

In re Moore, 1990 WL 605862 (Bankr.S.D.Ga., May 31, 1990) (NO. 88-40105)

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Savannah Division

IN RE:)	Chapter 11 Case
)	Number <u>88-40105</u>
LEROY MOORE,)	
d/b/a MOORE HOMES)	FILED
)	at 10 O'clock & 56 A.M.
Debtor-in-Possession)	Date: 5-31-90

ORDER ON OBJECTION TO CONFIRMATION BY M. C. ANDERSON
AND CRAM DOWN OF CONFIRMATION OVER PLAN REJECTION
BY C & S BANK AND M. C. ANDERSON

Based upon the evidence presented at hearings on confirmation, **stipulations entered, and briefs submitted**, this court makes the following findings of fact and conclusions of law regarding the objection to confirmation filed by M. C. Anderson and request for cram down of confirmation over plan rejection by creditors.

Debtor, Leroy Moore, has been engaged in the business of home construction and real estate development since 1959. He has built single family residences, numerous apartment and condominium complexes and developed real estate subdivisions. Debtor retains an interest in many partnerships as either a general partner or a limited partner. Individually and in conjunction with the partnerships in which he retains an interest, debtor owns substantial investment real estate, both improved and unimproved.

Changing economic conditions caused in part by changes in the federal tax laws made portions of the investment real estate difficult to sell and develop, and the debtor was required to seek protection under Chapter 11 of Title 11, United States Code, on February 2, 1988. At the time the debtor filed his Chapter 11 petition, the debtor had approximately Eighteen Million and No/100 (\$18,000,000.00) Dollars in debt. The debtor, with the approval of the court, has surrendered or sold in the time since filing this petition more than Twelve Million and No/100 (\$12,000,000.00) Dollars of real estate interests held by him individually or through his interest in one of the many partnership entities. The debtor still retains an individual interest in real estate with a value in excess of Three Million and No/100 (\$3,000,000.00) Dollars and an interest in numerous partnerships which have substantial real estate holdings.

As of the date of the filing of the debtor's Chapter 11 proceeding, M. C. Anderson (hereinafter referred to as "Anderson") was a creditor holding a secured claim of Three Hundred Fifty-Four Thousand Five Hundred Seventy-Two and 25/100 (\$354,572.25) Dollars. The debtor's approved disclosure statement acknowledges a second in priority security deed to secure the claim of Anderson in the following properties as identified in the disclosure statement:

- a) parcel 2-B (13.53 acres adjacent to Waterford) and adjacent commercial tract of approximately 6.5 acres (hereinafter referred to as "Parcel 2-B and adjacent acreage").
- b) debtor's interest in 33.36 acres of the Wild Horn tract

(hereinafter referred to as "Wild Horn tract").

Regarding the above referenced properties the debtor's schedules, allowed Proofs of claim, and approved disclosure statement establishes the following first in priority security deed holders ahead of Anderson and amounts of claims:

a) as to parcel 2-B and adjacent acreage First Union Bank (hereinafter referred to as "First Union") held an initial claim of Four Hundred Seventy-Three Thousand Five Hundred Eighty and 33/100 (\$473,580.33) Dollars. As additional collateral, First Union held a first in priority security deed in property identified as Lot 21 Rose Dhu. I

b) as to the Wild Horn tract, Ameribank N.A. holds a claim of Six Hundred Forty-Eight Thousand One Hundred Forty-Three and No/100 (\$648,143.00) Dollars. As additional collateral, Ameribank N.A. holds a first in priority security interest in the undivided 60.5% interest of the debtor in Spanish Villa apartments, nine (9) unimproved lots in Statesboro, Georgia, and a second in priority security interest in property identified as parcels 10 & 11, Georgetown Subdivision.

Pursuant to notice, a hearing on the debtor's amended disclosure statement was held on May 2, 1989. The notice of hearing further provided that in conjunction with the hearing on the disclosure statement the court would determine the secured status of all parties claiming liens on property of the estate and would determine the value of such property pursuant to 11 U.S.C. §506. Anderson filed a written objection to the value of his collateral as set forth by the debtor in the proposed amended disclosure statement. As it pertains to parcel 2-B and adjacent acreage the value was determined at the hearing as Nine Hundred Forty Thousand and No/100 (\$940,000.00) Dollars. As it pertains to Lot 21 Rose Dhu

the value was determined at the hearing as Ninety-Six Thousand No/100 (\$96,000.00) Dollars. The order approving disclosure statement, approving values of assets, and establishing the priorities of liens on such assets was entered July 25, 1989.¹ No appeal was taken from that order.²

Subsequent to the determination as to value announced by the court at the close of the hearing on the amended disclosure statement held May 2, 1989, the debtor pursuant to 11 U.S.C. §554(a) proposed to abandon parcel 2-B and adjacent acreage as well as Lot 21 Rose Dhu. The debtor's motion to abandon recited that this court had determined that the subject property had an aggregate value of One Million Thirty-Six Thousand and No/100 (\$1,036,000.00) Dollars. The motion recited that the Rose Dhu property was encumbered by a debt deed in favor of First Union and that the remaining property sought to be abandoned was encumbered by a first priority deed in favor of First Union and a second priority deed in favor of Anderson. The debtor contended that the aggregate claims of these

¹The court finds the procedural delay between the hearing on the disclosure statement and entry of the order approving same to be inexplicable.

