GET OUT THE VOTE: RECONCILING THE TREATMENT OF NONVOTING CREDITOR CLASSES IN CHAPTER 11 BANKRUPTCY CASES

by

Theresa J. Pulley Radwan*

Introduction

Chapter 11 of the Bankruptcy Code[1] (the "Code") serves as a means for businesses to reorganize their affairs through a plan of reorganization. That plan of reorganization, once confirmed, becomes a binding contract defining whether and how to pay creditors post-bankruptcy.[2] Unlike some other chapters of the Code,[3] chapter 11 allows creditors to express their approval or disapproval of potential reorganization plans through a voting process.[4] The Code provides that creditors vote in groups, known as "classes,"[5] and determines whether a class accepts or rejects[6] the proposed plan based on the percentage of class members voting in favor of the plan.[7]

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[1] 11 U.S.C. §§ 1101–1195.

[2] *Id.* § 1141(a).

[3] *See id.* §§ 941–944, 1221–1225, 1321–1325 (outlining plan process in chapters 9, 12, and 13, in which primary input from creditors comes from potential objections to confirmation of plan rather than voting process). Chapter 11 cases also differ from these other chapters by allowing plans proposed by parties other than the debtor. *Cf. id.* § 1121 with *id.* §§ 941, 1221, 1321.

[4] *Id.* § 1126(a) ("The holder of a claim or interest . . . may accept or reject a plan.").

[5] *Id.* § 1123(a)(1) (requiring that the plan provide classification of claims).

[6] Though some courts discuss class rejection of a plan, one bankruptcy court recently challenged that notion, indicating that while an individual creditor may "reject" the plan, classes of creditors only accept or not accept the plan. *In re* Sushi Zushi of Texas, LLC, No. 24-51147-MMP, 2025 WL 957792 (Bankr. W.D. Tex. Mar. 28, 2025).

[7] 11 U.S.C. § 1126 (indicating the process for acceptance of a plan by individual creditors, as well as the calculation of acceptance by a class of creditors).

To ensure some level of creditor support, the Code also requires that at least one "impaired"[8] class of creditors vote in favor of the plan.[9] The Code further protects dissenting creditors by requiring that if any impaired classes vote against the plan, the plan must meet additional fairness requirements for confirmation through a process known as "cramdown."[10] Together, these requirements ensure some level of support from creditors for the reorganization plan and protections for those creditors not in favor of the plan without allowing a single holdout creditor to undermine the prospect of a successful reorganization.

Though any impaired creditor may vote on the reorganization plan,[11] not all creditors exercise that right. The Code anticipates a potential nonvoting creditor and specifies how the failure of a creditor to vote impacts the determination of whether that creditor's class accepts or rejects a plan.[12] It does not consider, however, how to handle a nonvoting *class*—one in which *no* creditors within the class submit an acceptance or rejection of the plan. For decades, case law has disagreed on how to handle these nonvoting classes.[13] The addition of subchapter V bankruptcy cases, a subset of chapter 11 reorganizations focused on small businesses, has reinvigorated the debate. Though still early in the reincarnation of this issue, courts have been less likely to follow the majority rule established for traditional chapter 11 reorganizations, highlighting some of the statutory interpretation and policy concerns arising from prior case law. This article reconsiders that prior case law, proposing a consistent interpretation for each of the traditional chapter 11 reorganization cases and the subchapter V reorganization cases that honors the policy concerns of reorganizations and recognizes Congress's reasons for

[8] *Id.* § 1124 (defining impaired claims).

[9] *Id.* § 1129(a)(10).

[10] *Id.* § 1129(b)(1). U.S. Dep't of Just. Exec. Off. for U.S. Trustees, *Handbook for Small Business Chapter 11 Subchapter V Trustees* at 1–3, 3–10, 3–11 (2020) (noting that nonconsensual reorganization plans are known as "cramdowns").

[11] 11 U.S.C. § 1126(a) ("The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan."). Note that claims that are not impaired are automatically deemed to accept the plan, *id.* § 1126(f) and that claims that are paid nothing are automatically deemed to reject the plan, *id.* § 1126(g). In addition, some creditors may have their votes "designated" as being made not in good faith. *Id.* § 1126(e) ("[T]he court may designate any entity whose acceptance or rejection of such plan was not in good faith"). A designated vote is not counted when determining acceptance of a plan. DISH Network Corp. v. DBSD N. Am., Inc. (*In re* DBSD N. Am., Inc.), 634 F.3d 79, 101 (2d Cir. 2011).

[12] 11 U.S.C. § 1126(c) (specifying that calculation includes only those creditors actually submitting a vote on the plan).

[13] *See infra* Part IV.

adding statutory guidance on nonvoting creditors when adopting the current Code.

I. History of Bankruptcy Reorganizations

Modern-day chapter 11 came into existence with the 1978 adoption of the Code, a replacement for the Bankruptcy Act adopted nearly a century earlier.[14] Drafters of the Code combined several chapters of the previous Bankruptcy Act to create one business-focused reorganization chapter.[15] As the House Report noted, "[t]he purpose of the reorganization or arrangement case is to formulate and have confirmed a plan of reorganization or arrangement for the debtor."[16] The reorganization process should involve negotiation between the debtor and creditors to create the eventual plan of reorganization:

> In addition to certain other requirements, the Bankruptcy [Code][17] requires that the plan be accepted by a certain percentage of affected creditors and stockholders before it may be confirmed and put in operation. The consent requirement necessitates negotiation among management, creditors and stockholders. Negotiation is usually accomplished through committees. The result of the negotiations, the plan, is sent to all affected creditors and stockholders for consent. If they agree, and if all of the other requirements of the law are met, the court confirms the plan, and the debtor comes out of the case as a

[14] Bankruptcy Act of 1898, Pub. L. No. 55-541, 30 Stat. 544; Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; *see also The Evolution of U.S. Bankruptcy Law—a time line*, FED. JUD. CTR., https://www.fjc.gov/content/323917/evolution-us-bankruptcy-law-time-line.

[15] Bankruptcy Reform Act of 1978, Pub. L. 95-598, 1978 U.S.C.C.A.N. 5963, 5966, 6181 (noting that "[t]he Bankruptcy Act now contains four chapters for commercial reorganizations" and that "[t]he bill consolidates all four chapters into one business reorganization chapter"); Arthur L. Moller & David B. Foltz, Jr., *Chapter 11 of the 1978 Bankruptcy Code*, 58 N.C. L. REV. 881 (1980) (noting combination of former chapters VIII (railroads), X (large businesses), XI (small businesses), and XII (real estate)). One reason for consolidation was the frequently litigated challenge of determining whether a debtor belonged in a chapter X reorganization proceeding designed for larger businesses or a chapter XI small-business proceeding. H.R. Rep. 95-595 (1977), 1978 U.S.C.C.A.N. 6212; Moller & Foltz, *Chapter 11 of the 1978 Bankruptcy Code*, 58 N.C. L. REV. 881, 882–84. While multiple reorganization chapters existed under the Bankruptcy Act, "Chapter XI [ ] evolved into the dominant reorganization vehicle." H.R. Rep. 95-595, 1978 U.S.C.C.A.N. 6211.

[16] H.R. Rep. 95-595, 1978 U.S.C.C.A.N. 6180.

