court ruled that the plan proponent had failed to prove that the underlying property could generate sufficient income over the 30 year term to fund plan payments or would have sufficient residual value to fund the balloon payment.[48] In a different case, the court found feasibility but decided that a 23 year repayment term – mandated by the Section 1111(b) election in a case in which the gross debt was nearly twice the collateral value – was too long to be "fair and equitable."[49]

On the other hand, some courts have accepted the protracted payment terms needed to accommodate a Section 1111(b) election.[50] Indeed, even repayment terms of 30 years and more have been found permissible responses to a Section 1111(b) election.[51] Attempting to explain themselves, a few courts and commentators advance the dubious conjecture that making the

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[46] In re Mayslake Village-Plainfield Campus, Inc., 441 B.R. 309, 317 (Bankr. N.D. Ill. 2010)

[47] In re Trenton Ridge Investors, LLC, 461 B.R. 440, 491 (Bankr. S.D. Ohio 2011)

[48] In re Trenton Ridge Investors, LLC, 461 B.R. 440, 491-494 (Bankr. S.D. Ohio 2011)

[49] In re Reid Park Properties, LLC, 2012 WL 5462919 (Bankr. D. Az. 2012)

[50] In re Delta Transitional Home, 399 B.R. 654, 660 (Bankr. E.D. Ark. 2009) (approving fully amortized 9 ¼ year payment plan); In re IPC of Atlanta, 163 B.R. 396 (Bankr. N.D. GA 1994) (approving payment of interest only for 2 years, followed by interest and principal based on a 30 year amortization, fully due and payable in the 10th year); In re Pamplico Highway Dev., LLC, 468 B.R. 783, 790 (Bankr. D.S.C. 2012) (approving 25 year amortization, fully due in 10 years); In re Paradise Springs Associates, 165 B.R. 913, 927 (Bankr. D. Ariz. 1993) (dicta: the Court would approve 30 year amortization, due in 10 years); In re Broad Associates Ltd. Partnership, 129 B.R. 328 (Bankr. D. Conn. 1991) (confirming 14 year repayment, discussion at 125 B.R. 707).

[51] In re Brice Rd. Developments, L.L.C., 392 B.R. 274, 286 (B.A.P. 6th Cir. 2008) (payments based on a 40 year amortization, fully due in 36 years would be confirmable); and see, In re N. Indianapolis Venture, 113 B.R. 386, 391 (Bankr. S.D. Ohio 1990) (in the context of a relief from stay motion, court hypothesizes that a 30 year mortgage would be feasible and satisfy Section 1111(b)); In re Trenton Ridge Investors, LLC, 461 B.R. 440, 503 (Bankr. S.D. Ohio 2011) (with evidence of feasibility, payments based on a 40 year amortization, fully due in 30 years would be confirmable).

election bars the creditor from objecting to the plan at all.[52] More appropriately, some courts look to principles of waiver, and conclude that the creditor cannot both demand the necessarily protracted treatment required by a Section 1111(b) election and complain that such treatment is not "fair and equitable" or feasible.[53]

Finally, it should go without saying that these problems become more exacerbated as the claim becomes more undersecured. The foregoing examples assumed that gross debt did not exceed 200% of the collateral value; were gross debt to amount to 300% of collateral value, for example, much more protracted plan terms would be required in every permutation. Thus, even in cases where readily confirmable cram-down treatment is clearly feasible, constructing feasible Section 1111(b) treatment may prove impossible.

B. Interest Rate

In constructing the various Section 1111(b) treatment alternatives, we assumed that the interest rate we derived for readily confirmable cram-down treatment would apply. On further reflection, that conclusion is not obvious: Section 1111(b) treatment may compel a much higher cram-down interest rate; although not specifically as a result of the Section 1111(b) election. [54]

Recall that a cram-down interest rate is a function of applying a risk adjustment to a base interest rate. In order to minimize the risk adjustment, we assumed moderate and market terms which we characterized as "readily confirmable cram-down treatment," including a modest 5 year term and an amortization rate that would create a material equity cushion by the conclusion of that term.

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[52] In re 680 Fifth Ave. Associates, 156 B.R. 726, 733 (Bankr. S.D.N.Y. 1993) *aff'd*, 169 B.R. 22 (S.D.N.Y. 1993) *aff'd*, 29 F.3d 95 (2d Cir. 1994) ("A creditor therefore forfeits its right to vote on the plan because there is no undersecured deficiency claim and the secured claim is unimpaired."); and see, Wade v. Bradford, 39 F.3d 1126, 1129 (10th Cir. 1994) ("Alternatively, the creditor may elect to have his claim treated as fully secured. 11 U.S.C. § 1111(b)(2). This means that the creditor relinquishes his right to vote on the plan…"); Collen, John "Understanding the Section 1111(b) Election, 19 J. Bankr. L. & Prac. 4 Art. 1 (2010) ("It is generally held that when a creditor makes the Section 1111(b) Election, it may not vote on the plan. The rationale seems to be that upon receiving section 1129(b) treatment, the claim is no longer considered impaired."). These assertions seem clearly incorrect: Section 1111(b) treatment will ordinarily differ from the original contract terms, so the claim will not be unimpaired; Section 1124; and hence will be permitted to vote; compare, Section 1126(f).