²Anderson filed on May 11, 1989, a notice of appeal on the oral ruling of the court as to the value of parcel 2-B and adjacent acreage given at the conclusion of the hearing held on May 2, 1990, and filed with the District Court a motion for an interlocutory appeal. On May 19, 1990, Anderson dismissed that appeal. No appeal was filed on the order approving the disclosure statement and values of assets, and establishing the priorities of liens which was entered on July 25, 1989.

two creditors totaled approximately One Million and No/100 (\$1,000,000.00) Dollars and that additional interest on these claims accrued at a rate in excess of Seven Thousand and No/100 (\$7,000.00) Dollars per month. The debtor concluded that the property was, in the opinion of the debtor, of inconsequential value and benefit to the estate and should be abandoned. Pursuant to the proposed abandonment, notice was mailed on May 15, 1989 to all creditors providing that unless an objection was filed not later than June 1, 1989 the court would approve the proposed abandonment without further hearing. On June 2, 1989, an order was entered approving the proposed abandonment and modifying the stay to the extent necessary to allow creditors to foreclose their security interest according to state law in parcel 2-B and adjacent acreage and Lot 21 Rose Dhu. On July 11, 1989, an amended order approving the abandonment was entered. Subsequent to the entry of this order, First Union foreclosed its security interest in these properties. Anderson did not bid on the property at foreclosure and received nothing from the sale of the property. In his proposed plan, the debtor proposes to retain his interest in many of the partnerships and investment real estate holdings. The plan also proposes that the claim of Anderson was satisfied by the aforementioned abandonment.

A class of creditors is deemed to have accepted a debtor's plan of reorganization, if after the solicitation of an acceptance

or rejection of the plan, "such plan has been accepted by creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . . that have accepted or rejected such plan." 11 U.S.C. §1126(c). The debtors plan consists of thirty-five (35) classes of creditors, each class containing only one (1) creditor with the exception of class thirty-three (33) which contains the derivative claims of the debtor's partnership liabilities and class thirty-four (34) which consists of the claims of unsecured creditors. All classes of creditors have accepted the plan, except class five (5) which consists of Anderson and class eight (8) which consists of C & S National Bank (hereinafter referred to as "C & S").

The plan proposes to allow C & S to retain its lien on its collateral and for the collateral to be sold and the claim of C & S satisfied by such sale within twelve (12) months from the effective date of the plan. C & S has filed no written objection to the confirmation of the plan, but rejected the plan during the balloting procedure. See, 11 U.S.C. §1126; Bankruptcy Rule 3018.

The conditions for confirmation of a plan of reorganization under Chapter 11 of the Bankruptcy Code can be found at 11 U.S.C. §1129.

Section 1129(a) includes thirteen conditions;
precedent to confirmation. These conditions are
as follows:

(1) The plan must comply with all applicable provisions of title 11;

(2) The proponent of the plan must comply with all applicable provisions of title 11;

(3) The plan must be proposed in good faith and not by any means forbidden by law;

(4) Any payment made or promised for services rendered or for costs and expenses incurred in connection with the case of the plan must be approved by or must be subject to approval by the court;

(5) The identity and affiliation of proposed directors, officers or voting trustees must be disclosed as well as the identity of an affiliate of the debtor participating in a joint plan or a successor to the debtor under the plan. The proposed appointments of directors, officers, or voting trustees must be consistent with both the interest of creditors and equity security holders and with public policy. In addition, the proponent of the plan must disclose the identity of any "insider" of the debtor that will be employed or retained by the reorganized debtor and the nature of compensation which will be paid to such person;

(6) If the debtor is subject to governmental regulation and the plan proposes to alter rates over which a regulatory commission has jurisdiction, such commission must have approved such rates or any proposed rate change must be conditioned on such approval;

(7) With respect to each impaired class, the class must unanimously accept the plan or the class must receive under the plan at least what such class would receive in a liquidation under Chapter 7 of the Code. If, however, the class exercises the section 1111(b)(2) election, the class must receive property with a present value equal to the value of the class' secured claims;

(8) Each class must accept the plan or be unimpaired;

(9) Unless the holder of a priority claim agrees to less favorable terms, administrative claims entitled to priority must be paid in cash on the effective date of the plan; employee claims, pension benefit claims, and consumer claims entitled to priority must be either paid in cash on the effective date of the plan or must be paid in full over time according to

terms acceptable to the requisite majority of

the particular class: tax and customs claims entitled to priority must be paid in full but payments in respect of such claims may be extended over a period not to exceed six years from the date of assessment of such claims as long as the present value of the payments as of the effective date of the plan equals or exceeds the amount of those claims;

(10) If a class is impaired under the plan, at least one impaired class of claims must accept the plan;

(11) The plan must be feasible;

(12) Either the quarterly fees based on disbursements for the quarter have been paid or the plan makes satisfactory provision for the payment of such fees; and

(13) To the extent the debtor is required to continue paying retiree benefits under its original agreement or as it may have been modified pursuant to section 1114, the plan carries forward the obligation for the balance of the time for which the debtor is so obligated.

5 Collier on Bankruptcy ¶1129.01(c)(1) (L. King 15th ed.1989).

Although the provisions of section 1129(a)(7) and (8) have not been met, the debtor has requested that confirmation of the plan proceed under the cram-down provision of 11 U.S.C. §1129(b). The plan may be confirmed under section 1129(b) if the plan satisfies section 1129(a)(10) and the cram-down standards set forth in section 1129(b). 5 Collier on Bankruptcy, supra. Section 1129(b)(1) requires that a plan be "fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. §1129(b)(1). Section 1129(b)(2) then sets forth requirements which must be met for a plan to be

"fair and equitable".³ As to the treatment of the claim of C & S

³11 U.S.C. §1129(b) (2) provides:

For the purposes of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides -

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totalling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property.

