11 U.S.C. § 1129(a): Satisfying the Requirements for "Consensual" Confirmation

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INTRODUCTION

Section 1129(a) of the United States Bankruptcy Code (the "Code") governs confirmation of chapter 11 plans, providing that "[t]he court shall confirm a plan *only if* all of the following requirements are met."[2] At the confirmation hearing, counsel for a plan proponent should be prepared to establish, by a preponderance of the evidence, that *each* of the requirements is satisfied.[3]

The determination of whether a plan is consensual turns on section 1129(a)(8).[4] Where all impaired classes of creditors vote to accept a chapter 11 plan, the court shall confirm the plan if the plan proponent establishes that the plan satisfies the remaining requirements of section 1129(a). If all the requirements for confirmation have been met except for subsection 1129(a)(8), the court shall confirm a chapter 11 plan, if the plan also satisfies the "cramdown" requirements of section 1129(b).[5]

Bankruptcy Rule 3020(b) authorizes the court to rule on confirmation of the plan, after notice and hearing,[6] and where "no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues."[7] Interpreting these provisions, the Norton Bankruptcy Law and Practice treatise ("Norton") opines:

> It is manifest that the Bankruptcy Code and Rules give the judge broad supervisory powers over the confirmation of plans. Confirmation requires a court order whether or not there is an objection, and the Code contemplates that there will be a hearing

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[2] 11 U.S.C. § 1129(a) (emphasis added).
[3] *See, e.g.*, *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (Matter of Briscoe Enters., Ltd. II),* 994 F.2d 1160, 1165 (5th Cir.1993), *cert. denied*, 510 U.S. 992 (1993).
[4] *See* Part VIII, *infra*; *see also* 7 COLLIER ON BANKRUPTCY ¶ 1129.02[8] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.); 6 NORTON BANKR. L. & PRAC. 3d § 112:15.
[5] *See* §§ 1129(a)-(b); *In re A & B Assocs., L.P.*, 2019 WL 1470892, at *48 (Bankr. S.D. Ga. Mar. 29, 2019) (Coleman, J.).
[6] *See* Fed. R. Bankr. P. 2002(b).
[7] Fed. R. Bankr. P. 3020(b).

> in every case. The Code also requires the judge to take evidence before confirming any Chapter 11 Plan.[8]

Norton observes that, by providing the court need not receive evidence on the issue of good faith in the absence of an objection, Rule 3020 implies that the court "must take evidence on all the other requisites of confirmation."[9] Case law supports the view that courts have an independent duty to ensure that the criteria for confirmation set forth in 1129(a) are met.[10]

While the scope of a judge's involvement in a chapter 11 case can be a controversial topic, and the evidentiary showing that will be required may vary from judge to judge, counsel for a plan proponent should review the plan and disclosure statement before filing, and throughout the case as circumstances change, to ensure that each subpart of section 1129 has been addressed and any evidence or testimony in support of the plan is prepared.[11]

This paper addresses the requirements of section 1129(a) in turn, providing an overview of each, and including synopses of recent relevant caselaw, where available. This paper does not address the requirements for "cramdown" under section 1129(b) of the Code or cover the issues addressed by sections 1129(c) (competing plans), 1129(d) (avoidance issues), or Section 1129(e) (the time frame for confirming a plan in a small business case).

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[8] 8 NORTON BANKR. L. & PRAC. 3d § 160:18.
[9] *Id.* § 160:18 at n.3.
[10] *See Universal Am. Mortg. Co. v. Bateman (In re Bateman*), 331 F.3d 821 (11th Cir. 2003); *Kaiser Aerospace & Elecs. Corp. v. Teledyne Indus. (In re Piper Aircraft Corp.),* 244 F.3d 1289, 1299-1300 n.4 (11th Cir. 2001), *cert. denied*, 534 U.S. 827 (2001); *A & B Assocs., L.P.*, 2019 WL 1470892, at *48; *In re Las Vegas Monorail, Co*., 462 B.R. 795 (Bankr. D. Nev. 2011) (Markell, J.) (denying confirmation of a plan *sua sponte* because the debtor failed to satisfy its burden to show the proposed plan was feasible).
[11] *See, e.g.*, *Briscoe Enters.,* 994 F.2d at 1165.

I. 11 U.S.C. § 1129(a)(1): The Plan Complies with the Applicable Provisions of Title 11

A. Overview

Section 1129(a)(1) requires that "[t]he plan compl[y] with the applicable provisions of this title."[12] Courts have interpreted this provision as requiring that a plan satisfy the requirements of sections 1122 and 1123 of the Code.[13]

Section 1122 addresses the classification of claims or interests. Specifically, section 1122(a) provides that "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."[14] Section 1122(a) is satisfied "when a reasonable basis exists for the structure, and the claims or interests within each particular class are substantially similar."[15]

Section 1123(a)(1) addresses the contents of a plan, requiring that a plan designate classes of claims and interests.[16] A plan need not classify administrative claims and priority tax claims.[17] Sections 1123(a)(2) and (a)(3) require that a plan specify which classes are unimpaired and which classes are impaired under the plan.[18] Section 1123(a)(4) requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."[19] Section

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[12] 11 U.S.C. § 1129(a)(1).
[13] *See e.g.*, *A & B Assocs.*, 2019 WL 1470892, at *48; *In re Star Ambulance Serv., LLC*, 540 B.R. 251, 260 (Bankr. S.D. Tex. 2015) (Rodriguez, J.); *In re EnviroSolutions of N.Y., LLC*, 2010 WL 3373937, at *2-3 (Bankr. S.D.N.Y. July 22, 2010) (Bernstein, J.).
[14] 11 U.S.C. § 1122(a).
[15] *See In re 20 Bayard Views, LLC*, 445 B.R. 83, 94 (Bankr. E.D.N.Y. 2011) (Strong, J.); *In re Aleris Int'l, Inc.*, 2010 WL 3492664, at *11 (Bankr. D. Del. May 13, 2010) (Shannon, J.).
[16] 11 U.S.C. § 1123(a)(1).
[17] *See In re Berry & Berry Wings, LLC*, 2014 WL 6705779, at *3 (Bankr. M.D. Fla. Nov. 26, 2014) (Funk, J.) (describing the unsettled state of case law regarding whether a secured tax claim could be classified for purposes of voting and cram down, but refusing to deny confirmation on the basis that the proposed plan failed to designate a class for certain secured tax claims citing concerns of "efficiency and judicial economy"); *20 Bayard Views*, 445 B.R. at 94.
[18] 11 U.S.C. §§ 1123(a)(2), (3).
[19] *Id.* § 1123(a)(4).

1123(a)(5) requires that "a plan . . . provide adequate means for the plan's implementation," offering specific examples of potential courses of action.[20] Section 1123(a)(6) requires a plan to "provide for the inclusion in the charter of the debtor, if the debtor is a corporation . . . a provision prohibiting the issuance of nonvoting equity securities."[21] Section 1123(a)(7) requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee."[22]

Section 1129(a)(1) may be cited as grounds for denial of confirmation where the plan provision is inconsistent with the Code.[23] Recognizing the complexity of chapter 11 plan confirmation, however, some courts have adopted theories of "harmless error" to permit confirmation where technical noncompliance with section 1129(a)(1) did not significantly affect creditor rights.[24]

B. Recent Cases

- ***In re A & B Assocs., L.P.*, 2019 WL 1470892, at *48-50 (Bankr. S.D. Ga. Mar. 29, 2019) (Coleman, J.):** In this case, the debtor was a Georgia limited partnership that owned and operated an apartment complex in South Carolina, which was encumbered by a first priority lien held by the debtor's principal creditor.[25] The court denied confirmation of the debtor's

[20] *Id.* § 1123(a)(5).
[21] *Id.* § 1123(a)(6).
[22] *Id.* § 1123(a)(7).
[23] *See, e.g.*, *In re Autterson*, 547 B.R. 372, 396 (Bankr. D. Colo. 2016) (McNamara, J.) (denying confirmation where the proposed plan attempted to create a separate impaired class of one for an unsecured claim on the grounds of administrative convenience); *In re Continental Airlines*, 203 F.3d 203, 211-214 (3d Cir. 2000) (discussing various courts' approaches to the question of whether third party releases in proposed plans violated section 1129(a)(1)); *In re Beyond.com Corp.*, 289 B.R. 138, 143-44 (Bankr. N.D. Cal. 2003) (Morgan, J.) (finding a proposed plan failed to satisfy section 1129(a)(1) where the plan contained several "provisions that dramatically reduce notice to creditors of matters the drafters of the Bankruptcy Code and Rules considered fundamental to bankruptcy due process.").
[24] *See, e.g.*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648-49 (2d Cir. 1988) ("Where Code violations are so insubstantial that they constitute harmless error, they do not warrant overturning an entire plan of reorganization under subsection 1129(a)(1)."); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1129.02[1].
[25] *Id.* at *1.

proposed plan because the debtor had not met its burden of proof on the section 1129 requirements, focusing on the lack of persuasive testimony regarding the plan's feasibility.[26] In addition, the court found several infirmities in the proposed plan, including the plan's failure to comply with all applicable Code provisions under section 1129(a)(1).

Specifically, the plan proposed that its confirmation would enjoin collection efforts against the debtor's principal and guarantor, an individual who had managed the property through various entities he controlled for nearly three decades.[27] The primary creditor challenged the plan provision as an impermissible third party release on the basis that the guarantor was deceased.[28] The bankruptcy court discussed the current split of authority with respect to the permissibility of third party releases in plans of reorganization, noting that one approach is to construe section 524(e) to authorize the bankruptcy court to grant releases against a debtor, but not non-consensual third-party releases, while another interpretation relies on section 105(a) to find that third-party releases permissible and, in limited circumstances, may be approved without consent.[29]

Ruling: The bankruptcy court discussed prior Eleventh Circuit decisions, which permitted consensual third party releases in plans, provided the proposed release satisfied the seven factor test established in *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002).[30] The court, however,

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[26] *See infra* Part XI.B.
[27] *Id.* at *2, 48.
[28] *Id.* at *49.
[29] *Id.*
[30] *Id.* at *50. The *Dow Corning* court provided that a court may confirm a plan that enjoins non-consenting creditors' claims against a non-debtor where:

> (1) There is an identity of interests between the debtor and the third party . . . such that suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) the plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to

held that it could not confirm the debtor's plan because the third-party release at issue did not satisfy the *Dow Corning* factors.[31] Specifically, the bankruptcy court found that in light of the guarantor's death, the guarantor's interests (or rather, those of his estate) were no longer aligned with the debtor's interests, the injunction was not essential to the debtor's reorganization, and the impacted class, the lender whose debt had been guaranteed, opposed confirmation.[32] As a result, the court stated it would not confirm a plan that included the proposed third party release.[33]

- ***In re Council of Unit Owners of 100 Harborview Drive Condo.*, 572 B.R. 131, 137-39 (Bankr. D. Md. 2017) (Schneider, J.):** The debtor, an unincorporated association of condominium unit owners in a residential complex, filed for chapter 11 protection via its Board in an effort to address litigation between the council and certain residents.[34] The debtor sought confirmation of a chapter 11 plan over the objections of the United States Trustee and creditors, which had not been resolved after a "lengthy" confirmation hearing.[35]

Among the objectors' concerns were several proposed plan provisions containing third party releases, generally aimed at limiting the liability of the debtor's officers and directors.[36] One proposed provision sought to exculpate the debtor, "any [a]ffiliate or any of their respective directors, officers, employees," or consultants from any liability taken in connection with or arising out of the chapter 11 case.[37] A second provision protected each board member from personal

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settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

See S.E. Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070, 1078-81 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 109 (2015) (adopting the *Dow Corning* test).

[31] *Id.* at *50.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 136.

[35] *Id.* at 131, 136.

[36] *Id.* at 138-39.