[53] In re Trenton Ridge Investors, LLC, 461 B.R. 440, 505 (Bankr. S.D. Ohio 2011) ("[T]he Court would—in light of PNC's § 1111(b) election and its stipulation to the appropriateness of the 5.5% interest rate—have concluded that the repayment periods would not impose an unfair or inequitable risk on PNC. The Debtors' choice of the repayment period was driven by the § 1111(b) election, and that election itself provides significant protection to PNC.") (denying confirmation due to feasibility concerns).

[54] Compare, In re Bloomingdale Partners, 155 B.R. 961, 977 (Bankr. N.D. Ill. 1993) (interest rate is not affected by Section 1111(b) election *per se)*; with In re 222 Liberty Associates, 108 B.R. 971, 994-5 (Bankr. E.D. Pa. 1990) (proposed interest rate did not adequately compensate for risks inherent in Section 1111(b) election note).

Section 1111(b) treatment, however, would seem to command a much higher risk adjustment. There may be no equity cushion for decades, and payments will be required to continue over a protracted period of time. Compared to case law urging short repayment periods, Section 1111(b) treatment seems problematically protracted.

Even the amortized approach to Section 1111(b) treatment would seem to require a higher risk adjustment than the readily confirmable cram-down treatment. Admittedly, on our assumptions, there is ample cash flow to fund the payments, but the lengthy loan term imposes significant risks to the creditor: most of the payments will be due more than a decade or two into the future, at a time when no one can foresee market conditions. The creditor may be locked into this loan for decades. This would seem to be a level of risk materially in excess of the risk associated with readily confirmable cram-down treatment, hence requiring a much higher cram-down interest rate.

C. "Fair and Equitable" Treatment

Wholly apart from compliance with the objective cram-down test and Section 1111(b), a non-consensual plan must be "fair and equitable" to the dissident class.

Ordinarily, the "fair and equitable" requirement seeks to ensure an appropriate balance of risk between the debtor and the creditor. The key terms we postulated for our readily confirmable cram-down treatment – monthly payments of principal and interest, meaningful principal amortization, a modest five-year term – can be seen as an attempt to strike such an appropriate balance. These key terms differ strikingly – but necessarily – in all of the permutations of Section 1111(b) mathematics where the creditor is significantly undersecured.

Thus, where the creditor is materially undersecured, it is not difficult to argue that Section 1111(b) treatment allocates most or all of the risk to the secured creditor who must wait decades for its recovery, and thus cannot be "fair and equitable" to the secured creditor.[55]

IV. AVAILABILITY OF THE SECTION 1111(b) ELECTION

There are three constraints on the ability to make a Section 1111(b) election: the election must be timely made, the collateral must not be of "inconsequential value," and the election is not available where the creditor has the right to credit bid.

A. Timeliness

Absent an order of the court to the contrary, the Section 1111(b) election must be made prior to the conclusion of the disclosure statement hearing.[56] If material factual issues have been

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[55] See, footnotes 44-49, supra.

[56] Fed. R. Bankr. P. 3014. If the disclosure statement is conditionally approved prior to balloting; e.g., pursuant to Section 1125(f)(3); the election must be made by the deadline set for filing objections to the disclosure statement. Id., Fed. R. Bankr. P. 3017.1(a)(2).

deferred to the confirmation hearing – the valuation of the property, the cram-down interest rate – this deadline can cause serious problems for all parties, requiring a commitment to Section 1111(b) treatment before the consequences of that commitment can be known.

The problem associated with a premature election is exacerbated by the decisional law which generally holds that once a Section 1111(b) election has been timely made, it cannot be subsequently rescinded.[57] As a consequence, it will often be in the interests of one or more parties to ask that the court order a different deadline for the election or authorize an election which can be rescinded under specified circumstances.

B. Inconsequential Value

The Section 1111(b) election cannot be made if the collateral is of "inconsequential value."[58] In one case in which a junior lienholder threatened to block confirmation by making a Section 1111(b) election when the collateral value amounted to 10% of his gross debt, the court reduced the value of the collateral by hypothetical costs of sale, thereby eliminating the secured claim and the Section 1111(b) election entirely.[59]

Another court focused on the ultimate economics, using a result oriented test to determine that the secured claim was of inconsequential value:

> when a claim cannot be paid in full, either amortized annually or in a lump sum payment at the end of a specified period of time (i.e. thirty to forty years), without exceeding the present value of the collateral, the creditor's claim is probably of inconsequential value and an 1111(b) election should not be allowed.[60]

This seems to be the preferable approach as a matter of policy, focusing on the underlying economics and implementing the Congressional intent, rather than allowing a grossly undersecured creditor to block reorganization to no apparent end.[61] Unfortunately, it is difficult

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[57] In re Keller, 47 B.R. 725, 729 (N.D. Iowa 1985) (election could not be withdrawn); In re Paradise Springs Associates, 165 B.R. 913, 920 (Bankr. D. Ariz. 1993) (creditor cannot withdraw the election); but see, In re Scarsdale Realty Partners, L.P., 232 B.R. 300, 302 (Bankr. S.D.N.Y. 1999) (authorizing withdrawal of election).

