

OCT 06 2010

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No. EC-09-1292-En Banc
)	
BIG3D, INC.,)	Bk. No. 08-16768
)	
Debtor.)	
_____)	
PEOPLE'S CAPITAL AND LEASING)	
CORP.,)	
)	
Appellant,)	
)	
v.)	O P I N I O N
)	
BIG3D, INC.,)	
)	
Appellee.)	
_____)	

Argued to the Panel en banc and Submitted on July 22, 2010,
at Pasadena, California

Edmund J. Sherman, Glass and Goldberg,
argued for People's Capital Leasing Corp.
Scott M. Reddie, McCormick Barstow Sheppard Wayte & Carruth, LLP,
argued for Big3D, Inc.

Filed - October 6, 2010

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Hon. W. Richard Lee, United States Bankruptcy Judge, Presiding

Before: PAPPAS, Chief Judge, DUNN, JURY, MARKELL, HOLLOWELL, and
KIRSCHER, Bankruptcy Judges.

1 DUNN, Bankruptcy Judge:

2

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INTRODUCTION

4 The chapter 11¹ debtor in possession in this case is Big3D,
5 Inc. ("Big3D"). Secured creditor People's Capital and Leasing
6 Corporation ("PCLC") appeals the bankruptcy court's decision that
7 it was not entitled to adequate protection payments from Big3D to
8 compensate it for the alleged decline in the value of its
9 collateral occurring between the bankruptcy petition date and the
10 date PCLC filed its request for adequate protection. We AFFIRM.

11

FACTUAL BACKGROUND

12 Most of the material facts in this appeal are undisputed.

13 Big3D operates a commercial printing business, specializing
14 in printing on plastic lenses to produce a three dimensional
15 effect. PCLC is in the business of providing financing for the
16 acquisition of business equipment.

17 On October 21, 2005, Big3D and PCLC entered into "Master
18 Lease Agreement No. 1300" and related attachments (together, the
19 "Lease Agreement"). Under the Lease Agreement, PCLC leased to
20 Big3D a 2005 KBA Genius 52UV-5 Sheetfold offset press (the
21 "Equipment"). The lease term was 60 months, and Big3D was
22 required to pay PCLC monthly payments of \$8,516.13. The Lease
23 Agreement granted Big3D an option to purchase the Equipment at its
24 expiration or termination for \$101.00. PCLC filed a UCC-1

25

26 ¹ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 The Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
The Federal Rules of Civil Procedure are referred to as Civil
Rules.

1 Financing Statement concerning the transaction and the Equipment.²
2 The Lease Agreement was twice amended by the parties, on
3 February 8 and November 27, 2007, to allow Big3D to make up
4 payment shortfalls.

5 In March 2008, Big3D defaulted again on its payment
6 obligations under the Lease Agreement. PCLC alleges that it made
7 demand on Big3D to pay the missed payments under the Lease
8 Agreement, but Big3D did not do so. PCLC declared the entire
9 balance on the Lease Agreement, a total of \$348,411.71, due and
10 owing, and on July 28, 2008, PCLC sued Big3D in the Fresno County,
11 California Superior Court for breach of contract and to recover
12 possession of the Equipment from Big3D. People's Capital &
13 Leasing v. Big3D, Inc., No. 08CECG02553. On August 7, 2008, PCLC
14 filed an application for writ of possession in the state court
15 under Cal. Code Civ. Proc. § 512.020, and at a hearing on October
16 21, 2008, the superior court granted a prejudgment writ of
17 possession in favor of PCLC for the Equipment.

18 Big3D filed a chapter 11 bankruptcy petition on October 23,
19 2008; it has operated its business as a debtor in possession
20 continuously since that date. In its schedules, Big3D listed the
21 value of the Equipment at \$400,000, and listed an undisputed
22 secured debt of \$350,000 for the Equipment in favor of PCLC.

23 About six months later, on March 20, 2009, PCLC filed a
24 motion for relief from the automatic stay, or in the alternative,
25

26 ² While characterized by the documents as a "lease," because
27 of the nominal purchase option price, PCLC concedes that, for
28 purposes of the bankruptcy case, PCLC could be treated by Big3D as
a secured creditor rather than a lessor. Hr'g Tr. 4:17-24 (April
23, 2009). Big3D does not challenge this characterization.

1 for adequate protection, in Big3D's bankruptcy case. In the
2 motion, PCLC alleged that Big3D was in default under the Lease
3 Agreement, and that during the bankruptcy case, Big3D had made no
4 payments to PCLC, although Big3D had maintained possession and use
5 of the Equipment. PCLC calculated that the amount owed on the
6 Lease Agreement on the petition date was \$364,751.76, including
7 default interest but not including attorney's fees. PCLC alleged
8 it lacked adequate protection of its interest in the Equipment,
9 and sought stay relief to repossess the Equipment, or in the
10 alternative, adequate protection payments.

11 In support of its motion, PCLC submitted the declaration of
12 its expert witness, James R. White, who opined that the value of
13 the Equipment had remained constant at \$380,000 from July 2008 to
14 the petition date of October 23, 2008, but, because of
15 "deteriorating economic conditions," the Equipment's value had
16 declined \$45,000 between the petition date and the date of his
17 report, March 11, 2009. According to White, although the rate of
18 depreciation in value had slowed, the Equipment was still losing
19 value at the rate of 12 percent a year, or \$3,350 per month.

20 Big3D filed an opposition to PCLC's motion on April 9, 2009.
21 Big3D did not contest the factual assertions of PCLC's motion and
22 declaration. Rather, Big3D asserted that the Equipment was
23 necessary for its reorganization, and it offered to pay PCLC
24 \$3,500 per month thereafter for adequate protection.

25 At the April 23, 2009 hearing on PCLC's motion, counsel for
26 the parties and the bankruptcy court agreed that prospective
27 adequate protection payments should be made by Big3D to PCLC in
28 the amount of \$3,500 per month beginning May 15, 2009. However,

1 the bankruptcy court was skeptical about PCLC's request that it
2 order Big3D to make adequate protection payments to PCLC as
3 compensation for the Equipment's alleged loss in value from the
4 petition date to the date that PCLC filed its motion. The court
5 took that aspect of PCLC's request under submission and invited
6 the parties to file supplemental briefs.

7 In its brief, PCLC cited the BAP's decision in Paccom Leasing
8 Corp. v. Deico Elects., Inc. (In re Deico Elects., Inc.), 139 B.R.
9 945 (9th Cir. BAP 1992) ("Deico"), for the proposition that
10 adequate protection should be provided to a creditor based on when
11 it could have obtained its state court remedies if bankruptcy had
12 not intervened. According to PCLC, since it had obtained the
13 state court writ of possession two days before the filing of
14 Big3D's bankruptcy petition, it was entitled to adequate
15 protection payments from the petition date.

16 Big3D's brief argued that PCLC was not entitled to
17 "retroactive" adequate protection payments (i.e., for the period
18 prior to filing its motion) because it was protected by a
19 substantial equity cushion in the Equipment on the petition date.
20 Moreover, it reminded the bankruptcy court that while PCLC had the
21 writ of possession when Big3D filed for bankruptcy, PCLC had not
22 completed its state law remedies by repossessing and selling the
23 Equipment. As a result, Big3D argued that it need only make
24 prospective adequate protection payments to PCLC.

25 The bankruptcy court entered its Memorandum of Decision
26 Regarding Motion for Retroactive Adequate Protection ("Memorandum
27 Decision") on August 28, 2009. In its Memorandum Decision, the
28 bankruptcy court determined that, as the creditor, PCLC had the

1 burden of proving entitlement to retroactive adequate protection.
2 It also rejected PCLC's contention that Deico required that
3 adequate protection be provided from the petition date. Instead,
4 according to the bankruptcy court, Deico granted the bankruptcy
5 court "discretion to fix any initial lump sum amount, the amount
6 payable periodically, the frequency of payments, and the beginning
7 date, all as dictated by the circumstances of the case and the
8 sound exercise of that discretion." Memorandum Decision at 7,
9 citing Deico, 139 B.R. at 947 (emphasis in original). Because in
10 this case PCLC acknowledged that the Equipment had depreciated
11 only because of adverse economic conditions, and not because of
12 wear and tear or by Big3D's continued possession and use, the
13 bankruptcy court was not persuaded that PCLC had been harmed as a
14 result of the automatic stay prior to the hearing. The bankruptcy
15 court also expressed concern that PCLC had not filed its request
16 for adequate protection within a reasonable time. For these
17 reasons, the bankruptcy court declined to order that PCLC be paid
18 any adequate protection for the period prior to commencement of
19 the prospective payments.