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds

under the plan, the plan is fair and equitable. The plan proposes for the debtor to sell the collateral securing the claim of C & S and to satisfy that claim in full within one year after the effective date of the plan. If the claim is not satisfied within one year of the effective date of the plan, the plan would allow C & S to pursue its remedies under state law as to the collateral.

C & S would retain the lien on the collateral and would receive under the plan deferred cash payments totaling the amount of the claim or the indubitable equivalent, the property itself. See Sandy Ridge Development Corp. v. Louisiana National Bank (In re: Sandy Ridge Development Corp.), 881 F.2d 1346 (5th Cir. 1989) (property is the indubitable equivalent of itself), reh'g denied, 889 F.2d 663 (5th Cir. 1989). Therefore, as to the claim of C & S, the plan may be confirmed over plan rejection by C & S. 11 U.S.C. §1129(b).

The rejection and objection of Anderson poses a far more difficult problem. In rejecting the proposed plan and objecting to

under clause (i) or (iii) of this subparagraph; or (iii) for the realization by such holders of the indubitable equivalent of such claims.

its confirmation, Anderson contends that:

1) Since he received nothing as a result of the foreclosure sale of parcel 2-B and adjacent acreage under the plan he will receive nothing, neither payment of his claim nor the indubitable equivalent of his claim; and

2) the plan as proposed is not fair and equitable as it treats creditors similarly situated differently and unfairly discriminates against him.

In response, the debtor maintains that the abandonment of the collateral based upon the final determination by this court pursuant to 11 U.S.C. §506 of the value of the collateral provided Anderson with the indubitable equivalent of his claim, property securing his claim greater in value than the amount of his claim.

As was previously noted, property is the indubitable equivalent of itself. Sandy Ridge Development Corp., supra at 1350. Distribution of estate property, at values properly fixed by the bankruptcy court, to nonconsenting creditors under a liquidating plan satisfies the "indubitable equivalent" provision of 11 U.S.C. §1129(b) (2) (A) (iii). See, In re: Moore, Ch. 11 Case No. 88-40105, Slip. op. at 4 (Bankr. S.D. Ga. filed October 5, 1989). "Abandonment of the collateral to the creditor would clearly satisfy indubitable equivalence, as would a lien on similar property." 124 Cong. Rec. H11, 103 (daily ed. Sept, 28, 1978) (statement of the

sponsors of Pub. L. No. 95-598); 124 Cong. Rec. S17, 420 (daily ed. Oct. 6, 1978) (statement of the sponsors of Pub. L. No. 95-598). See also 5 Collier on Bankruptcy ¶1129.03(c) (L. King 15th ed. 1989).

The property abandoned by the debtor was valued by the court pursuant to 11 U.S.C. §506(a)⁴ at a value in excess of the

aggregate total debt owed First Union and Anderson. Anderson,

⁴11 U.S.C. §506(a) provides:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditors interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any

hearing on such disposition or use or on a plan affecting such creditor's interest.

through his counsel, appeared at the valuation hearing on the property to be abandoned. The valuation hearing was held in conjunction with the hearing on the disclosure statement. The notice sent out to Anderson and all other parties in interest provided that at the time of the hearing on the amended disclosure statement the court would also determine the secured status of all parties claiming liens on property of the estate and determine the value of such property pursuant to 11 U.S.C. §506. Anderson filed a written objection to the value of his collateral set forth by the debtor in the disclosure statement, and a hearing was held in which the court found the value of the collateral on which First Union held a first priority lien and Anderson held a second priority lien to be Nine Hundred Forty Thousand and No/100 (\$940,000.00) Dollars. The notice of the debtor's intention to abandon the property that went out to all parties in interest included the values of the property as established by the court. The order approving the abandonment was entered. No evidence has been presented to demonstrate that any change in the value of the property occurred between the time that the value was determined and the time of abandonment.

The fact that the property sold at a foreclosure sale for a sum sufficient to pay only the claim of First Union is irrelevant.

The order approving the abandonment clearly satisfied the indubitable equivalence requirement for confirmation. Anderson failed to protect his property interest at the foreclosure sale, and he must bear the burden of that decision, not this estate. Based upon the determination of the value of the property abandoned the subsequent foreclosure sale resulted in over Four Hundred Thousand and No/100 (\$400,000.00) Dollars of value lost. This loss must be born by Anderson. Following the determination of the value of the property pursuant to §506, Anderson could have appealed.⁵ Anderson could have contested the abandonment application, but did not. When faced with the abandonment based upon the prior determination of value, Anderson could have released his security interest in the property which would have prevented abandonment; and with the final determination of value, upon liquidation of the property over time by the debtor, the estate and the unsecured creditors under the plan of liquidation would have received the benefit of the equity cushion between the debt due First Union and the value determined. Anderson chose to retain his security interest in the property and ride the

security interest to foreclosure following the abandonment of the

⁵Anderson filed a notice of appeal of the ruling by this court on the value of the collateral securing his claim, and filed a motion for interlocutory appeal with the District court, but subsequently dismissed the appeal. See note 2 and accompanying text, supra.

estate's interest and must bear the consequences of that decision. Anderson was provided a full and fair opportunity to litigate the value of his collateral prior to the abandonment and was given notice of that value at the time of the abandonment. The objection to valuation was determined against Anderson at the disclosure statement hearing. No objection to the value was made at the time of the abandonment. No objection was made to the proposed abandonment. The value determined by the court at the time of the abandonment was sufficient to satisfy the claim of both First Union and Anderson. As the value was sufficient to satisfy those claims, Anderson, through the abandonment, will have received as of the date of confirmation, the indubitable equivalent of his claim against the debtor as required by 11 U.S.C. §1129(b)(2)(A)(iii).

