AMERICAN BANKRUPTCY INSTITUTE

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PLENARY SESSION

Great Debates

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2021

ABI Annual Spring Meeting – Great Debates 2.0

RESOLVE: Arbitration of disputes in bankruptcy should be allowed (and encouraged)?

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I. Introduction

Given recent developments about the enforceability of agreements to arbitrate, bankruptcy lawyers and judges should pay increasing attention to claims that need to be arbitrated and potential grounds to oppose arbitration.

To help with this, these written materials provide a short overview of the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq.*) (the "FAA") and recent cases holding that contracts mandating arbitration—even as to threshold questions of arbitrability—must be enforced. The materials then review the limited grounds to oppose arbitration and pose a question: when should arbitration of disputes in bankruptcy be allowed, or even encouraged, and when should it be forbidden due to an irreconcilable conflict between federal bankruptcy law and the FAA?

II. Overview Of The FAA

The FAA, first enacted in 1925, mandates arbitration of disputes involving commerce or maritime transactions in which the parties have agreed to settle their disputes through arbitration. This requirement is contained in § 2 of the FAA, which states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The FAA predates the Bankruptcy Code by more than 50 years.

The FAA broadly applies to virtually all activity that is regulated by or within the scope of the Commerce Clause. *See* 9 U.S.C. § 1 (defining "commerce" as inter-state commerce); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273–74, 281, 115 S. Ct. 834, 839, 130 L. Ed. 2d 753 (1995) (holding that the FAA applies to the extent of the Commerce Clause's regulation of interstate activity and to transactions involving interstate commerce, even if the

parties did not contemplate an interstate commerce connection). In other words, if the activity is generally "within the flow of interstate commerce," the FAA will mandate arbitration if the parties' contract requires it, even if there is no specific effect on interstate commerce from the underlying transaction. *Id.* at 273; *Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 56–57, 123 S. Ct. 2037, 2040, 156 L. Ed. 2d 46 (2003).

Notably for bankruptcy practitioners, the Supreme Court held that a debt restructuring agreement fell within the FAA's ambit even though it was executed in Alabama by Alabama residents. *Citizens Bank*, 539 U.S. at 57. There were three reasons for this: First, the borrower engaged in business throughout the southeastern United States using loans from the bank that were subject to the debt restructuring agreement. *Id.* at 57-58. Second, the restructured debt was secured by all of the borrower's business assets, including inventory that was created using raw materials that originated out-of-state. *Id.* Third, in what is perhaps most important for bankruptcy practitioners to note, commercial lending generally has an impact on the national economy and Congress has power to regulate it under the Commerce Clause. *Id.*

When a court proceeding is initiated and involves a matter subject to arbitration, the FAA mandates that the court in which an action is brought must send the matter to arbitration upon a proper and timely request to do so:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon *being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement*, shall on application of one of the parties *stay the trial of the action* until such arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration*."

9 U.S.C. § 3 (emphasis added). As is clear from the emphasized text, questions about arbitrability in bankruptcy cases will require a close read of the FAA and the relevant contract—in addition to considering bankruptcy law and policy. For example, what is the predicate "suit or proceeding" required by Section 3 in the context of a dispute arising in a bankruptcy case?

A party seeking to arbitrate a matter pending in court "may petition" any federal court that would have jurisdiction over the "civil action" but for the arbitration agreement. 9 U.S.C. § 4. This is done by filing a motion. 9 U.S.C. § 6. The presiding court must hear the parties and "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties" to arbitrate. 9 U.S.C. § 4. If there is a dispute about "the making of an arbitration agreement" or the failure to arbitrate, then "the court shall proceed summarily to the trial thereof" and a jury trial is available under the statute. 9 U.S.C. § 4.

As most practitioners are aware, proceedings before an arbitrator can include witnesses, and the FAA grants arbitrators subpoena powers in order to compel the attendance of witnesses. 9 U.S.C. § 7. An arbitration proceeding will conclude with a decision by the arbitrator and an "award" pursuant to the arbitration. 9 U.S.C. § 9. For the arbitration award to be enforceable as a judgment, any party to the arbitration proceed may apply to an appropriate court for an "order confirming the award," and the court "must grant such an order unless the award is vacated, modified, or corrected" as provided under §§ 10 and 11 of the FAA. 9 U.S.C. § 9. *See also* 9 U.S.C. § 13 (a judgment confirming an arbitration award is enforceable like any other judgment). Judicial review of an arbitration award is limited to, for example, correct math errors, vacating an award obtained by fraud, or vacating an award that exceeded the arbitrator's authority to enter. 9 U.S.C. §§ 10-11.

III. Matters That Are Not In Debate

Prior to the pair of recent Supreme Court decisions issued in January, 2019 (*New Prime, Inc. v. Oliveira*, No. 17-340, slip op., 139. S. Ct. 532 (Jan. 15, 2019) and *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. __, 139 S.Ct. 524 (Jan. 8, 2019)), lower courts looked primarily to the 1987 decision in *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) ("*McMahon*") to provide the framework guiding their decisions regarding arbitrability of various disputes. The *McMahon* Court identified three ways in which "a contrary congressional command" may override the FAA's mandated enforcement of agreements to arbitrate:

(1) The text of the statute;
(2) The legislative history; or
(3) The statute's underlying purpose.

Numerous circuit courts have examined these principles (sometimes with differing results) in the years since *McMahon*. While not raised in the bankruptcy context, two recent Supreme Court decisions have further addressed the issue of arbitrability and added some further parameters to the analysis:

Henry Schein

In 2010, the Supreme Court ruled that the FAA allows the parties to agree that the arbitrator, not the court, will decide whether a particular dispute is subject to the agreement to arbitrate. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). Subsequently, some courts created an exception to this rule. The exception, known as the "wholly groundless" exception, applied when the court concluded that a party's demand for arbitration was wholly groundless. In *Henry Schein*, the Court found that the statutory text of the FAA does not allow for a "wholly groundless" exception to whether an arbitrator (rather than a court) may determine the threshold question of arbitrability. The Court held that the "wholly groundless" exception is inconsistent with the FAA and other Supreme Court precedent.