20 The bankruptcy court entered an Order Denying Motion for
21 Retroactive Adequate Protection on August 28, 2009. PCLC filed a
22 timely notice of appeal on September 4, 2009.

23 JURISDICTION

24 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
25 and 157(b) (2) (A) and (M). The Panel has jurisdiction under 28
26 U.S.C. § 158.

27

28

1 **EN BANC CONSIDERATION**

2 On May 10, 2010, after a vote of the members of the Panel, an
3 order was entered directing that this appeal be argued and
4 submitted for decision en banc pursuant to 9th Cir. BAP R. 8012-2.
5 BAP R. 8012-2(a) provides that although en banc consideration of
6 an appeal by the Panel generally is not favored, an en banc
7 hearing will be ordered in order to maintain uniformity of the
8 Panel's decisions "including, without limitation, when there is a
9 challenge to an existing precedent of the Panel."

10 In light of Big3D's argument based on language of the
11 Bankruptcy Code, primarily in §§ 362(d) and 363(e), that as a
12 matter of law, adequate protection payments cannot be required for
13 any period prior to a creditor's filing a request or motion for
14 adequate protection payments, the merits panel requested that the
15 Panel hear and decide this appeal en banc, to consider the
16 continuing viability of Deico as precedent, as provided for in BAP
17 R. 8012-2(c). Thereafter, en banc consideration was approved by a
18 vote of a majority of the regular members of the Panel, as
19 provided for in BAP R. 8012-2(d).³

20 **ISSUES**

21 1. Whether the bankruptcy court abused its discretion in
22 denying PCLC's request for adequate protection for the period from
23 the petition date to the date of filing its motion for adequate
24 protection.

25 2. Whether the Panel should modify the rule announced in its
26 _____

27 ³ Since this appeal arose in the Eastern District of
28 California, which is not the home district of any regular member
of the Panel, all six regular members of the Panel were eligible
to vote on the request for en banc consideration.

1 decision in Deico, by ruling that a creditor is entitled to
2 adequate protection only for the depreciation of its collateral
3 going forward from the date it files its request or motion with
4 the bankruptcy court.

5 **STANDARDS OF REVIEW**

6 A bankruptcy court's decision regarding adequate protection
7 is reviewed for abuse of discretion. Deico, 139 B.R. at 947. In
8 applying an abuse of discretion test, we first "determine de novo
9 whether the [bankruptcy] court identified the correct legal rule
10 to apply to the relief requested." United States v. Hinkson, 585
11 F.3d 1247, 1262 (9th Cir. 2009). If the bankruptcy court
12 identified the correct legal rule, we then determine whether its
13 "application of the correct legal standard [to the facts] was (1)
14 illogical, (2) implausible, or (3) without support in inferences
15 that may be drawn from the facts in the record." Id. (internal
16 quotation marks omitted). Only if the bankruptcy court did not
17 identify the correct legal rule, or if its application of the
18 correct legal standard to the facts was illogical, implausible, or
19 without support in inferences that may be drawn from facts in the
20 record, is it appropriate to conclude that the bankruptcy court
21 abused its discretion. Id.

22 **DISCUSSION**

23 I.

24 Big3D did not contest that PCLC was entitled to adequate
25 protection payments to protect its interest in the Equipment.
26 This appeal concerns the parties' dispute over the timing of
27 adequate protection payments. The parties stipulated, and the
28 bankruptcy court ordered, that Big3D make monthly adequate

1 protection payments to PCLC of \$3,500 from and after May 23, 2009.
2 However, the bankruptcy court denied PCLC's request that a further
3 adequate protection payment be made to compensate PCLC for any
4 decline in value of the Equipment from the petition date on
5 October 23, 2008. The bankruptcy court's denial of this part of
6 PCLC's request for adequate protection is the focus of this
7 appeal.

8 The Panel may affirm the decision of the bankruptcy court
9 under the rule announced in Deico, because the bankruptcy court
10 did not abuse its discretion in denying retroactive adequate
11 protection payments in this case.

12

13 A.

14 The Bankruptcy Code provisions concerning stay relief and
15 adequate protection are straightforward. During the pendency of a
16 bankruptcy case, the automatic stay under § 362(a) prevents
17 secured creditors from exercising their usual state law
18 contractual and statutory remedies upon a debtor's default,
19 including the right to repossess and sell personal property
20 collateral securing a debt. Congress offers a secured creditor
21 two alternatives in the Bankruptcy Code when it perceives that its
22 collateral may be declining in value during a bankruptcy case: it
23 may seek relief from the automatic stay under § 362(d), or it may
24 seek adequate protection under § 363(e).

25 Under § 362(d)(2), stay relief is available to a secured
26 creditor if the debtor lacks equity in the collateral, but only if
27 it is also shown that the collateral is not "necessary to an
28 effective reorganization." However, pursuant to § 362(d)(1),

1 relief from stay is also available to the secured creditor if it
2 lacks adequate protection of its interest in the collateral.
3 Adequate protection is in turn defined in § 361,⁴ and is intended
4 to compensate a secured creditor whose collateral declines in
5 value while it is in the possession of, and being used by, a
6 chapter 11 debtor.

7 Section 363 lays down the ground rules for a debtor's use of
8 property in a chapter 11 bankruptcy case. In general, under
9 § 363(c)(1), a chapter 11 debtor in possession may use property of
10 a bankruptcy estate in which a creditor holds a lien in the
11 ordinary course of the debtor's business without notice to, or
12 obtaining the consent of, the creditor.⁵ But while a debtor in
13 possession may use property subject to a creditor's lien, § 363(e)

14
15 ⁴ § 361. **Adequate protection**

16 When adequate protection is required under section 362,
17 363, or 364 of this title of an interest of an entity in
property, such adequate protection may be provided by-

18 (1) requiring the trustee to make a cash payment or
19 periodic cash payments to such entity, to the
20 extent that the stay under section 362 of this
21 title, use, sale, or lease under section 363 of
22 this title, or any grant of a lien under section
23 364 of this title results in a decrease in the
value of such entity's interest in such property;

24 (2) providing to such entity an additional or
25 replacement lien to the extent that such stay, use,
26 sale, lease, or grant results in a decrease in the
27 value of such entity's interest in such property;
or

28 (3) granting such other relief, other than
entitling such entity to compensation allowable
under section 503(b)(1) of this title as an
administrative expense, as will result in the
realization by such entity of the indubitable
equivalent of such entity's interest in such
property.

⁵ This provision is to be contrasted with § 363(c)(2) which prohibits the use of a creditor's "cash collateral," as defined in § 363(a), without the creditor's consent, or authorization by the bankruptcy court obtained only after notice and a hearing.

1 conditions that right. It provides:

2 Notwithstanding any other provision of this section, at any
3 time, on request of an entity that has an interest in
4 property used, sold, or leased, or proposed to be used, sold,
5 or leased, by the [debtor in possession], the court, with or
6 without a hearing, shall prohibit or condition such use,
7 sale, or lease as is necessary to provide adequate protection
8 of such interest.

9 As noted previously, § 361(1) instructs that when adequate
10 protection is shown to be required to stave off a secured
11 creditor's request for stay relief:

12 such adequate protection may be provided by . . .
13 requiring the [debtor in possession] to make a cash
14 payment or periodic cash payments to such entity, to the
15 extent that the stay under section 362 of this title,
16 use, sale or lease under section 363 of this title, or
17 any grant of a lien under section 364 of this title
18 results in a decrease in the value of such entity's
19 interest in such property[.]

20 In this case, while not contesting that the Equipment was
21 necessary for Big3D's reorganization, PCLC through its motion
22 sought both stay relief and adequate protection. The parties
23 stipulated that cash adequate protection payments by Big3D to
24 PCLC, rather than stay relief, were the appropriate means of
25 safeguarding the value of PCLC's interest in the Equipment while
26 Big3D was attempting to reorganize. The parties could not agree,
27 however, on the period of time during the bankruptcy case for
28 which PCLC was entitled to adequate protection.⁶ In their briefs

24 ⁶ As noted above, the bankruptcy court ruled that PCLC had
25 the burden of proving it was entitled to retroactive adequate
26 protection payments. At first glance, this aspect of the
27 bankruptcy court's decision would seem to conflict with the
28 statutory allocation of burdens under § 363(p), which dictates
that while a secured creditor must prove the extent, validity and
priority of its lien in the debtor's property, "[i]n any hearing
under this section . . . the [chapter 11 debtor] has the burden of
proof on the issue of adequate protection." § 363(p) (1).

(continued...)