[58] Section 1111(b)(1)(B)(i) provides that a class of claims may not make the Section 1111(b) election if "the interest on account of such claims of the holders of such claims in such property is of inconsequential value…"

[59] Butters v. Mountain Side Holdings (*In re* Mountain Side Holdings) 142 B.R. 421 (D. Co. 1992).

[60] *In re* Wandler, 77 B.R. 728, 734 (Bankr. D.N.D. 1987).

[61] Ito, Peter "How Inconsequential Is 'Inconsequential Value'?" 31 Am Bankr. Inst. J. 22 (Oct. 2012) (advocating the *Wandler* analysis). Compare, *In re* Baxley, 72 B.R. 195, 199 (Bankr. D.S.C. 1986) which found that collateral worth 8% of the gross debt was not of "inconsequential value," but notably did not attempt to address the economic consequences of that decision.

to square this policy with the statutory language. As noted above, the problem is in the degree to which the creditor is undersecured, not the amount of the collateral. Section 1111(b) treatment for a creditor who is 95% undersecured is not likely to confirmable regardless of the value of the collateral, but if the value of the collateral is $5,000, it can readily be characterized as "inconsequential", if the value of the collateral is $500,000, that characterization seems unavailable.

C. Credit Bid Alternative

Finally, it is clear that a Section 1111(b) election is not available to a creditor who can exercise a right to credit bid at a sale during the course of the case or under the plan.[62] This requirement is consistent with the original objective of Section 1111(b), which was to protect the creditor from a low judicial valuation: either through credit bidding or through the Section 1111(b) election, the creditor can insist on payment of the full gross amount of its claim regardless of the court's valuation of the collateral. Decisional law on this issue has largely focused on inventive but unsuccessful attempts to evade both the Section 1111(b) election and credit bidding[63]

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[62] Section 1111(b)(1)(B)(ii) provides that a class of claims may not make the Section 1111(b) election if "such property is sold under section 363 of this title or is to be sold under the plan." In both cases, such a sale is subject to a right to credit bid under Section 363(k); and see, Section 1129(b)(2)(A)(ii).

[63] In re Waterways Barge P'ship, 104 B.R. 776, 782 (Bankr. N.D. Miss. 1989) ("[I]f the undersecured recourse creditor is not permitted to "credit bid" its claims, it is not precluded from making the § 1111(b)(2) election"); In re Kent Terminal Corp., 166 B.R. 555 (Bankr. S.D.N.Y. 1994) (lienholder must be afforded either Section 1111(b) election or right to credit bid lien); In re Western Real Estate Fund, Inc., 75 B.R. 580 (Bankr. W.D. Ok. 1987) (rejecting attempt to evade Section 1111(b) election by providing for sale in the indefinite future); In re Georgetown Park Apartments, Ltd., 103 B.R. 248 (Bankr. S. D. Cal. 1989) (same); compare, In re Way Apartments, D.T., 201 B.R. 444 (N.D. Tex. 1996) (no right to credit bid where creditor enjoyed Section 1111(b) protections).

APPENDIX

This Appendix presents six examples numerically and graphically.

In each case, the collateral value is considered static at $1 million (the orange line). In each case, the cram-down interest rate is assumed to be 5% (prime plus a 175 basis point risk factor).

Payments Based on Amortized Cram-Down Treatment

The first three examples present the normative case: "readily confirmable cram down treatment" with monthly payments based on a 20 year amortization (the blue curve). The monthly payments are kept the same for the cram down treatment (the blue curve) and the Section 1111(b) treatments (the green lines).

