St. John's Law Review

Volume 92
Number 1 *Volume 92, Spring 2018, Number 1*

Article 7

September 2018

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Michael D. Manzo

COMMENT

A RASH DECISION IN *SUNNYSLOPE*: CONFUSION LINGERS OVER COLLATERAL VALUATION

MICHAEL D. MANZO†

INTRODUCTION

Debtors seeking bankruptcy relief under the United States Bankruptcy Code (the "Code") file under Chapter 7,[1] Chapter 11,[2] or Chapter 13.[3] In Chapter 7 filings, or "liquidations," the debtor's assets are sold and the proceeds are shared among the creditors subject to the secured creditors' preference. Chapter 11 and 13 filings are called "reorganizations" because debtors retain their assets after negotiating the payment terms with the secured creditor. In all three filings, the valuation of assets is crucial because it determines whether and to what extent a loan will be repaid.

Unfortunately, it is sometimes unclear what constitutes the proper valuation methodology in reorganizations. Different valuation methods, such as replacement value and foreclosure value, are available, but there is no uniformity among the courts about what value to apply and when.[4] Even when a valuation method is selected, another problem arises when the debtor and creditor disagree over how to calculate such valuation and the amount of interest to be applied to loan repayments. The

† Associate Managing Editor, *St. John's Law Review*; J.D., 2018, St. John's University School of Law.

1 *See generally* 11 U.S.C. §§ 701–84 (2012).

2 *See generally id.* §§ 1101–74.

3 *See generally id.* §§ 1301–30.

4 *See, e.g.*, In re Heritage Highgate, 679 F.3d 132 (3rd Cir. 2012) (invoking *Rash* to apply the current value of collateral instead of a valuation based on income capitalization after a future development projection); United Air Lines, Inc. v. Regional Airports Improvement Corp., 564 F.3d 873, 878 (7th Cir. 2009) (holding that when a debtor proposes to retain a secured creditor's collateral under a cramdown Chapter 11 plan, a bankruptcy court may not value the collateral based on the debtor's proposed use if that use would result in a value less than what the creditor could obtain in foreclosure); In re Winthrop Old Farm Nurseries, 50 F.3d 72, 74–76 (1st Cir. 1995) (holding that when a debtor retains collateral under a Chapter 11 plan, § 506(a) dictates that the collateral should be valued according to its "fair market value" rather than its potentially lower "liquidation value").

inclusion of interest itself is uncontroversial because such payments compensate the creditor for the additional risk that the debtor may not fulfill a scheduled payment. The proper amount of interest as well as the valuation methodology, however, are frequently disputed when a bankruptcy court approves a debtor's proposal over a secured creditor's objections, a situation known as a "cramdown."[5] Because the Supreme Court has clarified neither when a valuation methodology applies nor how to calculate the appropriate interest rate, cramdown cases remain a fertile source of confusion over the valuation of a debtor's assets.

The Supreme Court had an opportunity to mitigate this confusion in *Associates Commercial Corp. v. Rash*[6] ("*Rash*"), but this decision ultimately raised more questions than it answered.[7] Recently, the United States Court of Appeals for the Ninth Circuit, sitting en banc, decided *In re Sunnyslope Housing Limited Partnership* ("*Sunnyslope*"). This decision contributed to the confusion over valuation by holding that the *Rash* precedent "command[ed]" that cramdown collateral be valued by the debtor's proposed disposition or use of it rather than by the value the creditor would realize had the asset been sold in foreclosure, even though this was an atypical case where the latter valuation exceeded the former.[8]

In *Sunnyslope*, Sunnyslope Housing Limited Partnership ("Sunnyslope") developed and operated an apartment complex in Phoenix, Arizona funded by several secured loans.[9] To secure financing for the building, the debtor agreed that the property would be used for affordable housing.[10] When Sunnyslope defaulted on the loan, the property was resold to First Southern National Bank ("First Southern").[11] The sale agreement stipulated that the property remain subject to the other "covenants, conditions and restrictions," such as the affordable

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5 11 U.S.C. §§ 1129(b)(2)(A), 1325(a)(5)(B)(ii) (2012).

6 Assoc. Commercial Corp. v. Rash, 520 U.S. 953, 955–956 (1997).

7 *See* Till v. SCS Credit Corp., 541 U.S. 465 (2004); *see generally* Mark E. Beatty, Comment, *How Should Property Be Valued in a Cram Down*, 49 MERCER L. REV. 891, 909 (1998).