1 in the bankruptcy court, and now on appeal, both parties suggest
2 that the answer to this question is controlled by the Panel's
3 opinion in Deico.

4 Deico was a manufacturer of computer components that filed
5 for protection under chapter 11. Paccom Leasing Corporation
6 ("Paccom") had leased equipment to Deico that Deico needed for its
7 reorganization. Concerned about the possibly declining value of
8 its collateral, Paccom filed two motions--a motion for relief from
9 the automatic stay and a motion for adequate protection--in the
10 bankruptcy court. In its motion for adequate protection, Paccom
11 argued that it was entitled to adequate protection payments from
12 Deico from and after one of three dates: the petition date, the
13 date Paccom filed its motion for relief from stay, or the date
14 Paccom filed its motion for adequate protection. Paccom's motion
15 for adequate protection was heard on August 22, 1991, and the
16 bankruptcy court ordered that adequate protection payments be made
17 by Deico to Paccom commencing on September 22, 1991. Paccom
18 appealed the bankruptcy court's selection of the payment
19 commencement date to the BAP. Deico, 139 B.R. at 946.

20 In Deico, the BAP observed that the Bankruptcy Code does not
21 specifically provide for a date upon which adequate protection

22 _____
23 ⁶(...continued)
24 However, because the parties have stipulated that adequate
25 protection must be paid by Big3D to PCLC, and no dispute exists
26 over PCLC's interest in the collateral, the question of the timing
27 of those adequate protection payments arguably falls outside the
28 parameters of § 363(p), and the general rule that, as the movant,
PCLC has the burden of persuasion on its motion, controls.
Hickman v. Hanna (In re Hickman), 384 B.R. 832, 841 (9th Cir. BAP
2008). PCLC has not challenged the bankruptcy court's ruling that
it must prove that it is entitled to retroactive adequate
protection. We therefore express no opinion on the bankruptcy
court's allocation of that burden.

1 value of the Equipment Collateral after that date.” Id.

2 We disagree with PCLC’s interpretation of the Bankruptcy
3 Code, and its reading of the holding in Deico. Instead, in our
4 view, as the Deico decision states, “the amount of adequate
5 protection to which an undersecured creditor is entitled is equal
6 to the amount of depreciation its collateral suffers after it
7 would have exercised its state court remedies. . . .” Deico, 139
8 B.R. at 947. Indeed, Deico left no ambiguity on this point,
9 because later in the opinion the Panel concluded that “[a]dequate
10 protection payments compensate undersecured creditors for the
11 delay bankruptcy imposes upon the exercise of their state law
12 remedies.” Id. (emphasis added).

13 While PCLC had obtained a state court order directing the
14 sheriff to take possession of the Equipment on PCLC’s behalf, PCLC
15 would not have fully “exercised” its remedies under its contract
16 and applicable state law until the Equipment was actually
17 repossessed and sold. It is only at that point that the value of
18 the Equipment would have been converted to cash, and PCLC’s
19 security would be immune from any future decline in value. But
20 even assuming the best possible circumstances, and the efficient
21 execution of the repossession and sale of the Equipment, it likely
22 would have taken PCLC substantial time to have removed and sold
23 the Equipment following the state court’s issuance of a writ of
24 possession.

25 For example, even if the sheriff had acted to enforce the
26 writ on the same day Big3D filed its bankruptcy petition,⁷ it is

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28 ⁷ To enforce the writ under California law, the sheriff
would have been required to maintain possession of the Equipment

(continued...)

1 likely that the disassembly and removal of the Equipment would
2 have taken some time to accomplish. In this regard, the
3 bankruptcy court observed that PCLC had not addressed the problems
4 of the writ enforcement and repossession process as to the
5 Equipment in its arguments. The bankruptcy court noted that the
6 Equipment was a large piece of specialized machinery, not easily
7 movable, and that the physical removal of the Equipment would
8 require a team of technicians at least several days. The
9 Equipment would need to be dismantled and transported in pieces to
10 another location. PCLC has not challenged these findings on
11 appeal.

12 After the sheriff took possession of the Equipment,
13 additional proceedings would have been required before PCLC would
14 have completed the exercise of its state law remedies. To
15 liquidate the Equipment, whether by execution sale after entry of
16 a final judgment by the state court, Cal. Code Civ. Proc.
17 § 716.010 et seq., or via private sale under Cal. U. Com. Code
18 § 9610(a),⁸ further time would be required. Therefore, the

19
20

21 ⁷(...continued)
22 in a secure location. Cal. Code. Civ. Proc. § 514.030. No
23 earlier than ten days after levy of the writ, the sheriff could
24 deliver the Equipment to PCLC. Id. However, the California Code
25 would allow Big3D to provide an undertaking equal to twice the
26 value of its interest in the collateral, preventing delivery of
the collateral to PCLC, and requiring return of the Equipment to
Big3D. Cal. Code Civ. Proc. § 515.020. If PCLC objected to
Big3D's undertaking within ten days, a contested hearing would
follow in state court, which would require at least another 10
days' notice to the parties. Id.

27 ⁸ After default, a secured party may sell, lease, license,
28 or otherwise dispose of any or all of the collateral in its
present condition or following any commercially reasonable
preparation or processing. Cal. Com. Code § 9610(a).

1 bankruptcy court did not err in concluding that PCLC had not
2 completed the exercise of its state law remedies on the petition
3 date, and that additional time would have been required to
4 repossess and sell the Equipment.

5 In addition to this problem with its argument, PCLC's
6 evidence concerning the decline in the value of the Equipment was
7 also of limited value to the bankruptcy court in determining
8 whether retroactive adequate protection was appropriate.

9 According to PCLC's expert witness, "the \$380,000 valuation of the
10 Equipment was . . . accurate as of the filing date of the instant
11 Bankruptcy case on October 23, 2008." The witness valued the
12 Equipment at \$335,000 on the date of his report, March 11, 2009,
13 explaining that this \$45,000 in depreciation was due to
14 "deteriorating economic circumstances." During this period of
15 approximately four and a half months, the expert concluded that
16 the Equipment depreciated at a variable rate, which rate slowed to
17 12% per annum by the time he completed his report. It is
18 impossible to understand from the expert's declaration when, and
19 how much, the Equipment depreciated from the theoretical point
20 when PCLC would have completed the exercise of its state law
21 remedies in reference to the date that PCLC sought adequate
22 protection.

23 To be entitled to adequate protection, Deico requires that
24 PCLC establish both a temporal point at which it would have
25 "exercised" its state law remedies outside of bankruptcy, and the
26 amount the Equipment declined in value after that time. Even
27 assuming that PCLC had exercised its state law remedies by the
28 petition date, according to its expert, it was at some point after

1 that date that the Equipment first started to depreciate, and once
2 that depreciation commenced, it continued at a variable rate,
3 culminating in a constant rate of depreciation of 12 percent per
4 annum approximately four and a half months after Big3D's
5 bankruptcy petition was filed. Nothing in this evidence would
6 allow the bankruptcy court to establish, or even estimate, the
7 temporal point at which the Equipment started to depreciate.

8 Based upon this record, the bankruptcy court observed, "it
9 appears that [PCLC] was adequately protected for some period of
10 time and that the date of filing is not the date from which
11 adequate protection should be calculated."⁹ Under Deico, the
12 bankruptcy court had discretion in fixing the beginning date,
13 amount and frequency of the adequate protection payments based on
14 the circumstances of the case. Deico, 139 B.R. at 947. Here, the
15 bankruptcy court's findings and conclusions are consistent with
16 Deico, and they are neither illogical, implausible, nor without
17 support in inferences that may be drawn from facts in the record.
18 Hinkson, 585 F.3d at 1262.¹⁰

19 _____
20 ⁹ Indeed, PCLC's counsel explained its delay in seeking
21 adequate protection in part by indicating that PCLC did not
22 believe it lacked adequate protection at the time of Big3D's
23 bankruptcy filing.

24 ¹⁰ Besides Deico, PCLC relies on the Panel's decision in
25 First Fed. Bank of Cal. v. Weinstein (In re Weinstein), 227 B.R.
26 284 (9th Cir. BAP 1998). PCLC asserts that "Weinstein contains a
27 very strong statement that the adequate protection must be paid
28 from the Petition Date." PCLC Open. Br. at 20. However, and more
precisely, the decision reads, "Adequate protection is provided to
safeguard the creditor against depreciation in the value of the
collateral during the reorganization process." In re Weinstein,
227 B.R. at 296. Weinstein does not require that adequate
protection commence upon the filing of the petition. Moreover,
the authority cited in Weinstein for the quoted statement is

(continued...)