[37] *Id.* at 138.

liability arising from their service to the debtor.[38] A third provision enjoined claim holders from asserting claims based on conduct other than willful misconduct or gross negligence.[39] A fourth provision barred taxing authorities from pursuing claims against the debtor's members, managers, or other officers arising from an audit or a failure to pay taxes or file tax returns.[40]

Ruling: Without much discussion, the court held that the proposed releases were not permissible under the *Dow Corning* factors because they "broadly hinder[ed] and/or depriv[ed] unit owners of their legitimate rights to access to the courts, [and] no cogent reason has been presented to impose such an onerous and possibly unconstitutional restriction."[41] In the bankruptcy court's view, the proposed releases were unnecessary to the reorganization in light of other less restrictive avenues to pursue similar means.[42] Specifically, the court noted that the debtor's bylaws afforded immunity from suit to officers and board members acting in good faith in performance of their official duties, and the court's retained jurisdiction afforded an adequate forum to monitor post-confirmation litigation.[43]

- ***S.E. Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070, 1078-81 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 109 (2015):** The bankruptcy court confirmed the plan of reorganization of a closely held civil engineering and surveying firm, over the objection of the debtor's non-insider equity holders.[44] The district court affirmed the bankruptcy court, and the equity holders appealed to the Eleventh Circuit.[45] Among the equity holders' concerns were plan provisions that approved releases of

[38] *Id.*
[39] *Id.* at 138-39.
[40] *Id.* at 139.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 1074.
[45] *Id.* at 1075.

claims against non-debtors, including officers and directors of the debtor or reorganized debtor or their representatives, for acts "in connection with, relating to, or arising out of" the chapter 11 case, "except and solely to the extent such liability [was] based on fraud, gross negligence or willful misconduct."[46]

The court provided an overview of the case law split third party releases, stating that the Fifth, Ninth, and Tenth Circuits interpret section 524(e) to prohibit such provisions, while the Second, Third, Fourth, Sixth, and Seventh Circuits permit them based on an interpretation of section 105(a) as informed by a seven factor test set forth in *Dow Corning Corp.*, 280 F.3d at 658.[47] The Eleventh Circuit adopted the view that bankruptcy courts have discretion to determine which of the *Dow Corning* factors are relevant in each case, that the analysis should be applied flexibly, and that "such bar orders should be used cautiously and infrequently, and only where essential fair and equitable."[48]

Ruling: Applying the *Dow Corning* factors to the debtor's proposed release, the Eleventh Circuit affirmed the bankruptcy court in approving the non-debtor releases, as it found the releases to be "fair, equitable, and wholly necessary to ensure that [the debtor] may continue to operate as an entity."[49] The court relied on the fact that the management of the reorganized debtor was substantially the same as that of the debtor, and so in the absence of such a release, key employees of the reorganized debtor would expend time in defense of litigation, as opposed to focusing on their professional duties for the reorganized debtor.[50] The court also noted that without such releases, litigation was likely to continue, "bleeding [the reorganized debtor] dry and dashing any

[46] *Id.* at 1076.
[47] *Id.* at 1078.
[48] *Id.* at 1079 (internal citation omitted).
[49] *Id.* at 1081.
[50] *Id.* at 1079-81 ("This case has been a death struggle, and the non-debtor releases are a valid tool to halt the fight.").

hope for a successful reorganization."[51] It was also important that the objecting equity holder would be paid the full value of its equity interest in the debtor.[52]

II. 11 U.S.C. § 1129(a)(2): The Proponent of the Plan Complies with the Applicable Provisions of Title 11

A. Overview

Where the focus of section 1129(a)(1) is the form and content of the plan, section 1129(a)(2) focuses on the activities of the plan proponent by requiring the plan proponent to comply with the applicable provisions of Title 11.[53] Generally, courts interpret section 1129(a)(2) to require the plan proponent to comply with the disclosure and solicitation requirements set forth in sections 1125 and 1126.[54] The plan proponent must establish substantial compliance with the Code and Rules regarding disclosure, notice, and solicitation of the plan and disclosure statement.[55] Some courts strictly construe section 1129(a)(2) and deny confirmation for any violation of the Code.[56] Examples of such violations include the debtor's use of cash proceeds from a sale of collateral without court permission,[57] failure to attend a 341 meeting of creditors,[58] and failure to include all creditors in the debtor's schedules.[59]

Other courts have tempered their approach to section 1129(a)(2), explaining that:

> Minor violations of §1129(a)(2), out not to be viewed as a 'silver bullet' to kill th[e] Plan . . . [as] Congress did not intend to fashion a minefield out of the provisions of the Bankruptcy Code . . . [I]f Congress had meant that any infraction, no matter how early on in the case, no matter how minor the breach, and regardless of whether

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[51] *Id.* at 1080.
[52] *Id*. at 1081.
[53] 11 U.S.C. § 1129(a)(2); 7 COLLIER ON BANKRUPTCY ¶ 1129.02[2].
[54] *See, e.g.*, *In re City of Colo. Springs Spring Creek Gen. Improvement Dist.*, 177 B.R. 684, 688 (Bankr. D. Colo. 1995) (Krieger, J.).
[55] *See In re Sentinel Mgmt. Grp., Inc.*, 398 B.R. 281, 303 (Bankr. N.D. Ill. 2008) (Squires, J.).
[56] *See In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 236-37 (Bankr. D. N.J. 2000) (Wizmur, J.) (collecting cases).
[57] *Cothran v. U.S.*, 45 B.R. 836, 838 (Bankr. S.D. Ga. 1984) (Alaimo, C.J.).
[58] *In re Keiser*, 204 B.R. 697, 699-700 (Bankr. W.D. Tex. 1996) (Monroe, J.).
[59] *In re Wermelskirchen*, 163 B.R. 793, 796 (Bankr. N.D. Ohio 1994) (Baxter, J.).

> the court has remedied the violations, should result in a denial of confirmation, Congress would have given some clearer indication in the legislative history or made the statutory provision far more express.[60]

This approach to section 1129(a)(1) balances the alleged harm with its practical effect on the plan confirmation process.[61] Even so, "serious violations of the Bankruptcy Code by a [proponent] can and should result in a denial of confirmation of a plan under § 1129(a)(2)."[62]

Preconfirmation plan modifications require special care, as section 1129(a)(2) may bar confirmation if the plan is materially modified after the disclosure statement is approved and interested parties have not received adequate notice of the modifications.[63] Similarly, the plan proponent should take care to comply with prior court orders issued in furtherance of the reorganization process, as failure to do so may risk denial of confirmation.[64]

B. Recent Cases

- ***In re Arquidiocesis De San Juan De Puerto Rico*, 2019 WL 1282796, at *9-10 (Bankr. D. P.R. Mar. 18, 2019) (Godoy, J.), *stayed pending appeal*, 2019 WL 1877399 (Bankr. D. P.R. April 25, 2019):** The issue in this case was the collection of a state court judgment against the Holy Roman Catholic and Apostolic Church in the amount of $4.7 million in favor of current

[60] *See Greate Bay Hotel & Casino*, 251 B.R. at 237 (quoting *In re Dow Corning Corp.*, 244 B.R. 721, 734 (Bankr. E.D. Mich. 1999)).
[61] *See, e.g.*, *id.*
[62] *Id.* (quoting *In re Landing Assocs., Ltd.*, 157 B.R. 791, 810 (Bankr. W.D. Tex. 1993) (Clark, J.)).
[63] *See, e.g.*, *In re Concrete Designers, Inc.*, 173 B.R. 354, 356-57 (Bankr. S.D. Ohio 1994) (Calhoun, J.) (denying confirmation where the debtor served an amended plan and the original disclosure statement, which did not accurately describe the amended plan, to creditors). *But see Sentinel Mgmt. Grp.*, 398 B.R. at 303 (taking a more flexible approach to section 1129(a)(2) and permitting a post-solicitation, preconfirmation plan modification on the ground that the impact of the proposed modification was de minimis and would not cause the affected creditors to reconsider their vote).
[64] *See Greate Bay Hotel & Casino*, 251 B.R. at 236-37 (rebuking the debtor for violating a court order providing that the votes of unsecured creditors would be anonymous and sealed with the court, but allowing confirmation to proceed notwithstanding the potential violation of section 1129(a)(2) on the ground that the debtor's conduct did not alter the outcome of the voting process and had "no practical effect . . . on the plan confirmation process."); *see also In re Multiut Corp.*, 449 B.R. 323, 340-41 (Bankr. N.D. Ill. 2011) (Squires, J.) (denying confirmation where the debtor failed to comply with the court's Rule 3020 order).

and former teachers and employees of various Catholic schools in Puerto Rico.[65] The debtor maintained that only one of six dioceses of the Catholic Church in Puerto Rico filed for chapter 11 protection, though it previously listed the "Roman Catholic Church in Puerto Rico" as a d/b/a in its petition.[66] The bankruptcy court rejected this contention, finding that bankruptcy filing impacted "all the assets of the Roman Catholic Church of Puerto Rico, unless those assets are owned by fragments of the Church that are formally incorporated" and granted an extension of time for the debtor to complete its schedules.[67]

Ruling: The bankruptcy court granted a motion to dismiss the case pursuant to section 1112(b), in part, because the debtor could not propose a plan that would comply with section 1129(a)(2).[68] Specifically, the court noted that section 1129(a)(2) could not be satisfied where the proposed plan only considered the assets, liabilities, and creditors of part of the debtor.[69] The debtor had proposed to lift the automatic stay as to the assets of the non-complying dioceses, but the bankruptcy court found that it could not permit the debtor to make an "end-run" around the Code because the Code "requires complete disclosure, [and] it does not allow for piece-meal bankruptcy."[70] The bankruptcy court granted the debtor's motion to stay the dismissal pending appeal of the dismissal order to the Bankruptcy Appellate Panel for the First Circuit, largely based on the fact that this debtor is not a typical debtor incorporated under state law but an entity whose

[65] *Id.* at *1.
[66] *Id.*
[67] *Id.* at *2.
[68] *Id.* at *10.
[69] *Id.*
[70] *Id.* at *9 (noting that the court lacked a complete list of the debtor's assets and liabilities, a petition that included a list of all employee identification numbers, an accurate list of creditors, and operating reports regarding "a significant portion" of the debtor's operations).

rights derive from the Treaty of Paris in 1898, which ended the Spanish-American war and negotiated a treaty between the Spanish monarchy and the Vatican.[71]

- ***In re Charles St. African Methodist Episcopal Church of Boston*, 578 B.R. 56, 95-96 (Bankr. E.D. Mass. 2017) (Bailey, J.):** The debtor, an incorporated congregation of the African Methodist Episcopal Church, filed for chapter 11 protection on the eve for foreclosure on its church building and two other properties by its largest creditor.[72] In its third amended plan, the debtor proposed to distribute proceeds of three sales of estate properties in partial satisfaction of the secured claims, retain its remaining properties, provide remaining creditors promissory notes and mortgages for the balances owing on their secured claims, and pay non-priority unsecured creditors pro rata from a designated pool of funds at an estimated distribution of approximately 5.5% of the claims.[73] The largest creditor objected to the proposed plan on the ground that the debtor entered a joint defense agreement without court authority and allegedly used its time in bankruptcy principally for the benefit of its parent entity.[74]

Ruling: Overruling the creditor's objection, the court held that the creditor had abandoned its objections under section 1129(a)(2) where it had not requested findings or rulings on the matter, and did not mention them in its memorandum of law or closing argument at the confirmation hearing.[75] Further, the court noted that even accepting the creditor's recitation of the debtor's alleged conduct, the type of conduct alleged was irrelevant to the inquiry mandated by section 1129(a)(2), which examines the debtor's conduct in proposing the plan, not the debtor's strategic decisions regarding the reorganization.[76] The court found the creditor's objections to be "wholly

[71] *See In re Arquidiocesis De San Juan De Puerto Rico*, 2019 WL 1877399, at *3 (Bankr. D. P.R. Apr. 25, 2019) (Godoy, J.).
[72] *Id.* at 59.
[73] *Id.* at 62.
[74] *Id.* at 66.
[75] *Id.* at 95.
[76] *Id.* at 96.

unsupported" and noted that it had not adequately voiced concern regarding the debtor's compliance with the Code.[77]

III. 11 U.S.C. § 1129(a)(3): The Plan Has Been Proposed in Good Faith and Not By Any Means Forbidden By Law

A. Overview

Section 1129(a)(3) requires the plan to have been "proposed in good faith and not by any means forbidden by law."[78] Good faith is not a defined term in the Code, but it is generally interpreted in the context of section 1129(a)(3) to mean that there is a "reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code."[79] A plan is proposed in good faith "only if it has a legitimate and honest purpose to reorganize the debtor."[80] The court considers the totality of the circumstances in the course of a "fact-intensive, case-by-case inquiry."[81]

Section 1129(a)(3) "speaks more to the process of plan development than to the content of the plan."[82] Accordingly, the good faith inquiry focuses on the conduct manifested in obtaining the confirmation votes, and not necessarily on the substantive plan provisions.[83] Section 1129(a)(3) does not require the bankruptcy court to determine whether the ends achieved in the plan contravene non-bankruptcy law,[84] as other Code provisions permit the court's review of the

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[77] *Id.* at 97.
[78] 11 U.S.C. § 1129(a)(3).
[79] *See In re Chemtura Corp.*, 439 B.R. 561, 608 (Bankr. S.D.N.Y. 2010) (Gerber, J.); *see also In re Breitburn Energy Partners LP*, 582 B.R. 321, 352 (Bankr. S.D.N.Y. 2018) (Bernstein, J.); *Matter of Madison Hotel Assocs.*, 749 F.2d 410, 424-26 (7th Cir. 1984).
[80] *Chemtura Corp.*, 439 B.R. at 608 (internal quotation omitted); *see 20 Bayard Views*, 445 B.R. at 95-96.
[81] *Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.)*, 324 F.3d 197, 211-12 (3d Cir. 2003); *see Chemtura Corp.*, 439 B.R. at 608 ("The bankruptcy judge is in the best position to assess the good faith of the parties' proposals.") (internal quotation omitted).
[82] *See Breitburn Energy Partners*, 582 B.R. at 352 (quoting *Chemtura Corp.*, 439 B.R. at 608).
[83] *20 Bayard Views*, 445 B.R. at 95-96.
[84] *Id.* at 95-96; *In re Ocean Shores Cmty. Club, Inc.*, 1991 WL 184827, at *2 (9th Cir. Sept. 19, 1991) ("[S]ection 1129(a)(3) bars confirmation of plans proposed in violation of law, not those that contain terms that may contravene law.").

legality of substantive plan provisions.[85] A plan may satisfy the good faith requirement even though the plan may not otherwise be confirmable.[86]

Although there is agreement regarding the general test for good faith under section 1129(a)(3), its application is less straightforward.[87] For example, courts have generally rejected arguments that good faith is lacking and permitted confirmation to proceed, where the purpose of the case was for the debtor to obtain a benefit or result inside of bankruptcy that it could not achieve outside of bankruptcy.[88] It is less clear, however, whether a debtor's decision to file a chapter 11 case after receiving an adverse judgment in another court raises a presumption of bad faith.[89]

B. Recent Cases

- ***In re Cheerview Enters., Inc.*, 586 B.R. 881, 901-02 (Bankr. E.D. Mich. 2018) (Shefferly, J.):** The debtor, a corporation that owned a gas station and convenience store, won final approval of its disclosure statement, but the court denied confirmation where not all of the impaired classes voted to accept the plan, the debtor had not met its burden to show the plan was feasible for purposes of section 1129(a)(11) because testimony established that the debtor's own projections to be unrealistic, and the plan was unconfirmable under section 1129(b) due to a