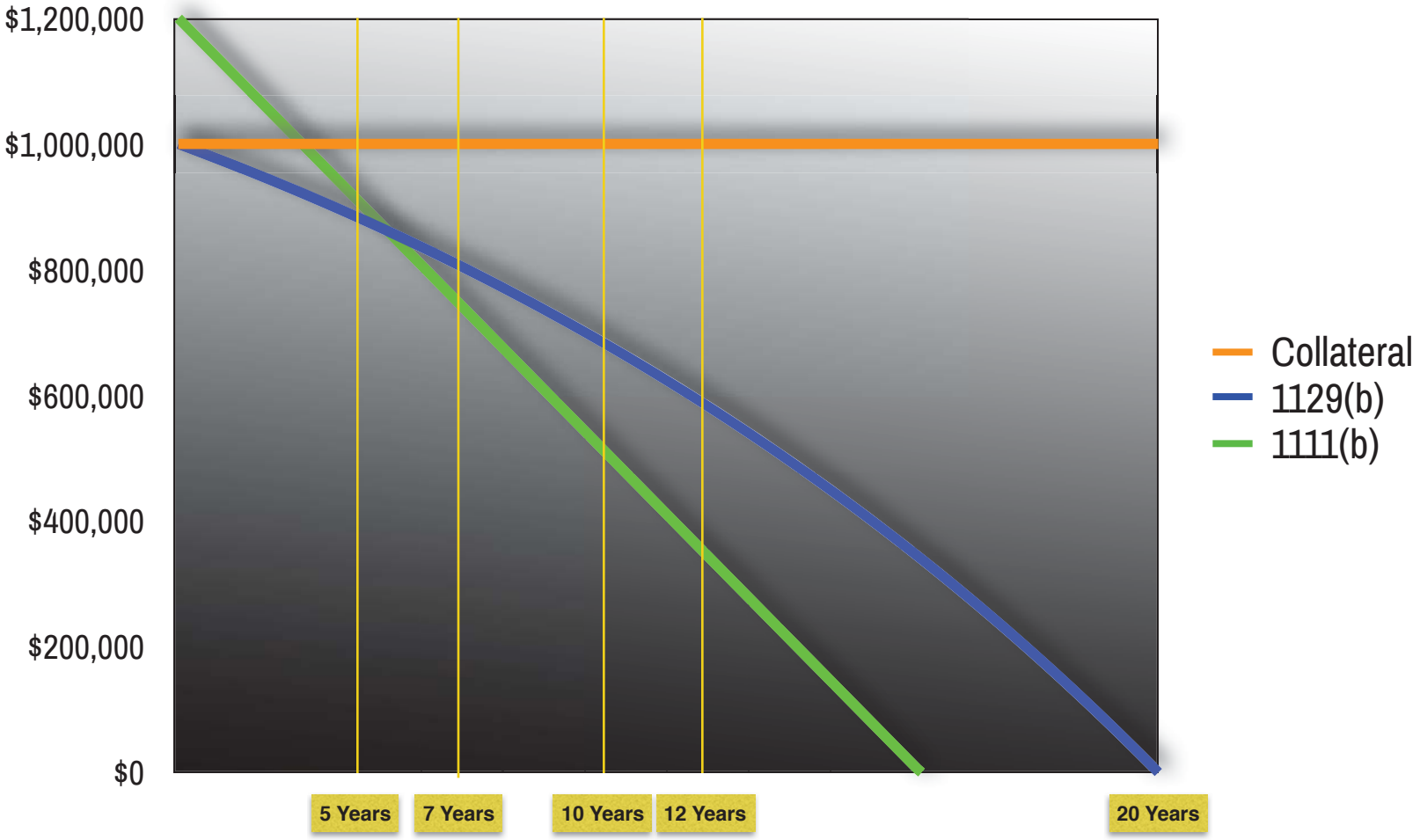
The Section 1111(b)(2) election is presented (as the green line) in three variants: where the unsecured debt represents 120% of the collateral value, where the unsecured debt represents 160% of the collateral value, and where the unsecured debt represents 200% of the collateral value. As is graphically demonstrated, Section 1111(b) treatment based on those payments becomes increasingly tenuous and protracted as the degree by which the creditor is undersecured increases.