1 In addition, the bankruptcy court read § 361(1) generally to
2 require that an award of adequate protection payments be measured
3 by that amount that the automatic stay, coupled with the debtor's
4 use of the collateral, "results in a decrease in the value" of the
5 collateral. The bankruptcy court noted that, in this case, PCLC
6 never argued that the Equipment depreciated as a result of Big3D's
7 use of the Equipment. Instead, the bankruptcy court observed that
8 PCLC's basis for seeking adequate protection was a decline in
9 value of the Equipment caused by "deteriorating economic
10 conditions." Such conditions occurred regardless of Big3D's
11 seeking to reorganize its affairs in bankruptcy.

12 In sum, the bankruptcy court's determination that PCLC did
13 not show that it suffered a compensable loss to support an award
14 of retroactive adequate protection as a result of the automatic
15 stay in Big3D's bankruptcy case was not an abuse of discretion.

16 C.

17 The bankruptcy court also focused its attention on PCLC's
18 decision not to seek stay relief or adequate protection until six
19 months after the commencement of Big3D's bankruptcy case. At the
20 hearing on April 23, 2009, the bankruptcy court questioned counsel
21 for PCLC as to why it had delayed in filing its motion and why, if
22 redressing the alleged harm to PCLC was as urgent as its counsel
23 suggested, PCLC did not act sooner by requesting an expedited
24

25 ¹⁰(...continued)
26 Deico, which, as discussed above, also does not require that
27 adequate protection payments begin effectively as of the petition
28 date. In both cases, the panels rejected the creditors' requests
for adequate protection from the petition date. In re Weinstein,
227 B.R. at 296; Deico, 139 B.R. at 947.

1 hearing. The explanation offered by PCLC's counsel – that PCLC
2 was initially oversecured and that PCLC had diligently attempted
3 to negotiate a settlement with Big3D – did not impress the court,
4 which noted that PCLC's counsel had apparently not even started to
5 prepare the motion until four months after the petition date, and
6 then did not seek a hearing date for an additional two months.

7 A court may raise, sua sponte, concerns over delays in the
8 filing of motions at any stage of proceedings. See Great Falls v.
9 U.S. Dep't of Labor, 673 F.2d 1065, 1069 (9th Cir. 1982). Indeed,
10 our court of appeals teaches that in equitable proceedings, a
11 party that sits on its rights is disfavored. Esta Later Charters,
12 Inc. v. Ignacio, 875 F.2d 234, 239 n.11 (9th Cir. 1989) ("The
13 principle which underlies all equity rulings is embodied in the
14 maxim vigilantibus non dormientibus aequitas subvenit, that is,
15 equity aids the vigilant, not those who slumber on their
16 rights.").

17 In Deico, the Panel noted that a bankruptcy court's order
18 that a debtor pay a "lump sum of past due adequate protection
19 could suffocate a debtor otherwise able to reorganize." 139 B.R.
20 at 947. The bankruptcy court's concerns about PCLC's perceived
21 delays in pursuing relief in this case are justified in this
22 context. Even beyond the facts of this case, it is well
23 established that delays in filing a motion for adequate protection
24 should not unfairly treat the debtor. In re Best Prods. Co.,
25 Inc., 138 B.R. 155 (Bankr. S.D.N.Y. 1992) (cautioning against the
26 danger of creditors waiting until late in the reorganization
27 process to seek adequate protection payments and thereby
28 attempting to control the plan confirmation process), aff'd, 149

1 B.R. 346 (S.D.N.Y. 1992); Greives v. Bank of W. Ind. (In re
2 Greives), 81 B.R. 912, 965 (Bankr. N.D. Ind. 1987) ("there is
3 imposed on a secured creditor the obligation to be diligent in
4 pursuing adequate protection"); In re Hinckley, 40 B.R. 679, 681
5 (Bankr. D. Utah 1984) (creditors should be encouraged to pursue
6 their available remedies quickly and not to sit on their rights
7 while the collateral diminishes in value); In re Adams, 2 B.R.
8 313, 314 (Bankr. M.D. Fla. 1980) (secured creditor "should not be
9 allowed to sit back and through his inaction compel the unsecured
10 creditors to become insurers of any deficiency that may arise").
11 Indeed, Deico cites a decision relied upon by PCLC, Travelers Life
12 & Annuity Co. v. Ritz-Carlton of D.C., Inc. (In re Ritz-Carlton of
13 D.C., Inc.), 98 B.R. 170 (S.D.N.Y. 1989). Although Ritz-Carlton
14 held that adequate protection should be awarded from the petition
15 date under the facts of that case, it also cautioned against
16 allowing delays by creditors in filing motions for adequate
17 protection that would be unfair to the debtor. Id. at 173.

18 In denying PCLC's request for retroactive adequate
19 protection, the bankruptcy court did not abuse its discretion in
20 considering PCLC's delay in filing its motion.

21 D.

22 Deico grants broad discretion to bankruptcy courts in
23 designing appropriate adequate protection awards for secured
24 creditors. As explained above, that discretion extends to the
25 bankruptcy court's decision as to when the adequate protection
26 payments should commence. In this case, the bankruptcy court
27 decided that PCLC had not fully exercised its state law remedies
28 when Big3D filed its bankruptcy petition. It also determined that

1 PCLC did not show when its collateral had declined in value
2 between the petition date and the date it filed its stay
3 relief/adequate protection motion. In addition, the court was
4 justifiably skeptical whether any decline in the value of the
5 Equipment was occasioned by Big3D's use of it, or whether the
6 depreciation was solely because of deteriorating economic
7 conditions. Finally, the bankruptcy court questioned PCLC's delay
8 in requesting adequate protection.

9 The bankruptcy court properly applied the Bankruptcy Code and
10 Deico's holding in reaching these conclusions. Its decision is
11 supported by the record. Simply put, the bankruptcy court did not
12 abuse its discretion by refusing to grant PCLC retroactive
13 adequate protection.

14 II.

15 A fundamental principle of our rule of law is that no
16 judicial system could do society's work if it eyed each issue
17 afresh in every case that raised it. See Benjamin Cardozo, The
18 Nature of the Judicial Process 149 (1921). "The doctrine of stare
19 decisis is of fundamental importance to the rule of law. . . .
20 [It] promotes stability, predictability, and respect for judicial
21 authority." Hilton v. S.C. Pub. R.R. Comm'n, 502 U.S. 197, 200
22 (1991) (internal citations ommitted). We therefore should not
23 disturb precedent absent "special justification." Arizona v.
24 Rumsey, 467 U.S. 203, 212 (1984); see also Hilton, 502 U.S. at 202
25 (stating that "we will not depart from the doctrine of stare
26 decisis without some compelling justification").

27 The Ninth Circuit's Bankruptcy Appellate Panel, the longest
28 functioning in the country, was established in 1979. Embracing

1 the values expressed above, and to implement the goals of Congress
2 in establishing bankruptcy appellate panels, this Panel has long
3 regarded the precedents established in its prior published
4 opinions as binding on the Panel absent changes in the Bankruptcy
5 Code or controlling decisions by the Ninth Circuit Court of
6 Appeals or United States Supreme Court. Aheong v. Mellon Mortg.
7 Co. (In re Aheong), 276 B.R. 233, 249 (9th Cir. BAP 2002); Palm v.
8 Klapperman (In re Cady), 266 B.R. 172, 181 n.8 (9th Cir. BAP
9 2001), aff'd, 315 F.3d 1121 (9th Cir. 2003); State v. Rowley (In
10 re Rowley), 208 B.R. 942, 944 (9th Cir. BAP 1997); Ball v. Payco-
11 Gen'l Am. Credits (In re Ball), 185 B.R. 595, 597 (9th Cir. BAP
12 1995). See also 9th Cir. BAP R. 8013-1(c)(1) (providing that BAP
13 opinions shall bind the Panel as precedent).

14 However, the rule of stare decisis "is not an inexorable
15 command." Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).
16 Courts may, and frequently do, revisit earlier holdings for
17 "prudential and pragmatic considerations designed to test the
18 consistency of overruling a prior decision with the ideal of the
19 rule of law, and to gauge the respective costs of reaffirming and
20 overruling a prior case." Id. The Supreme Court explained the
21 guidelines it applies when deciding to reaffirm or overrule its
22 prior decisions:

23 [W]e may ask whether the rule has proven to be
24 intolerable simply in defying practical workability;
25 whether the rule is subject to a kind of reliance that
26 would lend a special hardship to the consequences of
27 overruling and add inequity to the cost of repudiation;
28 whether related principles of law have so far developed
as to have left the old rule no more than a remnant of
abandoned doctrine; or whether facts have so changed, or
come to be seen so differently, as to have robbed the
old rule of significant application or justification.