Having determined that Anderson will receive the indubitable equivalent of his claim, the plan meets the condition that the plan be fair and equitable. This court must now determine that the plan does not discriminate unfairly. 11 U.S.C. §1129(b)(1). See also Sandy Ridge Development Corp. v. Louisiana National Bank (In re: Sandy Ridge Development Corp.) 889 F.2d 663 (5th Cir. 1989). Specifically, the court must determine whether the plan unfairly discriminates in its treatment of Anderson in relation to the plan's treatment of other similarly situated creditors. In order to meet the confirmation criteria of section

1129, the plan must not only provide that a dissenting class of creditors receive fair and equitable treatment, but must also assure that the plan allocates value to the class in a manner consistent with the treatment afforded to other classes with similar legal claims against the debtor. 5 Collier on Bankruptcy ¶1129.03(b) (L. King 15th ed. 1989). Anderson contends that Ameribank holds a claim against the debtor similar to the claim held by him, but is being allowed to look to all of its collateral to satisfy the obligation due Ameribank should the debtor fail to satisfy the claim by cash payment.

Anderson and Ameribank are not similarly situated creditors. Ameribank holds a second priority deed to secure debt on real property of the estate known as Parcels 10 and 11 Georgetown Subdivision, and Bankers First, holds the first in priority security deed on those parcels. Value of parcels 10 and 11 Georgetown Subdivision was determined at the May 2, 1989 hearing to be One Million Four Hundred Ninety-Five Thousand and No/100 (\$1,495,000.00) Dollars. The allowed secured claim of Bankers First is Four Hundred Thirty-Seven Thousand Three Hundred Sixty-Seven and 83/100 (\$437,367.83) Dollars and the allowed secured claim of Ameribank is Seven Hundred Forty-Four Thousand Three Hundred Eighty-Three and No/100 (\$744,383.00) Dollars, for a total indebtedness secured by parcels 10 and 11 Georgetown Subdivision of One Million One Hundred Eighty-One Thousand Seven Hundred Fifty and 83/100 (\$1,181,750.83)

Dollars. The estate has Three Hundred Thirteen Thousand Two Hundred Forty-Nine and 17/100 (\$313,249.17) Dollars of equity in these properties which would be of substantial benefit to the unsecured creditors. This property is not burdensome and of inconsequential value and benefit to the estate, and the abandonment of this property securing the indebtedness due Bankers First and Ameribank could not be approved by the court. See 11 U.S.C. §554(a).

Ameribank is participating in the debtor's reorganization plan and has accepted the plan. The plan proposes to pay Ameribank's claim within eighteen (18) months after the effective date of the plan from the proceeds derived from the disposition of Ameribank's collateral. The plan also provides, "If, at the end of such 18-month period, Ameribank's claim has not been paid in full, the debtor shall surrender collateral to the Bank with a value, determined as of the time of surrender, not less than the Bank's outstanding claim (emphasis added)." Anderson maintains that to allow Ameribank the opportunity to dispute the value of the property at the time of surrender also unfairly discriminates against his claim. However, if the debtor is forced to surrender the collateral to Ameribank, that surrender will not occur until eighteen (18) months after the effective date of the plan and more than two and one-half (2 1/2) years after the determination of value under 506 at the hearing on the disclosure statement, May 2, 1989. To force the parties to accept the transfer of property in satisfaction of

claim at values established more than two and one-half (2 1/2) years before would not be fair and equitable to the creditor or the debtor. Property values may have changed over the passage of time or due to changing circumstances. Anderson's collateral, however, was abandoned by the debtor soon after the valuation hearing. The notice of the debtor's intention to abandon the property included the values of the property as established by the court. Anderson did not object to the abandonment. At the point of confirmation and based upon determination of value of collateral made at the May 2, 1989 hearing, Anderson and Ameribank are not similarly situated creditors. The disparity of treatment under the plan is warranted.

Anderson also contends the plan unfairly discriminates against him because other creditors which were secured by second in priority liens on various real property, are being allowed to participate in the debtor's plan of reorganization as an unsecured creditor where the collateral securing the debt owed them had been surrendered to the first priority lienholder or abandoned by the debtor. The debtor's plan proposes to allow twelve (12) creditors formerly secured by second priority liens on debtor's real property to participate under the plan as unsecured creditors.

COASTAL FLOOR

Coastal Floor held a second priority deed to secure debt on three parcels of the debtor's real property known as Lot 2,

Colony, Lot 28, Colony, and Lot 67, Georgetown Townhomes. California Federal Savings and Loan Association (hereinafter referred to as "California Federal") held the first priority security interest in Lot 2 and 28, Colony. California Federal moved for relief from the automatic stay of 11 U.S.C. §362 in order to foreclose on its security interest in Lots 2 and 28, Colony as well as other collateral held by it to secure indebtedness owed by the debtor. On December 21, 1988, this court entered an order granting California Federal relief from stay and allowing California Federal an unsecured deficiency claim in the amount of Sixty-Thousand and No/100 (\$60,000.00) Dollars. The order determined that the collateral held by California Federal to secure its indebtedness was of insufficient value to fully satisfy the claim of California Federal. No value was available to satisfy the claim of Coastal Floor from these two (2) lots.