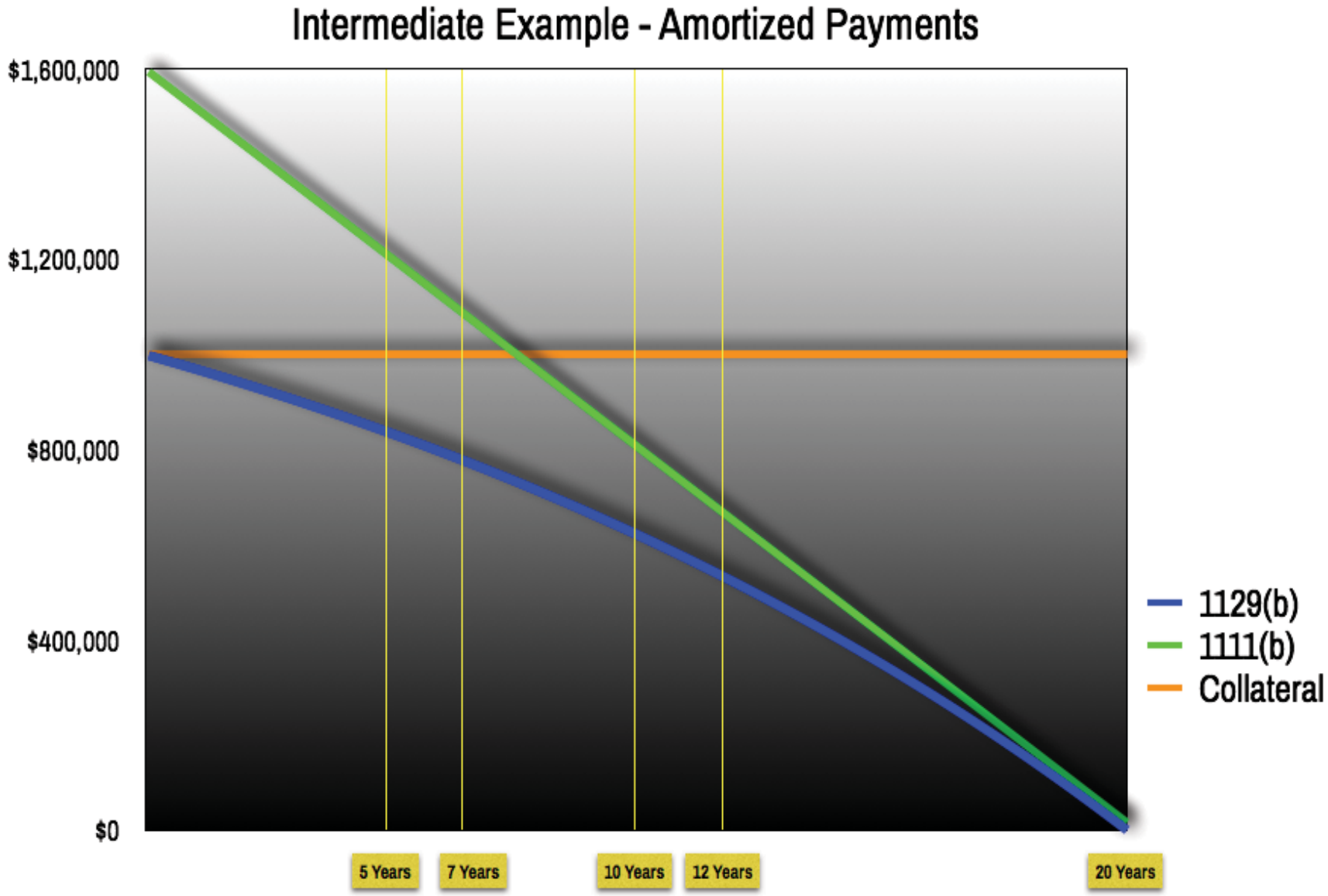
Interest Only Payments

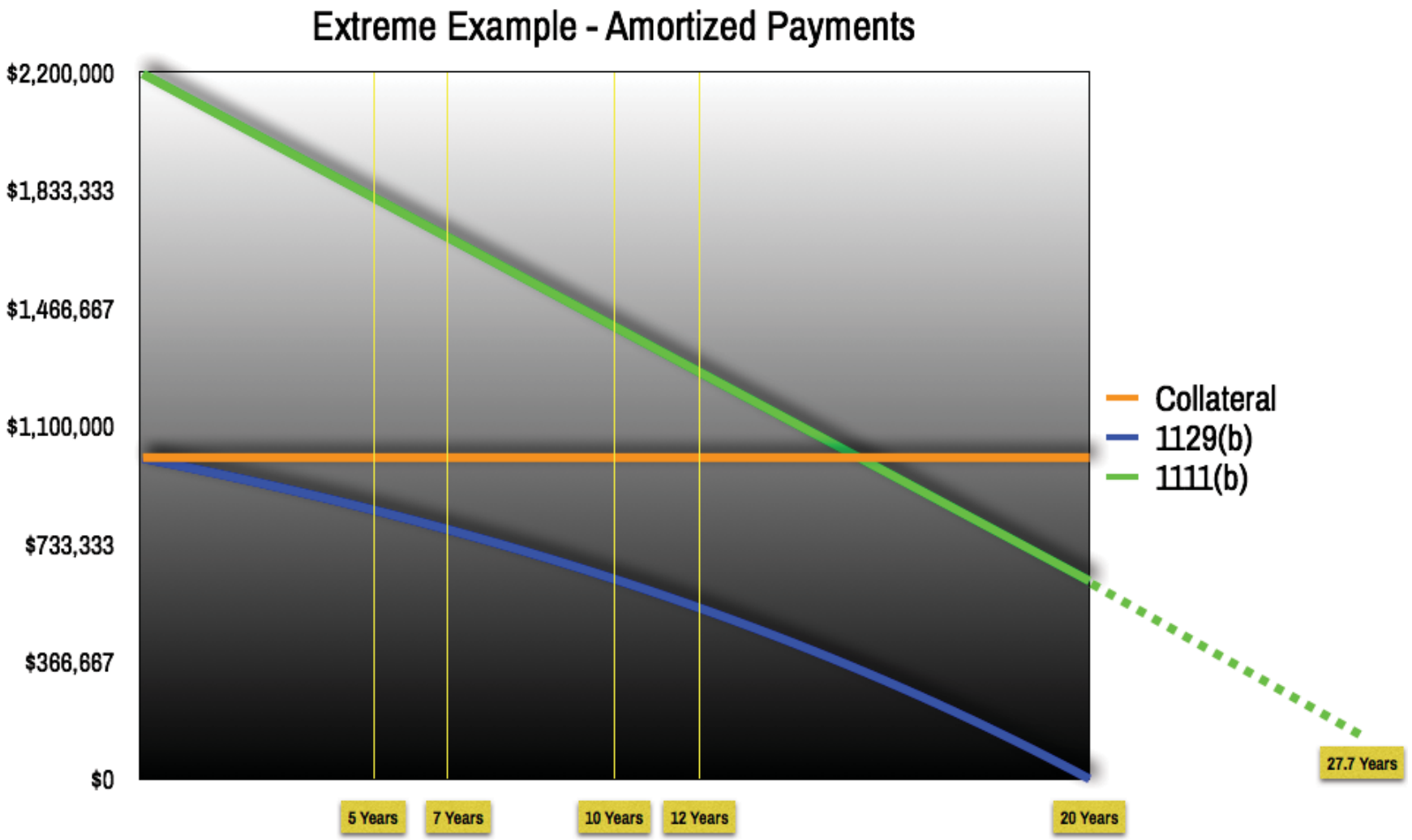
The second three examples present the most aggressive available cram-down case: interest only payments (based on collateral value) with a balloon at some future date (the blue line). The monthly payments are kept the same for the cram down treatment (the blue line) and the Section 1111(b) treatments (the green lines).

