Codifying Bankruptcy Law's Fastpass: New Value and the Absolute Priority Rule

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The notion behind the absolute priority rule is not novel to any of us. We all learned at a very young age that if someone is in front of you in line—they get served first. This basic notion of fairness affects our lives in several everyday contexts—for example, waiting in line at the ticket office (whether movie, concert, play, or athletic event). There are only a limited number of seats in any auditorium or arena, and at some point a person toward the back of the line is going to be turned away.

So it is in the context of bankruptcy. The limited resource in bankruptcy is the asset pool of the debtor. The people in line for this limited resource are the holders of interests in the debtor. Whether an interest holder is toward the front or end of the line depends upon what type of interest it holds. If the interest held by party A is “senior” to that of party B, then party A is in front of party B in line. The absolute priority rule essentially provides that the first party in line must be paid in full before the next party in line is entitled to anything.\(^1\) While the absolute priority rule satisfies our basic notion of fairness on the one hand, other considerations have lead to a great deal of effort to get around its wooden application.\(^2\)


\(^2\) *Id.* at 651 (“The absolute priority doctrine in corporate reorganizations under the Bankruptcy Act has never been comfortable for practitioners or theorist to live with. Almost as soon as the courts articulated this standard of fairness, it was subjected to attack. Over the years, dissatisfaction has grown and proposals for modification have accumulated.”).
Part II of this article attempts to briefly and neatly summarize the historical development and progression of the absolute priority rule. Part III synthesizes the current United States Supreme Court and United States Court of Appeals jurisprudence dealing with the absolute priority rule with a special emphasis on the Fifth Circuit. Part IV explores the role the absolute priority rule plays in the context of Chapter 11 plan negotiations and proposes that the new value exception should be incorporated into the statutory text of the Bankruptcy Code in order to provide clarity and fulfill the purpose of the absolute priority rule.

II. Historical Development and Progression

To understand the history of the absolute priority rule one must take a “fairly extensive sojourn into history” 3 back to the early days of the railroad industry. In short, it was not profitable. 4 Embryonic railroad companies often did not generate enough cash flow to support the debt payments resulting from borrowed money. 5 The financial problems of the railroads were resolved in the context of equity receiverships. 6

The procedure of an “equity receivership” is quite simple. A creditor would file a petition in federal court stating that the debtor could not pay its debts, and requesting (1) that the court equitably satisfy the various creditor claims and (2) appoint a receiver to run the business until the claims were satisfied. 7 To satisfy the claims the receiver would “‘sell’ the assets to a ‘new’ entity—typically a reshuffling of the old investors.” 8

The substance of an “equity receivership” in the context of the early railroad cases is far from simple, and contrary to its name—is quite inequitable to certain groups of creditors. The

4 Id. at 970.
5 Id.
6 Id.
7 Id.
8 Id.
assets of the debtor were sold to the “new entity” for a very low price. However, the low price usually had a disproportionate negative effect on the creditors.\footnote{Id. (“The price [at which the assets were sold to the new entity] would be lower than the amount of the senior debt . . . [for] example, the buyers might agree to pay $30 for a railroad ‘worth’ $80. The money would go to senior bondholders, but they would receive less than the total of their claim . . . and less even than the nominal worth of the [rail]road. Unsecured creditors would be eliminated, but the ‘new’ entity, controlled by stockholders of the ‘old,’ would emerge with a company worth $80, for which they had paid only $30.”).} Creditors typically agreed to these inequitable receiverships because (1) they wanted to preempt any objections from the debtor—regardless of merit, and (2) frequently these receivership reorganizations were controlled by insiders who had dual interests in both the company’s bonds and equities.\footnote{Id. at 970-71 (“For the insider-managers, it didn’t matter if they lost on bonds if they gained on stock. This approach is innocent enough for those who hold both bonds and stock, but it is devastating to those who do not. In particular this approach damages two groups. One is the unsecured trade creditors. The other group is the noninsider bondholders . . . .”).}