[17] The original indicates the "Act" but refers to the legislation that became the current Code, not to the previous Bankruptcy Act of 1898. *Id.*, referring to Pub. L. 95-598, 1978 U.S.C.C.A.N. 5963.

reorganized company.[18]

The new Code focused on ensuring a quick and relatively efficient reorganization process, recognizing that delay often doomed the reorganization attempt to failure.[19] Several provisions of the new Code provided additional protections for creditors not found in the Bankruptcy Act, including modifying how to determine creditor acceptance of a plan, a key component in the nonvoting class issue.[20]

Congress added subchapter V to the Code in 2019 as part of the Small Business Reorganization Act,[21] with a goal to "streamline the bankruptcy process" for small businesses.[22] When creating subchapter V, Congress expressed concern that small businesses use the chapter 11 process more frequently than larger businesses, but do not enjoy the same success rate as their larger counterparts.[23] Further, creditors often fail to participate in small business cases given their relatively small claims when compared to those in larger chapter 11 cases.[24]

The Small Business Reorganization Act was not the first time that Congress focused on small business bankruptcy filings. More than a decade before the creation of subchapter V, Congress introduced different reforms to the bankruptcy process for small businesses. These reforms primarily tightened the chapter 11 timeline and other requirements for small business cases in order to "weed out small business debtors who are not likely to [successfully] reorganize."[25] Despite those reforms, small businesses often continued to fail to reach successful resolutions in traditional chapter 11 cases.[26] Subchapter V reforms focused on ways to reduce the costs and administrative burdens of a bankruptcy case to enhance the likelihood of a successful reorganization for small businesses,[27] including:

- appointment of a trustee in every small business case to "monitor the debtor's progress toward confirmation" [28] (while continuing to allow a

[18] *Id.*, 1978 U.S.C.C.A.N. 6180.

[19] *Id.*, 1978 U.S.C.C.A.N. 6182 ("[M]ore often than not, speed in the reorganization attempt is more important to success than the scope of the reorganization.").

[20] *See infra* Part II.

[21] Small Business Reorganization Act, 133 Stat. 1079 (2019).

[22] Remarks from Committee on the Judiciary, Small Business Reorganization Act of 2019 (Purpose and Summary), available at https://www.congress.gov/congressional-report/116th-congress/house-report/171/1.

[23] *Id.* (Background).

[24] *Id.*

[25] *Id.* (citing H.R. Rep. No. 109-31, at 19 (2005)).

[26] *Id.* (Need for the Legislation).

[27] *Id.*

[28] *Id.*; 11 U.S.C. § 1183.

debtor-in-possession[29]);

- mandating an initial status conference "to further the expeditious and economical resolution" of the bankruptcy case;[30]
- eliminating creditor acceptance requirements in a cramdown proceeding;[31] and
- limiting the filing of a proposed plan of reorganization to the debtor.[32]

II. Determining Class Acceptance of the Plan

Achieving a confirmed reorganization plan requires several steps, beginning with the proposal of the plan[33] and the filing of a disclosure statement with the court.[34] The plan and the disclosure statement then go to claim holders for voting purposes;[35] the plan proponent (typically the debtor)[36] solicits, collects, and tabulates the votes to determine whether the creditors "accept" the plan.[37] Assuming that enough creditors approve of the plan to pass the acceptance stage, the plan moves to final confirmation.[38]

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[29] 11 U.S.C. § 1184.

[30] Remarks from Committee on the Judiciary, Small Business Reorganization Act of 2019 (Section-by-Section Analysis), available at https://www.congress.gov/congressional-report/116th-congress/house-report/171/1; 11 U.S.C. § 1188.

[31] Remarks from Committee on the Judiciary, Small Business Reorganization Act of 2019 (Need for the Legislation), available at https://www.congress.gov/congressional-report/116th-congress/house-report/171/1.

[32] *Id.* (Section-by-Section Analysis); 11 U.S.C. § 1189.

[33] The debtor may file a plan at the commencement of the case, or while the case is pending. 11 U.S.C. § 1121(a). Others may file competing plans if the debtor fails to file or confirm a plan within the first 4–6 months of the bankruptcy case. *Id.* § 1121(c)–(d). In some cases, the debtor works with creditors prior to the bankruptcy filing to create a plan that will be filed with the bankruptcy case, known as a "prepackaged" plan. Sarah Paterson & Adrian Walters, *Chapter 11's Inclusivity Problem*, 55 ARIZ. ST. L. J. 1227, 1256 (Winter 2023). This allows a debtor to hasten the acceptance process, even permitting the debtor to solicit votes in favor of the proposed plan prior to the bankruptcy filing. 11 U.S.C. § 1126(b) (noting that claimholders who accept or reject the plan prior to the bankruptcy filing are deemed to accept or reject the plan proposed during the bankruptcy case).

[34] The Court must approve the disclosure statement as containing adequate information and sufficiently reflecting the plan contents. 11 U.S.C. § 1125(a)(1), (b) (requiring "adequate information" in disclosure statement to allow voting creditors to make an informed decision).

[35] *Id.* § 1126(b).

[36] While other parties in interest may propose reorganization plans under *Id.* § 1121(c)–(d), for purposes of this article it will be presumed that the debtor filed the plan of reorganization.

[37] *Id.* § 1125(b) (disclosure and solicitation); *id.* § 1126(c) (tabulation of votes).

[38] *Id.* § 1129(a)(8), (10) (noting the requirements of acceptance to confirm a plan).

Acceptance of the plan dictates whether the plan can move into the confirmation stage, *and* what must be proven in that stage for the court to enter a confirmation order.[39] Once confirmed and effective, the plan becomes a binding post-bankruptcy contract between each creditor and the debtor.[40]

Voting on the plan constitutes the most significant role for the majority of creditors in a chapter 11 case. The voting process ensures creditors a voice in how the debtor will reorganize. Creditors[41] have the right to vote on any proposed plan of reorganization[42] if they hold an allowed[43] impaired[44] claim in the bankruptcy case. Although every such creditor has a right to vote, the tabulation of votes to determine creditor acceptance of the plan occurs through voting "classes" set up in the reorganization plan. This class-based voting system generally prevents a single dissenting creditor from impeding confirmation of the plan.[45]

A plan must group claims into classes,[46] and the Code requires that claims placed into the same class qualify as "substantially similar."[47] Secured

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[39] *Id.* §§ 1128(a), 1129.

[40] *Id.* § 1141(a).

[41] Creditors include any "entity" with a prepetition "claim against the debtor." *Id.* § 101(10). A claim includes a "right to payment" or a "right to an equitable remedy for breach of performance. . . ." *Id.* § 101(5).

[42] *Id.* § 1126(a) (allowing, but not requiring, vote by claimants). While creditors generally have a right to vote, there are situations in which a claim cannot be voted. *See id.* § 1126(f)–(g) (providing that creditors with unimpaired claims automatically accept the plan and creditors paid nothing under the plan automatically reject the plan); *id.* § 1126(e) (allowing court to "designate" and disallow the vote of a claimant as not being made in good faith).

[43] *See id.* § 502(b) (providing grounds for disallowance of claims).

[44] *See id.* § 1124 (claims impaired unless creditor's rights under plan are "unaltered" and, if subject to prepetition default, cures the default with specified compensation for loss).

[45] Individual dissenting creditors receive other protections in chapter 11 plans, such as protection through the "best interest" test of § 1129(a)(7)(A). *See* Thomas J. Salerno, *The Impact of Potential Avoidance Actions on the "Best Interests of Creditors Test" in Contested Plan Confirmation*, 16 AM. BANKR. INST. J. 32 (Sept. 1997).

[46] 11 U.S.C. § 1123(a) ("[A] plan shall . . . designate . . . classes of claims . . . ."). The debtor enjoys significant discretion as to the makeup of those classes. *In re* Holywell Corp., 913 F.2d 873, 880 (11th Cir. 1990) (citing Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co., 800 F.2d 581, 586 (6th Cir. 1986)).

[47] 11 U.S.C. § 1122(a). *But see id.* § 1122(b) (allowing small unsecured claims to be grouped together regardless of similarity "for administrative convenience"). While the Code does not dictate how to define "substantially similar" claims, courts have looked to such factors as "the kind, species, or character of each category of claims." Wells Fargo Bank, N.A. v. Loop 76, LLC (*In re* Loop 76, LLC), 465 B.R. 525, 536 (9th Cir. BAP 2012) (citing Steelcase Inc. v. Johnston (*In re* Johnston), 21 F.3d 323, 327 (9th Cir. 1994)). Courts have

claims generally fall into their own classes.[48] As a result, secured creditors inherently control their class's acceptance or rejection of proposed plans of reorganization.[49]

How the voting within a class impacts acceptance of the plan changed with adoption of the Code. Although the Bankruptcy Act also granted creditors a right to vote on the plan, the Code modified the required number and percentage of claims that must vote in favor of a plan to constitute acceptance by a "class" of creditors.[50] It also provided that creditors within a class who fail to cast a vote would simply not count in the calculation of class acceptance by requiring a designated percentage of *voting* creditors to approve of the plan for class acceptance.[51] The Bankruptcy Act, by contrast, required a designated percentage of *all* creditors in the class for the class to approve of the plan.[52]

Among those claims voted, a class accepts the plan if at least two-thirds of the *value* and more than half of the *number* of voting claims within the class vote in favor of the plan.[53] For example, assume one class includes six claims and creditors holding those claims vote as follows:

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also considered whether the claims "are similar in legal nature or character." *In re* Dow Corning Corp., 244 B.R. 634, 655 (Bankr. E.D. Mich. 1999).