However, some questions remain as to whether there may be an inherent conflict with the underlying purposes of the Bankruptcy Code in certain circumstances, even if no textual conflict is present.

Oliveira

New Prime is an example of when a court may find that a dispute or agreement to arbitrate falls outside the reach of the FAA, pursuant to an exception that is set forth in the text of the FAA itself (as opposed to a question arising out of the terms of the contract). Here, because the dispute involved a dispute that is expressly outside the scope of the FAA (contract of employment for workers engaged in foreign or interstate commerce), the FAA did not provide authority to order arbitration. *Oliveria* does not cite to *Henry Schein*.

Various lower courts have previously found no evidence in the text of the Bankruptcy Code or in the legislative history suggesting that Congress intended to create an exception to the FAA in the Bankruptcy Code – perhaps pointing again to the third prong of the *McMahon* test (underlying purpose) as the most viable ground for possible debate.

IV. Matters In Debate

While there is no debate over the fact that arbitration provisions are enforceable, what is up for debate the extent to which the third prong of the *McMahon* test—whether there is an inherent conflict between arbitration and underlying purpose of federal bankruptcy law—can be used to argue that bankruptcy courts should decide questions arising in bankruptcy questions.

Whether a matter is subject to arbitration is not as simple as considering if it is core or non-core under 28 U.S.C. § 157(b). Several U.S. Courts of Appeals have held that bankruptcy courts do not have discretion to deny a request for arbitration of non-core matters. *In re Crysen/Montenay Energy Co*., 226 F.3d 160, 166 (2d Cir. 2000); *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989); *In re Gandy*, 299 F.3d 489 (5th Cir.2002); *Matter of National Gypsum Co.,* 118 F.3d 1056, 1065 (5th Cir. 1997). This is likely because these matters are less likely to involve fundamental rights under the Bankruptcy Code or to raise matters of bankruptcy policy that conflict with the policy favoring arbitration.

However, decisions are less uniform when it comes to core matters. While several courts of appeal have held that the *McMahon* test must be satisfied, they have reached different outcomes on whether to permit arbitration in disputes involving core matters. On one hand, the Second and Third Circuits have permitted arbitration of core matters. *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006); *Mintze v. Am. Gen'l Fin. Servs., Inc. (In re Mintze)*, 434 F.3d 222, 222 (3d Cir. 2006) (core/non-core distinction does not affect whether matter is arbitrable, only the extent of bankruptcy court authority to render a decision on any issue).

Notably, the Second Circuit's decision permitted arbitration of a matter involving an alleged violation of the automatic stay. In doing so, the Second Circuit reasoned as follows:

> Bankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters, which implicate "more pressing bankruptcy concerns." In re U.S. Lines, Inc., 197 F.3d at 640. However, even as to core proceedings, the bankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that "inherently conflict" with the Arbitration Act or that arbitration of the claim would "necessarily jeopardize" the objectives of the Bankruptcy Code. Id. This determination requires a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy. The objectives of the Bankruptcy Code relevant to this inquiry include "the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.), 118 F.3d 1056, 1069 (5th Cir.1997). If a severe conflict is found, then the court can properly conclude that, with respect to the particular Code provision involved, Congress intended to override the Arbitration Act's general policy favoring the enforcement of arbitration agreements.
>
> [. . .]
>
> Although we reach the same conclusion as the lower courts that Hill's § 362(h) claim is a core proceeding, we hold that arbitration of her claim would not seriously jeopardize the objectives of the Bankruptcy Code because: (1) Hill's estate has now been fully administered and her debts have been discharged, so she no longer requires protection of the automatic stay and resolution of the claim would have no effect on her bankruptcy estate; (2) as a purported class action, Hill's claims lack the direct connection to her own bankruptcy case that would weigh in favor of refusing to compel arbitration; and (3) a stay is not so closely related to an injunction that the bankruptcy court is uniquely able to interpret and enforce its provisions.

MBNA Am. Bank, N.A., 436 F.3d at 108, 109. More recently, however, the Second Circuit has held that an alleged violation of a bankruptcy court discharge order is not an arbitrable dispute. *See In re Belton v. GE Cap. Retail Bank*, 961 F.3d 612, 613 (2d Cir. 2020), cert. denied sub nom. *GE Cap. Retail Bank v. Belton*, No. 20-481, 2021 WL 850624 (U.S. Mar. 8, 2021).

On the other hand, the Fourth and Ninth Circuits have refused to permit core matters to be arbitrated after determining, on the facts of those cases, that there were inherent conflicts between bankruptcy law and arbitration policy. *Phillips v. Mowbray, LLC (In re White Mountain Mining Co., LLC)*, 403 F3.d 164 (4th Cir. 2005) (applying the McMahon test in the context of international

arbitration and a bankruptcy case); *In re Thorpe Insulation Co*., 671 F.3d 1011, 1021 (9th Cir. 2012). The Fourth Circuit reasoned that "[a]rbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights contingent upon an arbitrator's ruling rather than the ruling of the bankruptcy judge assigned to hear the debtor's case." *In re White Mountain Mining Co. LLC*, 403 B.R. at 169 (internal quotation omitted). Thus the Fourth Circuit declined to permit a dispute pending in a different court to be arbitrated because, among other things, the issues in that proceeding—whether certain advances were debt or equity investments—were fundamental to formulation of a plan. *Id.* at 170.