8 *In re Sunnyslope Housing Limited Partnership* (*Sunnyslope III*), 859 F.3d 637, 645 (9th Cir. 2017) (en banc); *Rash*, 520 U.S. at 960.

9 Matter of Sunnyslope Housing Limited Partnership (*Sunnyslope I*), No. 12-CV-00597 (RJH), 2012 WL 12949503 at *1 (D. Ariz. Sept. 18, 2012).

10 *Id.* at *1–2.

11 *Id.* at *3.

housing restriction, and that they would be extinguished upon foreclosure.[12] First Southern commenced foreclosure proceedings, but they were stayed pending completion of Sunnyslope's Chapter 11 reorganization.[13] Sunnyslope proposed a cramdown plan where it would retain the property and treat First Southern's debt as secure "to the extent of the value of such creditor's interest" in the collateral—the apartment complex—in accordance with 11 U.S.C. § 506(a)(1).[14] The parties disagreed on how to value First Southern's collateral.

Sunnyslope proposed to continue using the property for affordable housing after reorganization, and valued it using that metric.[15] First Southern disagreed, contending that the use restrictions should be disregarded for valuation purposes.[16] The difference in value was significant. Without the restrictions, a receiver obtained a purchase offer of $7.65 million for the apartment complex.[17] But the bankruptcy court confirmed Sunnyslope's reorganization plan and valued the apartment complex with the use restrictions at $3.9 million.[18]

The district court affirmed the bankruptcy court's valuation of the property with the use restrictions in place,[19] but a divided panel of the Ninth Circuit reversed the bankruptcy court, holding that the court should have valued the apartment complex without regard to the affordable housing use restrictions.[20] The Ninth Circuit vacated the panel's opinion and granted Sunnyslope's petition for rehearing en banc. The en banc court reversed the three-judge panel, holding that the lower court did not err in making this determination because United States Supreme Court precedent "command[ed]" that cramdown collateral be valued by the debtor's proposed disposition or use.[21]

[12] *Sunnyslope III*, 859 F.3d at 641.
[13] *Id.* at 641.
[14] *Id.* at 641–42.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 641.
[18] *Id.* at 646.
[19] *Sunnyslope I*, 2012 WL 12949503 at *11.
[20] In re Sunnyslope Housing Limited Partnership (*Sunnyslope II*), 818 F.3d 937, 949–50 (9th Cir. 2016).
[21] *Sunnyslope III*, 859 F.3d at 645.

The Ninth Circuit grounded its holding in *Rash*. The *Rash* Court, according to the Ninth Circuit, held that § 506 of the Code requires application of the replacement value, rather than the foreclosure value, when valuing collateral for purposes of a cramdown.[22] Consequently, because Sunnyslope planned to use the collateral as an affordable housing complex after reorganization, the valuation must be based on the proposed use rather than a hypothetical foreclosure sale.[23] The court also pointed out that the *Rash* Court intentionally did not adopt a rule that values collateral at the higher of its foreclosure or replacement value.[24] Here, the Ninth Circuit confirmed that even in the atypical case where the foreclosure value exceeds replacement value, the latter is still the value to apply under §§ 506(a)(1) and 1129(b).[25] The en banc Ninth Circuit also held that the reorganization plan was fair and equitable, feasible, and that the bankruptcy court did not err in failing to allow First Southern, on remand, to make a second election to have its claim treated as either fully or partially secured under § 1111(b).[26]

Dissenting, Judge Alex Kozinski argued that the majority opinion "fetishizes a selection of the [Supreme] Court's words at the expense of its logic."[27] Even though cramdown valuations are supposed to limit a secured creditor's risk, the majority's valuation ignored the Court's expressed desire to reduce the risks that cramdowns pose for creditors.[28] The dissent would have held that the appropriate value of the building is without the use restrictions, which, in this case, is best approximated by foreclosure value.[29]

The Supreme Court recently denied First Southern's petition for certiorari in this case,[30] preserving a circuit split between the Ninth and Fifth Circuits.[31] As a result, the Ninth Circuit's flawed reasoning and holding in *Sunnyslope* stands. This

[22] Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 955–56 (1997).
[23] *Sunnyslope III*, 859 F.3d at 640; *see also Rash*, 520 U.S. at 963.
[24] *Sunnyslope III*, 859 F.3d at 645; *Rash*, 520 U.S. at 960, 962.
[25] *Sunnyslope III*, 859 F.3d at 645.
[26] *Id.* at 646–48.
[27] *Id.* at 648 (Kozinski, J., dissenting).
[28] *Id.*
[29] *Id.* at 648.
[30] *See* First Southern National Bank v. Sunnyslope Housing, 2018 WL 311350, at *1 (Jan. 8, 2018) (denial of certiorari).
[31] *See supra* note 4 and accompanying text.