[48] Bruce H. White & William L. Medford, *Consensual Plans with Non-voting Classes*, 21 AM. BANKR. INST. J. 28, 28 (Mar. 2002). Secured creditors necessarily differ from other claims because they possess a right to collateral to support their claims. Even creditors with interests in the same collateral vary due to different state-law priorities in the collateral that secures their claims. FGH Realty Credit Corp. v. Newark Airport/Hotel Ltd. P'ship, 155 B.R. 93, 99 (D.N.J. 1993) ("Secured claims . . . are not substantially similar to unsecured claims. Moreover, each secured claim is generally not substantially similar to other secured claims.") (citing *In re* Holthoff, 58 B.R. 216, 219 (Bankr. E.D. Ark. 1985)); *see also* 5 COLLIER ON BANKRUPTCY ¶1122.03 (Lawrence P. King et al., eds.15th ed. 1992).

[49] White & Medford, *supra* note 48, at 28.

[50] Moller & Foltz, *supra* note 15, at 920.

[51] 11 U.S.C. § 1126(c) ("A class . . . 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 . . . that have accepted or rejected such plan.").

[52] Heins v. Ruti-Sweetwater, Inc. (*In re* Ruti-Sweetwater, Inc.), 836 F.2d 1263, 1267 (10th Cir. 1988) (citing H.R. Rep. No. 95-595 (1977)); Moller & Foltz, *supra* note 15, at 916, 920; Stephen W. Sather & Barbara M. Barron, *Voting and the Apathetic Creditor*, 39 AM. BANKR. INST. J. 12, 12 (Dec. 2020); *In re* Townco Realty, Inc., 81 B.R. 707, 708 (Bankr. S.D. Fla. 1987).

[53] 11 U.S.C. § 1126(c) (phrasing value as "amount" of claim).

Creditor	Value of claim	Vote
A	$100,000	Reject
B	$40,000	Accept
C	$40,000	Accept
D	$30,000	Accept
E	$100,000	No vote submitted
F	$20,000	No vote submitted

In this case, four claimants voted, and those four claimants hold a total of $210,000 in claims. The two nonvoting claimants are simply disregarded for purposes of calculating class acceptance. Of the four voting creditors, three of them (75%) in number voted in favor of the plan, and those three creditors hold $110,000 (52.4%) in value of the total claims of the voting creditors. Unfortunately, the class does not accept the plan because the class failed to secure the value of acceptances (2/3) necessary to meet the acceptance threshold. If, however, Creditors E and F also voted, and voted in favor of the plan, the class would accept the plan because five of six (83.3%) creditors and $230,000 of the total $330,000 (70%) in value of the claims voted to approve the plan.

III. The Impact of the Voting Process on Plan Confirmation

Class acceptance or rejection of a plan dictates whether and how a plan moves to confirmation. Section 1129(a)(10) requires that at least one impaired class accept the plan for it to move to confirmation.[54] Section 1129(a)(8) also requires that *every* impaired class accept the plan before it can move to confirmation,[55] but the Code then provides an ability to confirm a plan *without* the acceptance of every impaired class through its "cramdown" provision.[56] The

[54] 11 U.S.C. § 1129(a)(10); *see also* 4 Norton Bankr. Law & Prac. § 112:27, *Acceptance by One Class* (3d ed. 2024) ("As Code § 1129(a)(10) was originally drafted, a question arose as to whether an unimpaired class that was deemed to accept could provide the requisite acceptance. The 1984 Amendments, however, made clear that if any class of claims is impaired, at least one impaired class must accept.") (citing *In re* Barrington Oaks Gen. P'ship, 15 B.R. 952 (Bankr. D. Utah 1981)).

[55] 11 U.S.C. § 1129(a)(8); *see also* 4 Norton Bankr. Law & Prac. § 112:15, *Consensual Plan* (3d ed. 2024) ("The real significance of Code § 1129(a)(8) is to make it clear that the unfair discrimination and fair and equitable requirements of a cram down under Code § 1129(b) do not apply to consenting classes.") (citing S. Rep. No. 989, 95th Cong. 2nd Sess. 126, 127 (1978)).

[56] 11 U.S.C. § 1129(b)(1). Under subsection (b)(1), the plan can be confirmed in cramdown if it "does not discriminate unfairly" and "is fair and equitable" to impaired,

result of these provisions means that:

- if no impaired class accepts the plan, the court cannot confirm the plan;
- if some, but not all, impaired classes accept the plan, the court can only confirm the plan in a cramdown situation;
- if all impaired classes accept the plan (known as a "consensual" reorganization), the court may confirm the plan without the need to consider the additional cramdown requirements.

A. Subchapter V Cases

Although the subchapter V voting and acceptance processes largely mirror that of a traditional chapter 11 case,[57] a few notable differences exist in the subchapter V context. Most importantly, while § 1191 envisions that plans either be consensual[58] or that the plan be "fair and equitable"[59] in a cramdown proceeding, the § 1129(a)(10) mandate that at least one impaired class accept the plan does not apply in subchapter V cramdown proceedings.[60] Section 1191(a) requires meeting the requirements of both § 1129(a)(8) and § 1129(a)(10) for a consensual plan.[61] But in the subchapter V cramdown context, the debtor need not satisfy *either* § 1129(a)(8) or § 1129(a)(10).[62] Cramdown may occur despite

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rejecting classes of claims. *Id.* § 1129(b)(1). Fair and equitable treatment is defined for each type of creditor. *Id.* § 1129(b)(2) (noting that secured creditors must retain their liens and be paid the value of their claims or receive the collateral supporting their claims or receive the "indubitable equivalent", and that unsecured creditors must receive the full amount of their claim or that no lesser-priority creditors be paid). The metaphoric term "cramdown" has been used for decades to refer to the ability to force dissenting creditors into a plan in any chapter upon proof of the fairness standards. *See In re* Powell, 15 B.R. 465, 474 (Bankr. N.D. Ga. 1981) (noting that cramdown "provision allows the Debtor to 'cram' the Debtor's plan down the throat of a rejecting . . . creditor"); *In re* Mallard Assoc., 8 B.R. 820, 824 (Bankr. S.D.N.Y. 1981) ("We must now consider whether [debtor], may . . . unappetizingly 'cram' its plan down [creditor's] apparently unreceptive throat.") (both applying Bankruptcy Act); *see also* Aaron J. Bell, *Making Cramdown Palatable: Post-Confirmation Interest on Secured Claims in a Chapter 11 Cramdown*, 23 WILLAMETTE L. REV. 405, 406 n.5 (1987) (noting that term "cramdown" appears in legislative history of the Code).

[57] 11 U.S.C. § 1181 (providing that § 1126 applies in subchapter V cases).

[58] *Cf. id.* § 1129(a)(8).

[59] *Id.* § 1191(a). *Cf.* 11 U.S.C. § 1129(b).

[60] *See id.* § 1191(b).

[61] *Id.* § 1191(a) ("The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met.").

[62] 11 U.S.C. § 1191(b) (allowing confirmation "if all of the applicable requirements of section 1129(a) of this title, *other than paragraphs (8), (10), and (15)* of that section, are met" (emphasis added) and the plan meets the "fair and equitable" standard).

no accepting class of creditors, leaving the possibilities as:

- if no impaired class accepts the plan, the court can only confirm the plan in a cramdown situation;
- if some, but not all, impaired classes accept the plan, the court can only confirm the plan in a cramdown situation;
- if all impaired classes accept the plan (as a consensual reorganization), the court may confirm the plan without the need to consider the additional cramdown requirements.

