

**Reconciling the “Per-Plan” Approach to 11 U.S.C.  
§ 1129(a)(10) with Substantive Consolidation  
Principles Under In Re Owens Corning**

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I. INTRODUCTION

The United States bankruptcy law, codified in Title 11 of the United States Code (“Bankruptcy Code” or “Code”) is a comprehensive mechanism used to “mitigate the effects of financial failure” for both debtors and creditors.<sup>1</sup> In the corporate context, companies may sell off

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assets to satisfy debts,<sup>2</sup> or alternatively, reorganize and rehabilitate their businesses or financial affairs.<sup>3</sup> The former option, occurring in Chapter 7 proceedings, in most cases involves unsuccessful pre-bankruptcy renegotiations between debtors and creditors, asset sales, and liquidation proceedings.<sup>4</sup> The latter option, occurring in Chapter 11, offers an alternative to the less favorable Chapter 7 option.<sup>5</sup> The idea is that oftentimes businesses are worth more alive than dismantled.<sup>6</sup>

To this end, Chapter 11 proceedings may alter or even extinguish the rights of certain creditors.<sup>7</sup> Reorganization plans may divide creditors into classes based upon “substantially similar” claims.<sup>8</sup> The plan need not place *all* similar claims into the *same* class.<sup>9</sup> When a reorganization plan changes the legal, equitable or contractual rights entitled to claim or interest holders within a class, that class is considered to be “impaired”;<sup>10</sup> and impaired classes are the only classes eligible to vote for or against a plan.<sup>11</sup>

For convenience, courts allow parties to combine related cases in bankruptcy proceedings, specifically, for example, through “joint administration” or “substantive consolidation.” Joint administration allows businesses and their affiliates to coordinate joint bankruptcy

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Henry M. Karwowski for their gracious guidance and support, as well as the *Seton Hall Circuit Review* staff for its editing assistance.

<sup>1</sup>COLLIER ON BANKRUPTCY ¶ 1.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2017).

<sup>2</sup> United States Courts, Services & Forms: Bankruptcy, <http://www.uscourts.gov/services-forms/bankruptcy> (last visited Apr. 19, 2018); *see Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554–55 (1915) (citing *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)).

<sup>3</sup> *See* 11 U.S.C. § 1123 (2018); *see also* COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1100.01.

<sup>4</sup> *See* W. HOMER DRAKE JR. & CHRISTOPHER S. STRICKLAND, CHAPTER 11 REORGANIZATIONS (2d ed. 2018), Westlaw (database updated March 2018).

<sup>5</sup> *Id.*

<sup>6</sup> *See* H.R. REP. 95-595, at 220 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6179:

The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business’ finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap.

<sup>7</sup> DRAKE & STRICKLAND, *supra* note 4; *see* COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1100.01 n.1.

<sup>8</sup> *See* 11 U.S.C. § 1122 (2018).

<sup>9</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1.07.

<sup>10</sup> *See* 11 U.S.C. § 1124 (2018); *see also* COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1.07.

<sup>11</sup> *See* § 1124; *see also* COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1.07.

petitions.<sup>12</sup> This proves to be helpful in proceedings involving enormous corporations with many affiliates and subsidiaries. Substantive consolidation, existing as an equitable remedy, in essence merges separate legal entities “into a single survivor left with all the cumulative assets and liabilities . . . . The result is that claims of creditors against separate debtors morph into claims against the consolidated survivor.”<sup>13</sup>

Normally, to confirm a reorganization plan, the Code requires that all impaired classes consent to the plan.<sup>14</sup> A bankruptcy court may, however, force confirmation even if one or more impaired classes vote against the plan, provided that certain requirements under the Code are satisfied.<sup>15</sup> This forced, nonconsensual confirmation is commonly referred to as a “cramdown.”<sup>16</sup> Section 1129 of the Code sets forth the requirements for a cramdown, and “contains a number of safeguards for secured creditors who could be negatively impacted by a debtor’s reorganization plan.”<sup>17</sup> One provision that must always be satisfied for both consensual and nonconsensual confirmation is § 1129(a)(10). This section states, “if a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.”<sup>18</sup>

Section 1129(a)(10) has been the source of contrasting judicial interpretations in cases where jointly administered reorganization plans involve multiple debtors.<sup>19</sup> On one side, proponents of a “per-plan” approach argue that approval from at least one impaired class for *any* debtor involved in the plan satisfies § 1129(a)(10) for all debtors involved.<sup>20</sup> In contrast, “per-debtor” proponents argue that § 1129(a)(10) requires *each* debtor involved in the plan to obtain approval from at least one impaired class.<sup>21</sup> The resolution to this contention may significantly

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<sup>12</sup> FED. R. BANKR. P. 1015; see Suzanne T. Brindise, *Choosing the “Per-Debtor” Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 NW. U. L. REV. 1355, 1365–66 (2014).

<sup>13</sup> *In re Owens Corning*, 419 F.3d 195, 205–09 (3d Cir. 2007) (internal quotation marks and citations omitted).

<sup>14</sup> 11 U.S.C. § 1129(a)(8) (2018).

<sup>15</sup> See § 1129(b); see also COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1124.02.

<sup>16</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1124.02 n.8.

<sup>17</sup> *In re Transwest Resort Props., Inc.*, 881 F.3d 724, 729 (9th Cir. 2018) (quoting *In re The Vill. at Lakeridge, LLC*, 814 F.3d 993, 1000 (9th Cir. 2016)).

<sup>18</sup> § 1129(a)(10).

<sup>19</sup> Compare *In re Transwest Resort Props., Inc.*, 881 F.3d at 730 with *In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011).

<sup>20</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1129.02; see *In re Transwest Resort Props., Inc.*, 881 F.3d at 729.

<sup>21</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1129.02; see *In re Tribune Co.*, 464 B.R. at 183.

affect the reorganization process; and ultimately, the per-plan approach is a more appropriate interpretation of § 1129(a)(10).<sup>22</sup>

Part II of this Comment reviews the Bankruptcy Code and Chapter 11's formation and purposes, compares joint administration and substantive consolidation, and explains § 1129(a)(10)'s role during plan confirmations. Part III examines relevant case law illustrating § 1129(a)(10)'s diverging applications. Part IV argues for adopting the per-plan approach.

## II. BACKGROUND

### A. *The Bankruptcy Code and Chapter 11*

Congress created a federal bankruptcy system to promote uniformity in bankruptcy proceedings across the nation, and to afford debtors relief while simultaneously protecting creditors' interests.<sup>23</sup> The most significant overhaul in bankruptcy law came in 1978 when Congress enacted the Bankruptcy Reform Act, establishing what is now referred to as the Bankruptcy Code.<sup>24</sup> As expected, different circumstances call for different remedial actions. An appropriate remedial action may depend on who is seeking relief and the involved parties' underlying goals.<sup>25</sup> The Bankruptcy Code provides various options for relief, traditionally referred to as "Chapters," to accommodate these different circumstances.<sup>26</sup>

Notably, the Bankruptcy Reform Act merged the reorganization chapters into a single chapter—Chapter 11—giving debtors the opportunity to reorganize their businesses or financial affairs.<sup>27</sup> Although

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<sup>22</sup> See *In re Transwest Resort Props., Inc.*, 881 F.3d at 729.