Comment argues that the Ninth Circuit's *Sunnyslope* decision misconstrued the *Rash* Court's holding and is divorced from the text and structure of the Code. *Rash* does not provide a bright-line rule that answers valuation questions in cramdowns; it offers a flexible standard that is compatible with the Code's protections for both debtors and secured creditors. Further, this Comment also argues that *Sunnyslope* could have been answered not as a valuation issue, but as a lien priority issue. In any event, the Ninth Circuit completely missed the mark in interpreting the Supreme Court's holding in *Rash* and in understanding the text and structure of the Code.

I. COLLATERAL VALUATION IN REORGANIZATIONS

In a Chapter 11 or 13 reorganization, the secured creditor seeks to recoup the highest possible valuation because its claim will eventually bifurcate into secured and unsecured claims with the deficiency—the amount by which the debt exceeds the value of the collateral—treated as unsecured.[32] Conversely, the debtor seeks the lowest possible valuation. By obtaining a low valuation, the debtor is able to discharge a higher amount of the debt in question and emerge from the reorganization in a stronger financial position. A creditor's collateral in a reorganization plan is typically valued at either the asset's price realized in foreclosure—the foreclosure value—or the value of its proposed disposition or use—the replacement value.

A. Replacement Value of a Debtor's Collateral

As the name suggests, the replacement value is the cost a debtor would incur to replace the collateral in question. This valuation method is grounded in the second sentence of § 506(a): "Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property."[33] The interpretation of this provision was at issue in *Rash*.[34]

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[32] *See* 11 U.S.C. § 506(a)(1) (2012).

[33] *Id.*; *see* Chris Lenhart, Note, *Toward a Midpoint Valuation Standard in Cram Down: Ointment for the* Rash *Decision*, 83 CORNELL L. REV. 1821, 1839–40 (1998).

[34] 520 U.S. 953, 953 (1997).

The *Rash* Court defined replacement value as the "price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller."[35] The majority focused on the "proposed disposition or use" language of § 506(a) in holding that the replacement value should be considered from the debtor's point of view, rather than the creditor's.[36] This emphasis was also determinative in *In re Trimble*, where the United States Court of Appeals for the Eighth Circuit held:

> [W]here a debtor intends to retain and use the collateral, the purpose of the valuation is to determine the amount an undersecured creditor will be paid for the debtor's continued possession[,] . . . not to determine the amount such creditor would receive if it hypothetically had to repossess and sell the collateral.[37]

The problem with the *Rash* Court's adoption of replacement value is its failure to articulate how to calculate such value. The bankruptcy courts were left to determine the "best way of ascertaining replacement value" on a case-by-case basis.[38] Consequently, courts are free to apply the retail value, wholesale value, or another alternative to value a secured creditor's collateral in reorganizations.[39] Proponents argue that because the debtor intends to retain and use the collateral, replacement value is the correct valuation methodology since it is the amount the debtor would be forced to pay to obtain that specific asset.[40] In other words, the secured creditor is compensated for the risk of an unsuccessful reorganization by receiving any excess that may result from a successful reorganization.[41]

B. *Foreclosure Value of a Debtor's Collateral*

The argument that the foreclosure value, rather than the replacement value, of a secured creditor's collateral should be applied in reorganizations is grounded in the first sentence of §

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[35] *Id.* at 960.

[36] *Id.* at 960–65.

[37] 50 F.3d 530, 532 (8th Cir. 1995).

[38] *Rash*, 520 U.S. at 965 n.6.

[39] Dawn M. Baumholtz, *Bankruptcy-Debtor's Exercise of the Cramdown Option-Valuation Standard for Collateral in Chapter 13*, 36 DUQ. L. REV. 455, 469–70 (1998).

[40] Lenhart, *supra* note 33, at 1839–40.

[41] *Id.* at 1842. An excess is created when the secured creditor receives more than it would have under either a Chapter 7 liquidation or state law remedies.