[85] *See In re Food City, Inc.*, 110 B.R. 808, 812 n.10 (Bankr. W.D. Tex. 1990) (Clark, J.) (reserving the court's consideration of "potentially illegal provisions" as a relevant consideration in the confirmation process that could affect the plan's feasibility under section 1129(a)(11)).
[86] *Matter of T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 802 (5th Cir. 1997).
[87] 7 COLLIER ON BANKRUPTCY ¶ 1129.02[3][a][ii][B].
[88] *Id.* ¶ 1129.02[3][a][ii][B]; *see PPI Enters.*, 324 F.3d at 211-12 (finding that it was not bad faith for a debtor to file chapter 11 for the primary purpose of capping a creditor's claim under section 502(b)(6)); *Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070, 1074-75 (9th Cir. 2002), *cert. denied* 538 U.S. 1035 (2003) (confirming a plan proposed by a solvent debtor solely for the purpose of curing its prepetition default, avoiding liability for default interest, and thereby reducing its debt to a particular creditor by $1 million over an objection regarding the debtor's good faith under section 1129(a)(3)).
[89] *Compare Epic Metals Corp. v. Condec, Inc.*, 232 B.R. 806, 808-09 (M.D. Fla. 1999) (Paskay, C.J.) (affirming the bankruptcy court's finding that the plan did not satisfy section 1129(a)(3) where the record demonstrated that the debtors sought the protections of chapter 11 as a litigation tactic to avoid having to post the supersedeas bond pending appeal of an adverse copyright and trade dress violation action) *with In re Alta + Cast, LLC*, 2004 WL 484881, at *2-4 (Bankr. D. Del. Mar. 2, 2004) (Walrath, J.) (overruling a good faith objection based on the fact that the chapter 11 case was filed before judgment was entered in the lawsuit and the debtor had a significant history of financial distress).

violation of the absolute priority rule.[90] With respect to the good faith issue, two creditors alleged that a claim of a potential insider had been incurred when the gas station and convenience store were shut down and the debtor had already consulted bankruptcy counsel.[91] The creditors believed that this scheme was intended to create a secured claim that could be separately classified to create an impaired class of claims likely to accept the plan.[92] Three witnesses testified to the relationships between the debtor's principals and the potential insider, and the court concluded that the individuals were not very sophisticated about financial or legal transactions, let alone the complexities of bankruptcy, leaving the court with the impression that they had not orchestrated a scheme to artificially create an impaired class despite the questionable timing of the transaction.[93]

Ruling: The Court overruled an objection on the basis of section 1129(a)(3), noting that whether the plan was realistic remained to be seen, but the creditors had not offered sufficient evidence that the debtor filed the plan for an improper purpose or that there had been misconduct by the debtor regarding the plan.[94] The court sympathized with the objecting creditors on the ground that the optics of the case—the fact that the only holder of a claim who accepted the plan happened to be a "friendly creditor with a long standing relationship" with the debtor's owner's family whose claim against the debtor did not exist until shortly before the debtor filed for bankruptcy—were not ideal.[95] But the court could not conclude, from the "after-the-fact outcome of the voting . . . that the Plan filed by [the Debtor] must not have been filed in good faith."[96] The court also reminded parties that "[a]n objection to a debtor's good faith should not be used as a

[90] *Id.* at 887, 908-09.
[91] *Id.* at 901.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 902.
[95] *Id.*
[96] *Id.*

substitute for 'all sorts of more specific objections covered by [other] specific confirmation standards.'"[97]

- ***In re Charles St. African Methodist Episcopal Church of Boston*, 578 B.R. 56, 95-96 (Bankr. E.D. Mass. 2017) (Bailey, J.):** The debtor's largest creditor contended that there were six ways in which the plan had not been proposed in good faith, each an independent basis for denying confirmation.[98] Among other grounds, the creditor objected that an anonymous $50,000 donation that had been restricted by the donor for purposes other than payment of its claim made the purpose and motivation of the plan suspect.[99] The court did not credit this argument on the ground that the donation would "obviously and significantly enhance the Church's liquidity and ability to meet its debt service and its various other needs and contingencies in the first years after confirmation," a purpose "entirely consistent with the Bankruptcy Code."[100] Further, the good faith in the church's acceptance of the donation was not marred by the donor's restriction on the funds.[101]

The creditor also objected that the plan was proposed in bad faith because the terms of the new promissory notes and mortgages it would receive were unreasonable.[102] Here, the bankruptcy court distinguished between the subsection 1129(a)(3)'s requirement that the terms be proposed for a purpose consistent with the Code, as opposed to whether a particular covenant structure is fair and equitable.[103] The court noted that the terms and covenants of the new promissory notes and mortgages were put in place out of a concern that the creditor would use them "inappropriately, to defeat the fresh start and reorganization that Chapter 11 is intended to foster and that the Church

[97] *Id.* (citing *Dow Corning*, 244 B.R. at 676).
[98] *Id.* at 97.
[99] *Id.* at 97-98.
[100] *Id.* at 98.
[101] *Id.*
[102] *Id.* at 99.
[103] *Id.*

is seeking in this case," and noted that the creditor had not presented evidence that the Church had unreasonably rejected alternate proposed terms and covenants or even specified terms and covenants that it would have been bad faith not to include.[104]

Ruling: Reviewing the totality of the circumstances, the court overruled multiple objections to confirmation where the proposed plan was designed to allow the debtor to continue operating on a stable financial foundation for the benefit of all its creditors, as opposed to the preferred treatment of the objecting creditor.[105] The court explained that good faith for purposes of section 1129(a)(3) requires a relation between the plan and the reorganization purpose it was designed to serve, which could include "maximizing value, providing the debtor a fresh start, and reaching compromise among disparate constituencies."[106]

IV. 11 U.S.C. § 1129(a)(4): Payments for Costs and Expenses Related to the Case are Disclosed and Have Been Approved, or are Subject to Court Approval, as Reasonable

A. Overview

Section 1129(a)(4) requires the bankruptcy court to review fees and costs related to confirmation and the chapter 11 case.[107] Most of these expenses are addressed in other portions of the Code, such as the provisions regarding the compensation of professionals pursuant to 11 U.S.C. § 330.[108] If other Code provisions provide for court approval of payments for services and expenses, those expenses need not be explicitly provided for in the plan.[109] Where such expenses are not addressed by other Code provisions, section 1129(a)(4) acts as a catch-all provision to

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[104] *Id.*
[105] *Id.* at 101.
[106] *Id.* at 97.
[107] 11 U.S.C. § 1129(a)(4).
[108] *See also id.* §§ 328, 329, 331, 503(b).
[109] *See In re Trenton Ridge Investors, LLC*, 461 B.R. 440, 473 (Bankr. S.D. Ohio 2011) (Hoffman, J.) (finding that a plan complied with section 1129(a)(4) even though it did not specifically provide for the Court's consideration and approval of professional fee applications).

ensure those fees and costs are subject to the court's review and ensures that creditors have the benefit of information that might affect their decision to accept or reject a proposed plan.[110]

To meet the requirements of section 1129(a)(4), the debtor must disclose any potential fees or expenses, usually during the disclosure statement process, and the court must approve the reasonableness of such fees or costs.[111] With respect to the disclosure requirement, one court denied confirmation on the ground the disclosure statement did not adequately notify creditors of a proposed expense where the generalized projection offered in the disclosure statement regarding potential costs of litigation "may become so understated as to be meaningless," in light of the fact that the debtor had not yet announced its litigation strategy. [112]

The court's review for reasonableness is a "relatively open-ended standard that is potentially ambiguous,"[113] and though no court has expressly applied the standards and rules developed under section 330 to the interpretation under section 1129(a)(4), such a reading would seem logical.[114] Where the expense is routine in the preparation or confirmation of a plan, such as expenses for legal or accounting services, expert witness fees, printing costs, and the payment has not been made from the bankruptcy estate, the court "will ordinarily have little reason to inquire further with respect to the amount charged."[115]

Plan proponents should also be aware that fees or expenses paid in connection with confirmation that are paid prior to approval of the plan will be reviewed at confirmation pursuant to section 1129(a)(4) and not prior to the date payments are made, even if those payments are made

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[110] *See Beyond.com Corp.*, 289 B.R. at 144; 7 COLLIER ON BANKRUPTCY ¶ 1129.02[4].
[111] *See id.*
[112] *See Beyond.com Corp.*, 289 B.R. at 144.
[113] *Matter of Cajun Elec. Power Co-op, Inc.*, 150 F.3d 503, 517 (5th Cir. 1998), *cert. denied*, 526 U.S. 1144 (1999) (internal citation omitted).
[114] *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.02[4].
[115] *Cajun Elec. Power Co*-op, 150 F.3d at 517.

among creditors prior to the filing or voting on a plan.[116] If the court determines the payment to be unreasonable, it may order the disgorgement of the unreasonable portion of the payment, which in turn may remove the section 1129(a)(4) barrier to confirmation.[117]

B. Recent Cases

- ***In re Pioneer Health Servs., Inc.*, 2018 WL 4812432, at *21-23 (Bankr. S.D. Miss. Oct. 2, 2018) (Olack, J.):** Pioneer Health Services, Inc. owned ten critical access hospitals in five states, each a debtor in this jointly administered case.[118] The proposed plan included a waterfall provision that allocated a reserve of approximately $1.3 million for payment of all unpaid professional fees for work completed before the plan's effective date.[119] The Plan allocated payment of the professional fees equally among six of the debtor hospitals, with no professional fees paid by the remaining debtor hospitals.[120] One of the creditors argued at the confirmation hearing that the plan violated section 1129(a)(4) because it was unreasonable to require certain debtors to pay the administrative expenses of the separate estates of other jointly administered debtors.[121] Specifically, the objecting creditor alleged it was unreasonable for the entity indebted to the creditor to pay the administrative expenses of other estates not indebted to the creditor.

Ruling: The court overruled the creditor's section 1129(a)(4) objection and concluded that the plan satisfied the reasonableness standard of section 1129(a)(4).[122] In reaching this conclusion, the court pointed to the fact that professional fees in the case were being paid from a cash collateral

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[116] *See Cajun Elec. Power Co-op*, 150 F.3d at 513-15 (requiring review of payments for legal fees of unofficial committee of the debtor's member cooperatives by a creditor/plan proponent at confirmation, but declining to read section 1129(a)(4) to require approval prior to payment).
[117] *Id.* at 515 n.4.
[118] *Id.* at *2.
[119] *Id.* at *21.
[120] *Id.*
[121] *Id.*
[122] *Id.* (noting that "[a]t least one other bankruptcy court has allowed the allocation of fees and expenses among jointly-administered cases when the allocation otherwise was reasonable and had been used throughout the bankruptcy cases without objection.")

carve out pursuant to an agreement reached with two secured creditors that provided for the allocation of administrative expenses among the estates.[123] The objecting creditor had not objected to the cash collateral order or to any interim fee application submitted pursuant to that allocation.[124] Further, the entity indebted to the objecting creditor would not have any unencumbered assets available to pay administrative expenses absent the agreed carveout.[125] The court also reasoned that nothing in section 330 or Rule 2016 requires an entry-by-entry allocation among debtors in a jointly administered bankruptcy case, citing other cases that permitted reasonable allocation of fees and expenses among jointly administered debtors that had been used without objection.[126]

V. 11 U.S.C. § 1129(a)(5): Plan Proponent has Disclosed the Identity of Post-Confirmation Directors, Officers, or Voting Trustees and Insiders

A. Overview

Broadly speaking, section 1125(a)(5) requires disclosures of the identity and affiliations of the reorganized debtor's management and a showing that such appointments are "consistent with the interests of creditors and equity security holders and with public policy."[127] This provision also requires the debtor to disclose whether any insiders will be employed or retained by the reorganized debtor and the nature of any compensation proposed to be paid to the insider.[128]

With respect to the disclosure of the debtor's post-confirmation management, section 1125(a)(5)(A)(i) requires disclosure of the debtor's "director[s], officer[s], or voting trustee[s]."[129] Although framed in terms of a corporation's management structure, some courts have extended this disclosure requirement to noncorporate entities who will be involved in managing the

[123] *Id.* at *21-22.
[124] *Id.* at *22.
[125] *Id.* at *23.
[126] *Id.* at *22.
[127] 11 U.S.C. § 1129(a)(5)(A).
[128] *Id.* §1129(a)(5)(B).
[129] *Id.* § 1129(a)(5)(A)(i).

reorganized debtor, such as general partners in a limited partnership[130] and members of the unsecured creditors' committee if charged with supervising a liquidation plan.[131] Although disclosure of proposed management's "affiliations" is a somewhat nebulous concept, courts have required disclosure of affiliations that would be significant to creditors,[132] such as an agreement placing a proposed liquidation manager in charge of an executive trust created to allow the debtor's former executives, including the liquidation manager, to receive their "golden parachutes."

Once management is disclosed, the court must make a substantive judgment that the post-confirmation service of such individuals is "consistent with the interest of creditors and equity security holders and with public policy."[133] This subsection is somewhat problematic, given that in most cases, the identity of management will be disclosed prior to solicitation and creditors will weigh their confidence in management in their vote.[134] Likewise, it can be difficult to discern whether the proposed management's service of the reorganized debtor is consistent with public policy, particularly where management for the reorganized debtor is the same as management for the prepetition debtor.[135] Although case law is sparse, it appears that the showing required by section 1129(a)(5)(A)(ii) is intended less to protect existing creditors, and "more for taking into

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[130] *See, e.g.*, *In re Valley View Shopping Ctr., L.P.*, 260 B.R. 10, 23 (D. Kan. 2001) (Robinson, J.).