The absolute priority rule jurisprudentially emerged from the backdrop of the inequities of the railroad receiverships.\footnote{Walter J. Blum,\textit{ Full Priority and Full Compensation in Corporate Reorganizations: A Reappraisal}, 25 U. CHI. L. REV. 417, 418 (1958); Ayer, supra note 3, at 971.} The first jurisprudential announcement of the absolute priority rule is found in \textit{Northern Pacific R. Co. v. Boyd}.\footnote{228 U.S. 482, 502, 504, 561-62 (1913).} In \textit{Boyd}, the United States Supreme Court held that Northern Pacific Railway was liable for the claim of a creditor of Northern Pacific Railroad despite the fact that the Railway had purchased the assets of the Railroad via an equity receivership reorganization.\footnote{Id. at 483-503, 504.} In so holding, the Court laid the foundation for the absolute priority rule: “[S]uch a transfer by stockholders from themselves to themselves cannot defeat the claim of a nonassenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made.”\footnote{Id. at 502. The Court did not require that the “nonassenting creditor” be paid in cash, but only that the nonassenting creditor be compensated for the value of his claim: “This conclusion does not, as claimed, require the impossible, and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock.” \textit{Id.}.} It has been said that after \textit{Boyd} “absolute priority . . . passed into the language and lore of the corporate lawyer.”\footnote{Ayer, supra note 3, at 973.} As it would turn out, the “lore” was just
The next significant jurisprudential step in the development of the absolute priority rule occurred over twenty-five years later in *Case v. Los Angeles Lumber*.16 The United States Supreme Court in *Case* refused to confirm a plan that allowed equity holders of the company to retain interests when the bondholders of the company were not paid in full because the plan was not “fair and equitable” as required by section 77B of the Bankruptcy Act of 1898.17 The Court reasoned that “[t]he words ‘fair and equitable’ as used in . . . 77B . . . are words of art which prior to the advent of . . . 77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations.”18

The “fixed meaning” the Court attributed to the phrase provided that a junior claim should receive nothing unless all senior claims are paid.19 In essence, the Court jurisprudentially incorporated the absolute priority rule into the statutory language of 77B via the phrase “fair and equitable.”20 However, the absolute priority rule—strictly speaking—is not the only notion that the Court engrafted into the phrase. *Case* is cited by many scholars and courts—whether expressly or impliedly—as the fount of the new value exception.21 The Court, in dicta,22 suggested that there may be situations where equity retention is allowed under a plan of reorganization even if creditors are not paid in full “[w]here [the] necessity exists and the old stockholders make a fresh contribution [in money or in money’s worth] and receive in return a

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16 308 U.S. 60 (1939).
17 Id. at 114.
18 Id. at 115 (emphasis added).
19 Id. at 116 (“In Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co. . . . this Court reaffirmed the ‘familiar rule’ that ‘the stockholder’s interest in the property is subordinate to the rights of creditors.’”).
20 Id. at 119.
22 The fact that it was dicta is made much of in subsequent jurisprudence in which the court either dodges the issue of whether there is a new value exception, or courts that reject the existence of the new value exception after the enactment of the Bankruptcy Code of 1978. See infra Part III.3.
participation reasonably equivalent to their contribution.”

The next step in the development of the absolute priority rule was statutory in nature—the enactment of the Bankruptcy Act of 1938. The 1938 act was divided into several chapters for different types of entities and proceedings, similar to the titles of the current Bankruptcy Code. Relevant to this discussion are Chapters X and XI, both of which governed reorganizations. The absolute priority rule was fully applicable in Chapter X, but not in Chapter XI. The tension created by the existence of two potential routes of reorganization can not be overestimated, and had a significant effect upon the structure of the Bankruptcy Code of 1978.

The enactment of the Bankruptcy Code in 1978 is the final stop on our tour of the historical development of the absolute priority rule. The rule is codified in 11 U.S.C. 1129(b)(2):

[T]he condition that a plan be fair and equitable with respect to a class includes the following requirements:

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on 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, except in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

The portion of the Bankruptcy Code of 1978 in which the rule is placed limits its application to “cramdowns.” A cramdown refers to the confirmation of a plan of reorganization

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23 Case, 308 U.S. at 122.
24 Ayer, supra note 3 at 976.
25 Id. at 976-77 (remarking that Chapter X grew out of the context of equity receiverships and Chapter XI out of the common law remedy of composition).
26 Id. at 977 (“No one can be certain of the influence that the competing principles of equity receivership and common law composition had upon the development of the absolute priority doctrine. It is safe to conclude, however, that each laid an independent foundation for the ultimate bankruptcy structure.”).
“notwithstanding the objections of an impaired class of creditors.” A plan can only be “crammed down the throats of objecting creditors” if the plan is found to be “fair and equitable.” The plan must pass muster under the absolute priority rule to be deemed “fair and equitable” in the context of unsecured creditors. How the codification of the absolute priority rule in the Bankruptcy Code of 1978 affects its current scope and application is the subject of the next section.