Federal National Mortgage Association (hereinafter referred to as "FNMA") held the first lien on Lot 67, Georgetown Townhomes, on which Coastal Floor had a second priority lien. FNMA also held a first priority security interest in Lot 53, Georgetown Townhomes. On February 16, 1989, the debtor filed his notice of intention to abandon both of the lots in which FNMA held a first priority security interest. The debtor's notice included the following language, "Comes now the Debtor-in-Possession . . . and, . . . abandons [Lot 53, Georgetown Townhomes and Lot 67, Georgetown

Townhomes] in full satisfaction of all obligations of the debtor to the Federal National Mortgage Association, its successors and assigns." The notice of the abandonment noted that the debtor estimated the "aggregate value of the property subject to the lien of [FNMA]" to be One Hundred Four Thousand and No/100 (\$104,000.00) Dollars and the claim to be Ninety-One Thousand Five Hundred and No/100 (\$91,500.00) Dollars. The notice of the abandonment referenced the second priority lienholders and their claims, but included no language to indicate that the claims of those second priority lienholders were to be satisfied by the abandonment. Notice of the debtor's intention to abandon these lots in satisfaction of the debt owed FNMA was sent to all parties in interest. As no party in interested objected, an order approving the abandonment of these properties was entered on June 2, 1989. Again, the property was of insufficient value to satisfy the claim of Coastal Floor which was Forty-Three Thousand and No/100 (\$43,000.00) Dollars and the debtor's intention to satisfy only the claim of the first lienholder by the abandonment was clear by the notice of abandonment.

EAST COAST INSULATION

East Coast Insulation held junior materialmen's liens on several parcels of real property known as Lot 9, Sugar Mill, Lots 3-8 Hunters Greene, and Lot 8, Rose Dhu. California Federal held

the first Lien on lots 3-8 Hunter's Greene, and the court determined that California Federal was entitled to an unsecured deficiency claim in this case after the debtor surrendered all collateral securing his indebtedness to California Federal. The value of the collateral securing the claim of California Federal, therefore, has been determined by the court to be of an insufficient value to fully secure the claim of California Federal, leaving East Coast Insulation with an unsecured claim.

Anchor Mortgage Resources, Inc. (hereinafter referred to as "Anchor") held the first priority lien on Lot 9, Sugar Mill. Anchor filed a motion for relief from stay and alleged that the debtor had no equity in the property. On August 4, 1988, after notice to all parties-in-interest, the court entered an order granting Anchor relief from stay in order to foreclose on its security interest in Lot 9, Sugar Mill and Lot 19, Sugar Mill in full satisfaction of its claim. The motion for relief and the order granting such relief includes no statement which could reasonably be construed to indicate that such property had a value sufficient to cover all second priority liens or that such an action was intended. The granting of the motion for relief in which Anchor alleged that the debtor had no equity in the property provided no relief to the second lienholder, East Coast Insulation. Only Anchor obtained relief from stay to foreclose on the property.

Liberty Savings Bank, FSB (hereinafter referred to as

"Liberty") held the first priority lien on Lot 8, Rose Dhu, and moved for relief from stay to allow it to foreclose on the lot and other collateral securing its claim against the debtor. The motion for relief from stay alleged that the outstanding indebtedness due Liberty was Seventy-Five Thousand Seven Hundred Seventy-Three and 69/100 (\$75,773.69) Dollars and that the debtor had no equity in the property. In response to the motion for relief from stay, the debtor filed a motion to abandon the property. The notice of the debtor's intention to abandon Lot 8, Rose Dhu, and the other collateral (identified in the notice of abandonment as Lot 2 Georgetown Neighborhood Shopping Area #2) specified that the debtor was abandoning the "property in full satisfaction of all obligations of the debtor to the Liberty Savings Bank, its successors and assigns." Notice of the abandonment was sent to all parties-ininterest, and no objections were filed. On June 2, 1989, the court entered an order approving the abandonment and granting Liberty relief from stay to permit it to foreclose on the property. The intention of the debtor's motion to abandon Lot 8, Rose Dhu in full satisfaction of only the claim of Liberty was clear from the motion. FRIEDMAN, HASLAM, WEINER, GINSBERG, SHEAROUSE & WEITZ

Friedman, Haslam, Weiner, Ginsberg, Shearouse, & Weitz held a claim against the debtor which was secured by a junior lien on Lot 14 Oglethorpe Village. Bankers First Federal Savings and Loan Association (hereinafter referred to as "Bankers First") held

the first priority lien on this property. Bankers First also held as collateral on its claim against the debtor a security interest in twenty (20) other parcels of property. On December 23, 1988, Bankers First filed a motion for relief from stay alleging that the debtor had no equity in the property securing its claim and that it lacked adequate protection. On January 24, 1989, the court entered an order granting Bankers First relief from stay as to all of its collateral except two parcels, Lots 10 and 11, Georgetown Subdivision, which the debtor retained.⁶ Bankers First was permitted to foreclose on all its collateral except Lots 10 and 11, Georgetown Subdivision, in full satisfaction the debtor's obligations secured by the collateral, and the order entered granting such relief so specifies. The second priority lienholder did not receive relief from stay to exercise its rights against the collateral.

