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[Home](#) > Memorandum of Decision Re: Chapter 11 Plan Confirmation

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Thursday, April 6, 2000

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA**

In re

TR3 & ASSOCIATES, INC.,

No. 99-12842

[Debtor](#)  (s).

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**Memorandum of Decision**

Debtor TR3 & Associates, Inc., is a Nevada corporation. Its sole assets are eight duplexes. Almost all of its debt is to two creditors: Imperial Bank, which was the construction lender and is owed \$825,000.00 plus accrued interest and fees, secured by the duplexes, and Mary Jean Mee, whose [claim](#)  of \$170,000.00 represents 87% of the unsecured debt. Prior to TR3's [Chapter 11](#)  filing, a state court receiver had been put into place to protect the interests of Imperial. The court allowed the receiver to remain in place during the Chapter 11 proceedings. Mee was the seller of the land to TR3. She is in her late sixties, and in very poor health. Through circumstances she claims in state court litigation were fraudulent, she was left with only an [unsecured claim](#)  for most of the purchase price. TR3's [plan](#)  of reorganization is now before the court. Under it, possession and control of the duplexes are to be returned to the debtor. Imperial and the other creditors are to be paid in full over time from rental income. Under the plan, Mee would receive no payment whatsoever for three

years after [confirmation](#)<sup>i</sup>. Imperial argues that under its calculations Mee would not receive any payments for nine years. The equity interests in TR3 retain their rights. Both Imperial and Mee rejected the plan. TR3 claims that it is entitled to have its plan confirmed over the objections of these creditors. The court disagrees. It appears that TR3 did little or no negotiation with Mee prior to the confirmation hearing. It takes the position that it is entitled to confirmation as a matter of law because the plan provides that Mee will eventually be paid in full. The facts that Mee may have been cheated out of her property, and that her age and health mean that she would in all likelihood never see a dime from TR3, are irrelevant according to TR3. The court believes that this position stems from a fundamental misunderstanding of the Chapter 11 process. Section 1129(a) (8) of the [Bankruptcy Code](#)<sup>i</sup> requires each impaired class of creditors to accept the plan. *This is the ordinary way in which confirmation of a plan is obtained.* However, Congress recognized that in some cases compliance with this requirement is not possible. Some creditors may have ulterior motives for wishing to see a plan fail. Some creditors might use a requirement of unanimity to exact unfair concessions. Accordingly, in § 1129(b) Congress gave the court the power to confirm a plan over the negative vote of an impaired class, so long as the court finds that the plan is fair and equitable as to that class. What is fair and equitable depends on the facts and circumstances of each case. Great Western Bank v. Sierra Woods Group, 953 F.2d 1174, 1177-78 (9<sup>th</sup> Cir. 1992). In § 1129(b)(2), Congress noted that to be found fair and equitable a plan must *include* several provisions. In the case of unsecured debt, it must either be paid in full on the effective date of the plan ( § 1129(b)(2)(B)(i)) or any junior interests will not receive or retain anything ( § 1129(b)(2)(B)(ii)). TR3 argues that if its plan meets one of these requirements, it is *deemed* to be fair and equitable as to the unsecured creditors. However, the plain meaning of the Code is that a plan can't be fair and equitable if it does not include the provisions, not that it is automatically fair and equitable if it does include them. As the court explained in In re Horowitz, 167 B.R. 237, 241 (Bkrtcy.W.D.Okl. 1994): [I]n 11 U.S.C. § 1129(b) . . . Congress says that a plan of reorganization can be confirmed over the objection of a rejecting class only if the court finds the treatment provided that class is "fair and equitable." The statute then continues to provide that "fair and equitable" includes satisfaction of certain absolute requirements which have expressed meanings. The Code also provides that "includes" is not limiting. 11 U.S.C. § 102(3). Therefore, once the absolute requirements have been satisfied, the decision for or against confirmation is placed squarely within the discretion of the judges and encompasses all their intrinsic perceptions of fairness and equity. In this case, the plan is unfair to Mee. She is not a consensual [creditor](#)<sup>i</sup>. Her age and health mean that she may never see anything under the plan, even using the most optimistic projections. It would not be fair to impose this plan on her over her objection. Both the age and health of a creditor and the length of repayment may be considered by the court in determining if a plan is fair and equitable. In re Memphis Partners, L.P., 99 B.R. 385, 388 (Bkrtcy.M.D.Tenn. 1989); Matter of Rose, 135 B.R. 603, 606 (Bkrtcy.N.D.Ind. 1991). The court would therefore reject the plan even if it contained one of the two provisions of § 1129(b)(2)(B). In addition, the plan does not contain one of the two provisions of § 1129(b)(2)(B). Even if TR3's interpretation of the law was correct, the plan would still be unconfirmable. The unsecured creditors are to receive a note, secured by a junior deed of trust, on which no payments will be made for at least three years. TR3 has not met its burden of proof of showing that this note would have a value, as of the date of confirmation, equal to the amount of the claims. In fact, it is more likely than not that the note would have little or no value. Accordingly, the plan does not meet the provisions of § 1129(b)(2)(B)(i). Under the plan, the equity ownership of the TR3 retains its rights, and even improves its position by

getting rid of Imperial's receiver. There is no provision in the plan for the equity owners to contribute anything of substance.<sup>(1)</sup> The plan accordingly does not meet the provisions of § 1129(b)(2)(B)(ii), even if the law provides a "new value" exception to this provision. The primary method of Chapter 11 reorganization is by achieving agreement and consensus. The cramdown provisions of the Bankruptcy Code were intended by Congress to be used when all else fails, to compel a class of creditors to accept a plan which treats it fairly. TR3 made a fundamental mistake when it looked first to the cramdown provisions instead of addressing Mee's concerns and negotiating a plan which she would support. The plan is unfair to Mee, and is unconfirmable for that reason alone. In addition, the plan fails to meet the cramdown requirements of the Code even if the court were not permitted to consider Mee's situation. Confirmation will accordingly be denied. Counsel for Imperial shall submit an appropriate form of order. TR3 having failed to propose a confirmable plan, the motion of the [U.S. Trustee](#) for conversion to [Chapter 7](#) will be granted. Counsel for the U.S. Trustee shall submit an appropriate form of order.

Dated: April 6, 2000

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Alan Jaroslovsky

U.S. [Bankruptcy Judge](#)

1. The declaration of TR3's CEO states that he and his wife would manage the duplexes for no more than \$1,000.00 per month. There is no such provision in the proposed plan, nor would the court consider this to be a substantial contribution even if the plan did so pr

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