506(a).[42] Justice Stevens, dissenting in *Rash*, argued that the foreclosure valuation is the proper methodology in cramdowns. Specifically, the first sentence of § 506(a) shifts the focus from the debtor's perspective to the creditor's perspective.[43] Proponents also rely on the language of § 506(a), specifically the phrase: "the value of the '*creditor's* interest in the estate's interest' in the property."[44] Opponents of the foreclosure valuation argue that because debtors in cramdowns strive to retain the collateral in question, this valuation method ignores the second sentence of § 506(a), rendering the "disposition or use" language of that section superfluous.[45]

Creditors and debtors view foreclosure valuation differently. Debtors believe that in valuing collateral in the hands of the debtor, the foreclosure value embodies the "such creditor's interest in the estate's interest in such property" language.[46] To the secured creditor, however, the foreclosure valuation provides a windfall to the unsecured creditors by reallocating the spread between the foreclosure and replacement values to the unsecured class.[47]

II. THE NINTH CIRCUIT'S MISINTERPRETATION

Sunnyslope is a Chapter 11 case with an atypical valuation issue: the foreclosure value of the debtor's collateral was greater than its replacement value. However, contrary to the Ninth Circuit's holding, *Rash* does not provide a bright-line rule for the valuation purposes, even in such an atypical case. The Ninth Circuit's reasoning and ultimate holding is also divorced from the text and structure of the Code. Finally, the facts in *Sunnyslope* hint that this case is not about valuation after all, but rather the priority of liens.

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42 11 U.S.C. § 506(a) (2012).

43 *Rash*, 520 U.S. at 966 (Stevens, J., dissenting).

44 *Id.* (quoting 11 U.S.C. § 506(a) (1994)) (emphasis in original). For example, in *United Savings Association of Texas v. Timbers of Inwood Forest Associates*, the Court held that collateral should be valued "as if it [were] in the creditor's hands." Lenhart, *supra* note 33, at 1833.

45 11 U.S.C. § 506(a)(1) (2012).

46 *Id.*

47 Lenhart, *supra* note 33, at 1835.

A. A Flawed Reading of Rash

The *Sunnyslope* court incorrectly held that it is "command[ed]" by the Supreme Court's holding in *Rash*.[48] By "tak[ing] the Supreme Court at its word," the Ninth Circuit flouted footnote 6 in the *Rash* majority opinion, which left bankruptcy courts with a wide range of discretion in collateral valuations:

> Our [decision] . . . leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented. Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property.[49]

In other words, courts could value collateral at the foreclosure value even when it exceeds the replacement value. Yet the Ninth Circuit disregarded this built-in flexibility in favor of a myopic reading.

The Ninth Circuit also erred by reading *Rash* to mean that when the value of the collateral is lower than the foreclosure value as a result of the debtor's intended use, the secured creditor may be given that lesser amount. *Rash* can be construed to stand for the proposition that the Code's cramdown provisions protect secured creditors when they do not accept a debtor's plan of reorganization.[50] In such a case, the creditor receives either the collateral itself or cash payments equal to the collateral's value. When the debtor retains the collateral, as here, the text instructs that the debtor pay the secured creditor the "value" of its collateral, "determined in light of . . . the proposed disposition or use of such property."[51] As the *Rash* Court explained, § 506(a)'s instruction to value collateral in light of its "proposed disposition or use" is designed to protect secured creditors when the debtor retains the collateral. Thus, the "particular use" of the retained collateral after reorganization is not dispositive for valuation purposes, as the Ninth Circuit overlooked. Although

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[48] *Sunnyslope III*, 859 F.3d at 645.

[49] *Sunnyslope III*, 859 F.3d at 640; Assoc. Com. Corp. v. Rash, 520 U.S. 953, 965 n.6 (1997).

[50] Brief for Petitioner at 22, First Southern National Bank v. Sunnyslope Housing Limited Partnership, No. 17-455 (U.S., Sept. 22, 2017) [hereinafter "Brief for Petitioner"]

[51] 11 U.S.C. § 506(a)(1) (2012).

foreclosure value is "typically lower" than replacement value, a secured creditor's collateral should not be undervalued in the atypical case where foreclosure value exceeds the replacement value.[52] Permitting Sunnyslope to shortchange First Southern in these circumstances flies in the face of the Code's protections for secured creditors.