<sup>23</sup> See Daniel R. Wong, *Chapter 11 Bankruptcy and Cramdowns: Adopting A Contract Rate Approach*, 106 NW. U. L. REV. 1927, 1928 (2012); Brindise, *supra* note 12, at 1360 (quoting U.S. Const. art. I, § 8, cl. 4); see COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1100.01:

Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate and to reorganize or sell its business as a going concern rather than simply to liquidate a troubled business. Continued operation may enable the debtor to preserve any positive difference between the going concern value of the business and the liquidation value. Moreover, continued operation can save the jobs of employees, the tax base of communities, and generally reduce the upheaval that can result from termination of a business.

<sup>24</sup> Pub. L. No. 95-598, § 402, 92 Stat. 2549; Charles Jordan Tabb, *The History Of The Bankruptcy Laws In The United States*, 3 AM. BANKR. INST. L. REV. 5, 32 (1995) (citing Pub. L. No. 95-598, 92 Stat. 2549 (1978)).

<sup>25</sup> United States Courts, Services & Forms: Bankruptcy, <http://www.uscourts.gov/services-forms/bankruptcy> (last visited Apr. 19, 2018).

<sup>26</sup> *Id.*

<sup>27</sup> See 11 U.S.C. §§ 1101–1174 (2012); COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1100.01; see also Tabb, *supra* note 24, at 33.

there is still much debate over the most desirable restructuring methods,<sup>28</sup> Chapter 11 embodies the principle that “it is generally preferable to enable a debtor to continue to operate and to reorganize or sell its business as a going concern rather than simply to liquidate a troubled business.”<sup>29</sup> Thus, in all Chapter 11 cases, the debtor’s paramount goal is to “formulate and have the bankruptcy court confirm a plan of reorganization.”<sup>30</sup>

As such, although reorganization strives to preserve creditors’ legal rights to the greatest extent possible, the process typically alters some or all legal interests, and may even involve extinguishing some interests.<sup>31</sup> This is done mindful that a debtors’ continued operations offer an opportunity to “save the jobs of employees, the tax base of communities, and generally reduce the upheaval that can result from termination of a business.”<sup>32</sup> Accordingly, the Bankruptcy Code gives debtors considerable control over plan negotiation.<sup>33</sup>

To strike a balance with the debtor control, Chapter 11 provides substantial protection for creditors.<sup>34</sup> For example, creditors are able to “obtain dismissal of a case that is filed in bad faith or in which there is no prospect of a feasible plan.”<sup>35</sup> Additionally, creditors “may obtain the appointment of an independent trustee, or a less intrusive examiner, when there is evidence of fraud, gross incompetence, misdealing, or other facts that indicate that the debtor is unsuited to manage the reorganization.”<sup>36</sup> With the exception of judicial districts in Alabama and North Carolina, all judicial districts have United States trustees who are “required to appoint a committee of unsecured creditors in a [C]hapter 11 case and may appoint additional committees of creditors or equity security holders.”<sup>37</sup>

The Code additionally imposes requirements promoting fairness and equity during plan confirmations, discussed further *infra*.<sup>38</sup> Specifically, § 1129(a)(3) requires a reorganization plan to be “proposed in good faith and not by any means forbidden by law.”<sup>39</sup> Although the Code does not

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<sup>28</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 21.01.

<sup>29</sup> Brindise, *supra* note 12, at 1361 (quoting COLLIER ON BANKRUPTCY ¶ 1100.01).

<sup>30</sup> Richard M. Cieri et al., “The Long and Winding Road”: *The Standards to Confirm A Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (Part I)*, 3 J. BANKR. L. & PRAC. 3, 4 (1993).

<sup>31</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1100.01 n.1 (quoting Brockett v. Winkle Terra Cotta Co., 81 F.2d 949, 953 (8th Cir. 1936)).

<sup>32</sup> *Id.* at ¶ 1100.01.

<sup>33</sup> *Id.* (citing 11 U.S.C. § 1121 (2012)).

<sup>34</sup> *Id.* (citing 11 U.S.C. §§ 1123, 1129, 1141 (2012)).

<sup>35</sup> *Id.* (citing 11 U.S.C. § 1112(b) (2012)).

<sup>36</sup> *Id.* (citing 11 U.S.C. § 1104(a) (2012)).

<sup>37</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1100.01 (citing 11 U.S.C. § 1104(a) (2012)).

<sup>38</sup> See discussion *infra* Part IV.

<sup>39</sup> 11 U.S.C. § 1129(a)(3) (2018).

define good faith, “the term is generally interpreted to mean that there exists ‘a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.’”<sup>40</sup> Courts assessing whether a plan is proposed in good faith may consider, for example, whether the plan maximizes value or resulted from arms-length negotiations between separate counsel and advisors.<sup>41</sup> Creditors may find the good faith requirement particularly useful, for instance, to safeguard against “artificial impairment”—when plan proponents needlessly impair claims solely to satisfy § 1129(a)(10).<sup>42</sup>

Further, in the cramdown context, a reorganization plan must satisfy the “best interest of creditors” test under § 1129(a)(7), as well as nondiscrimination, fairness and equity standards under § 1129(b).<sup>43</sup> The best interest test requires that “each creditor that does not vote to accept the plan must receive or retain property under the plan at least equal to its recovery in a Bankruptcy Code Chapter 7 liquidation.”<sup>44</sup> Thus, the balance between debtor control and creditor safeguards further the Code’s efforts to promote a negotiation process that yields “a consensual plan under which the debtor and a majority of creditors have agreed to both business and financial plans that offer some realistic chance of success.”<sup>45</sup>

### *B. Joint Administration and Substantive Consolidation*

Due to the size and complexities often attached to Chapter 11 proceedings, joint administration and substantive consolidation serve as administrative rules of convenience to facilitate and manage these proceedings.<sup>46</sup> The rules allow parties to combine related cases and bring them in a single proceeding, which helps to reduce complexities, and

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<sup>40</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1129.02 (quoting *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984)).

<sup>41</sup> *See In re Charter Commc’ns*, 419 B.R. 221, 260–61 (Bankr. S.D.N.Y. 2009).

<sup>42</sup> *See In re Daly*, 167 B.R. 734, 737 (Bankr. D. Mass. 1994) (explaining that “manufacturing an impaired class for the sole purpose of satisfying § 1129(a)(10)” may violate good faith requirements under § 1129(a)(3) (citing *In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 130–32 (8th Cir.1993); *In re Willows Convalescent Ctrs. Ltd. P’ship*, 151 B.R. 220, 222–24 (D. Minn. 1991)); *see also In re Boston Post Rd. Ltd. P’ship*, 21 F.3d 477, 482 (2d Cir. 1994) (“[I]f § 1122(a) permits classification of “substantially similar” claims in different classes, such classification may only be undertaken for reasons independent of the debtor’s motivation to secure the vote of an impaired, assenting class of claims.” (quoting *In re Greystone III Joint Venture*, 995 F.2d 1274, 1279 (5th Cir. 1991))).

