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Notes and Comments

CHOOSING THE "PER-DEBTOR" APPROACH TO PLAN CONFIRMATION IN MULTI-DEBTOR CHAPTER 11 PROCEEDINGS

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ABSTRACT—Chapter 11 of the Bankruptcy Code sets forth the procedures necessary for corporations to reorganize. To ensure that the bankruptcy process and proposed reorganization plan are fair, Chapter 11 mandates that certain requirements are met before confirmation of a reorganization plan can be achieved. Section 1129(a)(10) represents one of those requirements. Specifically, § 1129(a)(10) requires at least one impaired class of claims to vote in favor of the reorganization plan in order for it to be confirmed. Applying § 1129(a)(10) is relatively simple in bankruptcy proceedings involving a single debtor; however, its application is much more complicated in bankruptcy proceedings involving multiple debtors. As multi-debtor bankruptcy proceedings have become increasingly common, courts have begun to debate whether § 1129(a)(10) requires an impaired class from each debtor to vote in favor of a proposed reorganization plan in a jointly administered, multi-debtor Chapter 11 proceeding, or whether it requires only one impaired class from across all debtors to vote in favor of it. The former option is known as the "per-debtor" approach, and the latter as the "per-plan" approach. This Comment argues for the adoption of the per-debtor approach. In particular, it urges that the per-debtor approach more accurately aligns with the plain meaning and statutory construction of Chapter 11, more closely follows the purpose and underlying safeguards at work within the Bankruptcy Code, and better serves the interests and rights of the parties involved.

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INTRODUCTION

The global economic crisis over the last several years has served as a stark reminder of the central role federal bankruptcy law plays in today's corporate world. Although the number of corporate bankruptcy filings fell in the last two years,[1] 2012 and 2013 still observed several large bankruptcies, including Eastman Kodak, Houghton Mifflin Harcourt Publishers, and Hostess Brands.[2] These large bankruptcy proceedings underscore the importance of federal bankruptcy law as well as the frequency with which bankruptcy law affects business.[3]

U.S. bankruptcy law is designed to benefit both debtors and creditors. Debtors emerge from bankruptcy with a fresh start, and creditors recover a portion, if not all, of their investments.[4] Bankruptcy is meant to provide

[1] Adam Belz, *Bankruptcy Filings Drop to Lowest Levels Since 2008*, STAR TRIBUNE (Minneapolis), Nov. 8, 2012, at D1; *Bankruptcy Filings Drop 12 Percent in Fiscal Year 2013*, U.S. COURTS (Oct. 24, 2013), http://news.uscourts.gov/bankruptcy-filings-drop-12-percent-fiscal-year-2013 (noting that for the twelve-month period ending September 30, 2013, bankruptcy filings were down 12% from fiscal year 2012).

[2] Tom Hals, *U.S. Bankruptcies on Pace to Fall to Pre-2008 Level*, REUTERS, Jul. 5, 2012, *available at* http://www.reuters.com/article/2012/07/05/us-bankruptcy-stats-decline-idUSBRE8640UB20120705.

[3] *See Annual Business and Non-Business Filings by Year (1980–2012)*, AM. BANKR. INST., http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&CONTENTID=65139&TEMPLATE=/CM/ContentDisplay.cfm (last visited Apr. 3, 2014) (presenting bankruptcy filing statistics by year from 1980 to 2012).

[4] *See* Daniel R. Wong, Comment, *Chapter 11 Bankruptcy and Cramdowns: Adopting a Contract Rate Approach*, 106 NW. U. L. REV. 1927, 1928 (2012); *see also* Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915) (finding that the purpose of bankruptcy law is to provide debtors with a fresh start); Michael Bentley Guss, Comment, *Ohio* v. *Kovacs: The Conflict Between Federal*

debtors with a single forum in which they can quickly and efficiently sort out their affairs.[5] The reality, however, is that many bankruptcies result in lengthy and expensive litigation.[6]

Chapter 11 of the Bankruptcy Code addresses corporate reorganizations. It requires a bankrupt firm to create a plan of reorganization that restructures the financial claims against it so that it may continue operating as a going concern.[7] Under a reorganization plan, similar claims to the firm's assets are grouped into classes based on certain claim characteristics, such as priority.[8] The plan must propose a treatment for each class—that is, identify what each class will receive in return for their prebankruptcy claims.[9] If the plan alters a class's legal, equitable, or contractual rights, then that class is considered impaired.[10] Once proposed, a reorganization plan can be confirmed in two ways: consensually, if all classes have accepted the plan;[11] or nonconsensually, over the dissent of an impaired class if all of the Bankruptcy Code's requirements under § 1129(a) have been met, except for § 1129(a)(8).[12] Nonconsensual confirmation is generally referred to as a "cramdown."[13]

Because Chapter 11 proceedings are often large and complex, courts have allowed certain administrative rules of convenience to be used to facilitate the management of these proceedings. Joint administration and substantive consolidation are two of these rules. Joint administration allows closely related debtors, such as subsidiaries and affiliated companies, to file joint bankruptcy petitions.[14] By moving for joint administration, all closely related debtors are able to have their bankruptcy petitions administered by

Bankruptcy Laws and State Environmental Regulations, 34 AM. U. L. REV. 1263, 1269 (1985) ("[T]he creditors will receive at least part of the debt owed to them.").

5 *See* Wong, *supra* note 4, at 1928–29.

6 *See id.* at 1929. The average Chapter 11 proceeding lasts more than two years with estimated direct costs of approximately 6.5% of the debtor's book value of assets. *See* Edith S. Hotchkiss et al., *Bankruptcy and the Resolution of Financial Distress*, *in* 2 HANDBOOK OF EMPIRICAL CORPORATE FINANCE 235, 260, 262 (B. Espen Eckbo ed., 2008).

7 *See* Hotchkiss et al., *supra* note 6, at 242.

8 *See id.*; *see also* 11 U.S.C. § 1122(a) (2012) ("[A] plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.").

9 *See* Hotchkiss et al., *supra* note 6, at 242.

10 *See* § 1124(1); *In re* PPI Enters., 324 F.3d 197, 202 (3d Cir. 2003) ("Each creditor has a set of legal, equitable, and contractual rights that may or may not be affected by bankruptcy. If the debtor's Chapter 11 reorganization plan does not leave the creditor's rights entirely 'unaltered,' the creditor's claim will be labeled as impaired under § 1124(1) of the Bankruptcy Code.").

11 *See* § 1129(a). Any class that is not impaired is deemed to have accepted the plan. *See* § 1126(f).

12 *See* § 1129(b); *In re* Armstrong World Indus., Inc., 320 B.R. 523, 532 (Bankr. D. Del. 2005).

13 *See Armstrong*, 320 B.R. at 532; Bruce A. Markell, *Clueless on Classification: Toward Removing Artificial Limits on Chapter 11 Claim Classification*, 11 BANKR. DEV. J. 1, 2 (1995).

14 FED. R. BANKR. P. 1015.

the same court.[15] In theory, joint administration does not alter the Bankruptcy Code's requirements in any way—each debtor's estate is still considered separate and distinct.[16] Substantive consolidation, in contrast, allows a bankruptcy court to combine the estates of multiple debtors and to force each debtor's creditors to become creditors in a consolidated estate.[17] Unlike joint administration, substantive consolidation does alter the Bankruptcy Code's requirements.[18]

Although both rules promote efficiency in bankruptcy proceedings, each serves a distinct purpose. This distinction, however, has become blurred in the context of § 1129(a)(10). Section 1129(a)(10), one of the requirements for confirming a Chapter 11 reorganization plan, provides that "[i]f a class of claims is impaired under the [proposed reorganization] plan, at least one class of claims that is impaired under the plan [must have] accepted the plan."[19] Generally, § 1129(a)(10)'s requirement is simple: Did at least one impaired class under the debtor's proposed reorganization plan vote in favor of it? If so, then § 1129(a)(10) is satisfied. When joint administration and substantive consolidation are used, however, the application of § 1129(a)(10) becomes less clear. Because joint administration inevitably involves multiple debtors, the underlying difficulty with § 1129(a)(10) is this: Does § 1129(a)(10) require an impaired class from *each* debtor involved in the jointly administered Chapter 11 proceeding to vote in favor of the proposed plan, or does it require only one impaired class from across all debtors to vote in favor of the plan? The former option is known as the "per-debtor" approach, and the latter as the "per-plan" approach.[20]

As the Bankruptcy Court for the District of Delaware noted in *In re Tribune Co.*, the lack of clarity surrounding the appropriate interpretation of § 1129(a)(10) has led courts to differing interpretations in jointly administered proceedings, with some courts adopting the per-debtor approach and others adopting the per-plan approach.[21] This disparity is significant because a court's interpretation of this provision can have a substantial impact on how Chapter 11 reorganization plans are negotiated

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15 *See id.* Advisory Committee's Notes.

16 *See* Bunker v. Peyton (*In re* Bunker), 312 F.3d 145, 153 (4th Cir. 2002) ("Joint administration does not affect the substantive rights of either the debtor or his or her creditors.").

17 *See In re* Owens Corning, 419 F.3d 195, 205 (3d Cir. 2005).

18 *See* Timothy E. Graulich, *Substantive Consolidation—A Post-Modern Trend*, 14 AM. BANKR. INST. L. REV. 527, 527 (2006) (footnote omitted) ("As a consequence [of substantive consolidation], claimants can no longer recover on their claims from their original obligors; rather, claimants recover their ratable share of a common 'hotchpot' consisting of the combined assets of the consolidated entities.").

19 11 U.S.C. § 1129(a)(10) (2012).

20 *See In re* Tribune Co., 464 B.R. 126, 180 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011).

21 *Id.* at 180–82.

and structured. Traditionally, proposed reorganization plans for jointly administered Chapter 11 proceedings contain just one plan for all debtors. However, if each debtor is required to satisfy § 1129(a)(10) in its own right, as is required by the per-debtor approach, then this structure no longer works. Debtors will instead be forced to restructure their proposed plans to account for each debtor's individual creditors.