JOHNSON EXTERMINATORS

Johnson Exterminators held a second priority lien on a parcel of property known as 501 Kings Grant Subdivision. The first

⁶By agreement between the debtor and Bankers First, the debtor was permitted to retain Lots 10 and 11, Georgetown Subdivision, until December 31, 1990, in order to market the lots in an effort to sell them. The proceeds of any sale of Lots 10 and 11 Georgetown Subdivision, were to be paid to Bankers First in an amount sufficient to satisfy in full the debt to Bankers First secured by the lots. All other obligations due Bankers First were satisfied by the granting of relief from stay and subsequent foreclosure on all other collateral held by Bankers First.

priority lien on the property was held by NCF Mortgage Company d/b/a Prime Lending, Inc. (hereinafter referred to as "Prime Lending"). Prime Lending filed a petition for attorney fees pursuant to 11 U.S.C. §506(b) as an element of its secured claim. In response to the, petition for attorney fees, the debtor filed a notice of his intentions to abandon the property known as 501 Kings Grant Subdivision in full satisfaction of the claim of Prime Lending as the claim for attorney fees substantially consumed all of the debtor's equity in the property. After notice and hearing, the court entered an order on November 17, 1988, approving the abandonment of the property "in full satisfaction of the claim of NCF Mortgage Corporation d/b/a/ Prime Lending, Inc. . . . after it being determined that the property would be of inconsequential value to the estate if the attorney's fees claim of NCF Mortgage Corporation d/b/a Prime Lending, Inc. were granted." The order makes no reference to the satisfaction of junior lienholders, and the plan proposes to allow Johnson Exterminators to participate as an unsecured creditor under the plan.

LOWE'S OF GEORGIA, INC.

Lowe's of Georgia, Inc. held a second priority lien on Hunters Pointe Townhomes, a development of single family, semidetached housing. The first priority lien secured the claim of Connecticut National Bank (hereinafter referred-to as "Connecticut

National") which total One Million One Hundred Twenty-Seven Thousand Four Hundred Sixty-Three and 84/100 (\$1,127,463.84) Dollars as of May 1, 1988. Connecticut National filed a motion for relief from stay as to Hunters Pointe, and the debtor stipulated that there was, little or no equity in the property. The court, however, on October 14, 1988, entered an order denying the motion for relief despite the lack of equity on the basis that the property was essential to the debtor's Chapter 11 estate for a successful reorganization. Connecticut National appealed the order denying it relief from stay to the District Court. The parties reached a compromise on the appeal, and the District Court remanded the appeal to this court for the purpose of notice to creditors regarding the proposed settlement. Notice of the proposed settlement was sent to all parties in interest, and no objection being filed, the court approved the settlement by order dated March 13, 1989. The settlement provided for Connecticut National to be granted relief from stay to foreclose on Hunters Pointe in full satisfaction of its claim. No reference to junior lienholders is made in the order granting Connecticut National relief from stay.

SYDNEY PYLES PLUMBING

Sydney Pyles Plumbing held second priority liens on certain real property known as Lots 19-23, Oglethorpe Village. The first lien on the property was held by First Federal Savings Bank

of Brunswick (hereinafter referred to as "First Federal.") First Federal filed a motion for relief from stay in which First Federal alleged that the property was subject to deterioration, waste, and vandalism and that the debtor had no equity in the property. On March 23, 1989, the court entered an order granting First Federal relief from stay to foreclose on its collateral on the condition that the collateral be accepted in full satisfaction of its claim. No reference was made to the claims of junior lienholders or of their claims being satisfied by the relief from stay granted to First Federal.

SAVANNAH CONCRETE COMPANY

Savannah Concrete Company (hereinafter referred to as "Savannah Concrete") held junior liens on real property known as Lots 12 and 13, Oglethorpe Village. Bankers First held the first lien on these lots and obtained relief from stay to foreclose on these lots and its other collateral in full satisfaction of the indebtedness due it by debtor. Relief from stay was granted to Bankers First as a result of a motion for relief filed by Bankers First. No reference to the satisfaction of the claim of Savannah Concrete was made in the order granting relief from stay or in the motion.

SLOAN ELECTRIC COMPANY

The debtor's proposed plan of reorganization proposes to permit Sloan Electric Company (hereinafter referred to as "Sloan Electric") to participate as an unsecured creditor under the plan. Sloan Electric has a first priority lien on Lots 10 and 20, Forest Heights Subdivision. The hearing on the disclosure statement and §506(a) valuation established the value of these two lots to be Eight Thousand Seven Hundred and No/100 (\$8,700.00) Dollars each, and the debtor proposes to surrender these lots at the time of confirmation to Sloan Electric for a credit of Seventeen Thousand Four Hundred and No/100 (\$17,400.00) Dollars against the outstanding indebtedness due Sloan Electric.

Sloan Electric also holds a second priority lien on several additional parcels of real property known as Lots 1 - 8 Audubon Park and Lot 53, Georgetown Townhomes. Lots 1, 2, 3, and 8, Audubon Park secured a first priority lien held by Bankers First and were included in the order granting Bankers First relief from stay to foreclose on its collateral. The motion for relief alleged that the debtor had no equity in the collateral held by Bankers First. Lots 4-7 secured a first priority lien held by First Federal. By order entered June 13, 1988, the court granted First Federal relief from stay to foreclose on Lots 4-7 Audubon Park by allowing the debtor a credit of Fifty-Five Thousand and No/100 (\$55,000.00) Dollars per lot against his outstanding indebtedness. First Federal foreclosed on its security interest in these lots, and eventually foreclosed on other collateral in full satisfaction of

its claim against the debtor. In its motions for relief First Federal alleged that the debtor had no equity in the property, and the court granted First Federal the relief sought.

Sloan Electric also held a second priority lien on Lot 53, Georgetown Townhomes. FNMA held the first priority lien on Lot 53, Georgetown Townhomes, and the lot was abandoned by the debtor in full satisfaction of the claim of FNMA. The motion to abandon and the order approving such included no language to suggest that the value of the lot was sufficient to satisfy the claim of Sloan Electric or was intended to satisfy such a claim.