<sup>43</sup> 11 U.S.C. §§ 1129(a)(7) & 1129(b) (2018).

<sup>44</sup> *In re Owens Corning*, 419 F.3d 195, 209 n.14 (3d Cir. 2007) (discussing 11 U.S.C. § 1129(a)(7)).

<sup>45</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1100.01.

<sup>46</sup> *Brindise*, *supra* note 12, at 1357.

ultimately eases administrative and financial burdens.<sup>47</sup> At the forefront, a notable distinction between these two modes of convenience is that substantive consolidation restructures the creditors' rights, and joint administration does not.<sup>48</sup> In both jointly administered and substantively consolidated cases, however, courts may enter orders to avoid unnecessary cost and delay, so long as they do so while protecting the parties' rights under the Code.<sup>49</sup>

Joint administration, on the one hand, enables debtors and its subsidiaries to place their related cases on a single docket to help expedite the cases.<sup>50</sup> Importantly, "[t]here is no merging of assets and liabilities of the debtors, and [c]reditors of each debtor continue to look to that debtor for payment of their claims."<sup>51</sup> Alternatively, substantive consolidation combines various creditors' claims against separate debtors into one claim against a single entity.<sup>52</sup> By combining its claims with other creditors, a creditor agrees to be subjected to the possibility of recovering less, as all the claims are aggregated and distributed equally among the pooled creditors.<sup>53</sup> Although circuit courts have articulated their own tests for when substantive consolidation is appropriate, courts generally agree that substantive consolidation is used to promote fairness to creditors that relied on entity unity at the outset.<sup>54</sup>

The Third Circuit's decision in *In re Owens Corning* sets forth principles to advance when determining whether substantive consolidation

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<sup>47</sup> COLLIER ON BANKRUPTCY, *supra* note 1 at ¶ 302.02; see H.R. Rep. No. 595, 95th Cong., 1st Sess. 321 (1977), *reprinted in* App. Pt. 4(d)(i); S. Rep. No. 989, 95th Cong., 2d Sess. 32 (1978), *reprinted in* App. Pt. 4(e)(i); see also Brindise, *supra* note 12, at 1357.

<sup>48</sup> *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2007); see Brindise, *supra* note 12, at 1366.

<sup>49</sup> FED. R. BANKR. P. 1015(c).

<sup>50</sup> See FED. R. BANKR. P. 1015(b) Advisory Committee's Notes:

Joint administration as distinguished from consolidation may include combining the estates by using a single docket for the matters occurring in the administration, including the listing of filed claims, the combining of notices to creditors of the different estates, and the joint handling of other purely administrative matters that may aid in expediting the cases and rendering the process less costly.

<sup>51</sup> *In re Transwest Resort Props., Inc.*, 881 F.3d 724, 731 (9th Cir. 2018) (internal citations and quotations omitted).

<sup>52</sup> See *In re Owens Corning*, 419 F.3d at 202 ("Typically this arrangement pools all assets and liabilities of the subsidiaries into their parent and treats all claims against the subsidiaries as transferred to the parent.").

<sup>53</sup> See *id.* at 205.

<sup>54</sup> *In re Transwest Resort Props., Inc.*, 881 F.3d at 732; *In re Owens Corning*, 419 F.3d at 207–10. Both cases cite *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518 (2d Cir. 1988) (factors for determining whether substantive consolidation is appropriate are "(i) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors") (internal citations and quotations omitted).

is appropriate in a case.<sup>55</sup> Perhaps most noteworthy is the fundamental expectation that “courts respect entity separateness absent compelling circumstances calling equity . . . into play.”<sup>56</sup> The court also instructed that substantive consolidation will usually address harms that debtors caused, and should not be used to merely simplify case administration.<sup>57</sup> Rather, substantive consolidation should be used sparingly and defensively as a last resort remedy.<sup>58</sup> The *Owens Corning* Court explained that substantively consolidating debtor entities requires a showing, absent consent, that “(i) prepetition [debtors] disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition [debtors’] assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.”<sup>59</sup>

### C. Plan Confirmation and Section 1129(a)(10)

Confirming a reorganization plan is the primary objective in every Chapter 11 case.<sup>60</sup> The Bankruptcy Code lists requirements that plan proponents must include in a plan, and provides additional requirements when confirming the plan; all of which must be satisfied in the consensual plan confirmation context.<sup>61</sup> Specifically, § 1129(a)(8) requires that all impaired classes—the only ones to vote—accept the plan.<sup>62</sup> In some cases, however, a court may confirm a plan through the Code’s “cramdown” provision even when subsection (a)(8) is not satisfied.<sup>63</sup>

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<sup>55</sup> See *In re Owens Corning*, 419 F.3d at 211.

<sup>56</sup> *Id.* at 211.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 209–11 (“[Substantive consolidation] should be rare and, in any event, one of last resort after considering and rejecting other remedies . . . . [I]t may not be used offensively (for example, having a primary purpose to disadvantage tactically a group of creditors in the plan process or to alter creditor rights).”).

<sup>59</sup> *Id.* at 211.

<sup>60</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1129.01.

<sup>61</sup> See 11 U.S.C. §§ 1123(a) & 1129(a) (2018); see also Cieri, *supra* note 30, at 5: Specifically, a plan must classify claims; identify the classes that are not impaired; identify treatment for the classes established; treat all class members identically; provide a means for its implementation; not require the issuance of nonvoting equity securities; and be consistent with the interests of creditors, equity holders, and public policy in the manner by which the reorganized debtor’s officers and directors are selected.

<sup>62</sup> § 1129(a)(8).

<sup>63</sup> § 1129(a); see *In re MCorp Fin., Inc.*, 137 BR 219 (Bankr. S.D. Tex. 1992): Subsection (a) of § 1129 enumerates the requirements governing confirmation of a plan. It contains eleven paragraphs setting forth standards with regard to the plan or the proponent of the plan. Although the legislative history states that the court is to confirm a plan if and only if all of the requirements of subsection (a) are met, the cramdown provisions in § 1129(b) do provide a way in which a plan may be confirmed even if the requirements of subsection (a)(8) are not met.

The cramdown provision, codified in § 1129(b), enables a court to forcefully confirm a plan notwithstanding the presence of nonconsenting impaired classes when all confirmation requirements, other than those in subsection (a)(8), have been satisfied.<sup>64</sup> The court may do this only “if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.”<sup>65</sup> Indeed, plan proponents may not simply disregard creditor claims during the reorganization.<sup>66</sup> The Code mandates a hearing to occur prior to confirming a reorganization plan, at which all creditors, impaired and unimpaired, have the opportunity “to comment on the plan’s proposed treatment of their claims or interests, and object if necessary.”<sup>67</sup>

In all events, § 1129(a)(10) must be satisfied to confirm a plan. 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 any insider.”<sup>68</sup> An impaired claim, to repeat, is one whose legal, equitable, or contractual right is altered by the reorganization plan.<sup>69</sup> The requirement in § 1129(a)(10) prevents a court from exercising its cramdown powers when no impaired class has accepted a reorganization plan.<sup>70</sup> The idea is that before a court forces a plan into effect, which will compel non-approving impaired classes “to shoulder the risks of error necessarily associated with a forced confirmation, there must be some other properly classified group that is also hurt and nonetheless favors the plan.”<sup>71</sup> Section 1129(a)(10), therefore, serves as a general check on debtors from imposing reorganization plans that have no impaired creditor support whatsoever.