[131] *See, e.g.*, *Beyond.com Corp.*, 289 B.R. at 144-45 (noting the failure to disclose the identities or affiliations of the unsecured creditors' committee, as well as the failure to disclose the committee's bylaws outlining the committee's duties and governance).

[132] *See, e.g.*, *id.* (requiring disclosure under section 1129(a)(5)(A) of an agreement that placed a former executive in charge of trust created to allow former executives to receive their "golden parachutes," including responsibility for deciding whether to litigate to recover those funds).

[133] 11 U.S.C. § 1129(a)(5)(A)(ii).

[134] *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.02[5][b] (suggesting that this requirement may be intended to protect non-voting classes that are either unimpaired or eliminated under the plan).

[135] *Compare Beyond.com Corp.*, 289 B.R. at 144-45 ("Continued service by prior management may be inconsistent with the interests of creditors, equity security holders, and public policy if it directly or indirectly perpetuates incompetence, lack of discretion, inexperience, or affiliations with groups inimical to the best interest of the debtor.") *with In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 313-14 (Bankr. S.D.N.Y. 2016), *appeal dismissed*, 2017 WL 477780 (S.D.N.Y. Fed. 3, 2017) ("The Court also finds that the Plan complies with section 1129(a)(5)(A)(ii) of the Code because the members of current management are competent, and together with the rest of the new board, will provide both continuity and fresh insights into running the reorganized business."); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1129.02[5][b].

account the interests of future creditors and interested parties from future abuse of the reorganized debtor," providing a mechanism to deny confirmation where proposed management has a history of incompetence or questionable business judgment.[136]

Plan proponents must also disclose the identity and proposed compensation to be paid to any insider (as defined by 11 U.S.C. §101(31)) proposed to be employed or retained by the reorganized debtor.[137] Notably, this section requires only that the amount of compensation be disclosed, not that the court approve the proposed compensation.[138]

B. Recent Cases

- ***In re Acis Capital Mgmt., L.P.*, 2019 WL 406137, at *11 (Bankr. N.D. Tex. Jan. 31, 2019) (Jernigan, J.):** An individual and creditor of the debtors filed involuntary chapter 7 petitions against them, and, although contested, orders for relief were entered in both cases.[139] On motions by the chapter 7 trustee serving in the cases, the court ordered the cases jointly administered and converted the cases to cases under chapter 11. On the motion of the petitioning creditor, the court appointed a chapter 11 trustee.[140] The chapter 11 trustee proposed a plan which provided that the petitioning creditor, who was not an insider, was to receive 100% of the equity interests in the reorganized debtor.[141] The Plan did not provide for the appointment of any other

[136] *See, e.g. In re Bashas' Inc.*, 437 B.R. 874, 913 (Bankr. D. Ariz. 2010) (Marlar, C.J.) (concluding the proposed management's service was consistent with public policy where two insiders, who would remain officers and directors of the reorganized debtor, agreed to reduce their salaries by 15% from the prior year on the ground that the such compensation was reasonable, paid to experienced management, and not inconsistent with the insiders' responsibilities); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1129.02[5][b].
[137] 11 U.S.C. § 1129(a)(5)(B).
[138] *In re Granite Broad. Corp.*, 369 B.R. 120, 136 n.18 (Bankr. S.D.N.Y. 2007), *appeal dismissed*, 385 B.R. 41 (S.D.N.Y. 2008).
[139] *Id.* at *2.
[140] *Id.*
[141] *Id.* at *11.

officers or directors, but rather, as of the plan's effective date, the petitioning creditor would be free to structure the reorganized debtor's management as he wished.[142]

Ruling: In its discussion of the section 1129(a) requirements for confirmation, the court concluded that section 1129(a)(5) had been satisfied because the plan fully disclosed the identity and affiliations of the petitioning creditor.[143] The court also concluded that, to the extent that the petitioning creditor served as an officer of the reorganized debtor post-confirmation, his appointment was "consistent with the interests of [c]reditors, holders of [i]nterests and public policy."[144]

- ***In re The Kirk LLC*, 2016 WL 7402563, at *2 (Bankr. D. Utah Dec. 15, 2016) (Anderson, J.):** In perhaps the ideal case for consensual confirmation, the court analyzed the section 1129(a) requirements for confirmation where all of the classes voted to accept the plan and in the absence of objections by any party.[145] Examining the section 1129(a)(5) requirement, the court examined plan provisions that proposed that one individual continued to serve as the debtor's "CRO," subject to the debtor's members' election to terminate that individual and replace him with another individual whose potential salary had not been disclosed.[146]

Ruling: The court found that a plan "complie[d] materially with the [C]ode," specifically section 1129(a)(5), and did not view the non-disclosure of the replacement CRO's salary as problematic because the plan provided that the new CRO would not replace his predecessor until all non-insider creditors had been paid.[147]

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[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at *1.
[146] *Id.*
[147] *Id.*

VI. 11 U.S.C. § 1129(a)(6): Regulatory Approval for Any Rate Changes Provided in the Plan

A. Overview

Where a debtor is a utility, or is otherwise subject to price regulation by governmental agencies, section 1129(a)(6) provides that plans that call for a rate change must receive governmental approval of such change prior to confirmation, or the actual rate change must be expressly conditioned upon such approval.[148] In some cases, courts have approved confirmation in phases to allow for necessary approvals from multiple regulatory agencies, such as where the plan proposes a merger.[149]

Although infrequently litigated, one court noted that reorganizations of regulated monopoly utility companies present "an extensive and perplexing array of 'circular questions . . . stem[ming] primarily from the provisions of section 1129(a)(6)."[150] Concepts such as "'rates' and 'ratebase', and 'tariffs' and 'prudency' that govern the utility regulation world are clearly overlapping and conflicting with the words 'valuation' and 'claims determination' and 'sales of assets' and 'fair and equitable' that largely govern the bankruptcy reorganization world."[151] It will be worth watching to see if the bankruptcy court overseeing the pending PG&E Corporation chapter 11 case takes up issues related to section 1129(a)(6) during the confirmation process.[152]

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[148] *See* 11 U.S.C. § 1129(a)(6); *see, e.g.*, *In re Pac. Gas & Elec. Co.*, 304 B.R. 395, 210-11 (Bankr. N.D. Cal. 2004) (Montali, J.) (approving a plan proposing a rate change where confirmation was conditioned upon approval by the commission with jurisdiction over the debtor's rates).

[149] *See e.g.*, *Pub. Serv. Co. of N.H. v. Richards* (*In re Pub. Serv. Co. of N.H.)*, 148 B.R. 702, 704 (Bankr. D. N.H. 1992) (Yacos, J.), *aff'd*, 848 F.Supp. 318 (D. R.I. 1994), *aff'd*, 43 F.3d 763 (1st Cir. 1995), *cert. denied*, 514 U.S. 1108 (1995) (explaining that the debtor was reorganized pursuant to the plan after receiving regulatory approval by the state public utility commission for the rate agreement embodied in the plan, followed by a contingent stage after reorganization to effectuate a merger after the Federal Energy Regulatory Commission approved the proposed merger).

[150] *See In re Pub. Serv. Co. of N.H.*, 88 B.R. 521, 526-27 (Bankr. D. N.H. 1988) (Yacos, J.).

[151] *See id.* at 526 n.10.

[152] *See In re PG&E Corp.*, No. 19-30088 (Bankr. N.D. Cal. 2019) (Montali, J.).

VII. 11 U.S.C. § 1129(a)(7): Impaired Classes Have Accepted the Plan or Will Receive the Equivalent Value as Under a Chapter 7 Liquidation (the "Best Interest of Creditors" test)

A. Overview

Commonly known as the "best interests test," section 1129(a)(7) requires that each impaired class of claims either accept the plan or receive "a value, as of the effective date of the plan, that is not less than the amount such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date."[153] One of the cornerstones of chapter 11, this provision assures creditors that they will receive at least as much value in the reorganization process as if the debtor were liquidated, and it provides that any value in excess of liquidation is subject to negotiation and the balloting process.[154]

By its terms, section 1129(a)(7) applies only to impaired creditors and focuses on whether individual creditors will receive liquidation value, as opposed to the unimpaired class.[155] To receive the benefit of this rule, however, a creditor must file a proof of claim or be excused from the requirement to do so pursuant to section 1111(a), as courts have refused to extend the best interest of creditors test to hypothetical creditors on the ground that a contrary holding would eliminate the chapter 11 proof of claim filing date and render plans unconfirmable unless they provided for all individuals who could potentially be entitled to a distribution.[156]

After determining the present value of the property to be received under the plan, the plan proponent must perform a liquidation analysis of the estate to aid the court's analysis that the plan proposes "not less than" the value the creditor would receive in a chapter 7 case.[157] The liquidation

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[153] 11 U.S.C. § 1129(a)(7)(A).
[154] *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.02[7]; *see also* 6 NORTON BANKR. L. & PRAC. 3d § 112:7 (noting that section 1129(a)(7) provides "some protection for the minority dissent[ing]" creditors within an impaired class).
[155] *See* 7 COLLIER ON BANKRUPTCY ¶¶ 1129.02[7][a]-[b] ("Section 1129(a)(7) renders irrelevant class votes if but one member of that class would get less than their liquidation preference under the plan.").
[156] *See Marshall v. Marshall (In re Marshall)*, 721 F.3d 1032, 1046 (9th Cir. 2013).
[157] *See generally* 7 COLLIER ON BANKRUPTCY ¶¶ 1129.02[7][b][ii]-[iii].

analysis does not need to be a separate document and can be included in the disclosure statement.[158] Failure to provide a liquidation analysis violates section 1129(a)(7) and can result in a denial of confirmation.[159]

There has been some disagreement regarding the appropriate valuation standard for determining the value a creditor would have realized in a chapter 7 case.[160] As a starting point, "the best interests valuation is to be based on evidence[,] not assumptions, but it is not an exact science."[161] Traditionally, courts have used liquidation value, which "contemplates valuation according to the depressed prices that one typically receives in distress sales."[162] Depending upon the nature of the debtor's business, it may be preferable to use a higher, going-concern valuation for the liquidation analysis.[163] The bankruptcy court may use its discretion to disregard testimony regarding proposed valuations when it finds the testimony to be uninformed or unreliable.[164]

Section 1129(a)(7)(B) provides an exception from the best interests test for classes of secured claims that have made the election provided in section 1111(b).[165] Each member of the

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[158] *See Packard v. Cooper*, 2008 WL 4926962, at *6 (C.D. Cal. Nov. 13, 2008) (Anderson, J.); (citing *Tranel v. Adams Bank & Trust Co. (In re Tranel)*, 940 F.2d 1168, 1172 (8th Cir. 1991)).

[159] *See Multiut Corp.*, 449 B.R. at 344 (finding that the debtor had not carried its burden of showing that the best interests test had been met where it failed to provide an accurate and reliable valuation of its assets and instead relied "almost solely" on its Schedule B as the basis for its liquidation analysis).

[160] *See, e.g.*, *In re Lason, Inc.*, 300 B.R. 227, 232-33 (Bankr. D. Del. 2003) (Walrath, J.), *reh'g denied*, 2004 WL 2027975 (Bankr. D. Del. Aug. 27, 2004).

[161] *In re Monticello Realty Invs., LLC*, 526 B.R. 902, 914-15 (Bankr. M.D. Fla. 2015) (Funk, J.) (ruling that the debtor's manager's "off the cuff estimation" of the sale price in a chapter 7 liquidation does not satisfy section 1129(a)(7)); *Multiut Corp.*, 449 B.R. at 344.

[162] *Lason*, 300 B.R. at 232-33 (quoting *In re Sierra-Cal*, 210 B.R. 168, 171-72 (Bankr. E.D. Cal. 1997)).

[163] *See, e.g.*, *In re Webster*, 2017 WL 5989170, at *2-3 (Bankr. E.D. Mich. Dec. 1, 2017) (Randon, J.) (finding that a hypothetical chapter 7 trustee would be more likely to sell the business as a going concern through a forced sale, as opposed to engaging in a piecemeal sale of the debtor's assets). *Cf. In re Redox Power Sys., LLC*, 2019 WL 1062439, at *12-13 (Bankr. D. Md. Mar. 5, 2019) (Catliota, J.) (declining to apply going concern value for purposes of a liquidation analysis due to uncertainties over the debtor's cash resources, the state of its technology, and potential settlements of licensing claims); *Lason*, 300 B.R. at 232-33 (recognizing that there might be circumstances in which a going concern valuation was appropriate for purposes of section 1129(a)(7), but declining to apply a going concern value where the debtor's business was firmly based on key employees and customers' good will).

[164] *See, e.g.*, *Lason*, 300 B.R. at 232-33 (crediting the valuation testimony of the debtor's expert, an investment banker with significant experience in distressed sales, over the creditors' expert, who had "no relevant chapter 7 liquidation experience to render a reliable opinion").