Likewise, this judicial determination of whether to apply the per-debtor or per-plan approach can also have a serious impact on the availability of plan confirmation through a cramdown. A cramdown refers to a court's ability to confirm a plan proponent's, or a debtor-in-possession's,[22] proposed plan of reorganization over a creditor's objection.[23] It is a "powerful remedy available to plan proponents."[24] Section 1129(a)(10) is an important safeguard for creditors because it requires some measure of support from impaired creditors before a plan can be confirmed over their objections.[25] If a per-debtor approach is used, then each debtor must obtain the consent of an impaired creditor. If a per-plan approach is used, however, then a single consenting impaired class can provide the necessary vote to enable the cramdown of a plan on all creditors who have claims not just against that impaired class's debtor, but also against all other debtors involved in the jointly administered bankruptcy proceeding. This is a dramatic result, particularly given the important role voting plays in Chapter 11 proceedings. An impaired creditor's vote is its most powerful tool during bankruptcy, and adopting a per-plan approach discredits the value of that vote. This makes clarity regarding § 1129(a)(10) quite valuable.

Because the *In re Tribune Co.* decision only recently shed light on and challenged the application of § 1129(a)(10) in jointly administered Chapter 11 proceedings, very little has been written about this issue.[26] This Comment helps fill that void. After reviewing relevant case law and the underlying rationale for the two approaches, this Comment argues for the adoption of the per-debtor approach. The per-debtor approach accurately

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[22] A debtor automatically assumes the "debtor in possession" identity once it files a voluntary petition for relief under Chapter 11, or, in an involuntary case, once an order for relief has been entered. § 1101(1). A debtor-in-possession retains possession of its assets while in Chapter 11. This debtor-in-possession status continues until a reorganization plan is confirmed, the bankruptcy case is dismissed or converted, or a Chapter 11 trustee is appointed. *See* § 1104(a) (discussing the limited circumstances in which a trustee can be appointed to manage the debtor's affairs); *id.* §§ 1107–08 (discussing the rights and powers of the debtor-in-possession).

[23] A bankruptcy court receives its cramdown powers from Chapter 11 of the Bankruptcy Code. *See* § 1129(b)(1).

[24] *See In re* 266 Wash. Assocs., 141 B.R. 275, 287 (Bankr. E.D.N.Y. 1992), *aff'd*, 147 B.R. 827 (E.D.N.Y. 1992).

[25] *See, e.g.*, Michael Chaisanguanthum, Charter*: The Most Important Recent Bankruptcy Decision for Secured Creditors*, 27 EMORY BANKR. DEV. J. 9, 14 (2010).

[26] For a discussion of these issues, see *id.*

aligns with the statutory construction of Chapter 11, more closely follows the purpose and underlying safeguards implied within the Bankruptcy Code than the per-plan approach does (particularly in regard to cramdowns), and better serves the interests and rights of the parties involved. Adopting the per-debtor approach would also provide greater predictability and fairness to Chapter 11 bankruptcy proceedings by clearly indicating to parties their respective rights.

Part I of this Comment reviews the background of bankruptcy courts, Chapter 11 bankruptcy, and § 1129(a)(10). Part II discusses relevant case law and illustrates how the debate over the proper interpretation of § 1129(a)(10) has developed. Part III argues for the adoption of the per-debtor approach.

I. UNDERSTANDING CHAPTER 11 AND § 1129(a)(10)

The United States Constitution grants Congress the power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[27] Using this power, Congress created a federal bankruptcy system. In 1978, Congress passed the Bankruptcy Reform Act (Bankruptcy Reform Act of 1978), which completely overhauled prior federal bankruptcy law.[28] When drafting the Bankruptcy Reform Act of 1978, Congress recognized that resuscitating failing companies is often beneficial to society, which is why the Bankruptcy Reform Act of 1978 put greater emphasis on ensuring debtors received a fresh start after exiting bankruptcy.[29] It also provided debtors with a single forum in which they could sort out their affairs: the bankruptcy court.[30] Commonly referred to as the "Bankruptcy Code," this piece of legislation continues to govern all bankruptcy cases in the United States today.[31]

[27] U.S. CONST. art. I, § 8, cl. 4.

[28] Pub. L. No. 95-598, § 402, 92 Stat. 2549, 2682 (codified as amended in scattered sections of 11 and 28 U.S.C.). The Bankruptcy Reform Act of 1978 repealed the Bankruptcy Act of 1898, 30 Stat. 544 (codified as amended at 11 U.S.C. §§ 1–1255 (1976)). The previous major revision of the Bankruptcy Act of 1898 was the Chandler Act of 1938, Pub. L. No. 75-696, 52 Stat. 840.

[29] As stated by the Report of the House Judiciary Committee, "[T]he bill continues to recognize the States' interest in regulating credit within the States, but enunciates a bankruptcy policy favoring a fresh start." H.R. REP. NO. 95-595, at 126 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6087. Providing a fresh start for a debtor after bankruptcy involves "releasing the debtor from further collection attempts by creditors and allowing the debtor to retain certain property necessary for [its] return to a normal life." John W. Draskovic, United States v. Security Industrial Bank*: A Final Determination of the Retrospectivity of Section 522(f)(2)*, 10 OHIO N.U. L. REV. 573, 573 (1983).

[30] BARRY E. ADLER, DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 41 (Robert C. Clark et al. eds., 4th ed. 2007).

[31] *See* Wong, *supra* note 4, at 1931.

The Bankruptcy Reform Act of 1978 is further recognized for its creation of a robust business reorganization section: Chapter 11.[32] Chapter 11 outlines the procedures necessary for businesses to reorganize. It attempts to "strike a balance between the need of a corporate debtor in financial hardship to be made economically sound and the desire to preserve creditors' and stockholders' existing legal rights to the greatest extent possible."[33] Put more simply, Chapter 11 is designed to benefit both debtors and creditors by providing relief to debtors and protection to creditors.[34] Embodied within Chapter 11 is the policy that "it is generally preferable to enable a debtor to continue to operate and to reorganize or sell its business as a going concern rather than simply to liquidate a troubled business."[35] This policy, which again emphasizes the resuscitation of businesses, assumes that the continued operation of a bankrupt business generates greater value than liquidation.[36] The primary goal of any Chapter 11 case is to confirm a reorganization plan that will enable the bankrupt company to emerge with a new capital structure, to return to profitability, and to eliminate the debt overhang problem that initially forced it into bankruptcy.[37]

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[32] *See id.*; *see also* Richard M. Cieri, et al., *"The Long and Winding Road": The Standards to Confirm a Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (Part I)*, 3 J. BANKR. L. & PRAC. 3, 3 (1993) ("Chapter 11 reorganization has become one of the most valuable sanctuaries ever available to businesses facing seemingly insurmountable financial and legal problems.").

[33] 7 COLLIER ON BANKRUPTCY ¶ 1100.01, at 1100-4 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013) (citation omitted); *see also* Edward H. Levi & James Wm. Moore, *Bankruptcy and Reorganization: A Survey of Changes. III*, 5 U. CHI. L. REV. 398, 405 (1938) ("The problem of reorganization is primarily a problem of how a failing debtor may be made economically sound and at the same time the rights, insofar as they exist, of the creditors and stockholders be preserved under a fair arrangement.").

[34] This differs from prior bankruptcy law, which focused primarily on creditor recovery as opposed to debtor relief. *See, e.g.*, Charles Jordan Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) (discussing the history of bankruptcy laws in the United States and how the debtor and creditor rights changed over time).

[35] 7 COLLIER ON BANKRUPTCY, *supra* note 33, ¶ 1100.01, at 1100-4; *see also* Wong, *supra* note 4, at 1931. In a Chapter 7 bankruptcy, unlike in a Chapter 11 bankruptcy, the business ceases operations and sells all of its assets. The proceeds are then distributed to its creditors with any residual amount returned to shareholders and owners. *See* 6 COLLIER ON BANKRUPTCY ¶ 700.01, at 700-2 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013). A Chapter 7 bankruptcy is known as a liquidation bankruptcy and is used when an individual or corporation is unable to continue as a going concern.

[36] *See* Wong, *supra* note 4, at 1931–32; *see also* Cieri et al., *supra* note 32, at 4–5 (internal quotation marks omitted) ("A Congressionally favored alternative to liquidating a business, . . . Chapter 11 contemplates . . . that the assets of the debtor would be more valuable if used in a rehabilitated business than if sold for scrap.").

[37] *See* Wong, *supra* note 4, at 1932; *see also* Bosiger v. U.S. Airways, 510 F.3d 442, 448 (4th Cir. 2007) (internal quotation marks omitted) ("[S]uccessful completion of the reorganization process allows a debtor, burdened with the weight of oppressive indebtedness, to restructure its financial obligations, discharge its pre-existing debt, and emerge from bankruptcy with a new capital structure that better reflects financial reality."); Official Comm. of Unsecured Creditors v. PSS Steamship Co. (*In re* Prudential Lines Inc.), 928 F.2d. 565, 573 (2d Cir. 1991) ("[A] paramount and important goal of

A. Confirmation of a Plan of Reorganization Under Chapter 11

Chapter 11 requires the creation and confirmation of a plan of reorganization. A plan of reorganization operates as a contract between the debtor, its creditors, and its equity holders.[38] Section 1123(a) of the Bankruptcy Code outlines the various components that must be included in a reorganization plan.[39] It is purposefully limited to seven items. By limiting the number of components required in a plan of reorganization, Congress ensured that Chapter 11 would remain flexible and capable of accommodating many different types of arrangements.[40] This flexibility is also designed to "foster[] meaningful negotiations between management, creditors, and stockholders regarding the terms of any plan."[41]

Once a plan of reorganization is proposed, the plan proponent (generally, the debtor-in-possession or its trustee) must solicit creditor approval.[42] Creditors indicate their approval or disapproval of a proposed reorganization plan by voting.[43] Although all creditors are technically able to vote, in practice only impaired creditors actually exercise their right to vote because unimpaired creditors are presumed to have voted in favor of the proposed reorganization plan.[44] An impaired creditor's right to vote is its most powerful tool in the bankruptcy process.[45] It is its bargaining chip

Chapter 11 is the rehabilitation of the debtor by offering breathing space and an opportunity to rehabilitate its business and eventually generate revenue." (quoting Int'l Ass'n of Machinists & Aerospace Workers v. E. Air Lines, Inc., 121 B.R. 428, 433 (S.D.N.Y. 1990), *aff'd*, 923 F.2d. 26 (2d Cir. 1991))).