But what happens when one class fails to vote? Assume that one impaired class affirmatively accepted the plan, and the only other impaired class failed to vote. If the nonvoting class serves as an accepting class, all impaired classes accept the plan, and confirmation occurs without the need for cramdown. But if the nonvoting class serves as a rejecting class, some but not all impaired classes accept, and confirmation requires cramdown. Though the Code indicates how to handle the failure of a single creditor (within a multi-creditor class) to cast a vote regarding a plan, it fails to mention how to determine whether a class accepts or rejects the plan when *no* creditor within the class votes.[63]

B. The Importance of Consensual Reorganization Versus Cramdown

The chapter 11 cramdown process requires that the debtor meet additional requirements, found in § 1129(b) of the Code:

> [I]f all of the applicable requirements . . . other than paragraph (8) are met with respect to a plan, the court . . . shall confirm the plan . . . 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.[64]

The Code continues by defining "fair and equitable" based on the type of creditor. For secured creditors, the plan generally must provide that creditors remain secured by the collateral until paid the full value of their claim.[65] If the plan can be confirmed as consensual, debtors can avoid this requirement.

For unsecured creditors, cramdown requires that no junior claimant receives payment if a more senior claimant is not paid in full—a concept known

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[63] *In re* Augusto's Cuisine Corp., No. 15-09390 (ESL), 2017 WL 1169537, at *6 (Bankr. D.P.R. Mar. 28, 2017) (considering whether failure to vote by lone creditor within class could be dissenting class that leads to requirement of cramdown to confirm plan).

[64] 11 U.S.C. § 1129(b)(1).

[65] *Id.* § 1129(b)(2)(A)(i). The Code provides two other alternatives for secured creditors. If the collateral is sold, the creditors' liens attach to the proceeds received from the sale. *Id.* § 1129(b)(2)(A)(ii). The Code also allows for the "indubitable equivalent" of retention of the lien or transfer of the lien to the proceeds of sale. *Id.* § 1129(b)(2)(A)(iii).

as the "Absolute Priority Rule."[66] As a result, general unsecured creditors cannot receive payment if priority claims are not paid in full, and subordinated interests—such as equity—cannot receive payment if unsecured creditors are not paid in full.[67] The Absolute Priority Rule can pose a difficult hurdle for debtors seeking to confirm a plan, [68] and is one of the primary reasons why debtors seek consensual confirmation of a plan. In addition, because the Absolute Priority Rule only applies to classes of creditors that *reject* a plan, the determination of acceptance or rejection of a plan determines the ability of a creditor within a class to challenge confirmation in a cramdown proceeding based on the Absolute Priority Rule.[69]

Achieving consensual confirmation also speeds up the bankruptcy process, as well as the ability of some debtors to receive a discharge of debts.[70] Fewer objections to confirmation should be raised and the burden on the court is reduced due to fewer confirmation requirements.[71] In a traditional chapter 11 case, the court grants the debtor's discharge (for individual debtors) at the time of confirmation; thus, a quicker confirmation leads to a quicker discharge.[72] In a subchapter V case, only *consensual* plans allow for discharge upon confirmation—a cramdown discharge is delayed not because the confirmation process takes longer but because the Code delays the entry of a discharge until

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[66] *Id.* § 1129(b)(2)(B)(ii). The Code does not require meeting the absolute priority rule if claims are paid in full. *Id.* § 1129(b)(2)(B)(i). The absolute priority rule extends to any interests, not just creditors. *Id.* § 1129(b)(2)(C).

[67] Bank of America Nat'l Trust v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 444 (1999).

[68] *See, e.g.*, Jessica R. Ellis, *The Absolute Priority Rule for Individual After Maharaj, Lively, and Stephens: Negotiations or Game Over?*, 55 ARIZ. L. REV. 1141, 1166 (2013) (discussing impact of absolute priority rule in individual chapter 11 cases) (citing *In re* Shat, 424 B.R. 854 (Bankr. D. Nev. 2010)).

[69] DISH Network v. DBSD N. Am., Inc (*In re* DBSD N. Am., Inc.), 634 F.3d 79, 95 (2nd Cir. 2011) ("[A] confirmable plan must ensure either (i) that the *dissenting* class receives the full value of its claim, or (ii) that no classes junior to *that* class receive any property under the plan . . . .") (emphasis added).

[70] Law Office of Christopher P. Walker, *Strategies for Reorganization in a Chapter 11 Bankruptcy*, https://www.cpwalkerlaw.com/blog/strategies-for-reorganization-in-a-chapter-11-bankruptcy/ (last accessed May 23, 2025) (noting that consensual reorganization is "the least expensive and time consuming method").

[71] A consensual plan needs only to meet the sixteen requirements of § 1129(a), while a cramdown plan includes the additional requirements of § 1129(b). 11 U.S.C. § 1129.

[72] *Id.* § 1141(d); *see also* Ashley D. Champion & Nathan Juster, *Drafting Around the Problem of the Nonparticipating Class in Subchapter V*, 44 AM. BANKR. INST. J. 14, 15 (Oct. 2025) (noting ability to expedite discharge by having debtor make a "single lump-sum payment of debtor's projected disposable income" to avoid possible consequences of nonvoting creditor classes).

debtor has made payments under the plan for three years.[73]

The means of confirmation has other implications specific to subchapter V cases. Confirmation presumptively ends the service—and expense—of the subchapter V trustee.[74] After confirmation, whether and how a debtor may modify the plan also depends on whether the plan confirmed consensually or through cramdown. In a consensual subchapter V case,[75] the debtor may modify the plan any time post-confirmation and before "substantial consummation" of the plan regardless of the type of confirmation.[76] But in a subchapter V cramdown confirmation, the debtor may modify the plan during the three years post-confirmation.[77]

These consequences highlight the importance of determining whether a plan can be confirmed as consensual, may only be confirmed through the cramdown process, or cannot be confirmed at all.

IV. Case Law Regarding Nonvoting Classes

A. Early Cases Involving Traditional Chapter 11 Reorganizations

Courts considering how to handle nonvoting classes in the acceptance process often look to the first Circuit Court decision to address the issue, *Ruti-Sweetwater*.[78] *Ruti-Sweetwater* involved the chapter 11 reorganization of eight affiliated debtors,[79] with a reorganization plan including more than 100 classes

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[73] 11 U.S.C. § 1192. This provision does provide some discretion to the bankruptcy court to modify the timeline for discharge. *Id.* (providing that the court may extend the payment period up to 5 years).

[74] *Id.* § 1183(c); *see also* Michael J. Riela, *Plan Confirmation Requirements in a Subchapter V Chapter 11 Case under the SBRA*, WESTLAW PRACTICAL LAW, https://dl.icdst.org/pdfs/files4/5ca7fd00b2c4e870c5093fe013002921.pdf (last accessed May 23, 2025); Champion & Juster, *Drafting Around the Problem*, *supra* note 72, at 76 (suggesting early termination of subchapter V trustee in order to lessen consequences of nonvoting creditor class). Trustees receive payment per the provisions of the United States Code. U.S. Dep't of Just., Exec. Off. for U.S. Trustees, *Handbook for Small Business Chapter 11 Subchapter V Trustees*, at 3–21 (2020) ("The statutory basis of Subchapter V trustee compensation is 11 U.S.C. § 330 for case-by-case trustees and 28 U.S.C. § 586(e) for standing trustees."); Cameron Murray, *Compensation of the Nonstanding Subchapter V Trustee*, 41 AM. BANKR. INST. J. 60 (2022).

[75] The same rule applies in any chapter 11 case. 11 U.S.C. § 1127(b).

[76] *Id.* §§ 1127(b), 1193(b).

[77] *Id.* § 1193(c). As with the discharge provision, the bankruptcy court can modify the confirmation period. *Id.*; *see also* 11 U.S.C. § 1192.

[78] *In re* Ruti-Sweetwater, Inc., 836 F.2d 1263 (10th Cir. 1988).