[165] *See* 11 U.S.C. § 1129(a)(7)(B).

electing class 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 value of such holder's interest in the estate's interest in the property that secures such claims."[166] The mechanics of the section 1111(b) election are beyond the scope of this paper, but the practical effect is that a proposed plan may satisfy the requirement of section 1129(a)(7)(B) if the present value of payments made to it under the plan equal the value of the secured creditor's interest in its collateral.[167]

B. Recent Cases

- ***In re Abengoa Bioenergy Biomass of Kan., LLC*, 2018 WL 812941, at *13-14 (Bankr. D. Kan. Feb. 8, 2018) (Nugent J.), *appeal dismissed*, 2018 WL 4914127 (D. Kan. Oct. 10, 2018):** In this case, the debtor separately classified the claims of its affiliates, placing them in the distribution scheme below non-affiliate general unsecured creditors and denying them payment.[168] The holder of certain affiliates' claims objected, arguing that the separate classification was intended to gerrymander the unsecured creditors' class and alternatively, that the proposal did not satisfy the best interests of creditors test because the liquidation analysis submitted in the disclosure statement demonstrated that certain intercompany claims would receive a greater distribution in a chapter 7 liquidation than under the proposed plan.[169]

Ruling: Overruling the objection, the court noted that the best interest of creditors test required that the court consider the applicable rules of distribution of the estate under chapter 7, in this case sections 726(a) and 510, and engage in "'rational speculation' of what may occur in a chapter 7 liquidation, including whether certain claims may evoke an objection by the chapter 7

[166] *Id.* § 1129(a)(7)(B).
[167] *See Trenton Ridge Investors*, 461 B.R. at 475; *In re SM 104 Ltd.*, 160 B.R. 202, 219-20 (Bankr. S.D. Fla. 1993) (Ginsberg, J.) ("All that is ever required to satisfy the best interest test as to a §1111(b) nonrecourse deficiency claim is for the claimholder to receive the present value of the collateral.").
[168] *Id.* at *1.
[169] *Id.* at *13.

trustee."[170] The court upheld the debtor's assumptions in its liquidation analysis finding that it was proper for the debtor to "consider subordination agreements or any other events (such as claims objections) that may occur in a chapter 7 liquidation and how they may affect distributions, just as a chapter 7 trustee would, in determining the hypothetical distribution in a chapter 7 liquidation to the affiliate intercompany claimants."[171]

- ***In re Allied Consol. Indus., Inc.*, 569 B.R. 284, 289-92 (Bankr. N.D. Ohio 2017) (Woods, J.):** In this case, the debtors were affiliated entities whose cases were substantively consolidated.[172] The court considered a joint plan proposed by the debtors and the Official Committee of Unsecured Creditors and the objection thereto filed by a separately classed creditor who voted to reject the plan.[173] One of the grounds for the creditor's objection was that it would fare better if the debtors' assets were liquidated under chapter 7 because the debtors undervalued their assets in the liquidation analysis.[174] Further, the creditor argued that even if it would receive the same amount under the plan as in a chapter 7 liquidation, the plan provided for a 24-month period to market and sell the release estate securing its judgment lien to secure the greatest net recovery for creditors.[175]

Ruling: The court overruled the creditor's objection, discrediting the argument that it was disadvantaged by the proposed plan where the plan proposed payment to all creditors in full plus interest at the rate of 6% per annum.[176] Observing that the outcomes under the plan and the creditor's version of a liquidation analysis resulted in the same benefit to the creditor, the court noted that the creditor failed to argue that the 100% payout under the proposed plan was inflated

[170] *Id.*
[171] *Id.* at *14.
[172] *Id.* at 286.
[173] *Id.*
[174] *Id.* at 289-90.
[175] *Id.* at 290.
[176] *Id.* at 289-90.

or unlikely, rather, its own testimony indicated that the creditor believed the joint plan would pay creditors in full.[177]

Turning to the issue of the marketing period for the sale of certain property, the court did not credit the argument that the creditor would not face the same time constraints in a chapter 7 liquidation, as the creditor had not offered evidence to support its assumption that the chapter 7 trustee's marketing period would be shorter.[178] The court found that the proposed marketing period was reasonable, the creditor was not disadvantaged thereby, and there was no evidence that a liquidation of the collateral in a chapter 7 case could be accomplished more expeditiously.[179]

- ***In re Hercules Offshore, Inc*., 565 B.R. 732, 765 (Bankr. D. Del. 2016) (Carey, J.):** Several debtors engaged in performing offshore oil and gas drilling services filed for chapter 11 protection, and their cases were consolidated for procedural purposes.[180] To complicate matters, certain entities owned by the parent corporation, including international subsidiaries and assets, were not part of the bankruptcy proceedings.[181] The proposed plan provided for consensual releases of certain claims against third parties, and the Equity Committee objected to those releases on the ground that they were not consensual and did not satisfy the requirements for approval of such releases.[182] Among other things, the equity committee argued that the plan released claims held by the debtor's equity security holders that would otherwise be available to them in a chapter 7 liquidation.[183]

Ruling: The court concluded that the proposed plan satisfied the best interest of creditors test under section 1129(a)(7), explaining that "[i]n a case where claims are being released under

[177] *Id.* at 290.
[178] *Id.* at 292.
[179] *Id.* at 291-92.
[180] *Id.* at 735.
[181] *Id.*
[182] *Id.* at 764-65.
[183] *Id.*at 765.

the chapter 11 plan but would be available for a recovery in a chapter 7 case, the released claims must be considered as part of the [section 1129(a)(7)] analysis."[184] Even assuming that the claims were meritorious, the court concluded that the equity committee presented no credible evidence to show that the affected stockholders would recover greater value in a chapter 7 case than they are to receive under the plan.[185] Even adopting the high range of the estimated liquidation values, it appeared that there would be no excess value to distribute to equity holders on the released claims, and so even with the third party release provisions, the proposed plan satisfied the best interest of creditors test under section 1129(a)(7).[186]

- ***In re Couture Hotel Corp.*, 536 B.R. 712, 735-36 (Bankr. N.D. Tex. 2015) (Houser, J.):** The bankruptcy court held an evidentiary hearing to consider the debtor's proposed plan and a motion for stay relief filed by the sole creditor objecting to confirmation.[187] With respect to the objecting creditor, the plan proposed to repay the creditor with 59 equal monthly payments, culminating in a balloon payment in month 60.[188] The monthly payments were calculated based upon a 30-year amortization period at a 4.25% interest rate.[189] Among other objections, the creditor asserted that the proposed plan it failed to satisfy section 1129(a)(7) because creditors would receive "more 'up front' in a Chapter 7 liquidation than they would under the Plan."[190]

Ruling: The court noted, as a threshold matter, that the creditor misstated the best interests test, which does not require that the creditor receive more "up front" or more overall in a chapter

[184] *Id.*
[185] *Id.* (explaining that even accepting the high range of liquidation values in the debtor's liquidation analysis, there would not be excess value to distribute to stockholders in a chapter 7 case).
[186] *Id.*
[187] *Id.* at 718-19.
[188] *Id.* at 719.
[189] *Id.*
[190] *Id.* at 736.

7 liquidation, but whether the creditors would receive at least as much under the proposed plan as in a chapter 7 liquidation.[191] Because the proposed plan sought to pay all creditors in full with interest, "which is all creditors are legally entitled to receive," the court rule that the plan could not, "by definition," fail the best interests test of section 1129(a)(7).

VIII. 11 U.S.C. § 1129(a)(8): Each Class of Claimants Has Accepted the Plan or is Not Impaired Under the Plan

A. Overview

Section 1129(a)(8) provides that "[w]ith respect to each class of claims or interests— (A) such class has accepted the plan; or (B) such class is not impaired under the plan."[192] These provisions are the foundation of consensual confirmation, as they require acceptance of all classes of impaired creditors to confirm a plan.[193] Where a plan satisfies all of the requirements of section 1129(a), except for this one, a plan proponent may seek confirmation under section 1129(b)'s cramdown provisions.[194]

Notably, section 1129(a)(8) does not require all creditors within a class to vote to accept a plan.[195] A class of claims has accepted a plan if creditors holding at least two-thirds in amount and more than one half in number of the allowed claims the class vote to accept the plan.[196] Classes that are not impaired "are conclusively presumed to have accepted the plan."[197]

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[191] *Id.*
[192] 11 U.S.C. § 1129(a)(8).
[193] *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.02[8]; *see also* 6 NORTON BANKR. L. & PRAC. 3d § 112:15 ("[T]he real significance of Code § 1129(a)(8) is to make clear that the unfair discrimination and fair and equitable requirements of a cram down under Code § 1129(b) do not apply to consenting classes.").
[194] *See* §§ 1129(a)-(b); *A & B Assocs.*, 2019 WL 1470892, at *48.
[195] 7 COLLIER ON BANKRUPTCY ¶ 1129.02[8].
[196] *See id.* § 1126(c); *see also id.* § 1126(d) (acceptance by holders of interests).
[197] *See* 11 U.S.C. § 1126(f); *see also Ultra Wyo., Inc. v. Ad Hoc Comm. of Unsecured Creditors (In re Ultra Petroleum Corp.*, 913 F.3d 533, 540-42 (5th Cir. 2019) ("[T]he creditor's right to vote disappears when the plan doesn't actually affect his rights.").

Section 1124 sets out the circumstances under which a class of claims or interests is considered impaired, an important determination given that only impaired classes may vote on the plan.[198] Generally speaking, a class of claims or interests is unimpaired if: (1) the plan does not propose to alter the legal, equitable, or contractual rights of the claimant;[199] or (2) the plan proposes to cure defaults, reinstate the maturity of the claims or interest, compensate the creditor for any damages, and not otherwise alter the creditor's legal, equitable, or contractual rights.[200]

B. Recent Cases

- ***Ultra Wyo., Inc. v. Ad Hoc Comm. of Unsecured Creditors (In re Ultra Petroleum Corp.*, 913 F.3d 533, 540-42 (5th Cir. 2019):** During the course of chapter 11 proceedings of an oil and gas holding company, oil prices rose, allowing the debtor to propose a reorganization plan that would compensate creditors in full.[201] Accordingly, the debtor elected to treat a certain class of creditors as unimpaired, where the plan proposed to pay the outstanding principal, prepetition interest at a rate of 0.1%, and post-petition interest at the federal judgment rate.[202] A class of creditors objected on the ground that they were impaired because the plan did not require the debtors to pay a contractual make-whole amount, triggered by prepayment of the obligation, and additional post-petition interest at the contractual default rate.[203] The plan was confirmed with the stipulation that the bankruptcy court could resolve the impairment dispute by deeming the creditors unimpaired and the debtors would set aside funds to compensate the class, if necessary, to render them unimpaired.[204] Post-confirmation, the bankruptcy court held that the class was impaired

[198] *See* 11 U.S.C. §1124; 7 COLLIER ON BANKRUPTCY ¶ 1124.01.
[199] *See* 11 U.S.C. §1124(1).
[200] *See id.* §1124(2).
[201] *Id.* at 537-38.
[202] *Id.* at 538.
[203] *Id.*
[204] *Id.* at 538-39.

because the creditors had not received all they were entitled to under state law, even if those rights would be disallowed by the Code.[205]

Ruling: The Fifth Circuit reversed the bankruptcy court's finding of impairment on the ground that a creditor is impaired under section 1124(1) "only if *the plan* itself alters a claimant's legal, equitable, [or] contractual rights."[206] The court noted that a class could not claim impairment where the Code, as opposed to the plan, operated to alter the creditors' rights.[207] The court explained that it did not matter that the creditor might have received considerably more had it recovered on its claim before filing for bankruptcy; if a proposed plan gives the creditor everything the law entitles it to once the bankruptcy begins, the creditor is unimpaired.[208] The court remanded the case for a decision as to whether the creditor was entitled to claim the make whole amount under section 502(b)(2) or post-petition interest at the contractual default rate pursuant to section 726(a)(5) under existing Code provisions once the bankruptcy commenced, resulting in its classification as an impaired creditor.[209]

- ***In re Akbari-Shahmirzadi*, 2015 WL 13650076, at *5 (D. N.M. June 30, 2015) (Lynch, Mag. J.), *aff'd*, 2015 WL 8329208 (D. N.M. Mar. 24, 2016):** The debtor, a retired attorney, appealed from an order denying confirmation, requesting that the court reinstate her as debtor in possession to oversee the sale of certain properties and remand the case for further proceedings to determine whether the proposed plan was confirmable and to revise the plan as necessary.[210] The bankruptcy court denied confirmation as a matter of law, where the ballots tallied at the confirmation hearing showed that no class of creditors accepted her plan and one class

[205] *Id.* at 539.
[206] *Id.* (internal quotation omitted) ("Code impairment is not the same thing as plan impairment.").
[207] *Id.* at 539, 542.
[208] *Id.* at 540.
[209] *Id.* at 548-51.
[210] *Id.* at *1.

rejected the plan.[211] The debtor's argument on appeal was that an impaired creditor's failure to vote on the plan counted as deemed acceptance under section 1129(a)(8), thereby satisfying the requirement of section 1129(a)(10) that at least one impaired class voted to accept the plan.[212]

Ruling: The district court agreed with the bankruptcy court's denial of confirmation on the ground that deemed acceptance of a plan under section 1129(a)(8) could not substitute for actual acceptance by at least one class of impaired creditors as required by section 1129(a)(10).[213] The court clarified that "[s]ection 1129(a)(10) requires actual acceptance by at least one class of impaired creditors," and could not be satisfied by analogizing impaired, non-voting creditors to unimpaired creditors under section 1128(a)(8).[214]

IX. 11 U.S.C. § 1129(a)(9): Treatment of Allowed Administrative Priority, Gap, Priority Tax, and Secured Tax Claims

A. Overview

Pursuant to section 1129(a)(9)(A) of the Code, for a plan to be confirmed *with respect to a claim* for administrative expense priority under section 507(a)(2) or for involuntary "gap" [215] expenses under section 507(a)(3), the holder of each claim must be paid "cash equal to the allowed amount of such claim" on the effective date of the plan, unless the holder of a particular claim has agreed to a different treatment.[216] "The Code's confirmation scheme elevates allowed administrative claims [and gap claims] to a dominate priority such that unless the holders agree to