[38] *In re* Pettibone Corp., 134 B.R. 349, 351–52 (Bankr. N.D. Ill. 1991) ("A plan of reorganization is a contract which binds a debtor and its creditors."); *In re* Mako, Inc., 120 B.R. 203, 207 (Bankr. E.D. Okla. 1990) ("A Chapter 11 Plan . . . is . . . a contract between a debtor and the creditors of the bankruptcy estate.").

[39] 11 U.S.C. § 1123(a) (2012) (requiring only seven items be included in a plan). Under the Bankruptcy Code, a reorganization plan must determine "the classes that are not impaired; identify treatment for the classes established; treat all class members identically; provide a means for its implementation; not require the issuance of nonvoting equity securities; and be consistent with the interests of creditors, equity holders, and public policy in the manner by which the reorganized debtor's officers and directors are selected." *See* Cieri et al., *supra* note 32, at 5.

[40] Cieri et al., *supra* note 32, at 5.

[41] *Id.*

[42] To solicit creditor votes, a plan proponent must distribute ballots, certain required notices, and a disclosure statement approved by a court. Alan N. Resnick, *Subordination Agreement Provisions Shifting Chapter 11 Voting Rights: Can the Seniors Disenfranchise the Juniors?*, 118 BANKING L.J. 297, 299 (2001) (citing 11 U.S.C. § 1125 (2000)).

[43] Cieri et al., *supra* note 32, at 5.

[44] *See* 11 U.S.C. § 1126(f) (2012).

[45] The Bankruptcy Code's rigorous disclosure requirements "emphasize the importance of the voting process." *See* Cieri et al., *supra* note 32, at 5. For example, § 1125(b) of the Bankruptcy Code requires the plan proponent (generally, the debtor) to achieve court approval of a disclosure statement that contains "adequate information" before soliciting creditor votes on a proposed reorganization plan. *See* § 1125. Thus, the Bankruptcy Code requires that "sufficient information about the debtor's financial condition and the anticipated effect of the proposed [reorganization] plan must be

at the negotiating table, and it represents a creditor's only opportunity to stop a plan of reorganization from being pushed through the bankruptcy process.

A plan can be confirmed in two ways. The most commonly used method to confirm a plan of reorganization is consensual confirmation, which requires a plan proponent to obtain the consent of each class of claims.[46] Section 1129(a) sets forth the requirements for consensual confirmation.[47] Although unanimous consent from each class of claims is required for consensual confirmation, not all creditors or interested parties must support a proposed plan of reorganization for it be confirmed.[48] Chapter 11 requires that creditors be grouped into classes based on certain characteristics of their claims.[49] If a majority of the creditors in a class approve of the proposed plan, then that class is deemed to have accepted the plan.[50] This remains true regardless of whether there are any recalcitrant creditors within that class. Although this requirement may at first glance seem harsh to creditors, in actuality it is not as harsh as it initially appears. Because Chapter 11 requires claims to be substantially similar in order to be classified together,[51] plan proponents are still required to obtain the approval of a majority of that recalcitrant creditor's similarly situated fellow class members before it can push its plan through.

If a plan proponent is unable to achieve consensual confirmation, it may still be able to achieve confirmation through the Bankruptcy Code's "cramdown" process, which represents the second way a plan can be confirmed. Section 1129(b) sets forth the requirements for a cramdown. A cramdown permits a plan to be confirmed over the objections of one or more classes of impaired claims.[52] In other words, it allows a plan to be confirmed even if § 1129(a)(8), which requires all impaired classes to accept the plan, has not been satisfied. With the exception of § 1128(a)(8), however, the remaining requirements outlined in § 1129(a) must still be

disseminated to enable creditors and interest holders to make an informed choice whether to accept or reject the plan." Cieri et al., *supra* note 32, at 5–6.

46 *See* Charles D. Booth, *The Cramdown on Secured Creditors: An Impetus Toward Settlement*, 60 AM. BANKR. L.J. 69, 69 (1986).

47 *See* § 1129(a). Most bankruptcy courts have adopted a literalist approach to determining whether the requirements of § 1129(a) have been met, meaning if a proposed reorganization plan fails to meet any of the requirements outlined in § 1129(a), courts will not confirm it. *See* Cieri et al., *supra* note 32, at 11. Certain courts have even expressed the view that "the provisions of Chapter 11 require[] [them] to discharge [their] 'mandatory independent duty' to decide whether the plan of reorganization complied with each of the requirements for confirmation prior to approving the plan." *Id.* (quoting *In re* MCorp Fin., Inc., 137 B.R. 219, 225 (Bankr. S.D. Tex. 1992), *appeal dismissed*, 139 B.R. 820 (S.D. Tex. 1992)).

48 Cieri et al., *supra* note 32, at 5.

49 *See* § 1122(a).

50 *See id.* § 1126(c).

51 *See id.* § 1122(a).

52 *See* Booth, *supra* note 46, at 69.

met before a cramdown will be permitted under § 1129(b).[53] Cramdown also requires that a plan be "fair and equitable" and not unfairly discriminate against dissenting creditor classes.[54] Because confirmation of a plan by cramdown often involves complex valuation issues and uncertainties, it is generally more advantageous for creditors and interested parties to work together on the terms of a proposed reorganization plan and to reach a consensual settlement rather than to try to rely on the cramdown process under § 1129(b).[55]

B. Section 1129(a)(10)

Section 1129(a)(10) is one of the requirements that must be met in order for a reorganization plan to be confirmed under Chapter 11. It states that "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan."[56] Section 1129(a)(10), at a minimum, requires one impaired class of claims to vote in favor of the reorganization plan before it can be confirmed.[57]

Congress specifically added this requirement in 1978 when it overhauled the Bankruptcy Code, and it did so in part to encourage consensus in the reorganization process among interested parties.[58] Following the 1978 changes, courts began to disagree over whether the accepting class had to be impaired to satisfy § 1129(a)(10) or whether an unimpaired class would be enough.[59] This disagreement caused Congress to act a second time in 1984, to clarify that only an impaired accepting class would be sufficient.[60] Section 1129(a)(10) now serves as an important protective measure for creditors by requiring the plan proponent, which is typically the debtor, to obtain the support of at least some creditors whose claims are affected by the plan before it can achieve confirmation.[61] Section

[53] *Id.*

[54] § 1129(b).

[55] *See* Cieri et al., *supra* note 32, at 6.

[56] § 1129(a)(10). Insiders are excluded from this determination. *Id.*

[57] A claim is impaired under the code unless the plan "leaves unaltered the legal, equitable, and contractual rights to which [the] claim or interest entitles the holder of such claim or interest." *Id.* § 1124(1).

[58] *See* Peter E. Meltzer, *Disenfranchising the Dissenting Creditor Through Artificial Classification or Artificial Impairment*, 66 AM. BANKR. L.J. 281, 311–13 (1992) (explaining that 11 U.S.C. § 1129(a)(10) was added in 1978, and that Congress, in 1984, made explicit the requirement that the accepting class be an impaired class).

[59] *See id.*

[60] *See* Richard M. Cieri, et al., *"The Long and Winding Road": The Standards to Confirm a Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (Part II)*, 3 J. BANKR. L. & PRAC. 115, 146–47 (1994); Meltzer, *supra* note 58, at 311–13.

[61] *See* Chaisanguanthum, *supra* note 25, at 14. Congress's exclusion of the "insider" vote in satisfying § 1129(a)(10) further supports the idea that this section plays a protective function in cramdowns.

1129(a)(10) also operates as a powerful safeguard for creditors. It protects creditors from the debtor, who enjoys significant exclusivity and control advantages throughout the plan process,[62] and it protects creditors from a plan proponent's use of the cramdown powers granted by § 1129(b).[63] Even in a cramdown, § 1129(a)(10) must still be satisfied. Thus, regardless of how confirmation is obtained, § 1129(a)(10) plays a critical role in the confirmation process by protecting creditors' interests and by serving as an important creditor counterbalance against what is often a very powerful debtor.

C. Distinguishing Joint Administration from Substantive Consolidation

Joint administration and substantive consolidation are two frequently used administrative rules of convenience in Chapter 11 proceedings. Because Chapter 11 petitions are often filed by large corporations, which own numerous affiliated entities, today's bankruptcy proceedings tend to be very complex. When these large corporations file under Chapter 11, each affiliated entity is required to file a separate bankruptcy petition and to have its own Chapter 11 case.[64] Administrative rules of convenience, like joint administration and substantive consolidation, allow the parties and the court to combine the related cases in specific ways to eliminate some of these complexities and to ease the administrative burden on the parties throughout the bankruptcy process.

Joint administration allows multiple related cases—such as the cases of a debtor and its subsidiaries—to be consolidated and placed on a single docket.[65] It does not substantively abridge the requirements of the Bankruptcy Code in any way, meaning it does not alter creditors' rights or the bankruptcy estate of each debtor.[66] Instead, it merely serves as a tool of

[62] *Id.* For example, after a Chapter 11 petition is filed, the debtor is given the exclusive right to propose a plan of reorganization for the first 120 days. *See* § 1121(b) ("[O]nly the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.").