III. CURRENT JURISPRUDENTIAL TREATMENT

The current jurisprudential treatment of the absolute priority rule, in one sense, is uniform. After the adoption of the Bankruptcy Code of 1978, courts unanimously concede the absolute priority rule in codified in §1129(b)(2)(B). However, in another sense, the current jurisprudential treatment of the absolute priority rule is anything but uniform. The lack of uniformity is due to the widely divergent treatment of the new value exception. This section of the article synthesizes the current United States Supreme Court and Circuit Court treatment of (1) the absolute priority rule and (2) new value corollary, with a particular focus on the Fifth Circuit.

A. Current United States Supreme Court Jurisprudence: Ahlers and LaSalle

The United States Supreme Court has chimed in on the scope and application of the absolute priority rule in two relatively recent cases. In both cases, the Supreme Court acknowledges (1) the codification of the absolute priority rule in 11 U.S.C. 1129(b)(2)(B) and (2) the rule requires that “a dissenting class of unsecured creditors must be provided for in full

27 In re Iridium Operating LLC, 478 F.3d 452, 462 (2d Cir. 2007).
28 Kham v. First Bank of Witting, 908 F.2d 1351 (7th Cir. 1990).
before any junior class can receive or retain any property [under a reorganization] plan.”

In *Norwest Bank Worthington v. Ahlers*, a group of farmers retained their equity interest in the farm over the objection of unsecured creditors who were not paid in full. The Supreme Court held that “there is little doubt that a reorganization plan in which respondents retain an equity interest in the farm is contrary to the absolute priority rule.”

In *Bank of America National Trust v. 203 LaSalle Street Partnership*, the debtor’s prepetition equity holders retained title to the property over the objection of a senior class of impaired creditors who were not paid in full. The Court in *LaSalle* acknowledged that the proposed plan was a clear violation of a strict application of the absolute priority rule. The Court was clearly correct—a junior interest holder retained property despite the fact a dissenting unsecured creditor was not paid in full. One might have thought that such clear violations of the absolute priority rule in *Ahlers* and *LaSalle* would have been a slam-dunk for the dissenting class of unsecured creditors. However, that turned out to not be the case.

The real action in both *Ahlers* and *LaSalle* is the viability, scope, and application of the new value exception. Both cases dodge deciding the ultimate issue of whether the new value exception survived the codification of the absolute priority rule in §1129(b)(2)(B). The Supreme Court spent a good deal of time in both cases applying the new value exception, but concluded that even if there were such an exception it was not met in either of the cases before them. The extensive analysis regarding the new value exception in *Ahlers* and *LaSalle* arguably

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30 *Ahlers*, 485 U.S. at 202 (quoting In re Ahlers, 794 F.2d 388, 401 (8th Cir. 1986); *LaSalle*, 526 U.S at 441-42.
32 *Id.*
33 *LaSalle*, 526 U.S. at 438-39.
34 *Id.* at 443.
35 *Id.* at 443 (“We need not decide whether the statute includes a new value corollary or exception . . . .”); *Ahlers*, 485 U.S. at 203 & n.3 (“The United States, as amicus curiae, urges us to . . . hold that codification of the absolute priority rule has eliminated any “exception” to that rule . . . . We need not reach this question to resolve the instant dispute.”).
has the effect of engrafting the “Case dicta” into the phrase “on account of such junior interest” contained within §1129(b)(2)(B)(ii).36 Even though the Supreme Court never resolves the issue of whether the new value exception survived the enactment of the Bankruptcy Code in 1978, it is hard to argue that it didn’t treat the exception as being alive and well. The following Case dicta is cited by the Supreme Court as the substance of the new value exception:

It is, of course, clear that there are circumstances under which stockholders may participate in a plan or reorganization of an insolvent debtor . . . [w]here th[e] necessity [for new capital] exists and the hold stockholders make a fresh contribution [in money or in money’s worth] and receive in return a participation reasonably equivalent to their contribution . . . 37

The Court in LaSalle held that the requirements of the new value exception were not satisfied because the “benefit of equity ownership may be obtained by no one but old equity partners.”38 The exclusive opportunity to acquire the equity interest was deemed to be property, and the fact that this property was given exclusively to the old equity partners without any additional cash contribution precluded the application of the new value exception.39 The plan violated the “Case dicta” because (1) old equity holders did not make a “fresh contribution” and (2) what the old equity holders received in return was not “reasonably equivalent to their contribution.” For the reasons set forth above, the Court held that even if there were a new value exception, it was not met in this case.40