[79] *Id.* at 1263.

of creditors.[80] Twenty of the classes, each consisting of a single secured creditor, failed to vote. [81] During the confirmation hearing, the bankruptcy court treated the nonvoting classes as having accepted the plan and confirmed the plan of reorganization as consensual.[82] After confirmation, one secured creditor from a single-creditor, nonvoting class, brought an action seeking to undo the plan confirmation.[83] The bankruptcy court, district court, and Court of Appeals for the Tenth Circuit agreed that the nonvoting classes should count as acceptances for plan confirmation purposes.[84] The Tenth Circuit focused on the need for creditors to take an affirmative role in protecting their own interests:

> To hold [that a nonvoting class constitutes rejection] would be to endorse the proposition that a creditor may sit idly by, not participate in any manner in the formulation and adoption of a plan in reorganization and thereafter, subsequent to the adoption of the plan, raise a challenge to the plan for the first time. Adoption of [this] approach would effectively place all reorganization plans at risk in terms of reliance and finality.[85]

The Tenth Circuit also considered the historical context surrounding § 1126's voting provisions, particularly noting that, while the Bankruptcy Act specifically deemed a failure to vote a rejection of the plan, the modern Bankruptcy Code simply ignores a nonvoting creditor for purposes of determining whether a class accepts a plan.[86] In order to incentivize creditor participation in the plan process, and in recognition of the changes in the Code, the Tenth Circuit declined to allow the nonvoting creditor to bring forth its post-confirmation objection to the plan.[87] *Ruti-Sweetwater* received quick and widespread criticism,[88] such as this critique from a bankruptcy court:

> The Tenth Circuit's ruling in *Ruti-Sweetwater* is clearly a case of

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[80] *Id.* at 1264.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1264–65.

[84] *Id.* at 1264–66.

[85] *Id.* at 1266–67 (also noting that "[a]doption of the Heins' approach would relieve creditors from taking an active role in protecting their claims").

[86] *Id.* at 1265–67 (quoting Heins v. Ruti-Sweetwater (*In re* Ruti-Sweetwater, Inc.), 57 B.R. 748, 750 (D. Utah 1985)).

[87] *Id.* at 1267.

[88] One article agreed with the result, but not with the path to that result, suggesting that the court "could have reached its result without finding a deemed acceptance" by instead holding that a nonvoting creditor "consents by acquiescence and waives the objection." White & Medford, *supra* note 48, at 29; *see also Ruti-Sweetwater*, 836 F.2d at 1267–68 (noting that "Heins' inaction constituted an acceptance" of the plan, and that the creditor's failure "to object to the Plan . . . waived their right to challenge the Plan").

> the tail wagging the dog. The plan proposed in *Ruti-Sweetwater* was complicated and dealt with hundreds of claims and millions of dollars. The Court wanted the confirmation of this complicated Chapter 11 plan to stand. This result oriented approach is evident throughout the opinion. . . . [T]he Court was more concerned with confirming this plan than with an accurate reading of the Code.[89]

Ruti-Sweetwater and cases following its approach are often known as "deemed acceptance" cases because they treat nonvoting classes in the same way as if they had affirmatively accepted the plan.

One year after the *Ruti-Sweetwater* decision, the Ninth Circuit Bankruptcy Appellate Panel (the "BAP") took the opposite approach on a nonvoting class in *M. Long Arabians*.[90] The challenging creditor held the only claim in its secured-claim class. While the creditor filed a proof of claim, the debtor objected to that creditor's claim.[91] A challenged claim is presumptively disallowed,[92] and disallowed claims cannot vote on the plan absent permission of the bankruptcy court.[93] The creditor did not make such a request. Because the creditor could not vote and stood alone in the class, the class had no votes.[94] The Ninth Circuit BAP expressly rejected *Ruti-Sweetwater*'s implication that the failure of a class to vote qualifies as acceptance of the plan by that class.[95] Rather, "[t]he holder of a claim must affirmatively accept the plan" in order to deem it an acceptance.[96] Because the class did not accept the plan, the debtor failed to meet the requirement of § 1129(a)(8) that all classes accept the plan, and

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[89] *In re* Higgins Slacks Co., 178 B.R. 853, 856 (Bankr. N.D. Ala. 1995) (requiring cramdown anyway because one class affirmatively rejected plan).

[90] Bell Rd. Investment Co. v. M. Long Arabians (*In re* M. Long Arabians), 103 B.R. 211 (B.A.P. 9th Cir. 1989).

[91] *Id.* at 215. One court opted for deemed rejection of a plan, noting a concern that without such a rule debtors might object to claims of potential dissenting creditors to discount their vote. *See In re* Remington Forest, No. CIV.A. 95-76069, 1996 WL 33340744, at *9 (Bankr. D.S.C. June 18, 1996) (citing *In re* Goldstein, 114 B.R. 432 (Bankr. E.D. Pa. 1990)).

[92] 11 U.S.C. § 502(a) (providing that filed claims are presumptively allowed absent objection).

[93] *Id.* § 1126(a) (providing that claims must be "allowed under section 502" to vote).

[94] *M. Long Arabians*, 103 B.R. at 215. The creditor was under-secured, and the deficiency claim fell into an unsecured creditor class. In that class, all voting creditors approved of the plan. While the creditor tried to vote to reject the plan, the Court determined that the creditor's vote did not count and, thus, that class accepted the plan. Because the deficiency claim of the creditor constituted almost half of the total claim value within the class, had the creditor been able to vote to reject the plan, the class would not have accepted the plan. *Id.*

[95] *Id.*

[96] *Id.* at 216 (citing § 1126(c)).

confirmation required that the debtor also meet the cramdown requirements of § 1129(b).[97] A number of bankruptcy courts have followed the *M. Long Arabians* analysis, causing the deemed rejection approach to become the majority rule in nonvoting class cases.[98] This approach is generally known as "deemed rejection" because it leads to the same results as if the classes had rejected the plan.

Though most early cases adopted the *Ruti-Sweetwater* "deemed acceptance" model or the *M. Long Arabians* "deemed rejection" model, some courts expressly declined to deem nonvoting classes as either an acceptance or a rejection. *In re Vita Corp*.[99] involved a reorganization plan with nine classes, including six impaired-creditor classes. Of those, three impaired classes voted in favor of the plan and three failed to vote at all.[100] The district court noted that Bankruptcy Rule 3018 requires that acceptance or rejection of a plan be in writing.[101] It also agreed with the bankruptcy court's conclusion that § 1126(c) requires an affirmative act to accept the plan, since "[i]f Congress had intended otherwise, instead of basing a class's acceptance on whether 'such plan has been accepted by creditors' of a certain number and amount, it would have used the phrase 'if such plan has not been rejected by creditors'."[102] Although the court declined to expressly indicate that the nonvoting classes rejected the plan, it required that the plan meet cramdown requirements for confirmation, suggesting that it favored the deemed-rejection model.[103]

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[97] *Id.* at 218.

[98] *See In re* Root, No. 09-00645-TLM, 2012 WL 5193840 (Bankr. D. Idaho Oct. 19, 2012) (requiring affirmative vote for acceptance by a class); *In re* Augusto's Cuisine Corp., No. 15-09390 (ESL), 2017 WL 1169537, at *6 (Bankr. D.P.R. March 28, 2017) ("[C]onsensual confirmation requires unanimity of all classes that are affected by the plan, meaning that each impaired class must have affirmatively accepted the plan.") (citing Alan N. Resnick & Henry J. Sommer, 7 COLLIER ON BANKRUPTCY ¶1129.02[8] (16th ed. 2016)); *In re Higgins Slacks Co.*, 178 B.R. at 856 ("[I]f all members of a class fail to vote that class cannot be deemed to have accepted or rejected the plan."); *In re* Jim Beck, Inc., 207 B.R. 1010 (Bankr. W.D. Va. 1997) (one class's affirmative rejection of plan combined with failure of any other class to submit votes meant no impaired accepting class existed such that plan could not be confirmed even under cramdown process); *In re* Friese, 103 B.R. 90 (Bankr. S.D.N.Y. 1989) (acceptance requires certain number and percentage of creditors within class to vote in favor of plan).

[99] *In re* Vita Corp., 380 B.R. 525 (C.D. Ill. 2008).

[100] *Id.* at 526.