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<sup>64</sup> § 1129(b).

<sup>65</sup> *Id.*

<sup>66</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1129.01.

<sup>67</sup> See 11 U.S.C. § 1128 (2018); Cieri, *supra* note 30, at 7 nn.14–15 (explaining that constitutional due process requires debtors to provide notice to creditors of, for example, bar dates and confirmation hearings; and absent such notice, creditors may not be bound to confirmed reorganization plans (citing *In re Unioil*, 948 F.2d 678, 683–84 (10th Cir. 1991))).

<sup>68</sup> § 1129(a)(10).

<sup>69</sup> United States Courts, Services & Forms: Chapter 11 – Bankruptcy Basics, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> (last visited Apr. 19, 2018).

<sup>70</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1129.02; see *In re Douglas Hereford Ranch, Inc.*, 76 B.R. 781, 783 (Bankr. D. Mont. 1987) (“[T]he only aspect of Section 1129(a)(10) which is perfectly clear is that a plan cannot be confirmed if each class is impaired and no single class accepts the plan.” (quoting COLLIER ON BANKRUPTCY ¶ 1129–31 (15th ed.))).

<sup>71</sup> *In re 266 Wash. Assocs.*, 141 B.R. 275, 287 (Bankr. E.D.N.Y. 1992), *aff’d*, 147 BR 827 (E.D.N.Y. 1992).

## III. “PER-PLAN” VS. “PER-DEBTOR”

Relative to the Code’s reform in 1978, and various subsequent revisions, § 1129(a)(10) has only recently been subjected to split interpretations concerning whether to apply a “per-plan” or “per-debtor” approach; and only a small number of courts have addressed the issue head on.<sup>72</sup> In fact, the Delaware Bankruptcy Court adopted the per-debtor approach for the first time in 2011.<sup>73</sup> Prior to that, courts uniformly interpreted § 1129(a)(10) to require a per-plan application.<sup>74</sup> Despite the dual interpretations, the per-plan approach formed teeth from the Ninth Circuit’s decision in *In re Transwest Resort Properties, Inc.*<sup>75</sup>

A. *Per-Debtor*

The per-debtor approach requires that in a jointly administered bankruptcy proceeding involving multiple debtors, “absent substantive consolidation or consent, *each* debtor involved . . . must separately satisfy § 1129(a)(10).”<sup>76</sup> To support this position, proponents rely on the Code’s statutory rules of construction—provided to help construe the Code—and place significant emphasis on entity separateness.<sup>77</sup> In some circumstances, parties may advocate for a per-debtor application when a reorganization plan’s distribution scheme, although not expressly involving substantive consolidation, otherwise effectively merges debtor entities, thereby resulting in what is commonly referred to as “de facto” substantive consolidation.<sup>78</sup> Moreover, the per-debtor approach seeks to advance the notion that convenience alone cannot sufficiently deprive rights from impaired classes.<sup>79</sup>

1. *In re Tribune Company*

In *In re Tribune Company*, the Delaware Bankruptcy Court became the first court to explicitly require debtors to satisfy § 1129(a)(10) on a per-debtor basis.<sup>80</sup> The court set the tone at the outset when it included a

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<sup>72</sup> Compare *In re Transwest Resort Props., Inc.*, 881 F.3d 724, 730 (9th Cir. 2018) (applying a per-plan approach) with *In re Tribune Co.*, 464 B.R. 126, 183 (Bankr. D. Del. 2011) (applying a per-debtor approach).

<sup>73</sup> See *In re Tribune Co.*, 464 B.R. at 183.

<sup>74</sup> See *In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sep. 28, 2001); *In re Enron Corp.*, No. 01-16034, 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004); *In re Charter Commc’ns*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009).

<sup>75</sup> 881 F.3d 724 (9th Cir. 2018).

<sup>76</sup> Brindise, *supra* note 12 at 1369 (emphasis added).

<sup>77</sup> See *In re Tribune Co.*, 464 B.R. at 182–83; 11 U.S.C. § 102 (2018).

<sup>78</sup> See *In re Transwest Resort Props., Inc.*, 881 F.3d 724, 729 (9th Cir. 2018).

<sup>79</sup> See *In re Tribune Co.*, 464 B.R. at 183.

<sup>80</sup> See *id.*

parable illustrating “an inescapable facet of *human* character: the willingness to visit harm upon others, even at one’s own peril.”<sup>81</sup> At issue in *Tribune* were two competing reorganization plans between the one hundred and eleven debtors (“Debtor/Committee/Lender Plan” or “DCL Plan”) and holders of bonds that were issued in connection to an earlier leveraged buyout of Tribune (“Noteholder Plan”).<sup>82</sup> The key difference between each plan was how it treated “certain LBO-Related Causes of Action with the Senior Lenders and the Bridge Lenders, who loaned more than \$10 billion to Tribune in connection with the 2007 leveraged buy-out (or ‘LBO’) of Tribune.”<sup>83</sup>

The DCL Plan settled the actions for an amount that was, according to the Noteholder Plan proponents, unreasonable.<sup>84</sup> The Noteholder Plan, on the other hand, “preserve[d] all of the LBO-Related Causes of Action and create[d] two trusts to prosecute ‘vigorously’ those claims postconfirmation.”<sup>85</sup> The DCL Plan proponents argued that this cut against creditors’ best interests because, under the Noteholder Plan, the majority of distributions were contingent upon outcomes in protracted and risky litigation.<sup>86</sup> The DCL Plan proponents also argued that the Noteholder Plan contained “fundamental flaws that prevent[ed] confirmation under Bankruptcy Code § 1129(a),” and effectively treated “all impaired classes as though they were creditors of a single entity for purposes of § 1129(a)(10).”<sup>87</sup> This, the DCL Plan proponents argued, was at odds with the proper, per-debtor approach to § 1129(a)(10).<sup>88</sup> Of course, this contrasted with the Noteholder Plan proponents’ contention that the per-plan, not per-debtor, approach applies when, as here, “all debtor entities are the subject of the same joint plan of reorganization.”<sup>89</sup>

Additionally, although the DCL Plan proponents sought a per-debtor application, at this point neither the DCL Plan nor the Noteholder Plan obtained an impaired accepting class for each debtor involved.<sup>90</sup> In fact, out of the one hundred and eleven debtors that needed impaired accepting classes—according to the per-debtor approach—the DCL Plan received affirmative support of only seventy-two debtors, and the Noteholder Plan

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<sup>81</sup> *Id.* at 135.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 135–36.