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[211] *Id.* at *2.
[212] *Id.*
[213] *Id.* at *5.
[214] *Id.*
[215] Pursuant to 11 U.S.C. § 507(a)(3), a gap claim is an unsecured claim under § 502(f) which arises in an involuntary case during the ordinary course of the debtor's business after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief.
[216] *See In re Mableton, LLC*, 2017 WL 2480579, at *15 (Bankr. S.D. Ga. June 17, 2017) (Coleman, J.) (explaining that a plan of reorganization cannot be confirmed under § 1129(a)(9)(A) unless the plan provides for the payment in cash and in full of persons holding claims for administrative expenses).

a different treatment, a plan cannot be confirmed without full payment of those claims even if there are no estate assets to pay them. "[217]

Under section 1129(a)(9)(B), the plan must provide *with respect to a class of claims* specified in subsections 507(a)(1) [domestic support obligations], 507(a)(4) [wages], 507(a)(5) [employee benefit plans], 507(a)(6) [grain producer and fisherman], or 507(a)(7) [consumer deposits], as follows: (i) if such class has accepted the plan, for deferred cash payments, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) if such class has not accepted the plan, that such claims be paid in full on the effective date of the plan.[218] While treatment of administrative priority and gap claims under section 1129(a)(9)(A) is claim specific, treatment under section 1129(a)(9)(B) is class specific. If a majority of a class votes to accept deferred cash payments, the treatment of such claims is binding under section 1129(a)(9)(B) on dissenting members of the class.[219]

Pursuant to section 1129(a)(9)(C)(i) and (ii), the plan must provide that unsecured priority claims under section 507(a)(8) will receive regular installment payments in cash equal to the allowed amount of the claim as of the effective date of the plan over a period not to exceed five years from the date of the order for relief.[220] Section 507(a)(8) gives eighth priority to allowed unsecured claims of governmental units for certain: (i) taxes measured by income or gross receipts; (ii) property taxes; (iii) trust fund taxes[221]; (iv) employment taxes; (v) excise taxes; (vi)

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[217] *A & B Assocs.*, 2019 WL 1470892, at *15 (quoting *In re Molycorp., Inc.* 562 B.R. 67, 77-78 (Bankr. D. Del. 2017)).
[218] 11 U.S.C. § 1129(a)(9)(B).
[219] 6 NORTON BANKR. L & PRAC. 3d § 112:16.
[220] 11 U.S.C. §§ 1129(a)(9)(C)(i)-(ii); *see U.S. v. Southern States Motor Inns, Inc. (In re Southern States Motor Inns, Inc.)*, 709 F.2d 647, 653 (11th Cir. 1983) (holding that "the interest rate to be used in computing the present value of a claim pursuant to § 1129(a)(9)(C) should be the current market rate without any reduction for the 'rehabilitation aspects' of the plan").
[221] *See U.S. v. Haas (In re Haas)*, 162 F.3d 1087, 1089-90 (11th Cir. 1998) (plan that treated trust fund tax claim as a secured claim rather than as a priority unsecured claim which reduced the IRS's recovery impermissibly adjusted the priority of the claim by ignoring the priority status of the trust fund tax claim).

custom duties; and (v) penalties related to a priority tax claim representing compensation for actual pecuniary loss.[222]

Pursuant to section 1129(a)(9)(C)(iii), the plan must also treat priority claims under section 507(a)(8) at least as well as "the most favored nonpriority unsecured claim provided for by the plan[.]"[223] For example, in *United States v. Oscher (J.H. Inv. Servs., Inc.)*, 452 Fed. App'x 858 (11th Cir. 2011), the Eleventh Circuit held that the IRS failed to assert an unsecured deficiency claim for purposes of section 1129(a)(9)(C) after the IRS amended its previously bifurcated $46 million claim by filing a claim as secured for the full amount. The IRS filed an objection to confirmation arguing that the trustee's liquidating plan violated section 1129(a)(9)(C) because it paid a carve-out fund to unsecured creditors before paying the IRS's priority claim in full. The Court of Appeals concluded that the IRS failed to properly assert an unsecured priority claim for purposes of section 1129(a)(9)(C), explaining that under the Code creditors must take an affirmative step to purse an unsecured deficiency claim. Creditors are not required to pursue a claim in bankruptcy or even file a proof of claim. The IRS's objection to confirmation pursuant to section 1129(a)(9)(C) was not sufficient to place the trustee and creditors on notice that the IRS intended to pursue its deficiency claim. Section 1129(a)(9)(C) "assumes the objecting party has an allowed unsecured priority claim. "[224] Pursuant to Rule 3003(c)(2) of the Federal Rules of Bankruptcy Procedure, "any creditor who fails [to file a claim] shall not be treated as a creditor with respect to such claim for purposes of voting and distribution. "[225] Accordingly, the trustee did not need to object to the validity of the IRS's unsecured claim because the IRS failed to assert an unsecured claim. Further, Rule 3018 of the Federal Rules of Bankruptcy Procedure, which

[222] 11 U.S.C. §§ 507(a)(8)(A)-(G).
[223] *Id.* § 1129(a)(9)(C)(iii).
[224] *U.S. v. Oscher (J.H. Inv. Servs., Inc.)*, 452 Fed. App'x 858, 863 (11th Cir. 2011).
[225] *Id.*

allows a creditor to vote as both a secured and unsecured creditor, only applies to creditors whose claims have been allowed as partly secured and unsecured. Rule 3018 did not apply to the IRS's amended claim, which only asserted a secured claim.

Under section 1129(a)(9)(D), the plan must treat a secured tax claim in the same manner as an unsecured priority tax claim if the secured claim would qualify as an unsecured priority tax claim under section 507(a)(8) if the claim was not otherwise secured. Such claims must also be paid with regular installment payments in cash over a period not to exceed five years from the date of the order for relief in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan.

Pursuant to section 1123(a), a chapter 11 plan must designate, subject to section 1122, classes of claims, specify any class of claims that is not impaired under the plan, specify the treatment of any impaired class of claims, and provide the same treatment for each claim of a particular class.[226] It is important to note that section 1123(a)(1) excludes section 507(a)(2) administrative priority, section 507(a)(3) gap claims, and section 507(a)(8) priority tax claims from classification because section 1129(a)(9)(A) and (C) provide for the specific treatment of such claims. There is no need for the holder of an administrative priority, gap, or priority tax claim to vote on a plan because such claims will be paid in full on the effective date of the plan and are, therefore, not impaired.[227]

B. Recent Cases

- ***In re Pioneer Health Servs., Inc.*, 2018 WL 4812432 (Bankr. S.D. Miss. 2018) (Olack, J.):** The issue before the bankruptcy court was whether a "disputed claims reserve" had

[226] 11 U.S.C. §§ 1123(a)(1)-(4).
[227] *A & B Assocs.*, 2019 WL 1470892, at *15 (explaining that "[t]he Code clearly requires the full payment of all allowed administrative expenses.").

to be funded in the full amount of a lessor's asserted administrative claim pursuant to section 1129(a)(9)(A) or whether the reserve could be funded in the estimated amount of the claim which the debtor disputed and had not yet been allowed.

The debtors owned and operated ten critical access hospitals. Prepetition, one affiliate gave notice to its lessor, the Jamison Trust Lease ("Jamison Trust"), of its intent to renew its real property lease, but the debtors filed for relief before the parties completed negotiations. During the case, the debtors assumed several unexpired leases of non-residential real property pursuant to 11 U.S.C. § 365, including the Jamison Trust. Subsequently, the debtors moved to sell substantially all assets of the affiliate operating on the Jamison Trust property and to assume and assign unexpired leases to the purchaser. The APA scheduled the cure amount for the Jamison Trust as $0. After the court approved the sale, the debtors proposed a liquidating plan, requiring the liquidating trustee to establish several reserve accounts, including a disputed claims reserve. Prior to confirmation, the Jamison Trust filed a request for payment of administrative expenses under sections 503(b) and 507(a)(2), seeking liquidated damages for unpaid cure amounts totaling $245,314.29, plus additional unliquidated damages including the difference between post-petition rent paid and the fair market value rent, for a total amount of $685,344.46. The debtors filed an amended plan, requiring the liquidating trustee to fund, on the effective date of the plan, a disputed claims reserve with sufficient cash to pay the lesser of: (i) the amount claimed by the holder of a disputed claim, or (ii) the estimated amount of such claim.

The Jamison Trust objected, arguing in part that its claim for payment under section 365 constituted an administrative expense under section 503(b) which was required to be paid in full at confirmation pursuant to section 1129(a)(9)(A). Alternatively, the Trust argued that the debtors

were required to fund the disputed claims reserve in the full amount of its claim pending final resolution.

Ruling: A chapter 11 plan may satisfy section 1129(a)(9)(A) by establishing a disputed claims reserve for section 503(b) claims that have not yet been allowed or are disputed on the effective date of the plan. Section 502(c) provides that a court may estimate "for purposes of allowance under this section–(1) any contingent or unliquidated claim, the fixing or liquidation of which . . . would unduly delay administration of the case. "[228] While section 502(c) only applies by its terms to estimating claims for purposes of allowance under section 502, many courts have approved the use of section 502(c) for estimating administrative expenses under section 503(b). Here, the bankruptcy court found that it was appropriate to estimate the administrative expense claim in the amount proposed in the plan because:

(i) Liquidation of the administrative expense claim in the pending litigation would unduly delay administration of the case;

(ii) The claim was unliquidated and, thus, subject to estimation. A debt is liquidated if the amount due is fixed or readily ascertainable. Here the claim was not readily ascertainable by reference to the lease or by simple computation because the bulk of the claim relied upon the "fair market rent" plus an interest rate, neither of which were defined in the lease.

(iii) The plan proponents were asserting defenses of estoppel, res judicata and law of the case in the underlying litigation.

- ***In re Jerath Hosp., LLC*, 484 B.R. 245 (Bankr. S.D. Ga. 2012) (Barrett, J.):** The Georgia Department of Revenue ("Department") objected to the debtor's chapter 11 Plan which proposed to pay its tax claim over forty-eight months with a lump sum payment before the sixtieth month.

[228] 11 U.S.C. § 502(c).

Ruling: Unlike the requirement in section 1325(a)(5)(B) which provides that certain distributions under chapter 13 plans must be paid in "equal monthly installments," § 1129(a)(9)(C) provides that holders of certain tax claims under § 507(a)(8) shall receive "regular installment payments in cash. " Section 1129(a)(9)(C) does not provide that the payments must be in equal monthly installments. The court explained that the term "regular" is not the same as "equal." "'Regular installment payments' means payment made on a recurrent basis over a period of time."[229] Further, the court noted there is nothing in section 1129(a)(9)(C) prohibiting monthly payments, followed by a balloon payment. Had Congress intended to require equal payments, it could have done so as required in section 1325(a)(5)(B).

- ***In re 431 W. Ponce De Leon, LLC,* 515 B.R. 660 (Bankr. N.D. Ga. 2014) (Ellis-Monro, J.):** Before the court were competing chapter 11 plans, a plan of reorganization filed by the limited liability company debtors and a plan of liquidation filed by a secured creditor. After the bankruptcy court determined that the harm caused by substantive consolidation to the secured creditor outweighed the benefits to the debtors pursuant to the Eleventh Circuit's decision in *Eastgroup Properties v. Southern Motel Assoc., Ltd. (In re Eastgroup)*, 935 F.2d 245 (11th Cir. 1991), the bankruptcy court noted (without discussing the *per debtor* and *per plan* approaches discussed more fully below) that each debtor would have to satisfy section 1129(a)(10) pursuant to which at least one impaired class must vote in favor of the plan.

Thereafter, a key issue became whether tax claims held by third parties were impaired and entitled to vote on the plan of reorganization filed by the debtors. The debtors argued that each debtor had obtained the vote of an accepting impaired class. In four of the cases, the impaired class was comprised of claims held by transferees of property tax liens. The debtors classified the

[229] *Jerath Hosp.*, 484 B.R. at 247.

secured claims in Class 1 as impaired and provided for payment of the claims in accordance with section 1129(a)(9)(C) as required by section 1129(a)(9)(D) for secured tax claims. The secured creditor argued that treatment of the ad valorem tax claims, in accordance with section 1129(a)(9)(C) meant that the claims were not impaired and thus not entitled to vote. The debtors countered that the claims were impaired because they were held by third parties and not by governmental entities. The disputed issue became the effect of the word "holder" in section 1129(a)(9)(D) and whether the special treatment provided therein is limited to a governmental unit that is the "holder" of the tax debt.

Ruling: Finding no case law directly on point, the court turned to cases examining the meaning of the term "tax claim" as used in section 511 which was added to the Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). These courts have generally held that the types of claims covered by section 511 are broader than those described in section 507(a)(8) because the term "creditor" is used in section 511 whereas section 507(a)(8) uses the term "governmental unit." "Congress specifically limited the applicability of § 507(a)(8) and § 1129(a)(9)(C) and (D) to governmental units but did not so limit the application of § 511."[230] Thus, because Congress did not use the term "creditor" in section 1129(a)(9)(D) as it did in section 511, the bankruptcy court concluded that the holder of a claim identified by section 1129(a)(9)(D) must be a governmental unit. Third party holders of secured tax claims are not entitled to the treatment of creditors prescribed by section 1129(a)(9)(D) and should instead be treated in accordance with underlying state law rights. To the extent the debtors' plan impaired those state law rights, such creditors were "impaired" for voting purposes.

[230] *431 W. Ponce De Leon,* 515 B.R. at 690.