[63] *See* Cieri et al., *supra* note 60, at 147 n.178 (citing *In re* 266 Wash. Assocs., 141 B.R. 275, 287 (Bankr. E.D.N.Y. 1992) ("Section 1129(a)(10) operates as a statutory gatekeeper barring access to cram down where there is absent even one impaired class accepting the plan."), *aff'd*, 147 B.R. 827 (E.D.N.Y. 1992)); *see also* Chaisanguanthum, *supra* note 25, at 14 (footnote omitted) ("The intention of Congress was to reverse cases before the 1978 Bankruptcy Code, where cramdown was permitted without any consent of creditors.").

[64] Chaisanguanthum, *supra* note 25, at 18.

[65] FED. R. BANKR. P. 1015 Advisory Committee's Notes ("Joint administration as distinguished from consolidation may include combining the estates by using a single docket for the matters occurring in the administration, including the listing of filed claims, the combining of notices to creditors of the different estates, and the joint handling of other *purely administrative* matters that may aid in expediting the cases and rendering the process less costly." (emphasis added)).

[66] *See, e.g.*, Bunker v. Peyton (*In re* Bunker), 312 F.3d 145, 153 (4th Cir. 2002) ("Joint administration does not affect the substantive rights of either the debtor or his or her creditors.").

convenience that helps expedite cases and lower administrative costs.[67] The estates of each debtor remain separate and distinct, and creditors are able to reach only the assets of the specific debtor with which they have a claim.

Substantive consolidation, by contrast, does substantively abridge the requirements of the Bankruptcy Code and, more importantly, the rights of the parties involved.[68] Substantive consolidation is not provided for in the Bankruptcy Code, but is instead a federal common law construct that emanates from equity.[69] It allows a bankruptcy court to combine the estates of multiple debtors—each of which are separate legal entities—to pool the debtors' assets, and to force each debtor's creditors to become creditors in the consolidated estate.[70] In essence, it morphs separate creditor claims against separate debtors into claims against a single surviving entity.[71] When implemented, substantive consolidation significantly affects creditors' rights in the bankruptcy process and often prejudices creditors by causing them to recover less than they would have absent consolidation.[72] For example, if the estate of a debtor with a higher asset-to-debt ratio is substantively consolidated with the estate of a debtor with a lower ratio, then the creditors of the former debtor will receive less in the combined bankruptcy proceeding than they would have in an unconsolidated proceeding.[73] In this way, substantive consolidation, unlike joint administration, restructures and substantively abridges the requirements of the Bankruptcy Code and creditors' rights.

This distinction between joint administration and substantive consolidation is important not only because the bankruptcy courts have relied on these means of consolidation to apply § 1129(a)(10) in multi-debtor Chapter 11 cases, but also because the correct interpretation of § 1129(a)(10) depends on whether either or both are being used in a bankruptcy proceeding.

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[67] *See* FED. R. BANKR. P. 1015 Advisory Committee's Notes; *see also* Chaisanguanthum, *supra* note 25, at 18 ("Joint administration is a tool of convenience. For example, if there are fifteen entities, it obviates the need to file the same motion fifteen times.").

[68] *In re* I.R.C.C., Inc., 105 B.R. 237, 238 (Bankr. S.D.N.Y. 1989) ("Joint administration is distinguished from substantive consolidation because it is simply a procedural consolidation designed for administrative convenience and does not affect the substantive rights of the creditors of the different estates."); *In re* Farmers & Feeders, Inc., No. 93-30770, 1994 WL 1887489, at *3 (Bankr. D.N.D. Jan. 10, 1994) ("The basic and most significant difference between substantive consolidation and joint administration is that joint administration does not affect the substantive rights of creditors and other interested parties since the estate of each debtor remains separate and distinct." (emphasis omitted)).

[69] *See In re* Owens Corning, 419 F.3d 195, 205 (3d Cir. 2005).

[70] *See id.* (internal quotation marks omitted) ("Substantive consolidation . . . treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities . . . .").

[71] *See In re* Genesis Health Ventures, Inc., 402 F.3d 416, 423 (3d Cir. 2005).

[72] *See Owens Corning*, 419 F.3d at 205.

[73] *See In re* Snider Bros., Inc., 18 B.R. 230, 234 (Bankr. D. Mass. 1982).

II. CURRENT STATE OF THE LAW: CONTRASTING VIEWS OF § 1129(a)(10)

There exists limited legal precedent on whether § 1129(a)(10) demands a "per-debtor" or "per-plan" approach; to date, only a few bankruptcy courts have addressed the issue. This Part details the current state of the law by first discussing those cases applying the per-debtor approach and then discussing those cases applying the per-plan approach.

A. The Per-Debtor Approach

The first court to formally discuss and adopt the per-debtor approach to § 1129(a)(10) was the U.S. Bankruptcy Court for the District of Delaware in its 2011 *In re Tribune Co.* decision.[74] In *In re Tribune Co.*, two competing jointly administered reorganization plans were proposed, neither of which received the affirmative vote of an impaired class for each debtor entity included in the joint plan.[75] Because the parties had agreed only to joint administration and not substantive consolidation, the bankruptcy court was forced to determine whether § 1129(a)(10) required each debtor that was part of a joint plan to have at least one class of impaired creditors vote to accept the plan, or only one impaired accepting class for all of the debtors subject to the joint plan of reorganization.[76]

The court first looked to the statutory construction of § 1129(a)(10).[77] The court considered the effect of the Bankruptcy Code's own statutory rules of construction,[78] specifically § 102(7)[79] of the Bankruptcy Code, which states that "the singular includes the plural."[80] Under this rule, the court concluded that § 1129(a)(10)'s reference to "plan" in the singular was not, on its own, a sufficient basis upon which to conclude that any less than all debtors must satisfy the requirements of § 1129(a) in a multi-debtor case.[81] The court also analyzed § 1129(a)(10) in context,[82] concluding that because § 1129 included many plan confirmation requirements that had to be satisfied by each debtor—e.g., § 1129(a)(7) (best interests of creditors test), § 1129(b) (cramdown), § 1129(a)(3) (good faith requirement)—so too did § 1129(a)(10).[83]

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74 464 B.R. 126 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011). This case is especially important given the large number of federal Chapter 11 bankruptcy cases that are filed in the District of Delaware.

75 *Id.* at 180.

76 *Id.*

77 *Id.* at 182.

78 *Id.*

79 *See* 11 U.S.C. § 102(7) (2012).

80 *Tribune Co.*, 464 B.R. at 182.

81 *Id.*

82 *Id.*

83 *Id.* at 183.

Turning to the substance of the competing plans, the court determined that because both plans failed to provide for substantive consolidation[84] of the debtors, each joint plan actually "consist[ed] of a separate plan for each Debtor."[85] The court distinguished its case from prior cases where a per-plan approach was adopted, such as *In re SGPA, Inc.*[86] and *In re Enron Corp.*,[87] on substantive consolidation grounds.[88]

The court held that each debtor participating in a multi-debtor, jointly administered plan of reorganization must satisfy § 1129(a)(10) unless all of the debtors are substantively consolidated under the joint plan.[89]

Shortly after deciding *In re Tribune Co.*, the Delaware Bankruptcy Court reaffirmed its per-debtor interpretation in *In re JER/Jameson Mezz Borrower II, LLC* (*In re JER/Jameson*).[90] There, JER/Jameson Mezz Borrower II, LLC (Mezz II) filed for Chapter 11 protection the day before its sole creditor, Colony, was to participate in a foreclosure auction.[91] At the foreclosure auction, Colony intended to sell its only asset: Mezz II's membership interest in Mezz I.[92]

Colony, the sole creditor, sought to dismiss Mezz II's bankruptcy case for bad faith, stating that it was "a litigation tactic designed to forestall its efforts to foreclose on its collateral."[93] Colony also argued that Mezz II had no rehabilitation prospects as a going concern because the entity had no active operations or direct employees.[94]

Relying on *In re Tribune Co.*, the Bankruptcy Court dismissed the case.[95] The judge agreed with Colony that there was no realistic chance of reorganization because no plan of reorganization could be confirmed absent Colony's consent.[96] The judge reasoned that because substantive consolidation was absent, Mezz II would need at least one impaired consenting class to confirm a plan;[97] but, because Colony was the sole

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84 *See supra* Part I.C for a discussion on substantive consolidation.

85 *Tribune Co.*, 464 B.R. at 182.

86 No. 1-01-02609, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sept. 28, 2001). See *infra* Part II.B for discussion of this case.

87 No. 01-16034, 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004). See *infra* Part II.B for discussion of this case.

88 *Tribune Co.*, 464 B.R. at 181.

89 *Id.* at 183.

90 461 B.R. 293 (Bankr. D. Del. 2011).

91 *Id.* at 300.

92 *Id.*

93 *Id.*

94 *Id.* at 299, 301.

95 *Id.* at 302, 308.

96 *Id.* at 302.

97 *Id.*

creditor entitled to vote on the plan, no other impaired consenting creditors existed.[98] Mezz II needed Colony's consent for confirmation.

Collectively, *In re Tribune Co.* and *In re JER/Jameson* stand for the proposition that, absent substantive consolidation or consent, each debtor involved in a jointly administered plan must separately satisfy § 1129(a)(10).