1 Id. at 854-55 (citations omitted). Although the Supreme Court
2 did not mandate that other federal courts apply these four
3 guidelines, the Ninth Circuit has utilized them in reviewing its
4 precedents. Rand v. Rowland, 154 F.3d 952, 955 (9th Cir.
5 1998) (applying the principles of Casey to its review of its
6 precedent on fair notice requirements).¹¹ We, too, accept them as
7 useful guidelines in reviewing our precedents.

8 In this appeal, as an alternative to affirming the bankruptcy
9 court's decision as within its discretion under Deico, Big3D has
10 argued that the Panel may affirm by adopting a new rule: that
11 adequate protection payments may not be awarded to a secured
12 creditor for any period prior to its request. Big3D's Br. at 7-
13 13. In examining the continuing vitality of Deico, the Panel may,
14 as suggested by the Supreme Court, consider the workability of
15 that precedent; whether other courts have relied upon Deico to an
16 extent that a change might be inequitable; or whether developments
17 in the law justify abandoning the precedent.¹² In considering
18 these criteria in the present case, in our view, the general
19 principles applied in Deico remain viable, for the following

21 ¹¹ In his concurrence to the Ninth Circuit case United States
22 v. Aquon, 851 F.2d 1158, 1175 (9th Cir. 1988), Judge Reinhardt
23 observed a difference between review of precedent at the circuit
24 and Supreme Court levels. The Supreme Court is free at any time
25 to change its precedents. Only an en banc panel may change
26 precedent in the Ninth Circuit. Therefore, review of precedent at
the circuit level is a two-level process. First, the court [or
panel] must vote to consider the appeal en banc. Then, the en
banc panel is allowed to review the precedent. Our procedure in
this appeal involved both levels of review and is therefore
consistent with our court of appeals' instructions.

27 ¹² As to the fourth criterion identified by the Supreme Court
28 in Casey, we believe the facts underlying the 1992 Deico case have
no particular relevance to the present case.

1 reasons.

2 A.

3 As noted above, a threshold requirement for granting
4 relief from stay for lack of adequate protection under
5 § 362(d)(1), and for conditioning use, sale or lease of property
6 by requiring adequate protection under § 363(e), is a "request" of
7 a party in interest or an entity with an interest in the subject
8 property. A review of the history of case law concerning timing
9 of adequate protection payments reflects an evolution from an
10 early focus on the petition date to a greater emphasis in recent
11 authorities on the date of the request or even the date of the
12 court's consideration of the request.

13 Among the early decisions is Crocker Nat'l Bank v. Am.
14 Mariner Indus., Inc. (In re Am. Mariner Indus., Inc.), 734 F.2d
15 426 (9th Cir. 1984), overruled in part, Timbers, 484 U.S. at 368.
16 Am. Mariner held that an undersecured creditor was entitled to
17 compensation for the delay in enforcing its rights and "benefit of
18 its bargain" between the filing of the petition and the
19 confirmation of a reorganization plan. Id. at 435. Although Am.
20 Mariner never explicitly stated that adequate protection payments
21 should commence as of the petition date, courts relying on Am.
22 Mariner generally adopted the petition date as the starting point
23 for adequate protection. See, e.g., In re Orlando Trout Creek
24 Ranch, 80 B.R. 190, 192 (Bankr. N.D. Cal. 1987); In re Deeter, 53
25 B.R. 623, 628 (Bankr. N.D. Ind. 1985); Republic Bank Houston v.
26 Bear Creek Ministorage (In re Bear Creek Ministorage, Inc.), 49

27

28

1 B.R. 454 (Bankr. S.D. Tex. 1985).¹³

2 The greater focus on the date of the request appears to begin
3 with Ahlers v. Norwest Bank Worthington (In re Ahlers), 794 F.2d
4 388 (8th Cir. 1986), rev'd on other grounds, 485 U.S. 197 (1988).
5 In Ahlers, the creditor bank held a security interest in the
6 debtor's farm machinery and equipment. When the debtor defaulted
7 on the secured loan, the bank initiated an action to repossess the
8 equipment. The debtor filed a chapter 11 petition. The bank
9 filed a motion for relief from stay and/or adequate protection.
10 The district court held that the bank was entitled to adequate
11 protection from the date it filed its request for relief from
12 stay.

13 As the bankruptcy court observed in this appeal, in reversing
14 the district court, the Eighth Circuit opinion in Ahlers
15 "unequivocally holds that the motion [for relief from
16 stay/adequate protection] is the relevant date [for beginning
17 adequate protection payments]." Memorandum Decision, at 12. The
18 court of appeals explained:

19 [T]he starting date should not be when the petition is
20 filed, but rather when the secured creditor seeks either
21 possession of the collateral or adequate protection.
22 Moreover, this ruling will prevent a hardship to the
debtor caused by an adequate protection motion filed
well after the bankruptcy petition has been filed, which

23 ¹³ Interestingly, one early case held that Am. Mariner
24 supported the date of filing a motion for relief from stay as the
25 beginning point for adequate protection payments. Grundy Nat'l
26 Bank v. Tandem Mining Corp., 754 F.2d 1436, 1440-41 (4th Cir.
27 1985). However, a commentator and several courts have suggested
28 that the Fourth Circuit misread the word "petition" in Am. Mariner
to refer to a petition for relief from stay, rather than a
bankruptcy petition. Susan C. Stevenson, The Timing of Adequate
Protection Payments, 22 Cal. Bankr. J. 237, 240 (1995); In re Bear
Creek Ministorage, Inc., 49 B.R. at 458; In re Deeter, 53 B.R. at
628.

1 could require sizeable "makeup" payments. It is not
2 unreasonable to require the creditor to be vigilant in
requesting protection if it wants this protection.

3 Ahlers, 794 F.2d at 395 n.6.¹⁴

4 A significant majority of later decisions follow Ahlers' lead
5 in setting the point for commencement of adequate protection
6 payments at the filing of the motion for relief from stay or
7 adequate protection. See, e.g., In re Metromedia Fiber Network,
8 Inc., 290 B.R. 487 (Bankr. S.D.N.Y. 2003); In re Farmer, 257 B.R.
9 556, 561 (Bankr. D. Mont. 2000); Agency Servs. v. Keck, 1999 U.S.
10 Dist. LEXIS 5056 *5 (N.D. Ill. 1999); In re Best Prods. Co., Inc.,
11 138 B.R. 155 (Bankr. S.D.N.Y. 1992), aff'd 149 B.R. 346 (S.D.N.Y.
12 1992); In re Waverly Textile Processing, Inc., 214 B.R. 476
13 (Bankr. E.D. Va. 1997); In re Walter, 199 B.R. 390 (Bankr. C.D.
14 Ill. 1996); In re Cason, 190 B.R. 917 (Bankr. N.D. Ala. 1995); In
15 re Dynaco Corp., 162 B.R. 389 (Bankr. D.N.H. 1993); In re Barrett,
16 149 B.R. 494 (Bankr. M.D. Ohio 1993); In re Continental Airlines,

18 ¹⁴ Although the Panel's decision in Deico did not cite to
19 Ahlers, it appears that the Panel borrowed several concepts from
20 the Eighth Circuit decision: (1) as a precursor to the Deico
21 position that the court "first determine when the creditor would
22 have obtained its state law remedies had bankruptcy not
23 intervened," Deico, 139 B.R. at 947, Ahlers held "in fashioning
24 adequate protection payments, the bankruptcy court must determine
25 the date when the creditor, absent the filing of a bankruptcy
26 petition, could have taken possession of the collateral under
27 state law and could have sold it to a third party, the amount that
28 the creditor would have realized at this sale, and the creditor's
expected return upon reinvestment." Ahlers, 794 F.2d at 395. (2)
Where Deico was concerned that "requiring a lump sum of past due
protection could suffocate a debtor otherwise able to reorganize,"
Deico, 139 B.R. at 947, Ahlers noted that "this ruling will
prevent a hardship to the debtor caused by an adequate protection
motion filed well after the bankruptcy petition has been filed,
which could require sizeable 'makeup' payments. It is not
unreasonable to require the creditor to be vigilant in requesting
protection if it wants this protection." Ahlers, 794 F.2d at 396
n.6.

1 Inc., 146 B.R. 536 (Bankr. D.Del. 1992).

2 We do not quarrel with the trend of these decisions, and we
3 note that they are no more than consistent with the Bankruptcy
4 Code in determining that adequate protection for depreciation in
5 the value of all forms of collateral, other than cash collateral,
6 can be awarded only following an appropriate request or motion.
7 However, we emphasize that because the filing of a request or
8 motion is required as a matter of timing to determine when
9 adequate protection may be awarded does not define what "adequate
10 protection" is.