<sup>84</sup> *Id.* at 136.

<sup>85</sup> *In re Tribune Co.*, 464 B.R. at 136.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 136, 181 (internal citations and quotations omitted).

<sup>88</sup> *Id.* at 180–81.

<sup>89</sup> *Id.* at 181 (internal citations and quotations omitted).

<sup>90</sup> *Id.* at 180.

received affirmative support of only two debtors.<sup>91</sup> The DCL Plan proponents, however, argued that their plan “received broad support and was *accepted by an impaired class at every [d]ebtor for which votes were cast,*” and that “there is a substantial difference between affirmative rejection of a plan and simple creditor inaction.”<sup>92</sup> The DCL Plan proponents further argued that the Noteholder Plan, in contrast, “received the affirmative support of only *three* out of 256 impaired classes.”<sup>93</sup>

The *Tribune* Court observed the precedential scarcity for the issue at hand, and upon doing so, distinguished three cases applying the per-plan approach to overrule creditors’ objections.<sup>94</sup> First, the *Tribune* Court noted that although the bankruptcy court in *In re SGPA, Inc.* held that it was “unnecessary ‘to have an impaired class of creditors of each Debtor to vote to accept the Plan,’” the *SGPA* Court explicitly recognized that under the plan, “the objecting creditors suffered no adverse effect and that the result would not have changed if the debtors had been substantively consolidated.”<sup>95</sup> Second, the *Tribune* Court explained that the bankruptcy court in *In re Enron Corp.*, partially relying on *SGPA*, decided that “the substantive consolidation component of the global compromise allowed confirmation of a 177–debtor joint plan when at least one class of impaired claims voted to accept the plan.”<sup>96</sup> The *Enron* Court reviewed the global compromise that included all the debtors and determined that it was fair and reasonable to the creditors, mainly because it would reduce otherwise enormous potential litigation costs and delays that would substantially lower recoveries.<sup>97</sup> Last, the *Tribune* Court explained that in *In re Charter Communications*, the bankruptcy court “overruled an objection that certain classes of creditors were ‘artificially’ impaired to meet the § 1129(a)(10) requirement.”<sup>98</sup> Ultimately, however, the *Tribune* Court maintained that despite these cases’ discussions of § 1129(a)(10), “none of the three courts considered the § 1129(a)(10) issue central to its decision in the matter before it.”<sup>99</sup>

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<sup>91</sup> *In re Tribune Co.*, 464 B.R. at 180.

<sup>92</sup> *Id.* (emphasis in original).

<sup>93</sup> *Id.* (emphasis in original).

<sup>94</sup> *See id.* at 181.

<sup>95</sup> *See id.* (citing *In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291, at \*19 (Bankr. M.D. Pa. Sep. 28, 2001)).

<sup>96</sup> *Id.* (quoting *In re Enron Corp.*, No. 01-16034, 2004 Bankr. LEXIS 2549, at \*234–35 (Bankr. S.D.N.Y. July 15, 2004)).

<sup>97</sup> *In re Tribune Co.*, 464 B.R. at 181–82 n.64 (citing *In re Enron Corp.*, 2004 Bankr. LEXIS 2549, at \*134–35) (internal quotations omitted).

<sup>98</sup> *Id.* at 182 (discussing *In re Charter Commc’ns*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009)).

<sup>99</sup> *Id.* at 182.

The *Tribune* Court turned to the Code's rules of construction to discern § 1129(a)(10)'s plain meaning.<sup>100</sup> Specifically, the court concluded that § 102(7)—providing that “the singular includes the plural”—can properly “ascrib[e] the plural to the meaning of ‘plan’ in § 1129(a)(10) . . . .”<sup>101</sup> The court reasoned that since the proposed plans contained language expressly assuring that the debtors’ estates would not be substantively consolidated, “[t]he practical effect . . . is that each joint plan actually consists of a separate plan for each Debtor.”<sup>102</sup> Consequently, the court emphasized, “[i]n the absence of substantive consolidation, entity separateness is fundamental.”<sup>103</sup>

Next, the *Tribune* Court considered the statutory context, and instructed that “§ 1129(a)(10) must be read in conjunction with the other subsections of § 1129(a) . . . when considering rights of impaired unsecured creditors.”<sup>104</sup> The court first noted that despite the fact that both § 1129(a)(1) and § 1129(a)(3) state the word “plan” in the singular, neither statute can “be met if only one or more—but fewer than all—debtors proposing a joint plan satisfies them[.]”<sup>105</sup> Additionally, the court explained that under the “best interest of creditors” test in § 1129(a)(7), the words “each impaired class” must be read “as an entitlement to the prescribed treatment for every impaired class of creditors for each debtor which is part of a joint plan.”<sup>106</sup> The court further explained that “§ 1129(a)(8) mandates one of two outcomes—satisfaction by consent ((a)(8)(A)) or nonimpairment ((a)(8)(B)).”<sup>107</sup> The court, however, acknowledged that a cramdown confirmation under § 1129(b) “relieves a plan proponent from the § 1129(a)(8) requirement if all other § 1129(a) requirements are met,” so long as the proposed plan satisfies additional fairness and equity standards towards impaired classes.<sup>108</sup>

Finally, the *Tribune* Court observed that in “large, complex, multiple-debtor [C]hapter 11 proceedings,” debtors commonly take certain steps to convenience the parties and the courts.<sup>109</sup> For instance, debtors may file joint plans, or, as in this case, propose plans containing a single distribution scheme “without regard to where assets are found or

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *In re Tribune Co.*, 464 B.R. at 182 (citing *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir.2007)).

<sup>104</sup> *Id.* at 182 (citing *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991)).

<sup>105</sup> *Id.* at 183.

<sup>106</sup> *Id.* at 183 (discussing 11 U.S.C. § 1129(a)(7)).

<sup>107</sup> *Id.* at 183 (discussing § 1129(a)(8)).

<sup>108</sup> *Id.*

<sup>109</sup> *In re Tribune Co.*, 464 B.R. at 183.

where liabilities lie.”<sup>110</sup> Nevertheless, the court mandated, “convenience alone is not sufficient reason to disturb the rights of impaired classes of creditors of a debtor not meeting confirmation standards.”<sup>111</sup> Accordingly, the *Tribune* Court held that § 1129(a)(10), “absent substantive consolidation or consent, must be satisfied by each debtor in a joint plan,” and neither plan here satisfied the requirement.<sup>112</sup>

Briefly extending its § 1129(a)(10) discussion, the *Tribune* Court provided ways for plan proponents to overcome § 1129(a)(10) hurdles.<sup>113</sup> Specifically, with respect to creditor inaction when voting for a plan, the court stated that “‘deemed acceptance’ by a non-voting impaired class, in the absence of objection, constitute[s] the necessary ‘consent’ to a proposed ‘per plan’ scheme[.]”<sup>114</sup> The court relied on a sister bankruptcy court’s decision, which allowed “deemed acceptance” based on a proposed plan including an explicit, well-advertised, bold text presumption of deemed acceptance when a class eligible to vote on the plan does not.<sup>115</sup> “Alternatively,” the *Tribune* Court advised, “a plan proponent could . . . drop from a proposed joint plan those debtors that do not or cannot meet the § 1129(a)(10) requirement.”<sup>116</sup>