B. The Per-Plan Approach

The earliest case cited in support of the per-plan interpretation of § 1129(a)(10) is the 2001 decision *In re SGPA, Inc*. by the U.S. Bankruptcy Court for the Middle District of Pennsylvania.[99] SGPA and ten of its subsidiaries and affiliates filed Chapter 11 petitions.[100] The eleven debtors agreed to joint administration but not substantive consolidation.[101] After the debtors proposed a reorganization plan, the subordinated bondholders involved in the case—who were an impaired class under the proposed plan—filed an objection to confirmation in which they argued for the adoption of the per-debtor approach. Under the bondholders' interpretation, the proposed plan would not be confirmable because only one of the eleven debtors had received the necessary vote from an impaired class.[102]

The court overruled the bondholders' objection, finding that "in a joint plan of reorganization it is not necessary to have an impaired class of creditors of each Debtor vote to accept the Plan."[103] The court noted that "[w]hether these Debtors were substantively consolidated or jointly administered would have no adverse [effect] on the Subordinated Bondholders."[104] Accordingly, the court rejected the bondholders' argument and held that the reorganization plan complied with § 1129(a)(10) because "at least one class of impaired creditors . . . accepted the Plan."[105]

Although some courts view *In re SGPA, Inc.* as having adopted the per-plan interpretation solely because the result would have been the same if the parties had agreed to substantive consolidation, the language of the decision is unclear on whether or not this was the primary driving factor in its decision. Because the court did not focus on this issue, *In re SGPA, Inc.*

[98] *Id.*
[99] No. 1-01-02609, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sept. 28, 2001).
[100] *Id.* at *1.
[101] *Id.* at *9–10.
[102] *Id.* at *13.
[103] *Id.* at *21.
[104] *Id.* at *22 (emphasis omitted).
[105] *Id.*

more strongly supports the per-plan interpretation than it does the per-debtor interpretation.[106]

In 2004, a few years after *In re SGPA, Inc.* was decided, the Bankruptcy Court for the Southern District of New York similarly decided in *In re Enron Corp.* that § 1129(a)(10) could be satisfied on a per-plan basis.[107] There, 177 different debtors had filed Chapter 11 petitions.[108] However, unlike *In re SGPA, Inc.*, the debtors had agreed to both joint administration and substantive consolidation.[109]

The court began by considering the plain meaning of the statute.[110] Relying on *In re SGPA, Inc.*, the court found that "[t]he plain language and inherent fundamental policy behind § 1129(a)(10) of the Bankruptcy Code provides that an affirmative vote of one impaired class under a plan is sufficient to satisfy § 1129(a)(10)."[111]

The court also found that the parties' agreement to substantively consolidate supported the per-plan interpretation of § 1129(a)(10).[112] The court stated, "[T]he requirements of section 1129(a)(10) are satisfied as to each of the Debtors lacking an impaired accepting class because those Debtors are part of the global compromise [i.e., are substantively consolidated] embodied in the Plan."[113]

Thus, in reaching its conclusion that a per-plan approach satisfied the requirement of § 1129(a)(10), the court relied on both the plain language of the statute as well as the fact that the debtors had agreed to both joint administration and substantive consolidation of their Chapter 11 proceedings. As discussed below, use of the per-plan approach in circumstances like those presented in *In re Enron Corp.*, where the parties agree in advance to substantively consolidate, is acceptable because the parties have consented to the alteration of their substantive rights and effectively eliminated the threat typically posed by the adoption of the per-plan approach—disenfranchisement of an impaired creditor's right to vote without that creditor's consent.

In its next case, however, the Bankruptcy Court for the Southern District of New York expanded its *In re Enron Corp.* ruling well beyond acceptable limits. In *In re Charter Communications*, the Bankruptcy Court

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[106] For example, the bankruptcy court in *In re Tribune Co.* distinguished *In re SGPA, Inc.* on this fact. *In re* Tribune Co., 464 B.R. 126, 182 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011).

[107] *In re* Enron Corp., No. 01-16034, 2004 Bankr. LEXIS 2549, at *234 (Bankr. S.D.N.Y. July 15, 2004).

[108] *Id.*

[109] *Id.*

[110] *Id.* at *234–35.

[111] *Id.* at *235.

[112] *Id.*

[113] *Id.*

for the Southern District of New York not only reaffirmed its view that § 1129(a)(10) can be satisfied on a per-plan basis, but also expanded its application to all jointly administered cases even in the absence of substantive consolidation.[114] Like in *In re SGPA, Inc.*, the debtors had agreed to joint administration of their Chapter 11 proceedings but not substantive consolidation.[115]

The court relied on *In re Enron Corp.* and *In re SGPA, Inc.* in reaching its conclusion that "it is appropriate to test compliance with section 1129(a)(10) on a per-plan basis, not, as the . . . Noteholders argue, on a per-debtor basis."[116] The court indicated that because the debtors had agreed to joint administration, only one impaired accepting class was necessary to satisfy the requirements of § 1129(a)(10).[117] The court ultimately found that regardless of whether the debtors had agreed to substantive consolidation, § 1129(a)(10) allowed a per-plan interpretation when plans were jointly administered.

Although largely viewed as dicta,[118] this decision is significant because it indicates that the per-plan interpretation is applicable to all jointly administered Chapter 11 proceedings regardless of whether the parties agree to substantive consolidation. The court viewed agreement to joint administration as sufficient to alter the rights of the creditors, a holding that stands in contrast to *In re Tribune Co.* and *In re JER/Jameson*.

The most recent case to consider how to interpret § 1129(a)(10) is *In re Transwest Resort Properties, Inc.*[119] There, the court explicitly rejected *In re Tribune Co.*'s analysis and instead adopted the per-plan interpretation articulated in *In re SGPA, Inc.* and *In re Enron Corp.*[120] To distinguish the case from *In re Tribune Co.*, the *In re Transwest Resort Properties, Inc.* judge primarily relied on factual distinctions,[121] noting that even if *In re Tribune Co.* were correct on its facts, its analysis did not work in this instance because *In re Transwest Resort Properties Inc.* only had one proposed plan for all debtors, whereas *In re Tribune Co.* had separate proposed plans for each debtor.[122] The judge also indicated that even

[114] JPMorgan Chase Bank v. Charter Commc'ns (*In re* Charter Commc'ns), 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009).

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *In re* Tribune Co., 464 B.R. 126, 182 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011); Chaisanguanthum, *supra* note 25, at 19.

[119] *See* Transcript of Record, *In re* Transwest Resort Props., Inc., No. 10-37134 (Bankr. D. Ariz. Dec. 19, 2011) (court's ruling on the record confirming third amended and restated joint plan of reorganization). This is the only case to have ruled on this issue subsequent to *In re Tribune Co.* and *In re JER/Jameson*.

[120] *See id.* at 5.

[121] *See id.*

[122] *See id.* at 6–7.

though the parties did not explicitly agree to substantive consolidation, the result in this case, like in *In re SGPA, Inc.*, would be the same even if they had, meaning the creditors would have been no worse had substantive consolidation been adopted.[123] Accordingly, the judge determined that the per-plan approach was appropriate and that the requirements of § 1129(a)(10) "are met by having at least one impaired class vote for the plan."[124]

In sum, the few courts that have interpreted § 1129(a)(10) in this regard have adopted divergent approaches. *In re SGPA, Inc.* and its progeny focused on the presence (or deemed presence) of substantive consolidation and statutory history to determine that § 1129(a)(10) should be interpreted on a per-plan basis. *In re Charter Communications* found the presence of joint administration alone to be sufficient to allow § 1129(a)(10) to be applied on a per-plan basis. *In re Tribune Co.* also focused on the statutory history and broad purpose of § 1129(a)(10) but came to the opposite conclusion, holding that § 1129(a)(10) should be interpreted on a per-debtor basis absent a strict directive of substantive consolidation. Such divergent approaches call for clarity in this area.

III. DISCUSSION & ANALYSIS

Courts should resolve the confusion surrounding the application of § 1129(a)(10) by adopting the per-debtor approach outlined in *In re Tribune Co.* In jointly administered (but not substantively consolidated) Chapter 11 proceedings, § 1129(a)(10) should be satisfied only if at least one impaired class of claims under each debtor votes to accept the proposed reorganization plan. In contrast, if the parties agree to substantive consolidation, then the per-plan interpretation should be used because the parties will have effectively agreed to combine their estates and to accept an alteration of their rights.

This Part discusses why the per-debtor approach is the better interpretation. Part III.A illustrates why the per-debtor interpretation more accurately aligns with the statutory construction of Chapter 11. Part III.B argues that the per-debtor approach is preferable for two reasons: first, it better aligns with the Bankruptcy Code's cramdown procedures, and second, it ensures that the principles of substantive consolidation and joint administration are not conflated. Finally, Part III.C discusses the implications of adopting a per-debtor approach.

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[123] *See id.* at 7.
[124] *See id.* at 8.

A. Statutory Construction of the Bankruptcy Code Supports the Per-Debtor Interpretation

When analyzing statutory language, a thorough analysis requires examination of the plain meaning of the statute as well as the larger context of the relevant statutory language.[125] Here, close examination ultimately supports adopting a per-debtor interpretation of § 1129(a)(10).

Section 102 of the Bankruptcy Code outlines relevant rules of construction to be used throughout the Code for interpreting statutory language.[126] Relevant here is § 102(7), which provides that "the singular includes the plural."[127] Section 1129(a)(10) states, "If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan . . . ."[128] Section 1129(a)(10) requires at least one class of impaired claims under a plan to approve the plan before it can be confirmed.

Using the § 102(7) rule of construction, the *In re Tribune Co.* court found that § 1129(a)(10)'s reference to "plan" in the singular was an insufficient basis upon which "to conclude that, in a multiple debtor case, only one debtor—or any number fewer than all debtors—must satisfy [§ 1129(a)(10)'s] standard."[129] In multiple debtor cases that are jointly administered, but not substantively consolidated, the substantive rights of the parties are not altered (or at least are not supposed to be).[130] Joint administration merely allows related debtors to work out their reorganizations in a single proceeding. Each debtor remains a separate entity, and its creditors' claims remain entirely distinct from the claims of other debtors' creditors. The practical effect of not being substantively consolidated is that "each joint plan actually consists of a separate plan for each [d]ebtor."[131] The ability to pluralize "plan" under § 102(7) directly supports this view, indicating that § 1129(a)(10)'s requirement encompasses more than just approval for a singular plan. Even if a single plan is proposed for all debtors, as occurred in *In re Transwest Resort Properties, Inc.*, the result should not change when substantive

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[125] *See In re* Tribune Co., 464 B.R. 126, 183 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011); *see also, e.g.*, Ardestani v. INS, 502 U.S. 129, 135 (1991) (brackets and internal quotation marks omitted) ("The starting point in statutory interpretation is the language of the statute itself. . . . The strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances.").