11 In terms of the structure of the Bankruptcy Code, while a
12 request is a prerequisite to determining if adequate protection
13 should be awarded under §§ 362(d)(1) and 363(e), what constitutes
14 adequate protection is defined in § 361. If Congress intended a
15 temporal limitation on adequate protection that would preclude any
16 award of adequate protection for depreciation in the value of
17 collateral prior to the filing of a request by the concerned
18 creditor as a matter of law, logically, that limitation should
19 have been included in § 361. In addition, the phrase "on request
20 of" an entity or party in interest does not clearly state a limit
21 on the varieties of adequate protection that can be awarded in
22 appropriate circumstances. If Congress meant for the filing of a
23 request or motion for adequate protection to function as a
24 substantive limitation on what adequate protection can be awarded,
25 it could and, as we see it, would have used clearer language to
26 state that purpose. We conclude that the Deico Panel was
27 fundamentally right when it determined that,

28 [W]hile the amount of adequate protection to which an

1 undersecured creditor is entitled is equal to the amount
2 of depreciation its collateral suffers after it would
3 have exercised its state law remedies, neither that
4 determination nor the schedule for its tender are
5 appropriate for application of a rigid formula.
6 Instead, the bankruptcy court must have discretion to
7 fix any initial lump sum amount, the amount payable
8 periodically, the frequency of payments, and the
9 beginning date, all as dictated by the circumstances of
10 the case and the sound exercise of that discretion.

11 Deico, 139 B.R. at 947 (emphasis added).

12 B.

13 The discussion in Deico states that "adequate protection
14 analysis required the bankruptcy court to first determine when the
15 creditor would have obtained its state law remedies had bankruptcy
16 not intervened." 139 B.R. at 947. Indeed, four bankruptcy courts
17 have cited Deico for the proposition that the bankruptcy court
18 must first determine when the secured creditor would have obtained
19 its state law remedies absent bankruptcy protection in determining
20 whether requiring adequate protection payments is appropriate.
21 See First Commonwealth Bank v. Onasni Prop. Group, LLC (In re
22 Onasni Prop. Group, LLC), 425 B.R. 237, 241 n.9 (Bankr. W.D. Pa.
23 2010); In re Dulgerian, 2008 WL 220523, at *5 (Bankr. E.D. Pa.
24 2008); In re Dupell, 235 B.R. 783 (Bankr. E.D. Pa. 1999); and In
25 re Continental Airlines, 146 B.R. 536 (Bankr. D. Del. 1992).

26 In this appeal, PCLC argues that it had obtained its relief
27 under state law, i.e., the state court writ of possession, prior
28 to Big3D's bankruptcy filing, and accordingly, adequate protection
should be awarded from the petition date. In contrast, Big3D
attempts to focus the Panel on the following observation from
Deico: "Presumably, [the point when the creditor would have
obtained its state law remedies absent bankruptcy] will be after

1 the creditor first seeks relief.” Big3D's Br. at 14, citing
2 Deico, 139 B.R. at 947. Big3D insists that this statement in the
3 Deico opinion provides a basis to sustain its argument that
4 adequate protection may only be awarded to a secured creditor from
5 and after the time the motion for adequate protection is filed.

6 The bankruptcy court came to its own conclusions. In light
7 of its allocation of the burden of proof, the bankruptcy court did
8 not address Big3D's argument that the timing of the request fixes
9 the point in time from which adequate protection can and must be
10 measured. It disagreed with PCLC because it did not have an
11 adequate record to determine “the initial but unanswered question”
12 as to when PCLC could “have actually liquidated the Printing Press
13 in the state court proceeding.” Memorandum Decision, at 8. As
14 noted above, that question is complicated, and we agree with the
15 bankruptcy court that it was not adequately answered by the
16 evidence presented by PCLC.

17 The question then becomes, because the issue as to when PCLC
18 could have exercised its state law remedies to realize upon the
19 Equipment in the absence of Big3D's bankruptcy filing is complex,
20 are Deico's standards for determining appropriate adequate
21 protection fundamentally unworkable? Our answer is no.

22 First the bankruptcy court in this case made an appropriate
23 decision and did not abuse its discretion considering the record
24 before it in light of Deico.

25 But more importantly, the bankruptcy court's decision was
26 appropriate in light of the recognition by Deico generally of the
27 bankruptcy court's “discretion to fix any initial lump sum amount,
28 the amount payable periodically, the frequency of payments and the

1 PAPPAS, BAP Chief Judge, with whom JURY, Bankruptcy Judge, joins,
2 concurring:

3
4 We agree with our colleagues that the decision of the
5 bankruptcy court denying secured creditor PCLC "retroactive"
6 adequate protection payments should be affirmed. However, we
7 should not sustain this result merely because it was an
8 appropriate exercise of judicial discretion by the bankruptcy
9 court as this Panel authorized in In re Deico. Instead, we should
10 affirm because the bankruptcy court's holding is compelled by both
11 the terms of the Bankruptcy Code and important pragmatic
12 considerations. In doing so, we would align this Panel with the
13 clear trend in the case law and establish a bright-line rule that
14 adequate protection is not available to a secured creditor for any
15 decline in the value of collateral occurring during a bankruptcy
16 case prior to the filing of an appropriate request for such
17 relief.

18 I.

19 Deico instructs debtors, creditors and bankruptcy courts that
20 adequate protection payments by a chapter 11 debtor to a secured
21 creditor, intended by the Bankruptcy Code to compensate the
22 creditor for only those losses occasioned by the bankruptcy, are
23 required for only that period of time after the creditor would
24 have exercised its state court remedies had there been no
25 bankruptcy filing. However, in fashioning an adequate protection
26 remedy, Deico grants the bankruptcy court broad discretion in
27 fixing the beginning date, the amount, and the frequency of
28 adequate protection payments. In re Deico Elects., 139 B.R. at

1 947. While this pronouncement seems clear enough, to the extent
2 it allows bankruptcy courts to award "retroactive" adequate
3 protection to secured creditors, it conflicts with the Bankruptcy
4 Code. Moreover, in practice, application of the Deico rule is
5 unworkable. Strong evidence of the practical difficulties of
6 applying Deico is evident in this case, where both the debtor and
7 secured creditor point to different parts of the Deico opinion to
8 support their positions.

9 In particular, creditor PCLC cites to Deico for the
10 proposition that "adequate protection analysis requires the
11 bankruptcy court to first determine when the creditor would have
12 obtained its state law remedies had bankruptcy not intervened."
13 PCLC's Open. Br. at 13, quoting In re Deico Elects., 139 B.R. at
14 947. From this premise, PCLC argues that, because it obtained its
15 state law remedies (i.e., a state court writ of possession to
16 recover its collateral) before the filing of the petition, the
17 bankruptcy court should have awarded it adequate protection
18 payments from and after the petition date.¹⁵

19 In contrast, debtor Big3D attempts to focus the Panel on a
20 different snippet from Deico, where the Panel appears to condition
21 its ruling: "Presumably, [the point when the creditor would have
22

23 ¹⁵ Of course, the bankruptcy court declined PCLC's request
24 for retroactive adequate protection in this case. As the majority
25 notes, while several courts have read Deico to require adequate
26 protection for a secured creditor after the point it would have
27 obtained its state law remedies absent bankruptcy protection,
28 significantly, none of those courts awarded adequate protection
starting with the petition date. First Commonwealth Bank v.
Onasni Prop. Group, LLC (In re Onasni Prop. Group, LLC), 425 B.R.
237, 242 (Bankr. W.D. Pa. 2010); In re Dulgerian, 2008 WL 220523,
at *5 (Bankr. E.D. Pa. 2008); In re Dupell, 235 B.R. 783, 789
(Bankr. E.D. Pa. 1999); and In re Continental Airlines, 146 B.R.
536, 539 (Bankr. D. Del. 1992).