X. 11 U.S.C. § 1129(a)(10): Acceptance by At Least One Impaired Class of Claims

A. Overview

Pursuant to section 1129(a)(10), if any class of claims is impaired under the plan, at least one impaired class must vote in favor of the plan. Insider votes are excluded. "If *all* impaired creditors vote to reject the plan, then the plan cannot be crammed down. "[231] Pursuant to section 1126, "a creditor whose claim is not 'impaired' is 'conclusively presumed to have accepted the plan'" and is not entitled to vote. [232]

Pursuant to section 1124(1), the "Bankruptcy Code provides that a class of claims is not impaired if 'the [reorganization] plan . . . leaves unaltered the legal, equitable, and contractual rights to which such claim . . . entitled the holder.'"[233] The Fifth Circuit recently explained that "a creditor is impaired under § 1124(1) only if 'the *plan*' itself alters a claimant's 'legal, equitable, [or] contractual rights.'"[234] "[A] creditor's claim outside of bankruptcy itself is not the relevant barometer for impairment. "[235] Instead, according to the Fifth and Third Circuits, the only Circuits which have addressed the issue, courts "'must examine whether the plan itself is a source of limitation on a creditor's legal, equitable, or contractual rights.'"[236] That a creditor would have received more outside of bankruptcy on its contractual rights is irrelevant. If a chapter 11 plan proposes to pay a creditor everything to which the creditor is entitled under the Bankruptcy Code,

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[231] *Ala. Dep't of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas (In re Lett)*, 632 F.3d 1216, 1219 n.5 (11th Cir. 2011).
[232] *JPMCC 2006-LDP7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd. (In re Sagamore Partners, Ltd.)*, 620 Fed. App'x 864, 869 (11th Cir. 2015).
[233] *Ultra Petroleum Corp.*, 913 F.3d at 539.
[234] *Id.* at 543 (reversing the bankruptcy court's decision requiring debtors to pay make-whole amount owed pursuant to state law to make creditors truly unimpaired).
[235] *Id.*
[236] *Id.* at 540 (citing *PPI Enters.*, 324 F.3d at 197).

the creditor's claim is not impaired for purposes of section 1124(1). "[I]mpairment results from what the *plan* does, not what the [bankruptcy] statute does. "[237]

Pursuant to section 1124(2) a class of claims is not impaired if, "'notwithstanding any contractual provision or applicable law'" entitling the holder of a claim to demand or receive accelerated payment of such claim or interest upon default, "the plan cures [the] default."[238] "[U]nder § 1124, any outstanding default-rate interest is ignored when determining whether a claim . . . is impaired."[239] In addition to curing any default that occurred either before or after the commencement of the case, a claim is unimpaired under section 1124(a)(2) if the plan: (i) reinstates the original maturity date; (ii) compensates the holder of the claim for any damages arising as a result of reasonable reliance on contractual provisions or applicable law; (iii) compensates the holder of the claim for the actual pecuniary loses arising from the debtor's "failure to perform a nonmonetary obligation (other than a default arising from failure to operate a nonresidential real property lease subject section § 365(b)(1)(A))"; and (iv) does not otherwise alter the legal, equitable, or contractual rights to which the holder of the claim is entitled.[240]

"In order for a class of impaired creditors to *accept* a proposed plan, a majority of the creditors and those holding two-thirds of the total dollar amount of the claims within that class must vote to approve the plan."[241] Specifically, section 1126 provides that "[a] class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . . that have accepted or rejected such plan."[242]

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[237] *Id.*
[238] *Sagamore Partners*, 620 Fed. App'x at 869.
[239] *Id.* (explaining the tension between § 1123(d) pursuant to which a party cannot cure default without paying the agreed upon default-rate interest with unimpairment of a claim under section 1124(a)(2)).
[240] 11 U.S.C. §§ 1124(a)(2)(B)-(E).
[241] *Lett*, 632 F.3d at 1219 n.4.
[242] 11 U.S.C. § 1126(c).

In jointly administered cases, whether a joint plan must be accepted by at least one impaired class for each debtor is an issue which has divided courts with some following a *per debtor* approach while others have adopted a *per plan* approach.[243] Specifically, 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*, determined without including any acceptance of the plan by an insider."[244] As a matter of first impression, the Ninth Circuit recently rejected the *per debtor* approach, as discussed further below, finding based upon the plain language of the statute that section 1129(a)(10) requires only that at least one impaired class "under the plan has accepted the plan."[245] Courts adopting the *per debtor* approach have explained that a plan filed in jointly administered cases logically consists of separate plans for each debtor. Absent substantive consolidation, "entity separateness" remains fundamental according to courts following the per debtor approach.[246]

Finally, section 1129(a)(10) often presents difficult issues for single-asset real estate cases in which the principal secured lender may have a large unsecured deficiency claim thereby controlling the vote. Single-assets real estate debtors have attempted to avoid this problem by separately classifying the lender's unsecured claim with varying success.[247]

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[243] *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724 (9th Cir. 2018) (adopting per plan approach); *JP Morgan Chase Bank v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009) (Peck, J.) (per plan). *Cf. In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del. 2011) (Carey, J.) (adopting per debtor approach); *431 W. Ponce De Leon*, 515 B.R. at 690 (per debtor).

[244] 11 U.S.C. § 1129(a)(10) (emphasis added).

[245] *Transwest Resort Props., Inc.*, 881 F.3d at 729.

[246] *See Tribune Co.*, 464 B.R. at 182 (applying per debtor rule for purposes of § 1129(a)(10)).

[247] *See Beal Bank, S.S.B. v. Waters Edge Ltd. P'ship*, 248 B.R. 668 (D. Mass. 2000) (Saris, J.) (creditor's undersecured claim was not substantially similar to other unsecured claims and could be separately classified in single asset case). *But see Travelers Ins. Co. v. Bryson Props., XVIII (In re Bryson Props. XVIII)*, 961 F.2d 496 (4th Cir. 1992) (classifying mortgagee's unsecured claim separately from other unsecured claims unfairly manipulated vote).

B. Recent Cases

- ***JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724 (9th Cir. 2018):** The lender objected to debtors' joint chapter 11 plan which provided for a third-party investor to acquire the "Operating Debtors, thereby extinguishing the ownership interest of "Mezzanine Debtors." The cases were jointly administered, but not substantively consolidated. The lender rejected the plan and objected to confirmation, arguing in part that the plan did not satisfy section 1129(a)(10) because the lender was the only class member of the Mezzanine Debtors.

Ruling: The plain language of section 1129(a)(10) supports the "per plan" approach by requiring that one impaired class "under the plan" approve "the plan."[248] Section 1129(a)(10) does not distinguish or refer "to the creditors of different debtors under 'the plan,' nor does it distinguish between single-debtor and multi-debtor plans."[249] "Under its plain language, once a single impaired class accepts a plan, section 1129(a)(10) is satisfied as to the entire plan."[250]

- ***In re Neogenix Oncology, Inc.*, 508 B.R. 345 (Bankr. D. Md. 2014) (Catliota, J.):** The United States Trustee objected to liquidating chapter 11 plan. Class 3, which consisted of thirteen former and current directors and officers, was the only impaired class of claims entitled to vote on the plan. The trustee argued that all Class 3 members were insiders at the time their claims arose and were excepted from voting under 11 U.S.C. § 1129(a)(10). The debtor countered that the relevant period for assessing whether a class member is an insider is at the time the plan is developed or when voting occurs.

[248] *Transwest Resort Props., Inc.*, 881 F.3d at 729.
[249] *Id.*
[250] *Id.*

Ruling: For purposes of section 1129(a)(10), the relevant period for determining whether a member of an impaired class is an insider is when the plan is developed or when voting occurs. The liquidating plan met the requirements of section 1129(a)(10) because at least two members of Class 3 were not members during the relevant period for determining impairment. If any class is impaired under the plan, section 1129(a)(10) provides that "an impaired class of creditors must vote to accept the Plan, without including the votes of insiders."[251]

Section 101(31) provides a non-exhaustive definition of the term "insider."[252] When a person does not fit within one of the listed categories, courts engage in a fact intensive inquiry. "Ultimately, 'an insider may be any person or entity whose relationship with the debtor is sufficiently close so as to subject the relationship to careful scrutiny.'"[253] When the Debtor is a corporation, section 101(31)(B)(i)-(iii) defines the term "insider" to include "(i) a director of the debtor; (ii) an officer of the debtor; or (iii) a person in control of the debtor."[254] Under section 1126(c), a class of claims accepts the plan if the plan has been accepted by creditors holding at least two-thirds in amount and more than one-half in number of allowed claims "that have accepted or rejected such plan." Thus, the relevant time for determining whether a class member is an insider is when the member "has accepted" the Plan. The rationale behind excluding insiders is to avoid voting by a creditor who is beholden to or controlled by the debtor. This rationale does not extend to former insiders who are no longer connected with the debtor.

[251] *Neogenix Oncology,* 508 B.R. at 353.
[252] *See* 11 U.S.C. § 101(31).
[253] *Neogenix Oncology, Inc.,* 508 B.R. at 353.
[254] 11 U.S.C. §§ 101(31)(B)(i)-(iii).

XI. 11 U.S.C. § 1129(a)(11): Feasibility

A. Overview

For a plan to be confirmed pursuant to section 1129(a)(11), the court must determine that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[255] Although the word "feasibility" is not used in section 1129(a)(11), the requirements set forth in subsection (11) are "commonly referred to as the 'feasibility test.'"[256]

To determine whether a plan is feasible, bankruptcy courts will generally "consider factors such as the adequacy of the debtor's capital structure, the earning power of the business, economic conditions, the ability of management, and any other related matters" relevant under the particular circumstances of the case which may affect the debtor's ability to satisfy the terms of the proposed plan.[257] "To demonstrate feasibility, the plan proponent must establish that there will be sufficient cash flow to fund the plan and maintain operations according to the plan."[258] The plan proponent should provide the bankruptcy court with detailed financial projections and "be able to fully substantiate any projected increases in its income."[259] The Eleventh Circuit has further recently explained that for a plan to satisfy the feasibility test, a court must determine that the plan is not likely to "be followed by a Chapter 7 liquidation, a Chapter 11 liquidation, or a Chapter 11 classic reorganization."[260]

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[255] *Id.* § 1129(a)(11).
[256] *A & B Assocs.*, 2019 WL 1470892, at *58.
[257] *In re Two Streets, Inc.*, 597 B.R. 309, 317 (Bankr. S.D. Miss. 2019) (Olack, J.).
[258] Barbara J. Houser et al., *Disclosure Statements: Confirmation and Cramdown of Chapter 11 Plans*, ST005 A.L.I.-A.B.A. 2177, 2205 (2011).
[259] *Id.* at 2208.
[260] *United Mine Works of Am. Combined Benefit Fund v. Toffel* (*In re Walter Energy, Inc.)*, 911 F.3d 1121, 1155 (11th Cir. 2018).

The purpose of the feasibility test is to "ensure that a bankruptcy court confirms a plan only if it finds that the plan creates a 'reasonable assurance of commercial viability.'"[261] Section 1129(a)(11) "does not require the debtor to guarantee success."[262] Instead, "[t]he feasibility standard requires a court to consider whether the plan offers a reasonable probability of success."[263] "Feasibility does, however, require 'more than a promise, hope, or unsubstantiated prospect of success.'"[264] The bankruptcy court is in effect "required to predict, based on the historical dated provided by the parties, whether the debtor will be able to make all payments under the plan and to otherwise comply with the plan."[265]

B. Recent Cases

- ***In re A & B Assocs., L.P.*, 2019 WL 1470892 (Bankr. S.D. Ga. 2019) (Coleman, J.):** The bankruptcy court denied confirmation of debtor's amended chapter 11 plan, finding in part that the plan was not feasible as required under 11 U.S.C. § 1129(a)(11). The debtor, a limited partnership organized under the laws of the State of Georgia, owned and operated a 96-unit apartment complex. In 2015, the debtor obtained refinancing for $3.9 million secured by the apartment complex valued at $5.375 million. The debtor's principal had successfully managed the property for fifteen years until a two-party dispute arose between the debtor and its principal lender. After the lender was unable to securitize the loan as intended from the inception of the transaction, the lender declared certain non-monetary defaults under the loan agreement thereby precipitating the debtor's need for bankruptcy relief. Unfortunately, prior to confirmation the debtor's principal passed away. The amended chapter 11 plan of reorganization provided for his

[261] *Id.*
[262] *A & B Assocs., L.P.*, 2019 WL 1470892, at *58.
[263] *Two Streets.*, 597 B.R. at 317.
[264] *A & B Assocs., L.P.*, 2019 WL 1470892, at *58.
[265] *See* Houser, *supra* n. 258.

wife to continue managing the property along with an on-site property manager. During the confirmation hearing, the court heard testimony from an expert for the debtor regarding feasibility, as well as the representative of the secured lender.

Ruling: The debtor failed to demonstrate by a preponderance of the evidence that the amended plan had a reasonable probability of success given the limited experience of the debtor's management team and limited cash reserves. Further, the court was not persuaded by the expert witness testimony regarding the debtor's feasibility analysis. The feasibility analysis was not forward looking and failed to include projected expenses. "Where the financial realities do not support the proposed plan's projections or where proposed assumptions are unreasonable, confirmation of the plan should be denied."[266] The feasibility analysis also failed to demonstrate that the debtor would be able to refinance the balloon balance of $3.2 million at the end of seven years. "If a final payment, in the form of a 'balloon' payment, is proposed to come from new financing to be acquired by the Debtor in the form of some new lending vehicle, then proof of feasibility is necessary."[267] Whether the debtor will likely be able to make the balloon payment requires "credible evidence proving that obtaining that future financing is a reasonable likelihood."[268]

- ***In re Two Streets, Inc.*, 597 B.R. 309 (Bankr. S.D. Miss. 2019) (Olack, J.):** The issue in this case involved the feasibility of a liquidating chapter 11 plan filed by a small business debtor. The debtor, a solely-owned and managed Mississippi corporation, was engaged in the business of commercial and residential fence construction and repair. The debtor's principal also filed an individual chapter 11 petition. BancorpSouth, the largest secured creditor in the corporate

[266] *A & B Assocs., L.P.*, 2019 WL 1470892, at *58.
[267] *Id.* at *59.
[268] *Id.*

case, was oversecured in the individual case once given credit for the liquidation of its collateral in the corporate case. Although the amended liquidating plan provided that Class 3 members consisting of non-priority unsecured claims would receive a pro rata share of any proceeds from the liquidation of BancorpSouth's collateral should any proceeds remain after the payment of administrative claims and BancorpSouth's claim, it was unlikely that there would be any funds remaining to pay unsecured creditors.