#### B. *Per-Plan*

The per-plan approach submits that if *any* debtor involved in a reorganization plan obtains approval from at least one of its impaired classes, § 1129(a)(10) will be satisfied for all debtors involved in the plan.<sup>117</sup> Per-plan approach proponents largely base their interpretation on the statute’s plain language.<sup>118</sup> The proponents do not consider § 1129(a)(10) to be a primary creditor safeguard in a reorganization plan confirmation proceeding.<sup>119</sup> Rather, § 1129 includes several statutory requirements designed to more appropriately and effectively protect impaired class-members’ interests.<sup>120</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *In re Tribune Co.*, 464 B.R. at 183–84 (discussing *In re Adelphia Commc’ns Corp.*, 368 B.R. 140 (Bankr. S.D.N.Y. 2007)).

<sup>116</sup> *Id.* at 184.

<sup>117</sup> COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 1129.02; *see, e.g.*, *In re Transwest Resort Props., Inc.*, 881 F.3d 724, 729 (9th Cir. 2018).

<sup>118</sup> *See In re Transwest Resort Props., Inc.*, 881 F.3d at 729–30; *In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291, at \*18–19 (Bankr. M.D. Pa. Sep. 28, 2001).

<sup>119</sup> *In re SGPA, Inc.*, 2001 Bankr. LEXIS 2291, at \*19.

<sup>120</sup> *See, e.g.*, 11 U.S.C. § 1129(a)(7) (best interests tests); § 1129(b) (“fair and equitable” requirements during cramdowns).

1. *In re Transwest Resort Properties, Inc.*

In *In re Transwest Resort Properties, Inc.*, the Ninth Circuit held that § 1129(a)(10) requires a per-plan approach.<sup>121</sup> There, five related entities (collectively “Debtors”) filed jointly for Chapter 11 bankruptcy three years after acquiring two hotel resort properties.<sup>122</sup> The acquisitions were financed by two loans.<sup>123</sup> First—the “Operating Loan”—JPMCC 2007-CA Grasslawn Lodging, LLC (“Lender”) issued a \$209 million mortgage loan to the two entities that owned and operated the resort properties (“Operating Debtors”) in exchange for security interest in the properties.<sup>124</sup> Second—the “Mezzanine Loan”—Ashford Hospitality Finance, LP (“Mezzanine Lender”) issued a \$21.5 million loan to another two entities that solely owned the Operating Debtors (“Mezzanine Debtors”) in exchange for security interest in the Operating Debtors.<sup>125</sup>

After the Debtors filed jointly for Chapter 11 bankruptcy, the Lender filed a \$298 million claim for the Operating Loan, and the Mezzanine Lender filed a \$39 million claim for the Mezzanine Loan; the Lender subsequently acquired the Mezzanine Lender’s claim.<sup>126</sup> The Debtors’ proposed reorganization plan (the “Plan”), to be jointly administered and not substantively consolidated, involved ultimately “extinguishing the Mezzanine Debtors’ ownership interest in the Operating Debtors.”<sup>127</sup> The Plan additionally restructured the Lender’s loan to include “a due-on-sale clause requiring the Debtors to pay the Lender the outstanding balance of the restructured loan in the event the Resorts were sold,” but negated the clause if the resort properties were sold during a specified time period.<sup>128</sup>

The Lender objected to the Plan based on, among other reasons, § 1129(a)(10).<sup>129</sup> The Lender’s position was that § 1129(a)(10) applies on a per-debtor basis, and since the Lender was the only impaired claim against the Mezzanine Debtors, and did not assent to the Plan, the Debtors could not satisfy the Section.<sup>130</sup> Despite this objection, “the bankruptcy court approved a ‘cramdown’ reorganization plan,” and the district court affirmed.<sup>131</sup>

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<sup>121</sup> 881 F.3d 724, 730 (9th Cir. 2018).

<sup>122</sup> *Id.* at 726.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *In re Transwest Resort Props., Inc.*, 881 F.3d at 726.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *In re Transwest Resort Props., Inc.*, 554 B.R. 894, 901 (D. Ariz. 2016).

Affirming the lower courts' decisions to apply a per-plan approach, the Ninth Circuit primarily based its determination on the statute's plain language.<sup>132</sup> The court first noted that § 1129(a)(10) "makes no distinction concerning or reference to the creditors of different debtors under 'the plan,' nor does it distinguish between single-debtor and multi-debtor plans."<sup>133</sup> Rather, "[u]nder its plain language, once a single impaired class accepts a plan, section 1129(a)(10) is satisfied as to the entire plan."<sup>134</sup> The court expressed deference to Congress's choice not to "require[] plan approval from an impaired class for each debtor involved in a plan."<sup>135</sup>

Unlike the *Tribune* Court, the Ninth Circuit rejected the argument that "section 102(7) requires that section 1129(a)(10) apply on a 'per debtor' basis."<sup>136</sup> Further, regarding the Lender's assertion that the "other subsections in section 1129(a) indicate that section 1129(a)(10) must apply on a 'per debtor' basis," the Ninth Circuit found the argument to be "essentially a regurgitation of a summary of the *Tribune* decision unsupported by argument or other case law."<sup>137</sup> Accordingly, the Ninth Circuit majority held that § 1129(a)(10) applies on a per-plan basis.<sup>138</sup>

In his concurrence, Judge Friedland addressed the argument that applying a per-plan approach to this Plan would effectively result in "de facto" substantive consolidation of the Debtor entities.<sup>139</sup> Although the concurrence agreed that the Plan's distribution scheme "effectively merged the Debtor entities," the Plan was to blame for the "de facto" substantive consolidation, not the per-plan approach to § 1129(a)(10).<sup>140</sup> Therefore, the concurrence instructed, "if a creditor believes that a reorganization improperly intermingles different estates, the creditor can and should object that the plan—rather than the requirements for confirming the plan—results in de facto substantive consolidation."<sup>141</sup>

#### IV. SECTION 1129(A)(10) REQUIRES A PER-PLAN APPROACH

The issue, to reiterate, is whether, in a jointly administered proceeding involving multiple debtors, § 1129(a)(10) requires that *any* debtor involved obtains plan approval from at least one impaired class (per-plan), or rather *each* debtor involved obtains such plan approval (per-

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<sup>132</sup> *In re Transwest Resort Props., Inc.*, 881 F.3d at 725.

<sup>133</sup> *Id.* at 729.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 729–30; see 11 U.S.C. § 102(7) (2018) ("[T]he singular includes the plural.").

<sup>137</sup> *In re Transwest Resort Props., Inc.*, 881 F.3d at 730.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 731 (Friedland, J., concurring).

<sup>140</sup> *Id.* at 732 (Friedland, J., concurring).