1 obtained its state law remedies absent bankruptcy] will be after
2 the creditor first seeks relief." Big3D's Br. at 14, citing In re
3 Deico Elects., 139 B.R. at 947 (emphasis added). Relying upon
4 this statement, Big3D insists that Deico supports its argument
5 that adequate protection may only be awarded to a secured creditor
6 from and after the time the motion for adequate protection is
7 filed.¹⁶

8 Therefore, while both PCLC and Big3D agreed that the
9 beginning point for an award of adequate protection is the point
10 when the creditor would have obtained its state law remedies
11 absent bankruptcy, they disagreed when that point occurred in this
12 case. In attempting to resolve the disagreement, the bankruptcy
13 court perceptively notes the fundamental flaw in Deico's approach
14 to this issue: "Deico did not address what 'nonbankruptcy

15 _____
16 ¹⁶ Big3D argues in the alternative that, even if Deico does
17 not compel this holding, that based upon other case law, the Panel
18 should adopt a bright-line rule prohibiting retroactive adequate
19 protection. Big3D's Br. at 7-13. To consider this argument, and
20 whether Deico should be modified, the Panel decided to hear and
21 decide this appeal en banc. 9th Cir. BAP R. 8012-2(a), (d) (2)
22 (providing that a majority of the members of the Panel may vote to
23 hear an appeal en banc "when there is a challenge to an existing
24 precedent of the Panel."). While we disagree with the majority's
25 rejection of Big3D's arguments on the merits, we certainly agree
26 with the Panel's decision to sit en banc. Unlike the other
27 concurring opinion, we do not believe that en banc review is only
28 proper when the Panel acts to correct an "unjust or untoward
result." It is certainly proper for the Panel to hear and decide
an appeal en banc even when, after doing so, it concludes prior
precedent need not be modified. In other words, en banc review is
appropriate to address the propriety of the rule of law applied by
the bankruptcy court, not just the outcome of the case. This
approach is consistent with the guidance provided by the Ninth
Circuit to the Panel prior to its adoption of its en banc rule:
"[w]hen the panel believes that one of its precedents is wrongly
decided or otherwise deserves reconsideration, the goal of
judicial efficiency may be best served by allowing the BAP itself
to overrule its own precedent." Saddleback Community Church v. El
Toro Materials Company, Inc. (In re El Toro Materials Company,
Inc.), 504 F.3d 978, 982 n.7 (2007) (emphasis added).

1 remedies' should control." Memorandum Decision at 7. And this
2 deficiency in Deico is a problem for both parties. PCLC's
3 argument fails since it is simply unclear in Deico which state law
4 remedies control and whether those remedies need only to have been
5 initiated by the creditor, or must have been completed, to justify
6 an award of adequate protection. Big3D's argument is likewise
7 infirm in that Deico gives no clear reason for the presumption
8 that the starting point for determining adequate protection
9 payments will be after the creditor files its motion for relief.
10 Because our opinion was unclear, the bankruptcy court concluded
11 that, under Deico, it should fix the terms of the adequate
12 protection award, based on "the circumstances of the case and the
13 sound exercise of that discretion." Memorandum Decision at 7,
14 citing In re Deico Electrs., 139 B.R. at 947. Exercising this
15 discretion, the bankruptcy court decided, correctly in our view,
16 that PCLC was not entitled to retroactive adequate protection.

17 We agree that the bankruptcy court did not abuse the
18 discretion granted it by Deico. However, we would conclude that
19 the purported "rule" announced in Deico regarding the point in
20 time from which adequate protection may be calculated is so
21 problematic in its application that it should be abandoned. This
22 is because it is one thing to tell the bankruptcy court that it
23 has discretion to make an adequate protection determination based
24 upon the facts of each case. It is quite another, and
25 unacceptable in our view, to provide no effective guidance to the
26 parties or bankruptcy courts concerning how to select that date.

27 II.

28 As the majority opinion thoughtfully explains, a review of

1 the case law concerning the timing of adequate protection awards
2 shows, over time, there has been a pronounced shift away from the
3 rule announced in the early cases that emphasized the date of
4 filing the bankruptcy petition as the starting point for payments.
5 Clearly, the bulk of the cases decided since about 1990 favor
6 beginning adequate protection payments at the time relief is
7 requested by the creditor.

8 One particularly cogent discussion of the adequate protection
9 payment timing issue is found in In re Best Prods. Co., Inc., 138
10 B.R. 155 (Bankr. S.D.N.Y. 1992), aff'd 149 B.R. 346 (S.D.N.Y.
11 1992). In adopting the modern rule, the bankruptcy court in Best
12 Prods. first noted, as did the bankruptcy court in this appeal,
13 that § 363(e) expressly provides that the bankruptcy court "shall
14 prohibit or condition" the chapter 11 debtor's use of non-cash
15 collateral without adequate protection only "on request of an
16 entity that has an interest in the property" Id. at 156.
17 This requirement – that a secured creditor must first ask for
18 protection of its interest in non-cash collateral – is consistent
19 with the provisions of § 363(c)(1), which permit a chapter 11
20 debtor to use property of the estate in the ordinary course of its
21 business without providing adequate protection. The only
22 exception to this rule is found in § 363(c)(2), which restricts a
23 debtor's use of cash collateral without the secured creditor's
24 consent or a court order. Id. Even then, under § 363(c)(2)(B),
25 court permission to use a creditor's cash collateral will be
26 granted "in accordance with the provisions of this section[,]"
27 that is, if the secured creditor's interest is adequately
28 protected. Simply put, the Bankruptcy Code makes clear that,

1 except as to cash collateral, a chapter 11 debtor need not provide
2 adequate protection payments to a secured creditor for the use of
3 collateral until the secured creditor requests such relief.

4 In addition to discussing the Bankruptcy Code, the bankruptcy
5 court in Best Prods. also pointed out the hardship which may
6 result to a debtor if a secured creditor waits until the eve of
7 confirmation of the debtor's proposed reorganization plan to file
8 a request for retroactive adequate protection payments. According
9 to the court, this tactic would subject the debtor to "sizeable
10 'makeup' payments." Id., quoting Ahlers, 794 F.2d at 396 n.6 and
11 citing Grundy Nat'l Bank, 754 F.2d at 1441. Indeed, it is likely
12 that few reorganizing chapter 11 debtors have the ability to "make
13 up" substantial amounts of adequate protection payments.¹⁷

14 Finally, the bankruptcy court concluded that the filing of a
15 stay relief or adequate protection motion by a creditor gives the
16 debtor unmistakable notice that it "must decide what it should do
17 with the collateral. The debtor is given the option to surrender
18 the property to the entity that has made the request, and avoid
19 providing adequate protection, or provide adequate protection to
20 such entity for the debtor's continued use of the collateral."
21 Id. at 158. As a practical matter, then, a chapter 11 debtor
22 should be able to assume that, absent a request by the secured
23 creditor, it may use collateral without payments to the creditor
24 pending confirmation of a plan.

25 While acknowledging a division in the case law about the

26
27 ¹⁷ Even the Panel in Deico recognized that a bankruptcy
28 court's order that a debtor pay a "lump sum of past due adequate
protection could suffocate a debtor otherwise able to reorganize."
139 B.R. at 947.

1 starting date for adequate protection payments, the leading
2 bankruptcy law treatise also endorses the position taken by the
3 more recent decisions. See 3 Collier on Bankruptcy ¶ 361.02[3],
4 361-7 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.,
5 2010) (stating that “[t]he text of the Bankruptcy Code seems to
6 support the view that protection is provided only from the date of
7 the request” and that “[i]t would seem contrary to the
8 policy of providing a breathing spell for the debtor and an
9 opportunity to reorganize if the [bankruptcy] court were to
10 require protection against the . . . value decline that had
11 already occurred as a condition to further continuation of the
12 automatic stay or further continued use by the estate of the
13 collateral”).

14 In addition, the only other BAP to consider the issue has
15 opted for a bright-line rule. It noted:

16 “The Bankruptcy Code nowhere puts the responsibility on the
17 debtor to initiate a consideration of adequate protection of
18 a creditor’s noncash collateral.” In re Robinson, 225 B.R.
19 228, 233 (Bankr. N.D. Okla. 1998) (quoting First State Bank
20 v. Advisory Info & Management Sys., Inc. (In re Advisory
21 Info. & Management Sys., Inc.), 50 B.R. 627, 630 (Bankr. M.D.
22 Tenn. 1985). Entitlement to adequate protection in the first
instance with respect to all property of the estate other
than cash collateral is triggered by a creditor’s request to
the bankruptcy court and “if you don’t ask for it, you won’t
get it.” Id. (quoting In re Kain, 86 B.R. 506, 512 (Bankr.
W.D. Mich. 1988).

23 TransSouth Financial Corp. v. Sharon (In re Sharon), 234 B.R. 676,
24 684 (6th Cir. BAP 1999).

25 As can be seen, courts and commentators alike favor using the
26 date of filing of the creditor’s motion as the starting date for
27 adequate protection payments.