The debtor's largest unsecured creditor voted to reject the plan, arguing lack of feasibility based on monthly operating reports reflecting negative net cash flow. The unsecured creditor also questioned the debtor's ability to continue paying adequate protection payments to BancorpSouth in an increased amount, as well as the debtor's ability to pay administrative and priority claims held by the Mississippi Department of Revenue ("MDOR") for sales and withholding taxes. During confirmation, the debtor's principal testified that he had paid $1,400 from his personal account to the corporate account without court authority. The primary evidence of financial feasibility was testimony offered by the debtor's principal that the debtor should earn sufficient funds winding down its operations to pay administrative and priority claims as well as adequate protection payments to BancorpSouth while the debtor liquidated BancorpSouth's collateral. Although the debtor had employed a realtor to market its office building, the debtor had not received any offers. The principal also proposed to liquidate equipment on behalf of the debtor on a piecemeal basis through word of mouth.

Ruling: The feasibility analysis under section 1129(a)(11) differs when assessing a liquidating plan. "The focus of the analysis is whether the liquidation itself, as proposed in the plan, is feasible."[269] The debtor must demonstrate that "it can accomplish what it proposes to do,

[269] *Two Streets*, 597 B.R. at 317.

in the time period allowed, on the terms set forth in the plan."[270] "A test of the reliability of a debtor's projections as to its earning power is its performance" while proceeding as a debtor in possession.[271] The debtor failed to demonstrate that there would be sufficient funds to pay the administrative and priority claims of MDOR and adequate protection payments within the proposed timeframe given the debtor's inability to maintain a positive cash flow. While the debtor anticipated earning approximately $25,000 on three remaining fencing contracts, the debtor failed to offer copies of the fencing contracts or cost projections to support anticipated revenues. Finally, the timeline for the liquidation process was uncertain. The debtor had received no offers for its real property suggesting the debtor's valuation was inflated and the proposed piecemeal liquidation of equipment by word of mouth was not likely to generate a greater recovery for the estate than a foreclosure sale.

XII. 11 U.S.C. § 1129(a)(12): Payment of Statutory Fees

Section 1129(a)(12) requires a plan to provide that "[a]ll fees payable under section 1930 of title 28 as determined by the court at the hearing on confirmation of the plan, have been paid, or the plan provides for the payment of all such fees on the effective date of the plan."[272] Pursuant to 28 U.S.C. § 1930(a), a chapter 11 debtor must pay a quarterly fee (including any fraction thereof), as authorized by the Judicial Conference of the United States, until the case is converted, dismissed, or closed, whichever occurs first.[273] Pursuant to section 1129(a)(12), all quarterly fees must be paid current no later than the effective date of the plan.

[270] *Id.*
[271] *Id.*
[272] 11 U.S.C. § 1129(a)(12).
[273] 28 U.S.C. §§ 1930(a)(6)-(7).

XIII. 11 U.S.C. § 1129(a)(13): Treatment of Employee Benefit Plans

A. Overview

Pursuant to section 1129(a)(13), a chapter 11 plan must provide for continued payment of all retiree benefits "for the duration of the period the debtor has obligated itself to provide such benefits."[274] Specifically, section 1129(a)(13) requires the plan to provide "for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 . . . , at the level established pursuant to subsection (e)(1)(B) or (g) of section § 1114 . . . , at any time prior to confirmation of the plan, for the duration of the period *the debtor has obligated itself* to provide such benefits."[275]

Retiree benefits are defined under section 1114(a) as "payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition . . . "[276]

"The amount of such payments must be either the amount that the debtor was paying prior to bankruptcy or, if the debtor's payments have been modified either by agreement or order of the bankruptcy court, the amount set forth in the agreement or order."[277] Pursuant to subsection 1114(e)(1)(B), the debtor in possession, or trustee if one has been appointed, must timely pay and "shall not modify any retiree benefits, except that – (B) the trustee and the authorized

[274] 11 U.S.C. § 1129(a)(13).
[275] *Id.* § 1129(a)(13) (emphasis added).
[276] *Id.* § 1114(a).
[277] *Walter Energy*, 911 F.3d at 1129 (affirming the bankruptcy court's decision authorizing Chapter 11 debtors to terminate retiree benefits owed to workers employed in debtors' coal mining operations).

representative of the recipients of those benefits may agree to modification of such payments . . ."[278] If the authorized representative has refused to accept a proposal that fulfills the requirements of subsection (f) which provides for "modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all affected persons are treated fairly and equally,"[279] and "such modification is necessary to permit the reorganization of the debtor and assures that all . . . parties are treated fairly and equitably, and *is clearly favored by the balance of the equities*," [280] the bankruptcy court must enter an order providing for the modification of retiree benefits.

B. Recent Cases

- ***United Mine Works of Am. Combined Benefit Fund v. Toffel* (*In re Walter Energy, Inc.*), 911 F.3d 1121 (11th Cir. 2018):** What happens to a coal company's statutory obligation to fund retiree health care benefits when a debtor seeks liquidation under chapter 11 where the bankruptcy court has determined that termination is necessary to allow the coal company to sell its assets as a going concern, thereby avoiding piecemeal liquidation? In this case, the debtors sought to terminate certain statutory retiree benefits owed to employees employed in the debtors' mining operations to facilitate the sale of substantially all of the debtors' assets as a going concern to a purchaser willing to acquire the assets only if it was not required to provide retiree health care benefits.

The plaintiffs argued, in part, that the bankruptcy court lacked authority to terminate the debtors' obligation to pay premiums to the plaintiffs because the premiums did not qualify as retiree benefits under section 1114. The plaintiffs attempted to distinguish the debtors' statutory

[278] 11 U.S.C. § 1114(e)(1)(B).
[279] *Id.* § 1114(f).
[280] *Id.* §§ 1114(g)(1)-(3) (emphasis added).

obligation to pay premiums for retiree benefits pursuant to the Coal Industry Retiree Health Benefit Act of 1992 from retiree benefits under section 1129(a)(13) which indicates that a retiree benefit must be a payment that the debtor has "obligated itself" to provide. Pursuant to section 1114(g)(3), a bankruptcy court is permitted to modify or terminate the obligation to fund retiree benefits "only if the court finds among other things, that 'such modification is necessary to permit the *reorganization* of the debtor.'"[281] When a debtor intends to sell its assets as a going concern pursuant to section 363, the plaintiffs argued that a debtor is not engaged in a "reorganization" and, thus, the bankruptcy court lacked authority to terminate the obligation to fund retiree benefits under section 1114(g)(3).

Ruling: While the debtors never voluntarily undertook the obligation to pay premiums due under the Coal Act, the coal companies did in fact obligate themselves in earlier wage agreements to provide lifetime employee health benefits which are now statutorily covered. Given that the coal company did in some sense previously obligate itself to provide such benefits, the Eleventh Circuit concluded that it was not "inconsistent with § 1129(a)(13) to treat the premiums that a coal company pays . . . as retiree benefits."[282]

Addressing the question regarding whether a bankruptcy court has authority to modify or terminate retiree benefits when a chapter 11 debtor intends to sell substantially all of its assets, the Eleventh Circuit explained that the issue turned in part on whether the term "reorganization" as used in section 1114 refers only to "classic reorganizations or more broadly to any proceeding under chapter 11, including when a debtor liquidates by selling its business as a going concern."[283] To make this determination, the Eleventh Circuit analyzed the meaning of the terms "liquidation"

[281] *Walter Energy*, 911 F.3d at 1154 (emphasis added).
[282] *Id.* at 1145.
[283] *Id.* at 1153 (emphasis added).

and "reorganization" for purposes of determining feasibility under section 1129(a)(11). The plaintiffs argued that treating a chapter 11 liquidation as a type of reorganization would render the word "liquidation" in the phrase "liquidation or reorganization" meaningless.

"Section 1129(a)(11) imposes a 'feasibility requirement,' meaning that a bankruptcy court should not confirm a plan if it is likely to be followed by a future liquidation or further reorganization of the debtor."[284] Under section 1129(a)(11), a bankruptcy court may confirm a plan only if there is a "reasonable assurance that the plan will not be followed by a Chapter 7 liquidation, a Chapter 11 liquidation, or a Chapter 11 classic reorganization."[285] Under this interpretation, the term 'liquidation' is not rendered superfluous because the reference to 'liquidation' means that there must be a reasonable assurance that after the plan the debtor will not seek a chapter 7 liquidation or a chapter 11 liquidation.[286] And the reference to 'reorganization' . . . means there must be a reasonable assurance that after the plan the debtor will not seek a Chapter 11 classic reorganization or a Chapter 11 liquidation. "[287] "[L]iquidation need not mean *piecemeal* liquidation, and reorganization need not preclude a sale."[288] Applying this understanding of the terms liquidation and reorganization under section 1129(a)(11), the Court of Appeals found that for purposes of section 1114, a chapter 11 liquidation may qualify as a type of reorganization and that the bankruptcy court had the authority to terminate the debtor's obligation to pay retiree benefits.

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[284] *Id.* at 1155.
[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] *Id.*

XIV. 11 U.S.C. § 1129(a)(14): Payment of Domestic Support Obligations

Pursuant to section 1129(a)(14), an individual chapter 11 debtor must be current on all domestic support obligations accruing after the petition date as a condition of confirmation. Specifically, section 1129(a)(14) requires an individual chapter 11 debtor that is required to pay a domestic support obligation to have paid all amounts due "for such obligation that *first become payable after the date of the filing of the petition.*"[289]

While post-petition domestic support obligations in the nature of alimony, maintenance or support must be current as a condition of confirmation, prepetition domestic support obligations may be paid over the term of the plan in accordance with section 1129(a)(9)(B) as a claim of a kind specified in section 507(a)(1).

XV. 11 U.S.C. § 1129(a)(15): Requirement that Individual Debtor pay Five Years' Worth of Disposable Income to Unsecured Creditors

Under section 1129(a)(15), if an unsecured creditor objects to confirmation in a case in which the debtor is an individual, the plan must "either pay unsecured claims in full or the debtor must devote all of the debtor's disposable income over a five-year period to payment of claims."[290] Specifically, section 1129(a)(15) provides as follows:

> (A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.[291]

[289] 11 U.S.C. § 1129(a)(14) (emphasis added).
[290] *In re Baker*, 503 B.R. 751, 757 (Bankr. M.D. Fla. 2013) (Glenn, J.).
[291] 11 U.S.C. §§ 1129(b)(15)(A)-(B).

Standing to object to confirmation pursuant to subsection (a)(15) "is given to any single unsecured creditor holding an allowed claim."[292]

Section 1129(a)(15) incorporates the definition of "projected disposable income" as defined in section 1325(b)(2). Accordingly, an individual chapter 11 debtor's projected disposable income includes current monthly income received by the debtor (other than child support) less amounts reasonably necessary to be expended,

> (A)(i) for the maintenance or support of the debtor or a dependent of the debtor . . . ; and
>
> (ii)for charitable contributions in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
>
> (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.[293]

If an unsecured creditor objects to confirmation, the court must "look to the projected disposable income of the debtor for the five years following the first plan payment date, determine what that number is, and then ensure that at least that amount is distributed under the plan."[294] This requirement "[e]ssentially corresponds to the means test that was adopted for consumer cases to 'help ensure that debtors who can pay creditors do pay them.'"[295]

Finally, it is important to note that section 1129(a)(15) is not a temporal requirement. Subsection (a)(15) does not impose a minimum repayment period. Rather, pursuant to section 1129(a)(15) an individual "Chapter 11 plan of any length may be confirmed so long as the value of the property to be distributed is not less than the projected disposable income of the debtor to be received over five years" or the length of the plan, whichever is longer.[296]

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[292] *In re Manuel Mediavilla, Inc.*, 2015 WL 9590312, at *9 (Bankr. D.P.R. Dec. 30, 2015) (Flores, J.).
[293] 11 U.S.C. §§ 1325(b)(2)(A)-(B).
[294] *In re Angeron*, 2018 WL 6601130, at *2 (Bankr. E.D. La. 2018) (Anderson, J.).
[295] *Baker*, 503 B.R. at 757.
[296] *Baud v. Carroll*, 634 F.3d 327, 340 (6th Cir. 2011) (explaining that § 1129(a)(15) is not a temporal requirement).

XVI. 11 U.S.C. § 1129(a)(16): Restriction on Transfer of Property of Nonprofit Entities

Section 1129(a)(16) provides that "[a]ll transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust."[297] Congress added subsection 1129(a)(16) in 2005 and "was clear that this provision was meant to 'restrict the authority of a trustee to use, sell, or lease property by a nonprofit corporation or trust."[298] Section 1129(a)(16) "keeps in place the state law restrictions on such nonprofit entities, and buttresses this rule by giving standing to state attorneys general to raise this issue."[299]

[297] 11 U.S.C. § 1129(a)(16).
[298] 7 COLLIER ON BANKRUPTCY ¶ 1129.02[16].
[299] *Id.*