[101] *Id.* at 528. While many courts focusing on Rule 3018 have used that to demonstrate that acceptance must be affirmative, the wording of Rule 3018 also suggests that rejection must be affirmative. For a nonvoting class, that presents a quandary. FED. R. BANKR. P. 3018.

[102] *In re* Vita Corp., 358 B.R. 749, 751 (Bankr. C.D. Ill. 2007); *see also In re Vita Corp.*, 380 B.R. at 527.

[103] As the district court noted, "[t]he Bankruptcy Court acknowledged the existence of a split of authority . . . before going on to cite the line of cases holding that a non-voting class

In the *DISH Network* case[104] the bankruptcy court designated the vote of a creditor within a single-creditor class as not being made in good faith, causing it to become a nonvoting class.[105] More than twenty of the remaining classes voted in favor of the plan, with one other class voting against the plan.[106] On appeal, the Second Circuit expressly declined to comment on how to treat a "class[] in which no creditor files a timely vote[,]"[107] but noted the concern of a zero denominator in the fraction used to calculate acceptance.[108] It held that "the plain meaning of the statute and common sense lead clearly to one answer; just as a bankruptcy court properly ignores designated *claims* when calculating the vote of a class under § 1126(e), so it should ignore a wholly designated *class* when deciding to confirm a plan under § 1129(a)(8)."[109] Ultimately, the Second Circuit remanded the case to the bankruptcy court to make its determination in light of the opinion.[110] Although the case involved a creditor who attempted to vote but whose vote was denied, conceptually it bears no difference from a class in which no creditor votes.

B. Cases Considering the Nonvoting Class Issue in Subchapter V Bankruptcy Filings

Shortly after creation of subchapter V, bankruptcy courts started to see nonvoting classes within the subchapter. Given that subchapter V's voting requirements refer to the same sections as in larger chapter 11 cases, it is not surprising that these courts looked to the earlier precedent for guidance in handling nonvoting classes.

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is not deemed to have accepted the plan." *In re Vita Corp.*, 380 B.R. at 527. It then noted that the alternative would be a cramdown proceeding, which is the same result as if a class rejected the plan. *Id.* at 528.

[104] DISH Network Corp. v. DBSD N. Am., Inc., 634 F.3d 79 (2d Cir. 2011).

[105] *Id.* at 87–88. Designation occurs when the court determines that the vote of a creditor is not made in good faith; the result of designation is that the creditor's vote does not count in the determination of plan acceptance. 11 U.S.C. § 1126(e).

[106] *DISH Network*, 634 F.3d at 108 (Pooler, J., concurring in part). The dissenting class consisted of only one creditor, and that creditor's claim was only against one of the debtors involved in the case. The court did not consider that claim in rendering its decision because "no party argues here that it makes any difference." *Id.* at 86, n.1.

[107] *Id.* at 106, n.14.

[108] *See infra* Part IV.C.1.b.

[109] *DISH Network*, 634 F.3d at 106.

[110] *Id.* at 108.

1. Cases following the *Ruti-Sweetwater* "deemed acceptance" approach

In re Robinson[111] involved an individual filing[112] under subchapter V.[113] No creditors held impaired claims under the plan, meaning that no creditors could vote on the plan. Six of the seven classes included only one creditor.[114] The bankruptcy court looked to whether the plan met the requirements for consensual confirmation, noting that "confirmation under section 1191(a) is considered 'consensual' if all impaired classes of creditors have accepted it pursuant to section 1129(a)(8)."[115] If not, cramdown requirements applied for confirmation purposes. The court then turned to the issue of whether nonvoting classes accept the plan for § 1129(a)(8) purposes, finding that they do accept the plan.[116] Because no creditors voted, every class constituted a nonvoting class and, since the court treated nonvoting classes as accepting classes, every class effectively accepted the plan, meeting § 1129(a)(8)'s confirmation requirement.

But the analysis does not end there. Section 1191(a) also looks to § 1129(a)(10)'s requirement that at least one impaired class accept the plan for confirmation of a consensual plan.[117] Because § 1129(a)(8) requires consent of *all* impaired classes and § 1129(a)(10) requires consent of just *one* impaired class, satisfaction of § 1129(a)(8) would seemingly necessitate satisfaction of § 1129(a)(10).[118] The court noted, however, that outside of the subchapter V context, courts generally do *not* allow a nonvoting class to satisfy the impaired accepting class mandate of § 1129(a)(10) for the

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[111] *In re* Robinson, 632 B.R. 208 (Bankr. D. Kan. 2021).

[112] While subchapter V is designated "Small Business Debtor Reorganization," the Code defines a small business debtor as "a person engaged in commercial or business activities" with limited debt as specified in the Code. 11 U.S.C. § 101(51D); *see also id.* § 1182 (noting that a debtor for purposes of subchapter V includes small business debtors). A person, in turn, includes individuals as well as businesses. *Id.* § 101(41).

[113] *In re Robinson*, 632 B.R. at 211.

[114] *Id.* at 213.

[115] *Id.* at 216.

[116] *Id.* at 220.

[117] *Id.* at 219.

[118] *In re Robinson*, 632 B.R. at 219–20 ("Section 1129(a)(10) would appear to be superfluous if all impaired classes accept a plan under (a)(8), as long as at least one of the accepting classes was determined without including acceptance by an insider. If not all classes accept the plan, it cannot be confirmed as a consensual plan and § 1129(a)(10) is wholly irrelevant . . . .").

purposes of cramdown.[119] If nonvoting classes were treated as an acceptance both for § 1129(a)(8) and § 1129(a)(10) purposes, a consensual cramdown would be permitted. [120] If, however, nonvoting classes could be treated as an acceptance for purposes of § 1129(a)(8), but not provide the consenting class needed under § 1129(a)(10), confirmation would still be possible because subchapter V reorganizations do not need to meet § 1129(a)(10) to move into cramdown.[121]

The *In re Robinson* case presented unusual facts where no classes voted at all. The court allowed consensual confirmation despite the lack of a single approving class, noting that confirmation of this particular plan met the goal of subchapter V in providing a streamlined confirmation process, particularly because the case did not involve "apathy on the part of nonvoting creditors, but is the product of negotiated treatment to reach a consensual plan and promptly and effectively reorganize."[122] Several other courts in subchapter V cases agree, counting nonvoting classes as accepting classes for purpose of plan acceptance.[123]

2. Cases following *M. Long Arabians'* "deemed rejection" approach

Other courts considering the nonvoting class issue in the context of subchapter V cases have followed the deemed-rejection approach based on the "plain language" of the Code. In *S.B. Building Associates*[124] the bankruptcy court declined a consensual reorganization despite acceptance by

[119] *Id.* at 219 ("[I]n a non-subchapter V chapter 11 case, deemed acceptance by an impaired, non-voting class cannot be used to satisfy § 1129(a)(10) in order to pursue cramdown confirmation . . . .").

[120] 11 U.S.C. § 1191(a), (b).

[121] *In re Robinson*, 632 B.R. at 217 ("In short, a debtor in a subchapter V case is not required to have at least one impaired accepting class to obtain confirmation of a nonconsensual plan while a non-subchapter V chapter 11 debtor does.").

[122] *Id.* at 220.

[123] *See also In re* Jaramillo, No. 21-10306-T11, 2022 WL 4389292, at *2 (Bankr. D.N.M. Sept. 22, 2022) (finding that (a)(10) requires affirmative vote for acceptance, but (a)(8) allows nonvoting classes to be deemed to accept); *In re* Olson, No. BR 20-23408 (RKM), 2020 WL 10111637, at *2 (Bankr. D. Utah Sept. 16, 2020) (in plan with some approving impaired classes and one nonvoting class, requirements for consensual reorganization found to be met); *In re* Desert Lake Grp. LLC, No. 2:20-BK-22496 (Bankr. D. Utah Sept. 30, 2020) (in subchapter V case with six classes, where all voting creditors accepted plan, but three classes had no votes cast, the plan was confirmed as consensual).