V. Conclusion

Significant questions remain about the extent to which arbitration provisions will be enforceable in bankruptcy cases. While matters that do not involve fundamental matters of bankruptcy law and policy will likely be arbitrable, adjustment of the debtor-creditor relationship or other matters of significant bankruptcy policy might not be. As a result, here are the key take-aways for practitioners:

- Arbitration provisions will generally be enforced as long as they were not procured by fraud and the matters to be arbitrated to not implicate fundamental matters of bankruptcy law and policy. Identifying exactly what constitutes a fundamental matter of bankruptcy law and policy isn't always easy.

- Under *Henry Schein*, the question of whether a matter should be subject to arbitration may be decided by the arbitrator, if the arbitration provision contains such a requirement.

- Timely motions to refer matters to arbitration will likely be granted—but don't wait to bring such a motion.

- Opposition to arbitration in a bankruptcy case will likely be strongest when the claims are based upon fundamental rights under federal bankruptcy law—such as the automatic stay or discharge injunction—or claims and causes of action of the estate or trustee that do not come into existence until a filing, such as preferential transfer claims.

- One of the apparent motivations behind the Supreme Court's decision in *Henry Schein* is the enforcement of *private* agreements. To a certain extent—and perhaps even to a significant extent—bankruptcy is a *public* right.

GREAT DEBATES 2.0: PER PLAN OR PER DEBTOR & SECTION 1129(a)(10)'s IMPACT ON JOINT PLAN CRAMDOWN

I. Introduction & A Brief History

The Bankruptcy Code's cramdown provisions are powerful arrows in a debtor's plan confirmation quiver. Section 1129(a)(10) states that a plan may be confirmed if "at least one class of claims that is impaired under the plan has accepted the plan." Once a debtor has an impaired accepting class and satisfies certain other requirements, the plan can be "crammed down" on all other classes of impaired creditors that reject the plan. And those creditors will be bound to the plan. With modern, sprawling corporate enterprises that involve numerous debtors, how does one measure section 1129(a)(10) with a joint plan? Specifically, does acceptance by any one class of impaired creditors with claims against any one of the debtors satisfy section 1129(a)(10) or must an impaired class of creditors of each debtor that is party to the joint plan accept that plan? Cue the "per debtor" versus "per plan" great debate.

Some history on the "per debtor" versus "per plan" construction may help frame the debate. In scenarios involving jointly-administered, non-substantively consolidated debtors, case law demonstrates that disagreement exists over whether a chapter 11 plan can be "crammed down" with the consent of a single impaired class—the "per plan" approach—or, whether a class of creditors from each individual debtor entity must consent to the plan—the "per debtor" approach.

For a Delaware bankruptcy court considering this issue in 2011, section 1129(a)(10) applies to *each debtor* included in a joint plan instead of applying a per plan approach.[1] While many debtors attempting to confirm a joint plan on a per plan basis cited to and relied on *In re SPGA, Inc.*,[2] *In re Enron Corp.*,[3] and *JPMorgan Chase Bank, N.A. v. Commc'ns Operating LLC (In re Charter Commc'ns)*[4] in the past for support, the *Tribune* decision created a split in authority, and it became the leading case adopting the "per debtor" approach. In 2018, however, the Ninth Circuit's decision in *Transwest*—the first federal court of appeals to address application of the "per debtor" v. "per plan" approach—came to the opposite conclusion of the *Tribune* court and unanimously affirmed the lower court's "per plan" interpretation of section

[1] *In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del. 2011).

[2] No. 01-02609, 2001 WL 34750646, *234-235 (Bankr. M.D. Pa. Sept. 28, 2001) (holding that the joint chapter 11 plan of reorganization complied with section 1129(a)(10) because at least one class of impaired creditors accepted the plan, notwithstanding the fact that each debtor entity did not have an accepting impaired class).

[3] No. 01-16034, 2004 Bankr. LEXIS 2549, *234 (Bankr. S.D.N.Y. July 15, 2004) ("Though the Plan governs the treatment of claims against the 177 jointly administered Debtors, pursuant to applicable law, the affirmative vote of one impaired class under the Plan is sufficient to satisfy section 1129(a)(10).").

[4] 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) ("This is because it is appropriate to test compliance with section 1129(a)(10) on a per-plan basis, not . . . on a per-debtor basis).

1129(a)(10).[5] This opinion has significant implications for a conglomerate of jointly administered (but not substantively consolidated) debtors who seek to confirm a joint plan.

a. Before Transwest: Tribune & the Per Debtor Approach

In 2008, Tribune Company filed bankruptcy under the weight of debt incurred because of a 2008 leveraged buy-out (LBO), in which Tribune was taken private. In April 2007, Tribune had approximately $4.983 billion in outstanding debt. After the LBO and as of the December 9, 2008 petition date, Tribune had approximately $12.706 billion in outstanding debt. One of the central issues in the plans centered on the putative claims arising from the LBO.[6] The court was presented with two competing jointly administered plans, both of which contained provisions stating that they were *not* premised on substantive consolidation, and neither plan had received the affirmative vote of an impaired class for each debtor entity included in the respective joint plans.

In adopting the "per debtor" construction, Judge Kevin Carey explained, "I find nothing ambiguous in the language of § 1129(a)(10), which, absent substantive consolidation or consent, must be satisfied by each debtor in a joint plan. Neither plan here satisfies § 1129(a)(10)."[7] Judge Carey relied on principals of statutory construction and corporate separateness to conclude that "each joint plan actually consists of a separate plan for each Debtor."[8] First, in construing the plain language of section 1129(a)(10), the court turned to the rules of construction in section 102 of the Bankruptcy Code, one of which provides that "the singular includes the plural."[9] According to the court, the fact that section 1129(a)(10) referred to "plan" in the singular was not a basis, alone, upon which to conclude that, in a multiple debtor case, only one debtor—or any number fewer than all debtors—must satisfy the standard.[10]