28

1 III.

2 The Panel's precedent is flawed. We should modify the rule
3 announced in In re Deico by holding that adequate protection
4 payments are available to a secured creditor only from and after
5 the date of filing of its motion. The provisions of § 363 of the
6 Bankruptcy Code contemplate the application of this bright-line
7 rule by specifying that adequate protection payments may not be
8 ordered by the bankruptcy court until a secured creditor files a
9 "request." Moreover, the case law since Deico supports a bright-
10 line rule. As is seen in this case, the Deico opinion is subject
11 to varying interpretations and is frequently unworkable in
12 practice. In contrast, a bright-line rule will be easily applied
13 by debtors, creditors and bankruptcy courts. While a bankruptcy
14 court has discretion to fashion the other features of an adequate
15 protection award based upon the facts of each case, a clear rule
16 prohibiting adequate protection payments before a motion is filed
17 will encourage secured creditors that contend collateral is
18 declining in value to bring the issue promptly to the bankruptcy
19 court. If the creditor's proof shows it is correct, adequate
20 protection payments can be ordered "going forward," thereby
21 avoiding the potential prejudice to a reorganizing debtor
22 occasioned by large, retroactive, "makeup" awards.

23 Through this appeal, the Panel enjoys a rare opportunity to
24 correct one of its precedents. While caution is in order when
25 considering a change to established precedent, as the Supreme
26 Court has instructed, this Panel may properly revisit earlier
27 holdings for "prudential and pragmatic considerations"
28 Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992). Both the

1 Bankruptcy Code and pragmatic reasons require that we do so in
2 this case.

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5 MARKELL, Bankruptcy Judge, with whom HOLLOWELL, Bankruptcy Judge
6 joins, concurring in the result:

7

8 I concur in the result. I dissent, however, from the
9 decision to hear this matter en banc.

10 This appeal is simple. Under Paccom Leasing Corp. v. Deico
11 Elects., Inc. (In re Deico Elects., Inc.), 139 B.R. 945 (9th Cir.
12 BAP 1992), the bankruptcy court had discretion as to when adequate
13 protection payments were to begin. The bankruptcy court fairly
14 exercised that discretion, and required adequate protection
15 payments to begin after the date they were first requested.
16 Although appellant asked, the bankruptcy court did not
17 retroactively order any payments.

18 This set of facts call for us to affirm, as acknowledged by
19 the lead opinion. I therefore concur with the majority in
20 affirming the bankruptcy court's decision.

21 I write more because the separate concurrence indicates that,
22 notwithstanding its view that we should affirm the result, it
23 wishes to "abandon" Deico. Given this position, I feel compelled
24 to comment on the minimum conditions under which we should
25 exercise our en banc power.

26 I start with the separate concurrence's treatment of Deico.
27 It is concerned that Deico could be, and has been, argued both for
28 and against retroactive adequate protection, thus injecting

1 inappropriate and costly uncertainty in the bankruptcy process. I
2 find this concern odd given its stance that we should affirm. The
3 bankruptcy court's decision was not in the zone of discretion that
4 the separate concurrence would condemn; the bankruptcy court did
5 not order retroactive adequate protection. Indeed, neither the
6 lead opinion nor the separate concurrence cites any reported case
7 in which Deico has been used to justify such retroactive adequate
8 protection. Notwithstanding this, the separate concurrence would
9 have this en banc panel "abandon" a decision that has never been
10 used to justify the type of result it would reverse.

11 Given this oddity, it makes no sense to me to sit en banc
12 simply to rewrite a prior decision without facts or an order
13 exemplifying the evil to be eradicated. See, e.g., Western Pac.
14 R.R. Corp. v. Western Pac. R.R., 345 U.S. 247, 270 (1953) ("Hence,
15 insofar as possible, determinations en banc are indicated whenever
16 it seems likely that a majority of all the active judges would
17 reach a different result than the panel assigned to hear a case or
18 which has heard it.") (Frankfurter, J., concurring) (emphasis
19 supplied); Public Serv. Co. of New Mexico v. F.E.R.C., 863 F.2d
20 1021, 1023 (D.C. Cir. 1988) ("I do not think that this case is an
21 appropriate one for the court to rehear en banc . . . Thus, even
22 were the court to rehear the case and to accept all of FERC's
23 arguments, the end result would remain unchanged. I do not
24 conceive it to be a proper use of the court's resources to convene
25 en banc in such circumstances.") (D.H. Ginsburg, J., concurring).

26 I am concerned that as a Panel we venture outside the proper
27 realm of judicial review by indicating a willingness to rewrite
28 our precedent without an unjust or untoward result to guide our

1 drafting. Such an effort is the antithesis of the common law
2 method. See Robert A. Sprecher, The Development of the Doctrine
3 of Stare Decisis and the Extent to Which It Should Be Applied, 31
4 A.B.A.J. 501, 501-02 (1945). Without a change in result, our
5 words, I fear, are little more than nice sounding dicta, and we
6 unwittingly engage in treatise writing, not opinion drafting.

7 The separate concurrence justifies this exercise by
8 describing Deico as “flawed,” and by then invoking the Ninth
9 Circuit’s indication to this Panel that we should revisit a
10 decision that “deserves reconsideration.” Separate Concurrence, at
11 n.16 (citing Saddleback Community Church v. El Toro Materials
12 Company, Inc. (In re El Toro Materials Company, Inc.), 504 F.3d
13 978, 981 n.7 (2007)). Toward the end of this concurrence, it also
14 invokes, as does the lead opinion, the Supreme Court’s decision in
15 Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992), which
16 states that courts may properly revisit earlier holdings for
17 “prudential and pragmatic considerations”

18 But both of these precedents seem inapt. El Toro was issued
19 before we drafted our own en banc rule, which the Ninth Circuit
20 approved, and which would presumably control here. Casey was
21 drafted from the perspective of a court from which there is no
22 appeal.¹⁸

24 ¹⁸ Indeed, Casey itself listed the circumstances under which
25 the Court might reconsider a prior ruling. Under Casey,
26 when this Court reexamines a prior holding, its judgment
27 is customarily informed by a series of prudential and
28 pragmatic considerations designed to test the
consistency of overruling a prior decision with the
ideal of the rule of law, and to gauge the respective
(continued...)

1 Our position is quite different. Acknowledging that our
2 decisions may be appealed as of right to the Ninth Circuit, and
3 that any en banc hearing delays the ultimate resolution of the
4 case, our en banc rule states a limited role for en banc hearings.
5 Rule 8012-2(a) states that:

6 An en banc hearing or decision of an appeal is not
7 favored and ordinarily will not be ordered unless it
8 appears that it is necessary to secure or maintain
9 uniformity of the Panel's decisions including, without
10 limitation, when there is a challenge to an existing
11 precedent of the Panel.

12 Hearing this case en banc is not necessary "to secure or
13 maintain uniformity;" no contrary case has been identified. Nor
14 has there been any substantial challenge to this Panel's precedent
15 in the eighteen years since we decided Deico. The separate
16 concurrence labels Deico "so problematic in its application that
17 it should be abandoned." But it offers no convincing argument as
18 to why its application requires us to rewrite it without first
19 being presented with facts that require reversal.¹⁹

19 ¹⁸(...continued)
20 costs of reaffirming and overruling a prior case. Thus,
21 for example, we may ask whether the rule has proven to
22 be intolerable simply in defying practical workability,
23; whether the rule is subject to a kind of
24 reliance that would lend a special hardship to the
25 consequences of overruling and add inequity to the cost
26 of repudiation; whether related principles of
27 law have so far developed as to have left the old rule
28 no more than a remnant of abandoned doctrine,;
or whether facts have so changed, or come to be seen so
differently, as to have robbed the old rule of
significant application or justification"

26 Casey, 505 U.S. at 854-55. Today's opinions do not undertake this
27 analysis to any substantial degree.

28 ¹⁹ Selecting this case for en banc review raises a more
fundamental issue. If we signal a willingness to review an
(continued...)

1 Justice Stevens once paraphrased the Latin maxim at issue
2 here today - stare decisis et non quieta movere - as a "doctrine
3 that teaches judges that it is often wise to let sleeping dogs
4 lie." John Paul Stevens, The Life Span of a Judge-Made Rule, 58
5 N.Y.U. L. Rev. 1, 1 (1983). We should not disturb Deico's
6 somnolent status. I would simply affirm, and I concur to that
7 extent.

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26 ¹⁹(...continued)
27 imperfect precedent to the extent it is problematic, our
28 precedents, whatever they may be, becomes less certain and no
better than semi-absolute. And as it has been stated, a "semi-
absolute precedent has no more virtue than a semi-fresh egg."
Alfred L. Goodhart, Precedents in the Court of Appeal, 9 Cambridge
L.J. 349, 357 (1947).