TRUSSELS HEATING AND AIR

Trussels Heating and Air had a junior lien on Lot 37, The Colony. California Federal has been allowed an unsecured deficiency claim in the amount of Sixty Thousand and No/100 (\$60,000.00) Dollars in the debtor's Chapter 11 proceeding after foreclosing on all of its collateral.

WICKES LUMBER

The debtor's plan also proposes to allow Wickes Lumber, which held a second priority lien on Lots 463 and 464 Kings Grant, to participate as an unsecured creditor under the plan. Georgia

Federal Savings Bank (hereinafter referred to as "Georgia Federal") held the first lien on these lots. The debtor filed on August 11, 1988, a motion to abandon these lots in full satisfaction of the claim of Georgia Federal. In the motion to abandon the debtor-in-possession indicated that the abandonment was the result of negotiations with Georgia Federal which had agreed to waive any claim in the Chapter 11 proceeding as consideration for the abandonment. Notice of the motion to abandon went to all parties-in-interest and on September 13, 1988, the court entered an order in which "the debtor's abandonment of the above described lots (Lots 463 and 464, Kings Grant Subdivision] in full satisfaction of the debt of Georgia Federal Savings Bank . . . [was] approved." No reference to the claim of Wickes Lumber was made in the motion to abandon or in the order approving the abandonment.

LEROY MOORE, JR.

Two (2) creditors, Gaster Lumber and Hughes-Ball also held junior liens on other parcels of real property belonging to the debtor. Leroy Moore, Jr., was the guarantor of these two obligations and paid each one without taking an assignment of the security interest in the real property. In doing so, the claim of Leroy Moore, Jr. as to each of these debts was reduced to an unsecured claim, and the plan proposes to allow him to participate as an unsecured creditor.

Each order approving the debtor's motion to abandon

property clearly indicates that only the property securing the claim of First Union and the claim of Anderson had a value sufficient to

satisfy the claims of both the first priority lienholder and the second priority lienholder. The debtor's motion to abandon Parcel 2-B and adjacent acreage, and Lot 21, Rose Dhu, clearly indicated that the debtor believed the property to be of sufficient value to satisfy the claims of both First Union and Anderson. Anderson did not object to the abandonment. The motions to abandon all other property filed by the debtor referenced only the debt owed the first priority lienholder and made the allegation that the debtor had no equity in the property. No reference was made to "total debt" or "aggregate debt" which could be construed to imply that such a conclusion included the debt owed to junior lienholders. The orders approving each abandonment constitute a finding that the property was of inconsequential value to the estate because of the debt owed to the first lienholder, except the order approving the abandonment of Parcel 2-B and adjacent acreage, and Lot 21, Rose Dhu. Junior lienholders on those other properties, therefore, had nothing more than an unsecured claim, and the debtor's plan proposes to treat their claim as such an unsecured claim.

The motion to abandon Parcel 2-B and adjacent acreage, and Lot 21, Rose Dhu, includes a clear statement that the "aggregate claims of these two creditors [Anderson and First Union] total

approximately One Million and No/100 (\$1,000,000.00) Dollars . . .
. . . " The motion also included an accurate statement of the value
of the collateral as established by this court only three days prior

to the filing of the motion, a value in excess of the aggregate
claims of Anderson and First Union. The intention of the debtor to
satisfy the claims of both the first priority lienholder and the
second priority lienholder by providing the two creditors with the
indubitable equivalent of their claims, the property itself, was
clear. Anderson did not object to the abandonment, and the
abandonment was approved. The debtor's plan, therefore, does not
propose to discriminate unfairly against Anderson and other
similarly situated creditors as none of the other creditors holding
second priority liens on the debtor's property had liens on property
with a judicially determined value sufficient to satisfy the claims
of both the first priority lienholders and the second priority
lienholders. Those creditors with junior liens on property
determined to be of insufficient value to satisfy their claims, did
not receive the indubitable equivalent of their claim by the
abandonment of their collateral. Only the collateral of Anderson
had a value sufficient to satisfy the claim of both the first
priority lienholder and the second priority lienholder. Anderson
failed to protect his interest in that collateral or surrender his
security interest in the collateral to the estate for the benefit

of the unsecured creditors, and if allowed to participate as an unsecured creditor under the plan or to look to other collateral to satisfy his claim, Anderson's inaction would result in a substantial loss of equity to the estate. Basic principles of equity mandate

that the unsecured creditors and the estate not bear the burden of the loss of equity caused by Anderson's inaction or failure to protect this interest in his collateral, parcel 2-B and adjacent acreage.

In each instance in which the first lienholder was granted relief from stay, only that first lienholder obtained such relief. Each motion for relief by a first lienholder included an allegation that the debtor lacked any equity in the property, and the order granting such relief constituted a finding that the debtor lacked any equity in those properties. No reference to the claims of junior lienholders was made in any of those motions or orders, and the motions and orders could not reasonably be construed to infer that the claims of those junior lienholders were being included. Only the first priority lienholder was granted relief from the automatic stay to foreclose its interest in the collateral. The second priority lienholders were not included in the motions for relief or the orders granting them. Additionally, California Federal has an allowed unsecured deficiency claim of Sixty Thousand and No/100 (\$60,000.00) Dollars, which constitutes a judicial

determination that its collateral was of insufficient value to satisfy its claim without any reference to junior lienholders.