Second, the court reasoned that because the plan contained the common "non-substantive consolidation" provision—that is, the "respective Debtors' estates are not being substantively consolidated, that a claim against multiple Debtors will be treated as a separate claim against each, that claims are to be satisfied only from assets of the particular Debtor against which a claim is made, that obligations of any particular Debtor shall remain with that particular Debtor and no Debtor is to become liable for the obligations of another"—the practical effect of this provision meant each joint plan actually consisted of a separate plan for each Debtor. "Therefore, ascribing the plural to the meaning of 'plan' in § 1129(a)(10) is entirely logical and consistent with such a scheme."[11] The court also stated that absent substantive consolidation, entity separateness is fundamental, citing the Third Circuit's decision in *Owens Corning*.[12]

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[5] *In re Transwest Resort Properties, Inc*., 881 F.3d 724, 730 (9th Cir. 2018) ("Because the plain language of section 1129(a)(10) indicates that Congress intended a 'per plan' approach, we need not to look to the statute's legislative history or address the Lender's remaining policy concerns. . . . We therefore hold that section 1129(a)(10) applies on a 'per plan' basis.").
[6] *In re Tribune Co.,* 464 B.R. at 137-144.
[7] *Id.* at 183.
[8] *Id.* at 182.
[9] 11 U.S.C. § 102(7).
[10] *In re Tribune Co.,* 464 B.R. at 182.
[11] *Id.*
[12] *Id.* (citing *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2007)).

Third, the court held that section 1129(a)(10) must be read in conjunction with the other subsections of section 1129(a), particularly (a)(8), when considering rights of impaired unsecured creditors. This is the statutory canon of construction known as *in pari materia*.[13] The *Tribune* Court then examined the other requirements for plan confirmation under section 1129, asking itself whether any of those provisions may be satisfied if only one or more—but fewer than all—debtors proposing a joint plan satisfies them. Specifically, the court examined the good faith requirement in section 1129(a)(3); the best interest of creditors test in section 1129(a)(7); the consent or non-impairment requirement in section 1129(a)(8); and finally noted that although section 1129(b) excuses a plan proponent from compliance with section 1129(a)(8) if all other requirements for plan confirmation are met and the plan does not discriminate unfairly and is fair and equitable, section 1129(b) does not excuse compliance with section 1129(a)(10).[14] In short, each debtor—whether or not jointly administered—is required to satisfy these confirmation requirements, so the reasonable construction is that each debtor must also satisfy section 1129(a)(10).[15]

b. Transwest—The Per Plan Approach

Looking to the same "plain language" of section 1129(a)(10), the Ninth Circuit Court of Appeals came to the opposite conclusion in its 2018 *Transwest* decision, adopting the per plan approach and reasoning that the plain language of the statute supports the per plan approach, which requires approval of only one impaired creditor class for a plan involved in a multi-debtor proceeding.[16] In *Transwest*, the lender objected to the plan arguing that, because section 1129(a)(10) required the consent of an impaired class from each debtor, the plan could not be confirmed without the lender's consent.[17] The lender, citing to "the only court that has applied the per debtor' approach—*Tribune*—argued that section 102(7) required that section 1129(a)(10) apply on a per debtor basis. The Court of Appeals disagreed. First, in construing the plain language of section 1129(a)(10), the court explained,

> Section 1129(a)(10) requires that one impaired class "under the plan" approve "the plan." It makes no distinction concerning or reference to the creditors of different debtors under "the plan," nor does it distinguish between single-debtor and multi-debtor plans. Under its plain language, once a single impaired class accepts a plan, section 1129(a)(10) is satisfied as to the entire plan.[18]

The court, also leaning on the rules of construction in section 102(7) of the Bankruptcy Code, rejected the view in *Tribune* that "section 102(7) requires that section 1129(a)(10) apply

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[13] *See Norton Bankruptcy Law & Practice 2d* § 154:5 (Nov. 2003) ("Each provision in Title 11 [the Bankruptcy Code] must be read *in pari materia* with every other . . . . One cannot read any one section in isolation either from the statute as a whole or from any other provision.").
[14] *In re Tribune Co.,* 464 B.R. at 183.
[15] Shortly after *Tribune*, in *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302–03 (Bankr. D. Del. 2011), another Delaware bankruptcy court noted in dicta (in ruling on a motion to dismiss) that the debtors did not have a reasonable likelihood of reorganization because they could not confirm a joint plan where one of the debtors only had one, non-accepting class and cited *Tribune* for support.
[16] *See Transwest,* 881 F.3d at 729.
[17] *See id*. at 726.
[18] *Id.* at 729.

on a 'per debtor' basis."[19] Rather, the court explained that section 102(7) did not affect the court's construction that section 1129(a)(10) applies on a per plan basis; conversely, the rule of construction only further supported the court's analysis. The court explained,

> Section 102(7), a rule of statutory construction, provides that "the singular includes the plural." (internal citation omitted). This rule of construction does not change our analysis. Section 102(7) effectively amends section 1129(a)(10) to state, "at least one class of claims that is impaired under the plans has accepted the plans." The "per plan" approach is still consistent with this reading.[20]

The court also rejected the lender's argument—again relying on *Tribune*—that other subsections in section 1129 indicate that section 1129(a)(10) must apply on the per debtor basis, explaining that nothing in the plain text of, for example, section 1129(a)(3) (the good faith requirement), indicates that it must apply on an per debtor basis.[21]

Finally, the lender contended that the plan was effectively a substantive consolidation. But because the lender failed to raise an objection on that basis before the bankruptcy court, the Ninth Circuit declined to consider the argument. In a separate concurrence, however, Judge Friedland agreed that the distribution scheme adopted by the plan involved a degree of substantive consolidation. Judge Friedland explained:

> [T]he problem in my view is not the interpretation of the statute, but rather that the Plan effectively merged the Debtors without an assessment of whether consolidation was appropriate. Such an assessment would have required the bankruptcy court to evaluate whether it was fair to proceed on a consolidated basis. Had the court taken this step of "balanc[ing] the benefits that substantive consolidation would bring against the harms that it would cause," it might have alleviated concerns about whether consolidation of the proceedings was in fact unfair.[22]