[126] *See* 11 U.S.C. § 102 (2012).

[127] *Id.* § 102(7). When adding § 102(7) to the Bankruptcy Code, Congress clarified that it was a necessary addition to the Rules of Construction because the Bankruptcy Code "uses only the singular, even when the item in question most often is found in plural quantities." *See* H.R. REP. NO. 95-595, at 316 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6273.

[128] § 1129(a)(10).

[129] *Tribune Co.*, 464 B.R. at 182.

[130] *See supra* Part I.C.

[131] *Tribune Co.*, 464 B.R. at 182.

consolidation is absent. If separate plans did not exist for each debtor in a jointly administered proceeding then the substantive rights of the parties would undoubtedly be altered, for one impaired class of creditors would be able to speak for another impaired class of creditors with claims against an entirely different debtor. Because a creditor's ability to vote is its most powerful substantive right, eliminating this right by reading plan singularly in the absence of substantive consolidation would effectively mute that creditor. To avoid this result, § 1129(a)(10) must be read, as § 102(7) allows it to be, to require the use of the per-debtor approach.

Courts should also perform a contextual, *in pari materia* analysis of § 1129(a)(10), as the court in *In re Tribune Co.* did.[132] The per-debtor interpretation receives even greater support from reading § 1129(a)(10) in conjunction with the other subsections of § 1129(a) than it does from analyzing the plain meaning of the section on its own.[133] First, consider § 1129(a)(1), which requires that the reorganization plan comply with the applicable provisions of the Bankruptcy Code.[134] It is well established that § 1129(a)(1) cannot be satisfied if not all debtors meet it, even in jointly administered bankruptcy proceedings.[135] Likewise, § 1129(a)(3), which requires that the plan be proposed in good faith and not by any means forbidden by law, cannot be satisfied if not all debtors meet it.[136] These sections illustrate a consistent principle of application: all debtors must meet each requirement under § 1129(a). Applying this principle to § 1129(a)(10) would likewise require all debtors to meet it, meaning a per-debtor approach would be the correct interpretation.

Section 1129(a)(7) provides further guidance, particularly given its focus on the interests of impaired creditors. Section 1129(a)(7) embodies the "best interest of creditors" test, which addresses the treatment—what each class of claimants will receive in exchange for their pre-bankruptcy claims—required for "each impaired class"[137] of creditors. The best interest

[132] *See* King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) (citation omitted) (stating that a "cardinal rule" of statutory construction is that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context"); Crédit Agricole Corporate & Inv. Bank v. Am. Home Mortg. Holdings, Inc. (*In re* Am. Home Mortg. Holdings, Inc.), 637 F.3d 246, 255 (3d Cir. 2011) (citation and internal quotation marks omitted) ("The Supreme Court has indicated a reluctance to declare provisions of the Bankruptcy Code ambiguous . . . . [C]ourts [should] not be guided by a single sentence . . . , but [should] look to the provisions of the whole law, and to its object and policy.").

[133] Section 1129(a) outlines the requirements for confirmation of a Chapter 11 reorganization plan.

[134] Specifically, § 1129(a)(1) states, "The court shall confirm a plan only if [the] plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1) (2012).

[135] *See Tribune Co.*, 464 B.R. at 183.

[136] *See id.*

[137] § 1129(a)(7); *In re* Draiman, 450 B.R. 777, 809 (Bankr. N.D. Ill. 2011) ("Section 1129(a)(7) provides that each holder of an impaired claim who has rejected a plan must 'receive or retain under the plan on account of such claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive . . . if the debtor were liquidated under chapter 7 . . . on such date.'" (quoting § 1129(a)(7))).

of creditors test requires that, with respect to *each* impaired class of claims, *each* holder of a claim has accepted the plan or will receive or retain property that is worth at least as much as the impaired class of claims would have received if the debtor were liquidated.[138] For the analysis of § 1129(a)(10), the most important fact is that the test applies to each individual creditor holding impaired claims, regardless of whether the class as a whole voted to accept the plan.[139] Section 1129(a)(7) thus "cannot be read fairly other than as an entitlement to the prescribed treatment for every impaired class of creditors for each debtor [that] is part of a joint plan."[140] This again signals the Bankruptcy Code's focus on each individual debtor, rather than on the debtors as a whole.[141]

For all of these reasons, under a strict statutory analysis, the per-debtor interpretation of § 1129(a)(10) is better than the per-plan interpretation because it more closely aligns with the Bankruptcy Code's rules of construction and the other confirmation conditions outlined in § 1129(a).

B. The Per-Debtor Approach as the Preferable Method

The per-debtor approach is preferable to the per-plan approach because it preserves § 1129(a)(10)'s role as a protective measure against abuse of a cramdown when substantive consolidation is absent, and also because it ensures substantive consolidation and joint administration are not conflated.

1. Section 1129(a)(10) as a Safeguard Against Abusive Cramdown.—A cramdown is a powerful remedy available to plan proponents and is arguably one of "the most significant and probable risk[s]" creditors face in Chapter 11.[142] A cramdown, which is detailed in

138 *See* Cieri et al., *supra* note 32, at 49.

139 Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 441 n.13 (1999) ("Section 1129(a)(7) provides that if the holder of a claim impaired under a plan of reorganization has not accepted the plan, then such holder must 'receive . . . on account of such claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive . . . if the debtor were liquidated under chapter 7 . . . on such date.' The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan." (quoting § 1129(a)(7))).

140 *Tribune Co.*, 464 B.R. at 183.

141 The remainder of the requirements under § 1129(a) are boilerplate or inapplicable. Section 1129(a)(2) is a boilerplate provision, as are § 1129(a)(4)–(5). Section 1129(a)(6) is not discussed because it "applies only if a regulatory commission has jurisdiction over rates charged by the debtor." *See* Richard F. Broude, *Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative*, 39 BUS. LAW. 441, 448 (1984). Section 1129(a)(8) applies to each class of claims, which would lend further support to the use of § 1129(a)(10) under the per-debtor approach, but is not required to be met in order for a plan to be crammed down. *See* § 1129(b). Sections 1129(a)(9) and 1129(a)(11) are likewise inapplicable here.

142 Chaisanguanthum, *supra* note 25, at 10; *see In re* 266 Wash. Assocs., 141 B.R. 275, 287 (Bankr. E.D.N.Y. 1992), *aff'd*, 147 B.R. 827 (E.D.N.Y. 1992).

§ 1129(b) of the Bankruptcy Code,[143] forces confirmation of a reorganization plan over dissenting classes and forces those dissenting classes to rely on difficult court judgments, valuations, and determinations.[144] Section 1129(a)(10) serves as a protective mechanism for creditors in avoiding a cramdown because it requires some measure of support from impaired creditors, or those whose rights are being altered by the reorganization plan, in order for a plan proponent's reorganization plan to be confirmed.[145] Before a plan proponent is able to force a cramdown and compel those objecting creditors to "shoulder the risks of error necessarily associated with a forced confirmation," § 1129(a)(10) mandates that the plan proponent obtain the consent of at least one impaired creditor who would be hurt by the plan.[146] This is § 1129(a)(10)'s underlying policy rationale, and it is important because there are many risks and uncertainties associated with a cramdown: confusion, delay, valuation, discount rates, and increased likelihood of liquidation due to adversarial posturing of parties.[147]

Moreover, this underlying policy rationale is exactly what Congress intended for § 1129(a)(10). In 1984, when Congress amended § 1129(a)(10) to clarify that it required the accepting class to be impaired,[148] it did so in order to reverse the cases that had occurred prior to the 1978 Bankruptcy Code in which cramdowns were permitted without the consent of any creditor.[149] The legislative history indicates that creditor consent, specifically *impaired* creditor consent, is a critical component to a successful Chapter 11 reorganization. This requirement appropriately

[143] *See* § 1129(b); ADLER ET AL., *supra* note 30, at 707 ("Section 1129(b) is invoked when a reorganization plan fails to garner the acceptance of all impaired classes of claims . . . and thus fails to satisfy § 1129(a)(8)."). For a detailed discussion of § 1129(b), see 7 COLLIER ON BANKRUPTCY, *supra* note 33, ¶ 1129.03, at 1129-63.

[144] *See 266 Wash. Assocs.*, 141 B.R. at 287.

[145] *See id.*; Chaisanguanthum, *supra* note 25, at 14.

[146] *266 Wash. Assocs.*, 141 B.R. at 287; *see also In re* Anderson Oaks (Phase I) Ltd. P'ship, 77 B.R. 108, 112–13 (Bankr. W.D. Tex. 1987) ("[T]here must be some one other than the debtor, other than the insiders, and other than the target of the cram down, who cares enough about the reorganization and whose rights must also be considered to invoke the equitable grounds that justify resort to cram down.").

[147] *266 Wash. Assocs.*, 141 B.R. at 287; *see* Booth, *supra* note 46, at 104–05. Booth also notes that "[a]ll of these risks and uncertainties may be avoided if the parties avert a cramdown. . . . [I]n most chapter 11 cases, it will be in the best interest of all the parties to reach a settlement and to consent to a plan under section 1129(a), rather than to resort to a cramdown under section 1129(b)." Booth, *supra* note 46, at 104-05.

[148] Chaisanguanthum, *supra* note 25, at 14; *see also* Cieri et al., *supra* note 60, at 146–47; Meltzer, *supra* note 58, at 311–13.