The Court in Ahlers held that the requirements of the new value exception were not satisfied because the farmers’ future contribution of “labor, experience, and expertise” did not qualify under the Case dicta as “money or money’s worth.”41 Rather, the Court concluded that

36 LaSalle, 526 U.S. at 445; Ahlers, 485 U.S. at 203.
37 LaSalle, 526 U.S. at 445 (citing Case v. Los Angeles Lumber Products Co., 308 U.S. 106 (1913)) (inserted money or money’s worth).
38 LaSalle, 526 U.S. at 454.
39 Id. at 455-56
40 Id. at 458.
41 Ahlers, 485 U.S. at 203.
the proposed contribution by the farmers was “intangible, inalienable, and in all likelihood, unenforceable.” Since the proposed contribution by the farmers did not satisfy the Case dicta, the Court summarily concluded that even if there was a new value exception, the farmer’s proposed plan did not qualify.

The strength and influence of the Case dicta in both LaSalle and Ahlers is hard to ignore. Despite the Court’s reluctance to expressly confirm the viability of the new value exception, the depth of the Court’s analysis in both cases suggests that the new value exception is alive and well. The implicit effect of the Court’s analysis is a jurisprudential incorporation of the Case dicta within the phrase “on account of such junior interest” within the text of §1129(b)(2)(B)(ii).

B. Current Circuit Court Jurisprudence

A survey of current Circuit Court jurisprudence reveals that the real action in the context of the absolute priority rule is the scope and application of the new value exception. The absolute priority rule finds its way into decisions dealing with a wide variety of issues, including: libel actions, legal malpractice, pre-plan settlement agreements, solvent debtors (as opposed to the common insolvent debtor situation), and non-profit entities. In this multi-contextual application of the absolute priority rule, the Circuits can be divided into three categories: (1) Circuits that engage in a strict application of the absolute priority rule without any mention of the new value exception, (2) Circuits that conclude the new value exception survived the enactment of the Bankruptcy Code of 1978, and (3) Circuits that take no position on whether the new value exception survived the enactment of the Bankruptcy Code of 1978. Perhaps indicative of the

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42 Id. at 204.
43 Wilkow v. Forbes, Inc., 241 F.3d 552 (7th Cir. 2001).
45 In re Iridium Operating LLC, 478 F.3d 452 (2d Cir. 2007).
46 Dow Corning Corp., 456 F.3d 668 (6th Cir. 2006).
47 In re General Teamsters, Warehousemen and Helpers Union, Local 890, 265 F.3d 869 (9th Cir. 2001).
viability of the new value exception, no Circuit takes the position that the new value exception failed to survive the enactment of the Bankruptcy Code of 1978.

1. *Strict Application Circuits: Second and Third*

The Second and Third Circuits apply the absolute priority rule in a strict manner, without any meaningful discussion of the new value exception. The Second Circuit in *In re Coltex Loop Central Three Partners, L.P.*\(^{48}\) held that under a plain reading of §1129(b)(2)(B) a plan that allowed “old equity [to] retain the real estate of the debtor on account of its prior property interest” when the unsecured creditors are not paid in full was a clear violation of the absolute priority rule.\(^{49}\) While acknowledging the existence of the new value exception, and the District Court’s application of the exception, the court took a different path by its straightforward application of the absolute priority rule.\(^{50}\)

The Third Circuit also utilized a “plain meaning” methodology in interpreting §1129(b)(2)(B). In *In re Armstrong World Industries,*\(^{51}\) the Third Circuit held that the absolute priority rule was violated because the proposed plan would give property to a class junior to another class that was not paid in full.\(^{52}\) After a strict application of the absolute priority rule, the court rejected several arguments for exceptions thereto.\(^{53}\) The Court concedes the phrase “on account of” in §1129(b)(2)(B)(ii) is not a “categorical prohibition against transfers to prior

\(^{48}\) 138 F.3d 39 (2d Cir. 1998).

\(^{49}\) *Id.* at 43.

\(^{50}\) *Id.* at 41-43.

\(^{51}\) 432 F.3d 507 (3d Cir. 2005).