To read *Rash* any other way overlooks the fact that applying a "generally higher" valuation offsets the additional risk imposed on a secured creditor when the debtor retains the collateral.[53] When a debtor surrenders the collateral, the secured creditor receives it immediately and is free to sell it, recovering at least the foreclosure value. Therefore, when the *Rash* Court adopted the replacement value standard, it intended to ensure secured creditors receive at least the foreclosure value in bankruptcy.[54]

B. Sunnyslope's Reasoning is Inconsistent with the Text and Structure of the Code

Additionally, the Ninth Circuit erred by deeming the price offered in foreclosure legally irrelevant because nothing in the text of § 506(a) compels this conclusion. As *Rash* explained, the "proposed disposition or use" refers to the debtor's two options with respect to the secured creditor's collateral in a cramdown—either surrender ("disposition") or retention ("use")—rather than the valuation standard.[55] The proper measure of value in the retention context, according to *Rash*, is fair-market value, which the Court defined as "the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition."[56] The fair-market value of property is not necessarily governed by the particular use the debtor proposes.[57] The Ninth Circuit's justification that "absent foreclosure, . . . Sunnyslope cannot use the property except as affordable housing, nor could anyone else," overlooks the disadvantageous position this puts the creditor in.[58] Had Sunnyslope wanted to rent the apartment complex out at a

[52] *Sunnyslope III*, 859 F.3d 637, 649 (9th Cir. 2017) (en banc) (Kozinski, J., dissenting).
[53] Rash, 520 U.S. at 958.
[54] *Rash*, 520 U.S. at 959 n.2, 962–63.
[55] *Id.* at 962.
[56] *Id.* at 959 n.2.
[57] *Id.*
[58] *Sunnyslope III*, 859 F.3d at 644.

higher market rate, it could have consented to the foreclosure and purchased the property at the foreclosure sale. Sunnyslope was entitled to forgo that option and decide to operate the property as an affordable housing complex, but the Code does not permit Sunnyslope to impose the economic cost of that decision on First Southern.[59]

Section 506(a) also merely instructs courts to value collateral "in light of" the debtor's proposal of continued use.[60] The text provides no instruction to disregard the value of the collateral that would be realized in foreclosure. In fact, *Rash* instructs that courts should not disregard the asset's higher fair-market value when retained for continued use, but rather limit the secured creditor to the asset's "typically lower" foreclosure value.[61] Therefore, the price for which a buyer agreed to purchase the asset in a foreclosure sale is categorically relevant.

Moreover, the Ninth Circuit's holding is not only unhinged from the text of the Bankruptcy Code, but it also disregards the Code's statutory scheme for protecting secured creditors. The Code contains numerous provisions, including Chapter 11's cramdown provision at issue, that protect the right of secured creditors who have not been paid in full to receive the collateral or the economic equivalent.[62] Another goal of Chapter 11 is to avoid foreclosure, but this avoidance should not strip a secured creditor of its non-bankruptcy entitlement or the ability to maximize the value of the bankruptcy estate.[63] For example, clause (ii) of the cramdown provision ensures that the asset will not be sold for less than its foreclosure value,[64] and clause (iii) protects secured creditors by ensuring that they receive the property itself, or a "substitute of the most indubitable equivalence."[65] Clause (i) also permits creditors to elect, as First Southern did, to receive a stream of payments with a present value equal to "at least the value" of the collateral when the debtor retains the property.[66]

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59 Brief for Petitioner, *supra* note 50, at 24.

60 11 U.S.C. § 506(a) (2012).

61 *Rash*, 520 U.S. at 960.

62 Brief for Petitioner, *supra* note 50, at 25.

63 *Id.*

64 11 U.S.C. § 1129(b)(2)(A)(i)(II) (2012).

65 11 U.S.C. § 1129(b)(2)(A)(iii) (2012); *see* In re Murel Holding Corp., 75 F.2d 941, 942 (2nd Cir. 1935).

66 11 U.S.C. §§ 1129(b)(2)(A)(ii), 1111(b) (2012).

"Value" should be construed consistently throughout the Code—at least the value the secured creditor would realize if it exercised its right to foreclose. If the debtor could pay less than foreclosure value under clause (i), as the Ninth Circuit held, clause (ii) would be superfluous. It is unlikely Congress enacted clause (ii), which set foreclosure value as the floor on a secured creditor's recovery, only to effectively eviscerate those protections in clause (i) by permitting the debtor to keep the collateral for a lower-value use and pay less.[67] The only reading consistent with the Code's text and statutory scheme is that a secured creditor cannot be deprived of its right to foreclose and receive "at least the property," unless it is paid at least the foreclosure value.[68]