[149] *See* Chaisanguanthum, *supra* note 25, at 14 (citing 7 COLLIER ON BANKRUPTCY, *supra* note 33, ¶ 1129.LH[7], at 1129-204).

balances the interests of both the debtor and the creditor, which is a key foundational principle underlying all bankruptcy proceedings.[150]

If § 1129(a)(10)'s approval requirement is interpreted as per-plan in the absence of substantive consolidation, then its ability to safeguard creditors involved in joint plans of reorganization from a cramdown is for all practical purposes eliminated. Plan proponents—whether the debtor or creditors—could easily manipulate the proposed reorganization plan and ensure claims were classified in a way that would guarantee at least one impaired class from at least one debtor voted in favor of the plan.[151] For example, a plan proponent could intentionally try to misclassify one or more claims,[152] or isolate a secured creditor's large deficiency claim into its own class so another impaired class of unsecured claims could vote in favor of the plan if the large deficiency claim does not.[153] Likewise, a plan proponent could try to distribute lower payments to a class of unsecured creditors than the estate is otherwise capable of paying in order to create an "impaired" class.[154]

If a plan proponent may structure the claims in a way that enables it to obtain the affirmative vote of at least one impaired class, then under a per-plan interpretation, this vote would be sufficient to satisfy § 1129(a)(10) and allow the cramdown of the proposed plan on the remaining creditors, regardless of how they voted.[155] In effect, this result allows an impaired creditor class from Debtor *A* to dictate the rights, values, and reorganization plan structure not only for the remaining creditors of Debtor *A*, but also for the creditors of Debtor *B*, Debtor *C*, Debtor *D*, and so on. Admittedly, even under the per-debtor approach a single impaired class is able to dictate the structure of a reorganization plan for all other impaired creditor classes under that single debtor. However, while this may be the reality of a cramdown for the creditors of a single debtor, adopting the per-plan approach for § 1129(a)(10) would exasperate that already alarming reality. The impaired creditors under the other debtors involved in the joint plan would lose substantive rights (most importantly, the value of their vote) in the bankruptcy process and essentially be stripped of their § 1129(a)(10) safeguard. Adoption of the per-plan approach for § 1129(a)(10) would also

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150 *See id.*

151 This is particularly true given the unclear law surrounding artificial claims classifications. *See* Markell, *supra* note 13 (providing a historical and analytical analysis of claim classification under Chapter 11); Susan E. Trent & Mark A. Warsco, *Buying Votes in Chapter 11*, 30 AM. BANKR. INST. J. 38 (2011).

152 *See* 94 AM. JUR. 3D *Proof of Facts* § 36 (2007).

153 *See* 3 BAXTER DUNAWAY, THE LAW OF DISTRESSED REAL ESTATE: FORECLOSURE WORKOUTS PROCEDURES § 29:58 (2006). Courts remain split over whether classifying claims in this way is acceptable or a bad faith classification by the debtor. *Id.*

154 *See* 94 AM. JUR. 3D *Proof of Facts* § 36.

155 Cramdown can be particularly detrimental to secured lenders who are forced to risk "receiving debt-like compensation for taking equity-like risk." *See* Chaisanguanthum, *supra* note 25, at 11.

effectively override any decision by the parties involved in the bankruptcy proceeding against substantive consolidation by forcing it upon the parties without any consideration of the balance of equities, as is normally required in order for substantive consolidation to be implemented. Courts must not disregard these rights or the practical effects that would result by choosing to adopt the per-plan approach instead of the per-debtor approach.

Likewise, plan proponents can take advantage of the classification requirements under Chapter 11 to ensure § 1129(a)(10) is met. When classifying creditors, the Bankruptcy Code dictates in § 1122(a) that similarly situated creditors must be treated equally in a proposed plan of reorganization.[156] However, many courts have interpreted this portion of the Code to effectively disenfranchise creditors who could otherwise block confirmation with a dissenting vote.[157] Courts do this by reading the second portion of § 1122(a) to require only that claims classified together be substantially similar, not that *all* similarly situated claims be classified together.[158] The result is that plan proponents are able to artificially gerrymander classes, so long as those claims that are actually classified together remain substantially similar, to ensure that at least one impaired class votes in favor of the plan in order to satisfy the requirements of § 1129(a)(10). Because classes of claims must separately vote on whether to accept or reject a plan of reorganization, how claims are classified directly affects the integrity of the Chapter 11 voting process.[159] When coupled with a per-plan interpretation, this ability to artificially impair claim classification—which occurs at the plan proponent's discretion as creditors have no say unless they are the plan proponent—becomes much more powerful because plan proponents need only manipulate the classes for one debtor, rather than all debtors, to undermine the voting rights of all creditors in the case under Chapter 11.

If § 1129(a)(10) is instead interpreted on a per-debtor basis, Congress's intention to provide creditors with additional protection from cramdowns would be better served. Returning to the above example, under a per-debtor approach, the impaired class of Debtor *A* that voted in favor of the proposed plan would satisfy § 1129(a)(10) only in regard to Debtor *A*. The remaining debtors (e.g., Debtor *B*, Debtor *C*, and Debtor *D*) would each need their own impaired class of claims—assuming there were impaired classes—to vote in favor of the proposed plan in order for each of the debtors to meet § 1129(a)(10)'s requirement. This result ensures that all creditors retain their voting rights in the Chapter 11 proceeding regardless of whether they are involved in a jointly administered plan.

[156] 11 U.S.C. § 1122(a) (2012); *see also* Meltzer, *supra* note 58, at 290.

[157] Meltzer, *supra* note 58, at 290.

[158] *Id.*

[159] *See In re* 266 Wash. Assocs., 141 B.R. 275, 282 (Bankr. E.D.N.Y. 1992), *aff'd*, 147 B.R. 827 (E.D.N.Y. 1992).

Overall, the per-debtor approach better protects the rights of creditors by ensuring that at least one impaired creditor from each debtor approves the proposed reorganization plan.[160] If an agreement between debtor and creditor cannot be reached, then the debtor should not be allowed to cram down its desired plan of reorganization on creditors without clearing the necessary protective hurdles—one of which is substantive consolidation, another of which is supposed to be § 1129(a)(10). Neither substantive consolidation nor § 1129(a)(10) would retain its power under a per-plan interpretation. If no impaired creditors agree to the plan, a debtor should not be allowed to enjoy the benefits of a confirmation through cramdown by forcing acceptance upon the dissenting creditors.[161] A lack of an accepting impaired class indicates that "the debtor has failed to negotiate effectively with its creditors [while] devising a reorganization plan."[162] Ineffective negotiation should not be rewarded by a per-plan interpretation of § 1129(a)(10), particularly when creditors are facing the potential risks and consequences of a cramdown.

2. Ensuring Joint Administration Does Not Equate to Substantive Consolidation.—Requiring that the per-debtor interpretation be used in jointly administered Chapter 11 proceedings when substantive consolidation is absent ensures that the corporate form is respected and the substantive rights of creditors are protected. Joint administration is viewed as a tool of convenience.[163] It does not abridge the parties' legal rights.[164] This is a well-established principle. Case law resoundingly dictates that joint administration does not alter substantive rights.[165] Substantive consolidation, in contrast, is an equitable principle that does alter the substantive rights of the parties.[166]

A per-plan interpretation of § 1129(a)(10) in the absence of substantive consolidation effectively conflates the two principles. It allows an impaired class of claims for one debtor to speak for the creditors of another debtor who are situated differently, have different rights and recoveries, and arguably have diametrically opposed interests.[167] For

[160] *See In re* Polytherm Indus., Inc., 33 B.R. 823, 835 (W.D. Wis. 1983). This result also closely aligns with the current trend among federal appellate courts to vindicate creditors' rights in Chapter 11 proceedings. *See In re* Owens Corning, 419 F.3d 195, 210–11 (3d Cir. 2005).

[161] *Polytherm Indus., Inc.*, 33 B.R. at 835 ("[I]t would not be equitable to impose acceptance of [a] plan upon the creditors by enforcing the debtor's interest in confirmation of the plan through the cramdown authority.").

[162] *Id.*

[163] *See* Chaisanguanthum, *supra* note 25, at 18 (providing an example of the convenience of joint administration: "[I]f there are fifteen entities, it obviates the need to file the same motion fifteen times").

[164] *See supra* Part I.C.

[165] See *supra* Part I.C for further information on substantive consolidation and joint administration.

[166] *See supra* note 68 and accompanying text.

[167] *See* Chaisanguanthum, *supra* note 25, at 19.

example, creditors of a parent entity receive value through the equity of the parent entity's subsidiaries; their interests are undoubtedly in significant opposition to the interests of the subsidiary's creditors.[168] Requiring § 1129(a)(10) to be met at the individual debtor level in the absence of substantive consolidation will at a minimum better balance the control the plan proponent (typically, the debtors) has against the control the creditors have and provide courts with a more independent measure on valuation issues, which will allow bankruptcy court judges who are imperfect adjudicators of value reach a more accurate valuation result.[169]

Conflating these two concepts, moreover, is particularly troubling because it alters those creditors' rights while they are playing what is in essence a zero-sum game (i.e., all creditors are fighting over a fixed sum): the bankruptcy estate.[170] Allowing the per-plan approach in jointly administered proceedings blatantly ignores both the substantive rights of the creditors and corporate separateness because it effectively combines separate creditor entities from multiple closely related debtors.[171] Adopting a per-plan interpretation when substantive consolidation is absent—as occurred in *In re Charter Communications* and *In re Transwest Resort Properties, Inc.*[172]—would require precedent to be disregarded and the difference between joint administration and substantive consolidation to be ignored. Even if the result would be the same if substantive consolidation were imposed, as was indicated in *In re SGPA, Inc.* and *In re Transwest Resort Properties, Inc.*, courts should not skip the analysis required for implementing substantive consolidation. It is specifically designed to ensure that the creditors' and debtors' rights are considered and equitably balanced.