\(^{52}\) *Id.* at 513 (“We find that the plain meaning of the statute does not conflict with Congress’s intent. As a result, we will apply the plain meaning of the statute. Under this reading, the statute would be violated because the Plan would give property to Class 12, which has claims junior to those of Class 6.”).

\(^{53}\) *Id.* at 513-14 (rejecting several arguments for exceptions: (1) that a creditor can distribute what it acquires under the plan to a part of lower priority without violating the absolute priority rule, (2) exception based on the “on account of” language, and (3) broad equitable exception).
equity.” To this end, the Court cites in a footnote that the new value exception is not being discussed in the case.54

In In re PWS Holding Corp.,55 the Third Circuit held that a proposed plan did not violate the absolute priority rule even though the equity holders were released from potential claims. In so holding, the Court reasoned that “without direct evidence of causation, releasing potential claims against junior equity does not violate the absolute priority rule in the particular circumstance in which the estate’s claims are of only marginal viability and could be costly for the reorganized entity to pursue.”56 The holding in PWS, at first glance, does not appear to be a strict application of the absolute priority rule. However, the Court specifically provides in a footnote that they are not presented with the issue of the new value exception.57 If the claims subject to the release were not only of “marginal viability” the decision would most likely have come to a different result.

2. “Survival” Circuits: Sixth, Eighth, and Ninth

The Sixth, Eighth, and Ninth circuits all hold that the new value exception, or corollary, survives the enactment of the Bankruptcy Code of 1978. In In re U.S. Truck Co., Inc.,58 the Sixth Circuit held that the proposed plan did not violate the absolute priority rule despite the fact that an equity holder received an interest when the unsecured creditors were not paid in full.59 The Court found there was no violation because the equity holder gave up its prior interest and participated in the reorganized company by making a $100,000 contribution.60 The Court cited the Case dicta and applied the new value exception, without specifically stating it was doing

54 Id. at 515-16 & n.3 (“Because AWI does not assert any argument regarding the new value exception to the absolute priority rule, we do not address that issue.”).
55 228 F.3d 224 (3d Cir. 2000).
56 Id. at 242.
57 Id. at 238 & n.10.
58 800 F.2d 581 (6th Cir. 1986).
59 Id. at 588.
60 Id.
so. The Sixth Circuit in *In re Dow Corning Corp.* also provided insight into the application of the absolute priority rule to a solvent debtor. The Court held that when the debtor is solvent, “absent compelling equitable considerations . . . it is the role of the bankruptcy court to enforce the creditor’s contractual rights.”

The Eighth Circuit’s affirmation of the new value exception’s survival is evidenced by several of its cases. In *In re Ahlers*, the Eight Circuit held that the new value exception was satisfied by the farmers’ contribution of “experience, knowledge, and labor.” While the Supreme Court disagreed with the Eight Circuit’s *application* of the new value exception, it did not disagree with the Eight Circuit’s conclusion regarding the *survival* of the new value exception. In *In re Anderson*, the Eight Circuit impliedly recognized the viability of the new value exception, but concluded that its requirements were not met. In *In re Blankemeyer*, the Eighth Circuit declared that if a “junior class contributed something reasonably compensatory and measurable to the reorganization enterprise” it could retain an equitable ownership interest even if unsecured creditors were not paid in full.

The Ninth Circuit presents the most persuasive argument for the continuing viability of the new value exception after the codification of the Bankruptcy Code in *In re Bonner Mall*. While the Court states that the issue will most likely be resolved by the Supreme Court (they are wrong on that assertion to this point), it holds that “the new value exception remains a vital principle of bankruptcy law.” The Court structures its arguments in three logical segments: (1)

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61 Id.
62 456 F.3d 668 (6th Cir. 2006).
63 Id. at 679.
66 913 F.2d 530 (8th Cir. 1990).
67 861 F.2d 192, 194 (8th Cir. 1988).
68 2 F.3d 899 (9th Cir. 1993).
69 Id. at 901.
a plain reading of the statute allows the exception, (2) a lack of express inclusion of the new value exception within §1129(b)(2)(B)(ii) does not “reflect an intent to eliminate the exception,” and (3) “the new value exception is consistent with the underlying policies of Chapter 11.”

The Court reasoned that a plain reading allows the exception because if the new value exception is met, then the property is not retained or received “on account of such junior claim or interest.” The lack of express codification of the exception did not “reflect an intent” to get rid of same because Congress was aware of the exception before enacting the code, and it has not been clearly shown that Congress intended to change the viability of the exception. The Court finally concluded that the exception is consistent with the two major policies underlying Chapter 11: (1) permitting successful rehabilitation of debtors, and (2) maximizing the value of the estate.