[124] *In re* S.B. Bldg. Assoc. Ltd. P'ship, 621 B.R. 330, 336–37, 374–75 (Bankr. D.N.J. 2020).

all voting classes. The classes that failed to vote settled with the debtor or received full payment—none objected to the plan. The only creditor objecting to the plan (along with the U.S. Trustee) purchased its two claims, both of which were paid in full under the plan.[125] In objecting to the plan, the objecting parties argued that the debtor's plan failed to meet the "fair and equitable" requirements of a cramdown confirmation, which would be required due to the lack of acceptance by every impaired class.[126] The court agreed, holding that § 1129(a)(8) "expressly requires affirmative acceptance or nonimpairment."[127] *In re M.V.J. Auto World*[128] involved a plan of reorganization with two impaired classes of claims. One class voted to accept the plan and the other class—consisting of a single secured claimant—did not vote at all. The creditor, joined by the United States Trustee and the panel trustee opposed confirmation.[129] The bankruptcy court noted that § 1191(a) provides for confirmation "only if" all requirements of § 1129 are met, and that § 1129 requires that for "each class" of impaired claims "such class" accepts the plan.[130] The court determined that the nonvoting class could not be considered to have accepted the plan based on a plain language reading of the Code.[131] In the *In re Florist Atlanta* case, the bankruptcy court denied consensual confirmation when one class of impaired creditors voted in favor of the plan and two classes of impaired creditors failed to vote, despite no objections to confirmation from any creditor or the trustee, indicating that "most courts [require] that acceptance for purposes of § 1129(a)(8) requires affirmative acceptance by the class."[132] Similarly, in *Creason*, the bankruptcy court held that it could not confirm a plan with a nonvoting impaired class as a consensual plan despite the fact that "no interested party balked at counsel's citation to *Ruti-Sweetwater* and the concept of 'deemed acceptance'."[133] The

[125] *Id.* at 336–37. The objecting creditor had litigation pending with the debtor because of a contractual relationship.

[126] *Id.* at 337.

[127] *Id.* at 374.

[128] *In re* M.V.J. Auto World, Inc., 661 B.R. 186 (Bankr. S.D. Fla. 2024).

[129] *Id.* at 187.

[130] *Id.* at 188.

[131] *Id.* at 189 (explicitly rejecting the argument accepted by the Texas courts, that calculating a non-voting class creates an absurd result). The Texas cases are discussed in Part IV.B.3, *infra*.

[132] *In re* Florist Atlanta, Inc., No. 24-51980-PWB, 2024 WL 3714512, at *2 (Bankr. N.D. Ga. Aug. 7, 2024) (confirming under cramdown requirements).

[133] *In re* Creason, No. 22-00988-SWD, 2023 WL 2190623, at *1–2 (Bankr. W.D. Mich. Feb. 23, 2023) (noting that *Ruti-Sweetwater* is in the minority). The court continued by noting that "today's approach vests considerable power in the hands of a non-participating

bankruptcy court in *In re Thomas Orthodontics*[134] also noted the Bankruptcy Code's deemed acceptance with regard to unimpaired classes under § 1126(f). "If Congress intended that a non-voting creditor would be presumed to have accepted the plan, Congress knew how to write that presumption into the statute."[135]

3. Cases rejecting deemed-acceptance and deemed-rejection approaches

Taking a different route, a Texas bankruptcy court rejected the deemed-acceptance or deemed-rejection dichotomy in *Franco's Paving*.[136] The debtor's reorganization plan included six classes of creditors. Creditors in three of the classes unanimously voted in favor of the plan. But no creditors cast votes in the other three classes.[137] As a result, the trustee argued that the plan lacked the assent of all classes and the debtor must meet the cramdown requirements in order to confirm the plan.[138] The court looked to § 1191's requirement that all classes vote in favor of the plan or that the plan be "fair and equitable."[139] But in determining whether all classes voted in favor of the plan, the court needed to consider § 1126's class voting calculation. Unfortunately, that calculation created a problem because when no creditor in the class votes, the calculation creates an "equation [that] cannot be solved," frequently referred to as the "zero-denominator" problem.[140] As a result, the court determined that Congress could not have intended that the calculation apply to a nonvoting class of creditors:

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creditor with control over an entire class. As a policy matter, it is probably unwise" but that modification of the rule "'is a task for Congress not the courts.'" *Id.* at *2 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13–14 (2000)).

[134] *In re* Thomas Ortho., S.C., No. 23-25432-RMB, 2024 WL 4297032 (Bankr. E.D. Wis. Sept. 25, 2024).

[135] *Id.* at *7.

[136] *In re* Franco's Paving LLC, 654 B.R. 107 (Bankr. S.D. Tex. 2023).

[137] This voting pattern matches that found in *In re Vita Corp.*, with three affirming classes and three nonvoting classes. 380 B.R. 525 (C.D. Ill. 2008). The *In re Vita Corp.* case suggests that the plan could only be confirmed in a cramdown proceeding, indicating that § 1129(a)(8) was not met due to the nonvoting classes—a different result than in *In re Franco's Paving*, despite both cases having eschewed deeming a nonvoting class as an accepting or rejecting class.

[138] *In re Franco's Paving LLC*, 654 B.R. at 108.

[139] *Id.* at 108–09.

[140] *Id.* at 109; *see also infra* Part IV.C.1.b.

> The Court finds that attempting to do what the laws of mathematics prohibit is an absurd proposition and could not have been intended when Congress enacted the current version of § 1126. By implementing a denominator that includes only votes actually cast in § 1126, *it logically follows that Congress presumed that at least one vote was cast*.[141]

Without § 1126 to guide the vote, the court needed to determine how to handle a nonvoting class. It agreed with the policy concerns expressed in the *Ruti-Sweetwater* case but rejected the "binary choice between a 'deemed acceptance' and a 'deemed rejection'" that seemingly arose after the case.[142] Instead, the court determined that a nonvoting class would simply be ignored in determining approval of the plan. Because every class that *did* vote voted in favor of the plan, it satisfied § 1129(a)(8)'s requirement that all classes vote in favor of the plan.[143]

The debtor in *In re Hot'z Power Wash* also filed a subchapter V case in the Southern District of Texas, eventually filing five amended reorganization plans.[144] The final plan included three impaired creditor classes; two classes voted to accept the plan, but one single-creditor secured class failed to vote at all.[145] The case differed slightly from the *Franco's Paving* case in that the plan specifically noted that nonvoting classes would be deemed to accept the plan,[146] though the bankruptcy court discounted that notice as contradicting Bankruptcy Rule 3018(c)'s instruction that acceptance or rejection of a plan be in writing.[147]

The court considered whether the Code answers the question of how to treat nonvoting classes of creditors. Though § 1191(a) refers to § 1129 in determining whether creditors accept the plan,[148] the court found no guidance in those sections on how to handle a nonvoting class.[149] It then looked to case

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[141] *Id.* at 109–110 (emphasis added).

[142] *Id.* at 110.

[143] *Id.* ("In a situation where no votes are cast, the Court holds that the class should not be counted for purposes of § 1129(a)(8).").

[144] *In re* Hot'z Power Wash, Inc., 655 B.R. 107, 110 (Bankr. S.D. Tex. 2023).

[145] *Id.* at 112.

[146] *Id.*

[147] *Id.* at 113; FED. R. BANKR. P. 3018(c). For a recent case holding otherwise in the traditional chapter 11 context, *see In re* AIO US, Inc., No. 24-11836 (CTG), 2025 WL 2426380, at *31 (Bankr. D. Del. 2025) (finding that provision in Solicitation Order providing that a non-voting class "shall be deemed to have accepted the Proposed Plan" provided sufficient notice to creditors of consequence of failing to vote in single-creditor class).

[148] *In re Hot'z Power Wash, Inc.*, 655 B.R. at 114.

[149] *Id*. at 115 ("[T]he Code is . . . silent on the correct treatment of a nonvoting class.").

law, noting the split among the courts, with a majority rejecting the *Ruti-Sweetwater* "deemed acceptance" line of cases.[150] Although the court likewise rejected *Ruti-Sweetwater*'s result, it also expressed concern with the majority approach of deemed rejection because courts following that approach "frequently, without providing critical analysis, assume that a nonvote should be treated as a rejection."[151] The court instead followed the path of *Franco's Paving*, holding that nonvoting classes could not count for purposes of determining whether an impaired class accepts the plan.[152] In so doing, the court noted two pragmatic concerns. First, because the Internal Revenue Service ("IRS") typically refrains from voting on reorganization plans and plans generally classify those claims separately, to hold otherwise would lead to cramdown in *any* case involving claims owed to the IRS.[153] Second, cramdown should be avoided unless necessary, given that it necessitates additional cost and time.[154]

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[150] *Id.* at 115–16.