Although Anderson would have had to satisfy the debt due First Union in order to protect his second priority security interest in the property, the plan does not discriminate unfairly

against him. Anderson could have waived his second priority security interest in all of his collateral securing his claim prior to the entry of the order approving the abandonment of Parcel 2-B and adjacent acreage and participated as an unsecured creditor from the beginning of the debtor's reorganization efforts to the full extent of his pre-petition claim.⁷ Anderson rejected that opportunity, but instead chose to remain in the case as a secured creditor. In July, 1988, First Union moved for relief from stay to foreclose on the collateral in which Anderson held a second priority security interest. Anderson appeared at that hearing in support of First Union's motion for relief from stay requesting that he and First Union be permitted to foreclose on the collateral.⁸ Anderson

⁷The debtor's counsel maintained in his brief to the court that at least one of the creditors formerly holding a claim secured by a third priority security interest in the debtor's beach house had waived his secured status and was participating as an unsecured creditor. The debtor's counsel also noted that all creditors were given that option. No evidence or argument to controvert that position has been offered.

⁸The court denied this motion for relief filed by First Union because of the debtor's equity in the property. First Union filed an appeal of that order, but subsequently dismissed

did not object to the abandonment of the collateral by the debtor or to the subsequent relief from stay which permitted First Union to foreclose on the property. The abandonment of property determined to have value in excess of One Million and No/100

(\$1,000,000.00) Dollars to satisfy the claim of First Union of only Six Hundred Thousand and No/100 (\$600,000.00) Dollars could not have been approved by the court under the provisions of 11 U.S.C. §554. The intention to satisfy the claim of First Union and of Anderson was clear from the abandonment. Anderson will receive the indubitable equivalent of his claim at the time of confirmation by the abandonment and is receiving fair and equitable treatment under the plan. The plan does not unfairly discriminate against Anderson.

The debtor's plan proposes to pay all unsecured creditors in full within five (5) years after the effective date of the plan, and if such payment is not made within that time, the debtor proposes to transfer his interests in Georgetown Associates partnership to co-trustees in satisfaction of any remaining unsecured claims, with the debtor to remain as the residuary beneficiary. The debtor's total unsecured debt is One Million Seven Hundred Ninety Thousand One Hundred Fifty-Eight and 11/100 (\$1,790,158.11) Dollars. The debtor's interest in the Georgetown

the appeal.

Associates partnership was valued by the court at the time of the approval of the debtor's disclosure statement at Two Million Two Hundred Forty-One Thousand Six Hundred Ninety-One and 90/100 (\$2,241,691.90) Dollars, more than sufficient to satisfy the claims of the unsecured creditors.

The debtor's plan, however, proposes to allow all partnership creditors of the debtor to participate as unsecured

creditors under the debtor's plan if the partnership assets and other responsible partners do not satisfy the claims of these creditors. Anderson contends that because many of the partnership creditors will be participating in the debtor's plan as an unsecured creditor, the debtor's interest in the Georgetown Associates partnership will be insufficient to pay all of the unsecured claims in full. The plan, therefore, according to Anderson, does not comply with the provisions of 11 U.S.C. §1129(b) (2) (B) since the debtor plans to retain his equity interest in the partnerships and all property not assigned for the satisfaction of debt.⁹ Anderson

⁹11 U.S.C. §1129(b) (2) (B) provides:

(B) With respect to a class of unsecured claims

(i) the plan provides that each holder of claim of such class receive or retain on

maintains that the partnership creditors will seek an additional Eight Hundred Thirteen Thousand Forty-Five and 21/100 (\$813,045.21) Dollars from the trust established for the benefit of the unsecured creditors, which when added to the unsecured claims total Two Million Six Hundred Three Thousand Two Hundred Three and 32/100 (\$2,603,203.32) Dollars, an amount in excess of the value of the

debtor's interest in the Georgetown Associates partnership.¹⁰ The unsecured creditors, however, have accepted the plan. Anderson's claim will be fully satisfied at confirmation by the abandonment of

account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

¹⁰Anderson derived the amount expected to be sought by the partnership creditors from the estimated deficiencies in partnership assets set forth in the debtor's disclosure statement.

his collateral by the debtor. The absolute priority rule set out in section 1129(b)(2)(B) does not apply to this case. "[T]he application of the so-called 'absolute priority rule' applies only in cases when a class of unsecured claims or equity interests is impaired and does not accept the plan." 5 Collier on Bankruptcy §1129.03(e) (L. King 15th ed. 1989). The unsecured creditor class has accepted the plan.

Under the debtor's plan as proposed, Ameribank has agreed to extend to the debtor an additional Thirty-Six Thousand and No/100 (\$36,000.00) Dollars in credit which will be added to the secured claim of Ameribank. Anderson contends that this additional extension of credit violates the provision of the Bankruptcy Code which prohibits the extension of credit secured by a senior lien on property of the estate that is already subject to a lien unless the holders of the other liens are adequately protected. See 11 U.S.C. §364(d)(1). Ameribank, as part of its collateral securing its claim against the debtor, holds a first priority security interest in the debtor's one-half (1/2) interest in the Wild Horn tract. Anderson

holds a second priority security interest in the debtor's interest in the Wild Horn tract. However, as Anderson's claim will be fully satisfied, upon confirmation the Wild Horn tract will have no liens against it other than that of Ameribank.

The debtor's plan of reorganization complies with the

criteria of confirmation set forth in 11 U.S.C. §1129(b). Anderson's claim may be deemed fully satisfied by the abandonment of the collateral, and it is therefore ORDERED that the objection to confirmation filed by M. C. Anderson is overruled.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 31st day of May, 1990.