A plurality of the Circuits adopt the approach of the Supreme Court and decide not to take a position on the viability of the new value exception subsequent to the enactment of the Bankruptcy Code of 1978. The following is the uniform statement made in all cases that apply this approach: “[E]ven if some limited new capital exception were viable under the Bankruptcy Code, it would not be so expansive as to apply under the facts of this case.”

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70 Id. at 907-15.
71 Id. at 908.
72 Id. at 912.
73 Id. at 915-16.
74 For relevant Fourth Circuit jurisprudence see In re Bryson Properties, XVIII, 961 F.2d 496 (4th Cir. 1992). For relevant Fifth Circuit Jurisprudence see Carriere v. Jobs.com Inc, 393 F.3d 508 (5th Cir. 2004); In re Babcock and Wilcox Co., 250 F.3d 955 (5th Cir. 2001); Matter of Greystone III Joint Venture, 995 F.2d 1274 (5th Cir. 1991). For relevant Seventh Circuit jurisprudence see Kahm v. First Bank of Witting, 908 F.2d 1305 (7th Cir. 1990); Wilkow v. Forbes, 241 F.3d 552 (7th Cir. 2001). For relevant Tenth Circuit jurisprudence see Unruh v. Rushville State Bank, 987 F.2d 1506 (10th Cir. 1993).
75Bryson Properties, 961 F.2d at 505 (4th Cir. 1992).
The Fifth Circuit negated the viability of the new value exception in the original
*Greystone* opinion: “Because we find no ‘new value exception’ to the absolute priority rule . . .
that rule was violated by Greystone’s plan.” However, on rehearing, the Fifth Circuit struck
down the portion of the original opinion negating the viability of the new value exception: “In
withdrawing this portion of the panel opinion we emphasize that the bankruptcy court’s opinion
on the ‘new value exception’ to the absolute priority rule has been vacated and we express no
view whatever on that part of the bankruptcy court’s decision.” Accordingly, the Fifth Circuit
falls in line with the United States Supreme Court in declining to decide on whether the new
value exception remains viable under the Bankruptcy Code of 1978.

IV. FROM PURPOSE TO PROPOSED MODIFICATIONS

Several scholars and courts have noted the effect that the absolute priority rule has on the
negotiation structure of a Chapter 11 plan of reorganization. In a brilliant summary of this
proposition, Klee states:

While these rules [cram down] will be important in the context of confirmation of
a plan when a class dissent, one of the hypotheses of the Code is that the rules
will also affect the negotiating posture of the debtor and creditors with respect to
the formulation of a plan. Hence, an ancillary effect of the cram-down rules will
be to produce a plan which all classes will accept voluntarily.

Given the importance of cram down rules in the context of plan negotiation, the new
value corollary to the absolute priority rule should be included in the statutory text of
§1129(b)(2)(B)(ii). The incorporation of the new value exception will give greater clarity to the
parties who are negotiating, and will give creditors greater incentive to enter into plans

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76 *Greystone*, 995 F.2d at 1276.
77 Id.
78 Kenneth N. Klee, *All You Ever Wanted to Know About Cram Down*, 53 AM. BANKR. L.J. 133; Blum & Kaplan,
*supra* note 1; *Greystone*, 995 F.2d 1274.
79 Klee, *supra* note 78, at 134.
voluntarily. After the incorporation of the new value corollary into the statute, §1129(b)(2)(B)(ii) will read:

(ii)(I) 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, except in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section;
(II) property is not received or retained on account of such junior claim or interest if the holder of a junior claim or interest makes a fresh contribution in money or in money’s worth to the reorganized entity where such contribution was necessary and receives property reasonably equivalent to the holder’s contribution. 80

V. CONCLUSION

The history, current jurisprudential treatment, and purpose of the absolute priority rule all point to the incorporation of the new value corollary into the statutory text of §1129(b)(2)(B). While the creditor and the debtor are clearly acting on behalf of their own interests, as all parties do in legal negotiations, the new value corollary (as explicated in the Case dicta) provides a much needed level of objectivity to the current jurisprudential and statutory state of this crucial area of bankruptcy law.

80 The added section is a modification of the Case dicta that has proven to be so influential.