In voicing concern that "entangling various estates in a complex, multi-debtor reorganization diminishes the protections afforded to creditors by the Bankruptcy Code,"[23] Judge Friedland provided the following advice to creditors, so as to avoid being in the same situation as the lender in *Transwest*:

> [I]f a creditor believes that a reorganization improperly intermingles different estates, the creditor can and should object that the plan—rather than the requirements for confirming the plan—results in de facto substantive consolidation. Such an approach would allow this issue to be assessed on a case-

[19] *In re Tribune Co.,* 464 B.R. at 729–30.
[20] *Id.* at 729–30.
[21] *See id.* at 730.
[22] *Id.* at 732–33 (J. Friedland concurrence).
[23] *Id*.

by-case basis, which would be appropriate given the fact-intensive nature of the substantive consolidation inquiry.[24]

II. Why the Per Plan Construction Is the Best Approach[25]

The "per plan" construction is the best approach because it: (i) accords with the plain meaning of section 1129(a)(10) and, when read as a whole, jives with other provisions of section 1129(a); (ii) promotes the reorganization of integrated enterprises by appropriately balancing power to prevent holdouts while still providing meaningful protection to ensure creditors' support for a joint plan; and (iii) recognizes the modern era of myriad corporate enterprises within a given structure that operate on an integrated basis (e.g., one need only review a cash management motion). For ease of reading, the arguments proceed in bullet-point fashion:

- **The Per Plan Approach Honors the Plain Meaning of § 1129(a)(10).** The starting point for statutory construction is, of course, the statute itself. As the Supreme Court has repeatedly reminded us, "[w]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[26] Section 1129(a)(10) provides 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. . . ." The text of section 1129(a)(10) is clear and unambiguous. It requires that only *one* impaired class "under the plan" accept "the plan." Notwithstanding the statute's plain language, the per debtor debate team strains to modify section 1129(a)(10) so that it reads "at least one class of claims *of each debtor* that is impaired under the plan has accepted the plan." The per debtor team essentially expands section 1129(a)(10) to include a prepositional phrase not found anywhere in the text. In a further contortion of section 1129(a)(10), the per debtor team imports section 102(7), which provides that when interpreting sections of the Bankruptcy Code, "the singular includes the plural." By changing the singular to the plural as the per debtor team insists, section 1129(a)(10) reads "[i]f classes of claims are impaired under the *plans*, at least one of the classes that are impaired under the *plans* has accepted the *plans*. . . ." The per debtor team concludes that this modification requires each debtor to obtain acceptance from one of its impaired classes of creditors. Even if section 1129(a)(10) is modified to transform the singular to the plural, however, the result remains the same—that is, "at least one" of the impaired classes of the debtors' creditors has still accepted the plans.

- **The Per Plan Approach Is Consistent with Other Sections of 1129(a) and Creditors Are Protected By Other Cramdown Requirements**. Reading the statute *in pari materia* actually supports the per plan approach; indeed, no conflict exists between section 1129(a)(10) and the other referenced subsections of section 1129 as the per debtor team may suggest. Each subsection of section 1129(a) is phrased differently—some provisions are measured on a plan basis while others hinge off of debtor-specific analysis. For example, the best interest of creditors test requires a liquidation analysis on a "per debtor" basis. 11 U.S.C. §

[24] *Id.*

[25] The Honorable Mary Grace Diehl and Jonathan T. Edwards (Alston & Bird) will argue the "per plan" side of section 1129(a)(10) at the 2021 ABI Spring Meeting. This position paper sets forth the arguments of each side solely for purposes of the Great Debate and may not reflect the authors' individual views.

[26] *Lamie,* 540 U.S. at 534 (citation and internal quotations omitted).

1129(a)(7) (each holder of a claim must receive not less than such holder would receive *if the debtor were liquidated* under chapter 7. . . ."). Moreover, Congress clearly knew how to cross-reference the subsections of 1129(a), as evidenced by sections 1129(a)(8) and 1129(b). Yet Congress did not do so with respect to section 1129(a)(10), thereby establishing a mutually exclusive requirement for confirmation. It is therefore difficult to understand why the "per debtor" team concludes that the per plan approach renders the statutory scheme in irreconcilable conflict with any other subsection of 1129(a)

- **The Per Plan Approach Is Consistent with Favoring Reorganization and Preserving Value**. The per plan approach paves a clearer path forward for confirmation. And that approach is more consistent with certain acknowledged policies of chapter 11, such as encouraging reorganizations and preserving jobs. In contrast, the per debtor interpretation gives unsecured creditors a confirmation veto power under section 1129(a)(10) solely because it controls the sole impaired class of debtor. The whole purpose of bankruptcy and the mechanism by which classes vote is intended to solve for the creditor holdout problem (hence the reason for a majority in number and two-thirds in amount to achieve class acceptance). In numerous instances, if courts adopt the per debtor approach, debtors may be forced to liquidate in chapter 7 or, at the very least, dismiss their cases to the detriment of their business enterprise on the whole, as well as its thousands of employees, trade creditors, and other stakeholders. This cannot be what Congress had in mind when it enacted section 1129(a)(10). It runs directly counter to the reason we have the bankruptcy system we have today—for example, had the old equity railroad receiverships allowed bondholders to seize individual pieces of the railroad tracks, the development of interstate commerce as we know it would have proceeded along a very different path. Bankruptcy courts are about preserving long-term value, jobs, and businesses, not myopic statutory interpretation that encourages hostage-taking.