<sup>141</sup> *Id.* at 733 (Friedland, J., concurring).

debtor).<sup>142</sup> The *Tribune* Court created the split interpretation when it declared that § 1129(a)(10) requires a per-debtor application.<sup>143</sup> Despite this departure, courts should recognize, as did the Ninth Circuit, that the Bankruptcy Code requires § 1129(a)(10) to be applied on a per-plan basis.<sup>144</sup> In support, courts should primarily focus on § 1129(a)(10)'s plain language.<sup>145</sup> Courts should also note a problem arises when parties suggest that jointly administering plans involving multiple debtors, absent substantive consolidation, effectively creates separate individual plans. Moreover, reorganization plans, not a particular statutory interpretation, cause "de facto" substantive consolidation; and the Code includes creditor safeguards that more appropriately enable courts to address "de facto" substantive consolidations during cramdowns than § 1129(a)(10).<sup>146</sup> Properly interpreting the Code and exercising appropriate creditor safeguards will, consequently, allow courts to reconcile the per-plan approach with entity separateness principles mandated in *Owens Corning*.<sup>147</sup>

The foremost reason courts should adopt the per-plan approach is because the per-debtor approach is contrary to § 1129(a)(10)'s plain language. Section 1129(a)(10) provides:

(a) The court shall confirm a plan only if all of the following requirements are met: . . . (10) If a class of claims is impaired under the plan, at least *one class of claims that is impaired under the plan has accepted the plan*, determined without including any acceptance of the plan by any insider.<sup>148</sup>

Indeed, the subsection requires only "one class of claims that is impaired under the plan" to vote in favor of the plan.<sup>149</sup> Well-settled statutory interpretation canons require courts to "presume[] that Congress says in the statute what it means,"<sup>150</sup> especially when the text is unambiguous.<sup>151</sup> As such, "[i]f the statutory language is plain, [courts] must enforce it according to its terms."<sup>152</sup> Applying these canons to § 1129(a)(10) requires courts to allow any debtor in a jointly administered, multi-debtor proceeding to satisfy the subsection for all debtors involved.

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<sup>142</sup> See *supra* Part I, notes 19–22.

<sup>143</sup> See *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011).

<sup>144</sup> See *In re Transwest Resort Props., Inc.*, 881 F.3d at 724.

<sup>145</sup> See *id.* at 725.

<sup>146</sup> *Id.* at 732–33 (Friedland, J., concurring).

<sup>147</sup> See *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2007).

<sup>148</sup> 11 U.S.C. § 1129(a)(10) (2018) (emphasis added).

<sup>149</sup> *Id.*

<sup>150</sup> *In re Transwest Resort Props., Inc.*, 881 F.3d at 730 (citing *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)).

<sup>151</sup> See *BedRoc Ltd., LLC*, 541 U.S. at 183 ("Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.").

<sup>152</sup> *In re Transwest Resort Props., Inc.*, 881 F.3d at 729 (quoting *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)).

Per-debtor proponents, such as the *Tribune* Court, use the Code's statutory construction rule § 102(7)—"the singular includes the plural"—to pluralize the word "plan" in § 1129(a)(10).<sup>153</sup> However, this application is improper and misleading. Even upon amending the word "plan" to "plans," it still remains that "at least one class of claims that is impaired under the plans has accepted the plans."<sup>154</sup> Courts should be hard-pressed to read the words "at least one class of claims" as requiring anything more than one impaired assenting class to satisfy § 1129(a)(10) for all debtors involved.

Moreover, a practical dilemma arises when considering the notion that a joint plan involving multiple debtors, without substantive consolidation, effectively creates "a separate plan for each [d]ebtor."<sup>155</sup> Although it is true that, absent substantive consolidation, debtor-entity separateness is essential, if a court were to consider each debtor to be proceeding under a separate plan, debtors with assenting impaired classes, having satisfied § 1129(a)(10), could confirm and move forward with their plans without approval from other debtors' impaired classes. Under the *Tribune* Court's analysis, however, plan proponents would need to "drop from a proposed joint plan those debtors that do not or cannot meet the § 1129(a)(10) requirement."<sup>156</sup> This necessarily means that the debtors would not be proceeding under their own separate plans.<sup>157</sup>

Further, § 1129(a)(10) is not the appropriate subsection under which creditors should seek to protect substantive rights. Under the Code, § 1122(a) enables a reorganization plan to group substantially similar claims together in particular classes.<sup>158</sup> Sections 1122(a) and 1129(a)(10) together enable, in some cases, a single impaired class member to bind other impaired classes to a plan. An impaired dissenting creditor being treated improperly under a plan can and should object based on the creditors' best interests test in § 1129(a)(7) or, during cramdowns, fairness and equity principles in § 1129(b).<sup>159</sup>

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<sup>153</sup> *In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del. 2011).

<sup>154</sup> *See In re Transwest Resort Props., Inc.*, 881 F.3d at 730 (applying § 102(7) to § 1129(a)(10)) (emphasis added).

<sup>155</sup> *In re Tribune Co.*, 464 B.R. at 182.

<sup>156</sup> *Id.* at 184.

<sup>157</sup> *See In re Transwest Resort Props., Inc.*, 881 F.3d at 732 ("Had the Debtors—and thus their reorganization plans—remained separate, there would have been no need to invoke the 'per debtor' approach to preserve the effectiveness of any objection Lender had.").

<sup>158</sup> 11 U.S.C. § 1122(a) (2018) ("[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.").

<sup>159</sup> *See* 11 U.S.C. § 1129(a)(7)&(b).

The same is true in joint proceedings involving multiple debtors. In this regard, per-debtor proponents seem to lose the forest for the trees. The *Tribune* Court injected entity separateness principles into § 1129(a)(10) to protect impaired creditors' rights and, ultimately, adopt a per-debtor approach.<sup>160</sup> Section 1129(a)(10), however, does not aim to protect creditors' substantive rights, but rather serves as a technical requirement to ensure that a plan is not without any impaired class's support.<sup>161</sup> "De facto" substantive consolidation must, therefore, result from a reorganization plan's distribution scheme, not from a particular statutory interpretation.<sup>162</sup>

Sections 1129(a)(7) and 1129(b) should be used to protect creditors from mistreatment in a reorganization plan, specifically where distribution schemes result in "de facto" substantive consolidation. Indeed, substantive consolidation is rooted in fairness principles, and requires a fact-intensive analysis when determining whether its use is appropriate.<sup>163</sup> The Third Circuit's decision in *Owens Corning* expressly burdens substantive consolidation proponents to prove that consolidation is appropriate.<sup>164</sup> Proponents may, for example, present contracts setting expectations that the debtors were one indistinguishable entity; and in all cases, proponents must show that "they actually and reasonably relied on debtors' supposed unity."<sup>165</sup> However, notwithstanding such proof, creditors opposing substantive consolidation can defeat the proponent creditors' reliance on debtor-unity "if they can prove they are adversely affected and actually relied on debtors' separate existence."<sup>166</sup>

Sections 1129(a)(7) and 1129(b)—not § 1129(a)(10)—give creditors an opportunity to challenge and defeat, based on entity separateness principles set forth in *Owens Corning*, a plan that inappropriately merges debtor entities.<sup>167</sup> As such, courts should refrain from expanding a

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<sup>160</sup> See *In re Tribune Co.*, 464 B.R. at 183.