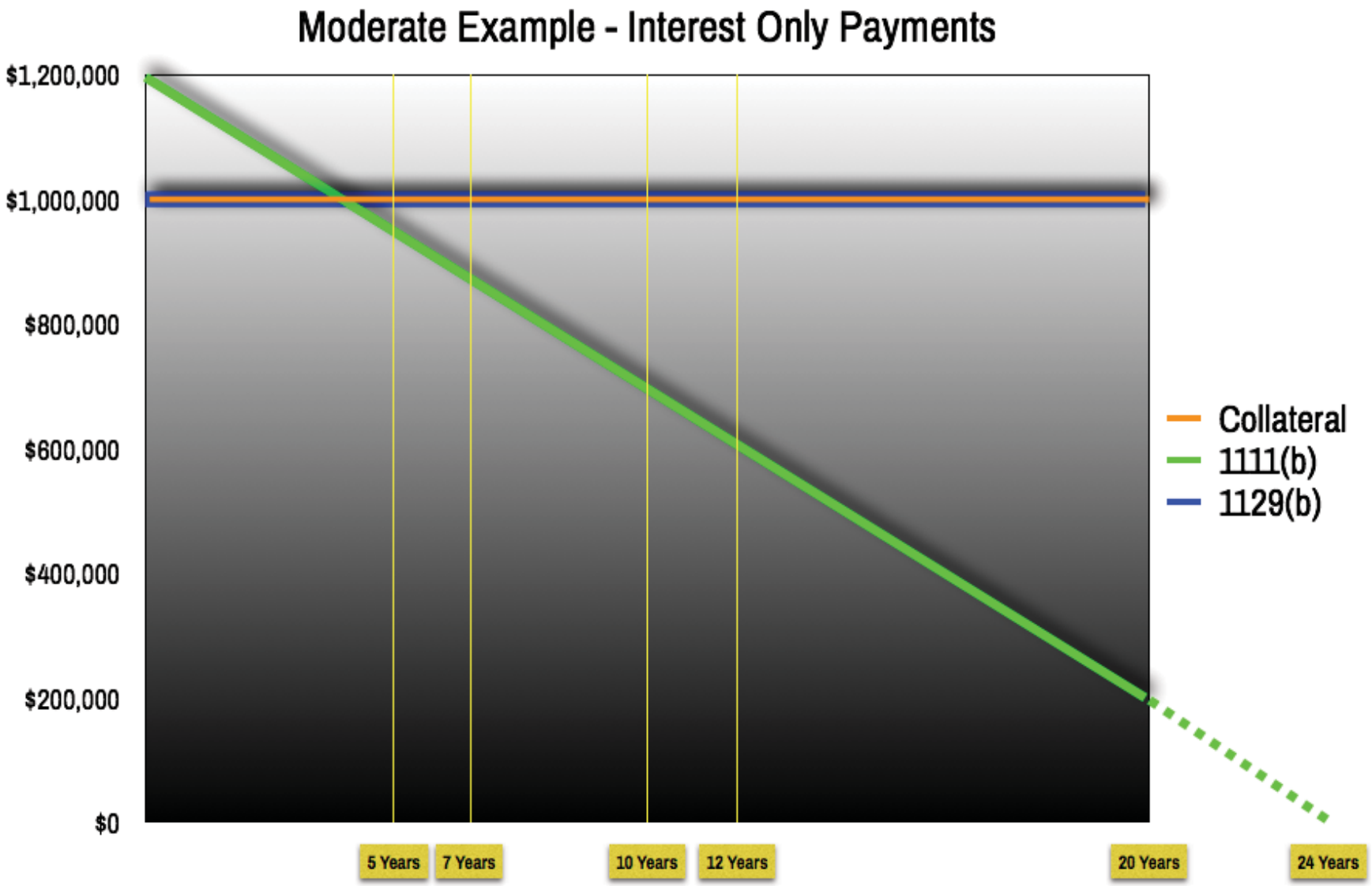
The Section 1111(b)(2) election is presented (as the green line) on this most aggressive basis: interest only payments with a balloon. Three variants are presented: where the unsecured debt represents 120% of the collateral value, where the unsecured debt represents 160% of the collateral value, and where the unsecured debt represents 200% of the collateral value. As is graphically demonstrated, where the Section 1111(b) treatment is reduced to interest only payments, the treatment becomes even more increasingly tenuous and protracted as the degree by which the creditor is undersecured increases.