- **The Per Plan Approach Does Not Abrogate Creditor Support.** Section 1129(a)(10) was intended to ensure that a debtor's plan have some creditor support. Both teams agree that voting plays an important role in chapter 11 proceedings, and an impaired creditor's vote is a powerful tool to force a debtor to negotiate. But adopting a per plan approach does not diminish the value of that vote. Nor does it strip creditors of separate but related entities from other protections found in the Bankruptcy Code. The plain meaning contemplates creditor support by requiring that one impaired class accepts a joint, multi-debtor plan.

- **The Per Plan Approach Does Not Effect Substantive Consolidation**. First, substantive consolidation, a judicially-created, equitable doctrine, is irrelevant to a technical requirement like section 1129(a)(10).[27] If the per debtor team is implicitly suggesting a joint, multi-debtor plan constitutes de facto substantive consolidation, it does no such thing; there is no pooling of assets and liabilities thereby reducing recoveries. Further, creditors often do not balk at the idea of continuing joint debtors' prepetition consolidated cash management programs; nor

[27] *See In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995) (finding that section 1129(a)(10) provides no substantive rights to creditors).

does continuing such programs effect substantive consolidation. Second, the per debtor team ignores how businesses in the modern era actually operate—on an integrated and often enterprise basis, thereby rendering it more than appropriate for debtors to propose a joint plan. In fact, all creditors, regardless of the debtor against whom their claims arose, typically receive distributions under a plan from the debtors' reorganized business enterprise on the whole.

- **Even the ABI Chapter 11 Reform Commission Recommended That Section 1129(a)(10) Be Abolished as Part of Any Amendments to the Bankruptcy Code**. The Commission aptly noted that the requirement that one impaired class of creditors accepts the plan under section 1129(a)(10) may prevent a debtor or plan proponent from confirming a plan under the cramdown provisions of section 1129(b). Although some courts and commentators suggest that section 1129(a)(10) was intended to ensure that a plan had some creditor support, neither the legislative history nor the Bankruptcy Code indicate such a purpose.[28] Notably, given the variation in class composition and the different motives and objectives of creditors, a non-accepting class does not necessarily equate to lack of creditor support for the plan. Some commentators have questioned the section's continued utility in light of the barriers to confirmation and the creditor holdup value it creates in many chapter 11 cases. Given hedge fund and other activism, the Commission discussed cases with a limited number of impaired creditor classes and a lender or other large creditor who purchased a sufficient number of claims in each class to control the plan vote. By voting against the plan in each of these classes, that single creditor can block a cramdown because there will be no accepting impaired class of creditors for purposes of section 1129(a)(10). The per debtor approach encourages such activity. And although the Commission recommended eliminating section 1129(a)(10) in its entirety from the Bankruptcy Code, the per debtor plan at least maintains the original intent that there be a modicum of support for joint debtors' plan.

III. Why the Per Debtor Construction Is the Best Approach[29]

Chapter 11 is supposed to be a consensual process. The relevant provisions of chapter 11 contemplate requirements that each individual debtor must meet. One of those is that there be at least one impaired class of a debtor's own creditors that supports the proposed terms of the debtor's liquidation. The purpose of this provision was to modify the practice that prevailed

[28] *See generally* S. Rep. No. 95-989, at 128 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5914 (stating that at least one class must accept the plan). *See, e.g.,* Clark Boardman Callaghan & Randolph J. Hines, Bankruptcy Review Commission Fails to Achieve Significant Chapter 11 Reform, 8 Norton Bankr. L. Adviser 1, Aug. 1997 ("No case law or commentator has identified any important social or reorganization policy that [section 1129(a)(10)] serves. The historical genesis for the requirement reveals it to be a vestigial mutation that serves no evolutionary purpose."); Scott F. Norberg, Debtor Incentives, Agency Costs, and Voting Theory in Chapter 11, 46 U. Kan. L. Rev. 507, 537–38 (1998) (noting that neither the legislative report to the 1978 version of the Bankruptcy Code nor 1984 revisions provide insights concerning the purpose of section 1129(a)(10)). *Cf. In re Windsor on the River Assocs., Ltd*., 7 F.3d 127, 131 (8th Cir. 1993) (interpreting legislative history to suggest that the purpose of section 1129(a)(10) "is to provide some indicia of support by affected creditors and prevent confirmation where such support is lacking").

[29] The Honorable Michael E. Wiles and Erica S. Weisgerber (Debevoise & Plimpton) will argue the "per debtor" side of section 1129(a)(10) at the 2021 ABI Spring Meeting. This position paper sets forth the arguments of each side solely for purposes of the Great Debate and may not reflect the authors' individual views.

before the Bankruptcy Code was enacted, under which courts were permitted to use cramdown powers to confirm a reorganization plan without the consent of any class of a debtor's creditors.[30]

Permitting one debtor to be reorganized without an affirmative vote of any of its own impaired creditors – based on the happenstance that several affiliates chose to file their plans in the form of a single document rather than separately – exalts form over substance and makes a mockery of the clear statutory intent of section 1129(a)(10).

- **The Per Debtor Approach Is Consistent with the Plain Meaning of § 1129(a)(10).** The provisions of chapter 11 that describe the permissible components of a plan of reorganization and the requirements for confirmation of a plan are worded from the viewpoint of a single debtor. For example:

  - Section 1121(a) states that the "debtor" may file a plan;
  - Sections 1121(b) and (c) set forth an exclusive period within which only the "debtor" may file a plan.
  - Section 1123(a)(5) states that a plan may provide for the retention "by the debtor" of all or any property of the estate, or for the merger or consolidation of the "debtor" with one or more persons, or for an amendment of the "debtor's" charter, or for the issuance of securities "of the debtor";
  - Section 1123(a)(6) requires the inclusion of certain provisions in the charter of "the debtor";
  - Section 1123(b) states that a plan may provide for the assumption or rejection of contracts "of the debtor" and the settlement of claims or interests "belonging to the debtor";
  - Section 1125(a)(1) requires disclosure of adequate information about the "debtor" so that the holders of claims may make informed decisions in voting on a plan;
  - The definition of an "investor typical of holders of claims or interests of the relevant class" means an investor having "such a relationship with the debtor" as the holders of other claims or interests of such class;
  - Section 1129(a)(4) requires court approval of certain payments to be made "by the debtor";

[30] 7 Collier on Bankruptcy ¶ 1129.02[10] (16th ed. 2019).