<sup>161</sup> See *In re Bataa/Kierland, LLC*, 476 B.R. 558, 578 (Bankr. D. Ariz. 2012) ("Section 1129(a)(10) is therefore a purely 'technical requirement for confirmation,' but 'is not a substantive right of objecting creditors.'").

<sup>162</sup> *In re Transwest Resort Props., Inc.*, 881 F.3d at 733 (Friedland, J., concurrence).

<sup>163</sup> *In re Bonham*, 229 F.3d 750, 765 (9th Cir. 2000) ("[O]nly through a searching review of the record, on a case-by-case basis, can a court ensure that substantive consolidation effects its sole aim: fairness to all creditors." (citing *In re Auto-Train Corp., Inc.*, 810 F.2d 270, 276 (D.C. Cir. 1987))); see *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2007).

<sup>164</sup> *In re Owens Corning*, 419 F.3d at 212.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*; see *In re Transwest Resort Props., Inc.*, 881 F.3d at 733 (Friedland, J., concurring) (noting an original loan document as possibly evidencing reliance on entity separateness).

<sup>167</sup> See *In re Transwest Resort Props., Inc.*, 881 F.3d at 733 (Friedland, J., concurring); *In re Owens Corning*, 419 F.3d at 211.

technical requirement in subsection (a)(10) and, instead, turn to substantive rights protections in subsections (a)(7) and (b) to produce just results. To illustrate, when the *Tribune* Court determined that the three bankruptcy cases adopting a per-plan approach were not authorities on which it should rely, largely because § 1129(a)(10)'s interpretation was not central to those cases' outcomes, it overlooked the reasons implicit in those courts' choices not to primarily focus on the split interpretation.<sup>168</sup>

The *SGPA* Court, finding the per-debtor argument to be unpersuasive, conducted a fact-intensive analysis that involved extensively examining the parties' interests and potential for adversity under a jointly proposed plan.<sup>169</sup> The court concluded that the plan sought to maximize creditors' recoveries, and the objecting creditors were the only ones truly opposing the plan.<sup>170</sup> Although the court did not explicitly state whether the plan effectively resulted in substantive consolidation, it determined that, regardless, the plan did not adversely affect the objecting creditor—something *Owens Corning* requires an objecting creditor to show once a court determines that the circumstance is one that warrants substantive consolidation.<sup>171</sup> Notably, the court reached its conclusion after spending considerable time discussing the “fair and equitable” requirements in § 1129(b), an issue it considered to be the “heart of the matter.”<sup>172</sup> The court relied far less on § 1129(a)(10), and alluded to supporting debtors' position that “section 1129(a)(10) is a technical requirement for confirmation rather than a substantive right of objecting creditors.”<sup>173</sup>

The *Enron* Court, addressing head on whether substantive consolidation was appropriate, also treated § 1129(a)(10) as a technical requirement, rather than using it to protect substantive rights.<sup>174</sup> In its analysis, the court applied principles mirroring those set forth in *Owens Corning* to conclude that substantive consolidation was appropriate. For example, the court observed that there was “extensive entanglement” between the debtors, and attempting to separate them would substantially

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<sup>168</sup> *In re Tribune Co.*, 464 B.R. 126, 182 (Bankr. D. Del. 2011).

<sup>169</sup> *See In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sep. 28, 2001).

<sup>170</sup> *Id.* at \*6–7.

<sup>171</sup> *Id.* at \*21–22. Although the *SGPA* Court's express reasoning may not have mirrored the heightened standards for determining whether substantive consolidation is appropriate provided in *Owens Corning*, which was rendered four years after *SGPA*, the court's analysis nonetheless demonstrates the statutes to properly apply when making this determination.

<sup>172</sup> *Id.* at \*33–49.

<sup>173</sup> *Id.* at \*20 (internal citations and quotations omitted).

<sup>174</sup> *See In re Enron Corp.*, No. 01-16034, 2004 Bankr. LEXIS 2549, at \*234–36 (Bankr. S.D.N.Y. July 15, 2004).

dilute creditors' recoveries.<sup>175</sup> Additionally, parties relied on debtor-unity, and creditors objecting to substantive consolidation adduced no evidence showing their reliance on separateness.<sup>176</sup> The *Enron* Court concluded that substantive consolidation under the plan was appropriate, and did not "discriminate unfairly," but rather was "fair and equitable" in accordance with § 1129(b).<sup>177</sup>

The *Charter Communications* Court, facing what it described as "perhaps the largest and most complex prearranged bankruptcies ever attempted," opted for a per-plan approach in a jointly administered proceeding.<sup>178</sup> The court determined that the proposed plan complied with §§ 1129(a)(3), (a)(7), (a)(10), and (b).<sup>179</sup> The court thereafter rejected the objecting creditors' argument that the plan was the "functional equivalent of substantive consolidation."<sup>180</sup> The court reasoned that the objecting creditors were "receiving significant consideration under the [p]lan that is greater than what such creditors would receive if Charter were liquidated," which along with satisfying § 1129(a)(7), inadvertently complies with *Owens Corning's* principle that substantive consolidation be used to remedy identifiable harms that entangled affairs caused while not adversely affecting objecting creditors that relied on entity separateness.<sup>181</sup>

Therefore, courts may treat § 1129(a)(10) as a technical requirement and apply a per-plan approach, irrespective of whether the proceeding involves one debtor or multiple, while adhering to *Owens Corning's* guiding principles regarding substantive consolidation.

## V. CONCLUSION

Section 1129(a)(10) has been the source of split interpretations in jointly administered proceedings involving multiple debtors. Although the *Tribune* Court read this Section to require that before confirming a plan, *each* debtor obtain approval from an impaired class (per-debtor), the proper interpretation enables *any* debtor obtaining approval from an impaired class to satisfy the Section's requirement for all debtors involved (per-plan). The per-plan approach is chiefly founded in the Section's plain language, even when pluralized using the Code's rule of construction § 102(7). Courts should resolve unfair distribution schemes, such as those resulting in "de facto" substantive consolidation, through objections based

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<sup>175</sup> *Id.* at \*89–92, 134–36.

<sup>176</sup> *Id.* at \*89–90.

<sup>177</sup> *Id.* at \*149, 239–44.

<sup>178</sup> *In re Charter Commc'ns.*, 419 B.R. 221, 230 (Bankr. S.D.N.Y. 2009).

<sup>179</sup> *See generally id.* at 260–269.

<sup>180</sup> *Id.* at 269.

<sup>181</sup> *Id.* at 271.

on a plan's details, and not a particular statutory interpretation. Accordingly, this will allow courts to properly reconcile the per-plan approach to § 1129(a)(10) with substantive consolidation principles mandated in *Owens Corning*.