C. Lien Priority as the Crux

The Ninth Circuit overlooked that *Sunnyslope* is not just about valuation, but also the priority of liens. Sunnyslope owned the apartment complex subject to secured loans from Capstone Realty Advisors (first priority), the City of Phoenix (second priority), and the State of Arizona (third priority).[69] The first priority loan was guaranteed by the U.S. Department of Housing and Urban Development ("HUD").[70] Critically, only the agreements with the City of Phoenix and State of Arizona provided that the affordable housing restrictions "run with the land" but would be terminated upon foreclosure of the lien.[71] When Sunnyslope defaulted, HUD took over the loan and sold it to First Southern.[72] The sale agreement between HUD and First Southern expressly subordinated the use restrictions to the lien of the mortgage.[73] Therefore, that subordination agreement is enforceable under § 510(a). Section 510(a) states: "A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law."[74]

[67] Brief for Petitioner, *supra* note 50, at 27.
[68] *Id.* (citing In re Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935)).
[69] *Id.* at 13.
[70] *Sunnyslope II*, 818 F.3d 937, 939 (9th Cir. 2016).
[71] Brief for Petitioner, *supra* note 50, at 13.
[72] *Sunnyslope I*, No. 12-CV-00597 (RJH), 2012 WL 12949503 at *3 (D. Ariz. Sept. 18, 2012).
[73] Brief for Petitioner, *supra* note 50, at 14.
[74] 11 U.S.C. § 510(a) (2012).

By holding that the valuation must be determined with use restrictions in place, the Ninth Circuit effectively reversed the priorities of the liens: the senior lien no longer had priority. This is impermissible because the Code does not include any command or exception that permits § 506(a) to supersede § 510(a). Statutory interpretation is a holistic endeavor, so each provision should be read by reference to the whole Code. Thus, § 506(a) and § 510(a) should be interpreted *in pari materia* and consistently with one another.

CONCLUSION

Perhaps it is bittersweet that the Supreme Court did not grant certiorari in *Sunnyslope*.[75] The Court is notorious for oversimplying complex bankruptcy issues and handing down abstruse opinions, begetting further uncertainty.[76] *Rash* should be construed as a flexible valuation standard determined on a case-by-case basis until the Supreme Court instructs otherwise, rather than a rigid rule that does not account for other provisions of the bankruptcy code and practical consequences.

For example, the Ninth Circuit's holding will have negative consequences for the credit markets if adopted by other Circuits. Even though this was a real estate transaction, the Ninth Circuit's interpretation could apply in any case a debtor seeks to cramdown a secured creditor. If debtors are free to put a secured creditor's collateral to less valuable economic uses and pay the replacement value, then the risk of creditors accepting less than the foreclosure value is significantly magnified.[77] Furthermore,

[75] First Southern National Bank v. Sunnyslope Housing, 2018 WL 311350 (Jan. 8, 2018) (denial of certiorari).

[76] *See e.g.*, Czyzewski v. Jevic Holding Corp., 137 S.Ct. 973, 983 (2017) ("We turn to the basic question presented: Can a bankruptcy court approve a structured dismissal that provides for distributions that do not follow ordinary priority rules without the affected creditors' consent? Our simple answer to this complicated question is 'no.' "); Stern v. Marshall, 564 U.S. 462, 503 (2011) (holding that although the bankruptcy court had the statutory authority to issue a final and binding decision on a claim based exclusively on a right assured by state law, the bankruptcy court nonetheless lacked the constitutional authority to do so. This placed an extreme limitation on the jurisdiction and role of the bankruptcy courts); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 54, 87 (1982) (holding, behind the backdrop of four separate opinions with varying views on how the case should be decided, that bankruptcy courts are prohibited from handling fraud-type claims and related disputes against a third party).

[77] Brief for Petitioner, *supra* note 50, at 29–32.

adoption of the Ninth Circuit's decision will also inhibit future affordable housing projects. A reduction in the amount of capital available to fund affordable housing projects, and raising the cost of such capital, will likely result in fewer and less financially stable projects. The decision will also impact HUD's ability to support the housing market.[78] As the three-judge panel noted, the risk that a buyer like First Southern might receive less than foreclosure value in bankruptcy will "make it much more difficult for HUD to sell defaulted loans on the secondary market and would drastically reduce the amount that HUD could obtain from reselling those loans."[79] Nevertheless, the Supreme Court missed an opportunity to correct the Ninth Circuit's erroneous reading of *Rash* in *Sunnyslope*. Hopefully, consensus will emerge among the Circuits and bring clarity to this area of bankruptcy law.

[78] *Id.* at 32.
[79] *Sunnyslope II*, 818 F.3d 937, 949 (9th Cir. 2016).