- Section 1129(a)(7) requires that each creditor in a class receive value that is at least equal to what the creditor would receive if "the debtor" were liquidated under chapter 7;

- Section 1129(a)(11) requires a finding that confirmation is not likely to be followed by a need for further reorganization or liquidation.

In this context, treating the reference to a "plan" in section 1129(a)(10) as though Congress did not intend the provision to apply to each individual debtor is not reasonable. All of the foregoing provisions of chapter 11 contemplate what each separate "debtor" must do or can do, and the requirements that each debtor's plan must satisfy, in order for that debtor's reorganization to be confirmed. If a joint plan is filed, it is still a "plan" for each separate debtor, and the requirements for confirmation should still be met separately as to each debtor before it can be confirmed as to that debtor.

This is particularly true since the filing of a single document that purports to be a joint plan on behalf of multiple debtors (without substantive consolidation of the debtors) is in reality no different from the filing of separate plans for each separate debtor. The difference is only one of form, not substance. If a debtor files a stand-alone plan there is no question that the debtor must comply with section 1129(a)(10). It makes no sense to conclude that the requirement disappears just because affiliated debtors elect the administrative convenience of filing a single plan instead of separate ones. Creditors' rights cannot and should not be abridged merely for the convenience of the debtors.

There are other provisions of chapter 11 that also refer to conditions that a "plan" must satisfy. Section 1129(a)(1) requires, for example, that each "plan" comply with the Bankruptcy Code. Section 1129(a)(3) requires that each "plan" be filed in good faith. Surely these are requirements that must be satisfied as to each separate debtor whose "plan" is before a court. There is no sound reason to treat section 1129(a)(10) differently.

- **Other Cramdown Requirements May Not Sufficiently Protect Creditors**. As noted above, the purpose of section 1129(a)(10) was to change the former practice, under which plans could be crammed down without the affirmative support of any creditor class and subject only to the protections set forth in cramdown standards.

When the Bankruptcy Code was enacted in 1978, section 1129(a)(10) merely required that "at least one class of claims has accepted the plan, determined without including any acceptance of the plan by any insider holding a claim of such class."[31] Courts struggled with the question of whether a "deemed" acceptance by an unimpaired class would be sufficient to satisfy this requirement.[32] Section 1129(a)(10) was then amended in 1984 to make clear that the

[31] *See* Public Law 95-598, 92 Stat. 2549 (1978).
[32] *See, e.g., In re Barrington Oaks Gen'l Partnership*, 15 B.R. 952, 967-970 (Bankr. D. Utah 1981) (reviewing the legislative history and concluding that the purpose of the provision was to ensure that confirmation would be barred if "no class of affected [*i.e.*, impaired] creditors has voted for the plan").

requirement needed to be satisfied as to an "impaired" class of creditors, unless a debtor had no impaired classes of creditors.[33]

Congress therefore acted initially to insert section 1129(a)(10) in the Code, and again several years later to clarify its requirements. Arguing that "cramdown standards" are sufficient protection for creditors, and that section 1129(a)(10) therefore serves no separate purpose, is effectively arguing that the congressional judgment on this point should be ignored.

It is also important to note that while section 1129(a)(10) is often discussed as though it were a condition to the cramdown of a plan, in fact section 1129(a)(10) applies regardless of whether a plan has been accepted by all classes under section 1129(a)(8), and regardless of whether cramdown is sought. Classes of creditors may include insiders, and a class (including insiders) may vote to accept a plan for purposes of section 1129(a)(8). However, section 1129(a)(10) does not permit confirmation unless there has been an affirmative vote by at least one impaired class of creditors *without* counting the votes of insiders. In other words, Congress was not only concerned with cramdown protections, and it did not deem cramdown protections—or even acceptance by all classes—as sufficient. Congress wanted to ensure that there was affirmative support from impaired, arm's-length creditors (excluding insiders) before confirmation could be granted. A "per plan" application of this requirement would effectively eliminate it whenever a debtor has affiliates.

In any event, cramdown protections are not always enough. For years, courts have struggled with the problem of gerrymandering in chapter 11 cases, in which some claims are separately classified just for the purpose of creating (artificially) an accepting impaired class where there otherwise would not be one. It is often the case that such gerrymandering results in an unfavorable but arguably technically permissible "cramdown" of a secured creditor's claims. The better view is that such gerrymandering is not permitted unless there is a good-faith basis for separate classification, and it is widely accepted in those cases that the mere fact that a gerrymandered class might have the benefit of other cramdown protections is not enough.[34] If section 1129(a)(10) is interpreted as applying only on a "per plan" basis, however, then one debtor's need for a separate accepting impaired class of its own will be eliminated, and that debtor will be able to accomplish all of the evils of gerrymandering without the need to do the actual gerrymandering itself. If the cramdown requirements are deemed to be insufficient protections against gerrymandering in a single debtor case, why should they somehow be deemed to be sufficient just because the debtor has affiliates?

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[33] *See* Public Law 98-353, 98 Stat. 333 (1984).

[34] *See, e.g., Norton Bankruptcy Law & Practice 3d* § 113:8 (Jan. 2020) ("the weight of the Circuit Court opinions rejects such efforts, at least when they are characterized as an attempt to gerrymander the vote"); *In re Combustion Engineering, Inc.*, 391 F.3d 190, 243–44 (3d Cir. 2003); *Matter of Windsor on the River Associates, Ltd.*, 7 F.3d 127 (8th Cir. 1993) ("a claim is not impaired [for purposes of section 1129(b)] if the alteration of the rights in question arises solely from the debtor's exercise of discretion."); *In re Deming Hospitality, LLC*, 2013 BL 93045, *6 (Bankr. D.N.M. Apr. 5, 2013); *In re All Land Investments, LLC*, 468 B.R. 676, 690 (Bankr. D. Del. 2012).