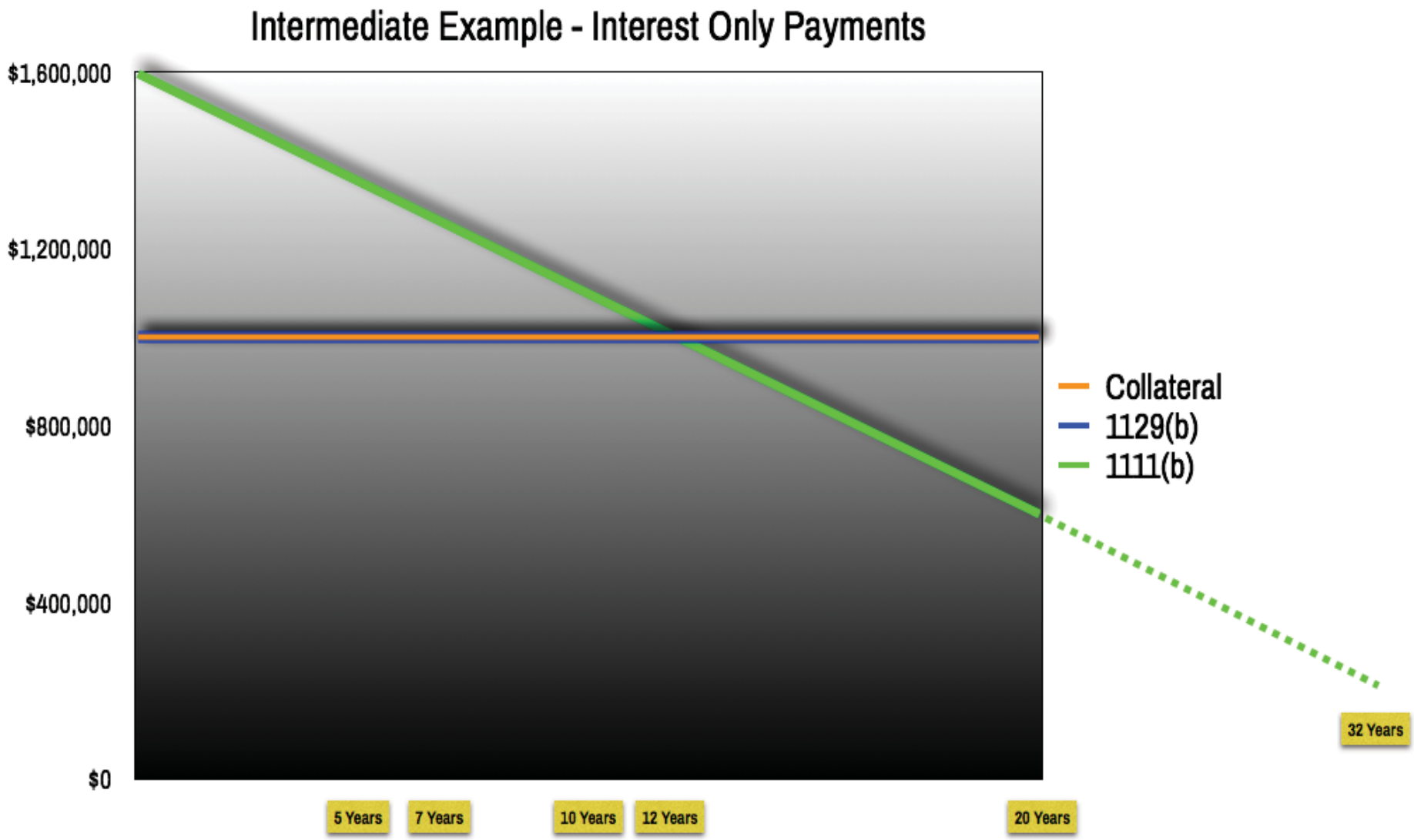
Moderate Example - Amortized Payments

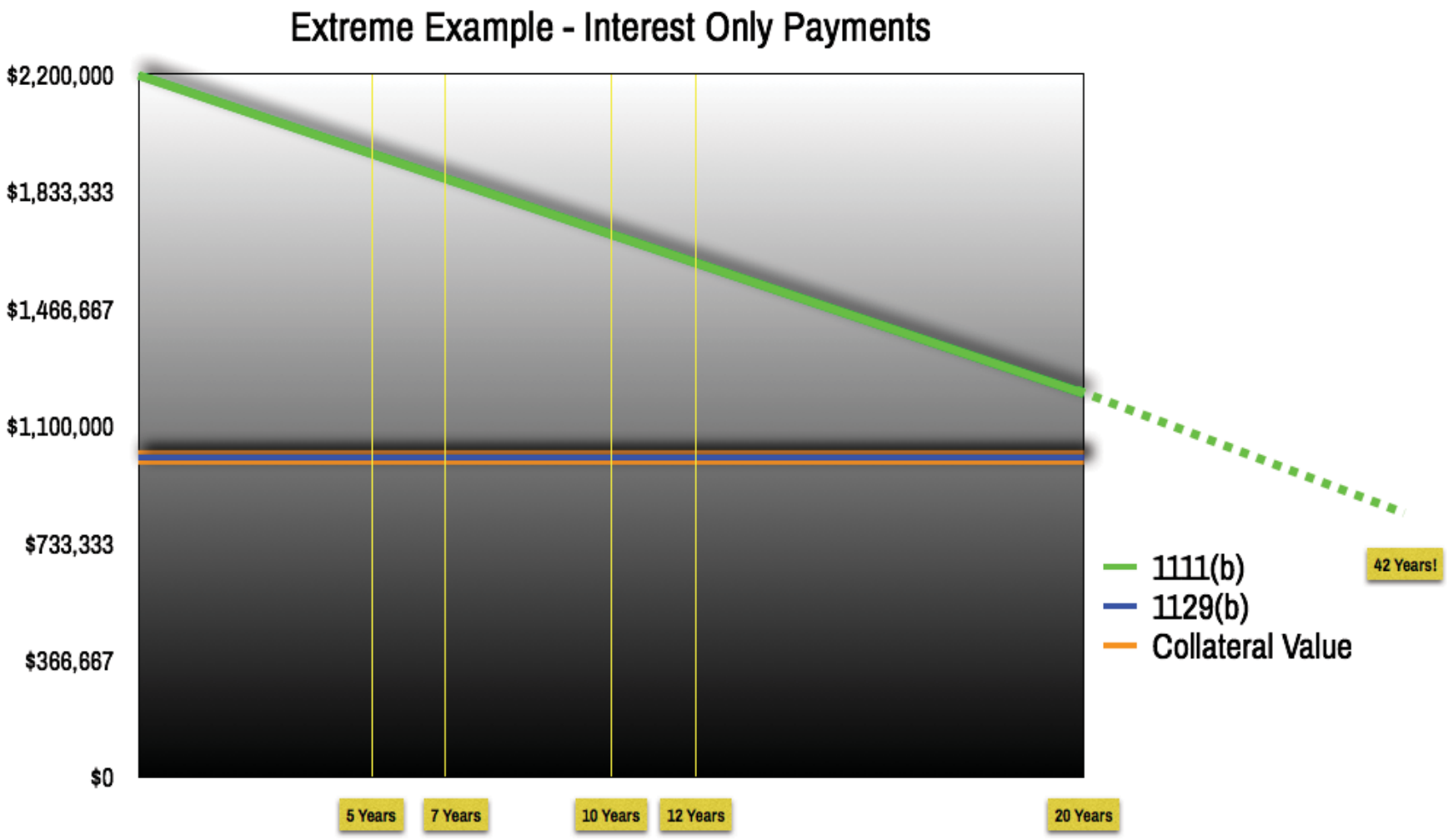



Intermediate Example - Amortized Payments
$1,600,000
$1,200,000
$800,000
$400,000
$0
5 Years
7 Years
10 Years
12 Years
20 Years
1129(b)
1111(b)
Collateral


Extreme Example - Amortized Payments
$2,200,000
$1,833,333
$1,466,667
$1,100,000
$733,333
$366,667
$0
5 Years
7 Years
10 Years
12 Years
20 Years
27.7 Years
Collateral
1129(b)
1111(b)


Moderate Example - Interest Only Payments
$1,200,000
$1,000,000
$800,000
$600,000
$400,000
$200,000
$0
5 Years
7 Years
10 Years
12 Years
20 Years
24 Years
Collateral
1111(b)
1129(b)


Intermediate Example - Interest Only Payments
$1,600,000
$1,200,000
$800,000
$400,000
$0
5 Years
7 Years
10 Years
12 Years
20 Years
32 Years
Collateral
1129(b)
1111(b)


Extreme Example - Interest Only Payments
$2,200,000
$1,833,333
$1,466,667
$1,100,000
$733,333
$366,667
$0
5 Years
7 Years
10 Years
12 Years
20 Years
42 Years!
1111(b)
1129(b)
Collateral Value