Only by following a per-debtor approach can the corporate form and substantive rights of the parties involved in the bankruptcy proceeding remain intact. The per-debtor approach ensures that the creditors of *each* debtor (or at least one impaired creditor of each debtor) retain meaningful protection and a say in how the proposed reorganization plan allocates and distributes value. This is critical because eliminating the value of an impaired creditor's vote during the bankruptcy process in essence purges from that creditor one of the most important—if not *the* most important—benefits it receives from the bankruptcy process, and it does it all for the benefit of the debtor, who already enjoys tremendous exclusivity and control advantages.

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[168] *Id.* at 20.

[169] *Id.*

[170] *Id.* ("Allocating enterprise value [in a bankruptcy proceeding] is a zero-sum proposition . . . .").

[171] *See In re* Owens Corning, 419 F.3d 195, 210–11 (3d Cir. 2005).

[172] See *supra* Part II.B for a discussion of *In re Charter Communications* and *In re Transwest Resort Properties, Inc.*

Given the implications a per-plan approach would have on a creditor's ability to safeguard itself from a cramdown, as well as its disregard for a creditor's substantive rights, it should not be adopted. Instead, courts should adopt the per-debtor approach, which preserves § 1129(a)(10)'s safeguarding role—unless the parties agree otherwise through substantive consolidation—and ensures creditors are able to continue enjoying those rights granted to them in the bankruptcy process.

3. The Policies and Principles Underlying Chapter 11.—The policies and principles underlying Chapter 11 support the adoption of the per-debtor approach. The primary goals of Chapter 11 bankruptcies are to provide the bankrupt with a fresh start and to maximize the value of the bankruptcy estate so the highest value of assets is available to creditors.[173] The per-debtor approach advances both of these interests.

The per-debtor approach aids the debtor in obtaining that fresh start by clarifying debtor rights at the start of the Chapter 11 process. If a debtor believes a per-plan approach is necessary to ensure successful rehabilitation, then that debtor now knows substantive consolidation must be formally obtained. Because the substantive consolidation determination requires a bankruptcy court to analyze the necessity of consolidation for a successful reorganization and the actual expectations of the parties involved, the court will be forced to determine whether such an approach is truly appropriate by balancing the various interests of the affected parties, including the debtor, its creditors, and its employees.[174] This balancing is a critical part of the bankruptcy process[175] and something that should be enforced throughout the substantive consolidation decisionmaking process.

Additionally, by adopting a per-debtor approach, debtors will be able to more easily manage the bankruptcy process because the formal adoption of the per-debtor approach eliminates any confusion surrounding the interpretation of § 1129(a)(10). Although this could also be achieved by adopting the per-plan approach, the per-plan approach does not accurately follow the language of § 1129(a)(10) and compromises the explicit directive of the Bankruptcy Code.

Adopting the per-debtor approach in jointly administered proceedings also helps maximize the value of the bankruptcy estate. It ensures that

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[173] *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527–28 (1984) (noting that one of the primary goals of Chapter 11 is the maximization of the value of the bankruptcy estate); 7 COLLIER ON BANKRUPTCY, *supra* note 33, ¶ 1100.01, at 1100-4; Mary Elisabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U. PITT. L. REV. 381, 417 (1998).

[174] *See, e.g.*, *Owens Corning*, 419 F.3d at 211 ("In our Court what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.").

[175] *See Bildisco & Bildisco*, 465 U.S. at 527.

debtors with higher asset-to-debt ratios are not combined with debtors that have lower ratios unless their assets are actually substantively commingled.[176] The resulting loss from the bankruptcy process, then, is as minimal as possible. Creditors will face lower asset-to-debt ratios only when their expectations appropriately support such a result.

C. Implications of Adopting a Per-Debtor Interpretation

Adopting the per-debtor interpretation for § 1129(a)(10) will inevitably have an impact on how Chapter 11 proceedings are conducted. For example, because companies today are often structured in complex ways with many affiliated companies and bankruptcy-remote (special purpose) entities, the per-debtor approach could prevent these companies from cramming down a reorganization plan absent substantive consolidation and make the reorganization process more difficult, costly, and time consuming.[177] These cost implications, however, are insufficient on their own to overpower the protection of creditor rights provided by the per-debtor approach. Corporations filing under Chapter 11 tend to have more resources—e.g., internal legal and finance departments—that allow them to obtain a better understanding of the potential risks associated with the bankruptcy process and with debt.[178] Corporations, as debtors, also have greater control over the bankruptcy process itself, which allows them to better control and minimize costs throughout the process, particularly as compared to creditors. As a result, the cost impact is unpersuasive as a rationale for allowing the per-plan approach to be adopted over the per-debtor approach.

Adopting the per-debtor approach may also cause creditors to object more frequently to reorganization plans that incorporate a per-plan scheme.[179] This could cause companies entering bankruptcy to reconsider the debtors they wish to place in bankruptcy.[180] It may also cause companies entering bankruptcy to seek substantive consolidation at the onset of the bankruptcy process to circumvent the per-debtor requirement

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[176] *See Owens Corning*, 419 F.3d at 211.

[177] Gary E. Axelrod et al., *New Challenges for Real Estate Restructurings*, LAW360 (Sept. 11, 2012, 12:19 PM), http://www.lw.com/thoughtLeadership/law-360-real-estate-restructurings; *see* Jared S. Roach, *Jointly Administered Plans Must Obtain Impaired Class Approval 'Per Debtor' Rather than 'Per Plan,'* COM. RESTRUCTURING & BANKR. NEWSL. (Reed Smith LLP, Pittsburgh, P.A.), June 2012, at 3, *available at* http://www.reedsmith.com/files/Publication/5eb8589d-c5b2-48e3-81e9-8533a73b5bf4/Presentation/PublicationAttachment/b28e4949-a14d-4e4c-bdd0-9e60915744f2/crab0612%5B1%5D.pdf.

[178] *See* 7 COLLIER ON BANKRUPTCY, *supra* note 33, ¶ 1129.05[2][c], at 1129-148 ("[The cost-minimizing] rationale, while not absent from chapter 11 cases, is certainly minimized in larger chapter 11 cases.").

[179] *See* Axelrod et al., *supra* note 177.

[180] *See id.*; Roach, *supra* note 177.

and effectively impose the per-plan interpretation.[181] Requiring companies to consider substantive consolidation from the beginning is a good thing because it forces the courts to focus on the best interests of all parties at the start of the process and it forces the debtor to consider how best to handle the bankruptcy process.

The per-debtor interpretation will also likely force debtors and plan proponents to develop new methodologies and negotiating strategies for obtaining the necessary consent of an impaired voting class.[182] Today, jointly administered reorganization plans, which are used for the convenience of the parties, usually propose just one distribution scheme.[183] The structure of that distribution scheme is often designed without regard for where the debtor's assets and liabilities are located.[184] This structure will not be successful under the per-debtor interpretation. However, this can be easily remedied once debtors (or other plan proponents) know that the per-debtor approach will be used, because they can adjust the structure of the plan at the beginning of the bankruptcy process to ensure it appropriately addresses all parties involved.

Despite any possible negative ramifications, the per-debtor approach is still preferable over the per-plan approach. As the *In re Tribune Co.* court stated, "[C]onvenience alone is not [a] sufficient reason to disturb the rights of impaired classes of creditors of a debtor not meeting confirmation standards."[185] The Bankruptcy Code is designed to benefit both debtors and creditors. The per-debtor approach better achieves this goal. Assuming the per-debtor interpretation is adopted, parties will need to focus on consensus earlier in the process and act more aggressively in attempting to achieve it in order to overcome the hurdles imposed by § 1129(a)(10).[186] But this additional effort is not without good cause. The per-debtor approach better protects the interests of the creditors by more accurately balancing the distribution of bargaining power between the debtors and the creditors. A better distribution of power makes the negotiation process more meaningful and ensures that debtors and creditors work together to reach the best reorganization solution possible, which is the underlying objective of Chapter 11. The Bankruptcy Code's spirit should not be quashed by the adoption of a per-plan interpretation.

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181 *See* Axelrod et al., *supra* note 177.

182 *See id.*; Roach, *supra* note 177.

183 *See* Axelrod et al., *supra* note 177. This would be similar to the plan proposed in *In* re *Transwest Resort Properties, Inc*. *See* Transcript of Record, *In re* Transwest Resort Props., Inc., No. 10-37134 (Bankr. D. Ariz. Dec. 19, 2011) (court's ruling on the record confirming third amended and restated joint plan of reorganization); *see also supra* Part I.C.

184 *See In re* Tribune Co., 464 B.R. 126, 183 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011).

185 *See id.*

186 *See* Axelrod et al., *supra* note 177.

CONCLUSION

This Comment sheds light on the different approaches bankruptcy courts are using to interpret § 1129(a)(10) of the Bankruptcy Code. Some courts have adopted a per-plan approach, while others have adopted a per-debtor approach. This lack of consistency in applying § 1129(a)(10) has left debtors and creditors with unclear legal precedent and a lack of clarity on how to best structure their reorganization plans. Such uncertainty only adds to the complexity of Chapter 11 reorganizations and to the time it takes to complete bankruptcy proceedings.

Adopting the per-debtor approach finds support in several areas. The per-debtor approach more accurately aligns with the meaning and context of the Bankruptcy Code. Specifically, the per-debtor interpretation better coincides with the other subsections of § 1129(a). The per-debtor approach also allows § 1129(a)(10) to retain its safeguard mechanism in relation to cramdowns. This result helps creditors retain the protections granted to them throughout the bankruptcy process and is more in line with Congress's intention in adopting § 1129(a)(10). Finally, the per-debtor interpretation ensures that two very different legal principles—substantive consolidation and joint administration—are not conflated and the substantive rights of creditors disregarded.

The benefits of the per-debtor approach far outweigh the benefits of the per-plan approach and the costs of implementation. Courts should adopt the per-debtor interpretation for § 1129(a)(10) when dealing with jointly administered, but not substantively consolidated, Chapter 11 reorganizations.