- **Chapter 11 Is Intended To Be A Consensual Process**. Encouraging reorganization and preserving jobs certainly is a legitimate objective of chapter 11. However, another policy objective is that chapter 11 should be a consensual process – that the creditors of a particular debtor should have a voice in defining the business that debtor will conduct and how that debtor's affairs will be reorganized. To that end, Congress believed that confirmation should require the acceptance of at least one impaired creditor class of that debtor's creditors. Indeed, the purpose of section 1129(a)(10) "is to provide some indicia of support by affected creditors and prevent confirmation where such support is lacking."[35] People may disagree, but unless and until the statute is changed, the congressional judgment needs to be respected and followed.

Arguments about obstructive "holdout" creditors really should be no different, as to a particular debtor, whether a "joint" plan or a "separate" plan is filed as to that debtor. If the creditor is voting in bad faith, then the creditor's vote can be disregarded. If the creditor is not voting in bad faith, however, then there is no reason to ignore the creditor's vote and to cram down a plan just because the creditors of *other* affiliated debtors would prefer to take the debtor's business in a different direction or to reorganize it on different terms.

- **The Per Plan Approach Is Not Consistent with the Separation of Estates That Is Recognized in the Bankruptcy Code and the Need for Support from Each Debtor's Creditors to the Terms of That Debtor's Reorganization.** Sometimes the substantive consolidation of debtors is appropriate, in which case a group of companies will be treated as though it were a single entity.[36] For the most part, however, the Bankruptcy Code respects the separate existence of each debtor and the fact that the filing of each separate debtor creates a separate estate. This is consistent with the fundamental separateness of corporate entities outside of bankruptcy as well. The mere fact that a debtor is part of a broader enterprise is not a reason, in the absence of substantive consolidation, to say that persons who hold claims against affiliated entities, or interests in affiliated entities, should dictate the terms on which a debtor may be reorganized, while the creditors of that debtor are left with nothing but cramdown protections. The "per plan" approach effectively means that someone else's creditors support a plan – not that the debtor's own creditors do so—and that is not the kind of creditor support that Congress envisioned.

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[35] *In re Windsor on the River Assocs., Ltd*., 7 F.3d 127, 131 (8th Cir. 1993) (quoting *In re Lettick Typografic, Inc*., 103 B.R. 32, 38 (Bankr. D. Conn. 1989)).

[36] Substantive consolidation requires a finding that either (a) creditors dealt with the debtors as a single economic unit and did not rely on their separate identity in extending credit, or (b) the affairs of the debtors are so entangled that consolidation will benefit all creditors.

Faculty

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Hon. Daniel P. Collins is a Bankruptcy Judge for the U.S. Bankruptcy Court for the District of Arizona in Phoenix, appointed on Jan. 18, 2013. He served as chief judge from 2014-18. Previously, he was a shareholder with the law firm of Collins, May, Potenza, Baran & Gillespie, P.C. in downtown Phoenix, practicing primarily in the areas of bankruptcy, commercial litigation and commercial transactions. Judge Collins served on the State Bar of Arizona's Subcommittee on the Uniform Fraudulent Transfer Act. He also served as chairman of the Bankruptcy Section of the State of Arizona and was a lawyer representative to the Ninth Circuit Court of Appeals. He was granted the St. Thomas More Award in 2017. Judge Collins is presently the education chair for the National Conference of Bankruptcy Judges, a member of ABI's Board of Directors, on the board of the Phoenix Chapter of the Federal Bar Association and a member of the University of Arizona Law School's Board of Visitors. He also is a founding member of the Arizona Bankruptcy American Inn of Court. Judge Collins received both his B.S. in finance and accounting in 1980 and his J.D. in 1983 from the University of Arizona.

Hon. Mary Grace Diehl is a retired U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta, appointed in February 2004 and retired in 2018. She is currently serving on recall status. Prior to taking the bench, Judge Diehl was a partner in the litigation section of Troutman Sanders LLP and chaired its Bankruptcy Practice Group. During her years in private practice, she was consistently named in *The Best Lawyers in America* and *Chambers US: America's Leading Business Lawyers*. Judge Diehl is a past president of the National Conference of Bankruptcy Judges, and serves on the Boards of Directors of ABI, the Turnaround Management Association and IWIRC. She is also a Fellow of the American College of Bankruptcy and formerly served as vice president of its board of directors; she has also served on the boards of ABI, the Turnaround Management Association and the

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Hon. Michael E. Wiles is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on March 3, 2015. Previously, he was a partner with Debevoise & Plimpton LLP, where he focused on general commercial litigation and bankruptcy. Judge Wiles co-authored the *Collier Business Workout Guide* (Mathew Bender 2007) and has appeared on panels organized by the Association of the Bar of the City of New York, the American College of Investment Council and others to discuss current issues in bankruptcy litigation. He is also a member of the Committee on Bankruptcy and Reorganization of the Association of the Bar of the City of New York. His publications and written CLE materials include "May Parties Consent to Bankruptcy Court Adjudication of 'Stern Claims'" (September 2014) (presented at a continuing legal education session at the Association of the Bar of the City of New York); "Ponzi Schemes and Avoidance Actions: 3 Issues," *Law360* (March 7, 2011); "The Good Faith Defense to Fraudulent Transfer Claims" (December 2010) (presented at a continuing legal education session at the Association of the Bar of the City of New York); and "At the Crossroads: The Intersection of the Federal Securities Laws and the Bankruptcy Code," *The Business Lawyer* (November 2007). Judge Wiles received his A.B. from Georgetown University in 1975 and his J.D. from Yale Law School in 1978.