[151] *Id.* at 116 (also noting that "[a]mong the courts that have rejected the holding of *Ruti-Sweetwater* and its progeny, the unanimous conclusion is that a Debtor is then unable to satisfy § 1129(a)(8) and must proceed with a cramdown pursuant to § 1129(b) or § 1191(b) as applicable").

[152] *Id.* at 117–18.

[153] *In re Hot'z Power Wash, Inc.*, 655 B.R. at 114; *see also In re Robinson*, 632 B.R. at 217 (noting that the IRS typically refrains from voting on reorganization plans). While not mentioned by this court, a similar situation would arise when an impaired class's votes are designated as not being made in good faith, since if the creditor whose vote is designated is the only member of its class, the debtor's choice to seek designation of the vote would necessarily mean that the class has not affirmatively accepted the plan. This concern is less of an issue, however, since designation of the vote often occurs when the creditor votes *against* the plan to prevent a successful reorganization. *See* DISH Network Corp. v. DBSD N. Am., Inc., 634 F.3d 79, 108 (2d Cir. 2011); Pac. Western Bank v. Fagerdala USA—Lompoc, Inc. (*In re* Fagerdala USA—Lompoc, Inc.), 891 F.3d 848, 854 (9th Cir. 2018); *In re* Bataa/Kierland, LLC, 476 B.R. 558, 575 (Bankr. D. Ariz. 2012); *see also* Hon. Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019*, available at https://cdn.considerchapter13.org/content/uploads/2022/11/21160446/SBRA-Guide-June-2022-Compilation-FINAL.pdf at 168 (last accessed May 23, 2025) (noting that "[h]olders of priority tax claims often do not vote on chapter 11 plans that comply with" chapter 11 plan requirements mandating the amount to be paid to priority tax claims absent agreement of the claimant under § 1129(a)(9)).

[154] *In re Hot'z Power Wash, Inc.*, 655 B.R. at 118 (noting "additional administrative burdens and expenses associated with cramdown merely because a creditor class was negligent or apathetic about asserting their rights"); *see also In re* Campbell, 89 B.R. 187, 187–88 (Bankr. N.D. Fla. 1988) (noting the delay and "additional burdens on both the Court and the debtor", and that the cramdown requirements can be "very difficult, if not impossible, to meet" in some cases).

Although both *In re Franco's Paving* and *In re Hot'z Power Wash* are recent cases, they have not completely changed the trend of following the deemed-rejection approach.[155] One case considering the neither deemed accepted nor deemed rejected approach was the *In re Sushi Zushi* case.[156] The bankruptcy court considered whether to confirm a plan as consensual when each voting class voted in favor of the plan, but one single-class creditor failed to vote. That lone creditor did not object to confirmation. Despite no objections to confirmation, the bankruptcy court declined to follow the recent holdings in *In re Franco's Paving* and *In re Hot'z Power Wash*.[157] In so doing, the court indicated that:

> The Court understands the attempt to apply the fractional formula established by § 1126(c), and the truism that any "0" in the denominator of a fraction creates an unsolvable mathematical problem. The Court does not, however, believe the statute requires that sort of mathematical calculation.[158]

Though it disagreed with the mathematical impossibility, the court did not provide a different way to calculate a class's acceptance of the plan, instead indicating that "the arithmetical exercise becomes futile where no creditors in a class vote."[159]

C. The Solution—The Ignored-Class Approach

The "neither deemed acceptance nor deemed rejection" approach—or more simply the ignored-class approach—used in the *In re Franco's Paving*, *In re Hot'z Power Wash*, and *DISH Network* cases—provides a consistent result that recognizes changes from the Bankruptcy Act to the Code and promotes the policies inherent in bankruptcy law.

Section 1129(a)(10) ensures some minimal level of support for a traditional chapter 11 bankruptcy plan by requiring that "at least one class of

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[155] *See also In re* M.V.J. Auto World, Inc., 661 B.R. 186 (Bankr. S.D. Fla. 2024); *In re* Florist Atlanta, Inc., No. 24-51980-PWB, 2024 WL 3714512, at *2; *In re* Thomas Ortho., S.C., No. 23-25432-RMB, 2024 WL 4297032 (Bankr. E.D. Wis. Sept. 25, 2024) (each expressly rejecting holdings of *In re Franco's Paving* and *In re Hot'z Power Wash*).

[156] *In re* Sushi Zushi of Texas, LLC, No. 24-51147-MMO, 2025 WL 957792 (Bankr. W.D. Tex. Mar. 28, 2025).

[157] *Id.* at *2.

[158] *Id.* at *3.

[159] *Id*. at *3 (also noting that "when no creditors in a class affirmatively vote, the class cannot accept the plan, no matter what the denominator may be").

claims that is impaired under the plan has accepted the plan."[160] Given that goal, "[a] failure to vote should not be sufficient to satisfy the gatekeeping function of 11 U.S.C. § 1129(a)(10), because the purpose of this subsection is to ensure that *someone* with some stake in the outcome *approves* the plan."[161] Ignoring a nonvoting class means that the nonvoting class cannot serve as that required assenting class. This result mirrors the deemed rejection rule by not assuming that the class accepted for purposes of confirmation.

For § 1129(a)(8), ignoring the impaired nonvoting class mirrors the deemed acceptance rule. Section 1129(a)(8) requires that "each [impaired] class of claims . . . has accepted the plan." If the calculation simply ignores a class that fails to vote, the plan meets acceptance requirements if all *voting* classes accept the plan. This result ensures that a nonvoting class does not necessitate cramdown proceedings.

1. Statutory Language

The challenge with the ignored-class approach lies in the statutory language of the Code. Perhaps the most difficult language to overcome in the ignored-class approach is § 1129(a)(8)'s language requiring "each" class to "accept[]" the plan, particularly considering Rule 3018's requirement that acceptance or rejection be in writing. A class that does not vote has not affirmatively accepted the plan, an argument that serves as the basis for the "deemed rejection" approach. Those courts seeking to avoid deemed rejection have considered several statutory bases for an alternative approach.

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[160] 11 U.S.C. § 1129(a)(10).

[161] Sather & Barron, *supra* note 52, at 53–54 (emphasis added) ("[T]he authors believe that a non-voting class should be treated the same as a non-voting creditor within a class. . . . Silence should be treated as acquiescence, with one important caveat. Having at least one impaired accepting class . . . requires that someone care about a plan. If a debtor cannot obtain even one class of creditors to affirmatively support a plan, the plan probably does not deserve to be confirmed."); *see also In re* Castaneda, No. 09-50101, 2009 WL 3756569 (Bankr. S.D. Tex. Nov. 2, 2009) (plan could not be confirmed for lack of any accepting class when no creditor voted on debtor's proposed chapter 11 plan).

Sather & Barron propose adding language to the Code to clarify that "[i]f no creditors or interest-holders within an impaired class of claims or interests casts a vote upon the plan, the class shall not be counted as either an accepting or rejecting class." Sather & Barron, *supra* note 52, at 54; *see also* Patricia A. Redmond & Ashley D. Champion, *"You're Killing Me, Smalls!": The Problem of the Nonparticipating Class in Subchapter V*, AM. BANKR. INST. J. 20, 56 (Oct. 2024) (proposing revision to "clarify that a plan may be confirmed if a class of claims either fails to reject the plan or fails to vote"). Such additional language should not be necessary, as § 1129(a)(10) expressly provides that one class must vote in favor of the plan.

a. The superfluity argument

Reading § 1129(a)(8) to require the affirmative vote of creditors does create some potential issues. For example, consider the situation from the *In re Robinson* case, in which no creditors (and, thus, no classes) vote at all on the plan.[162] Holding that § 1129(a)(8)'s "every class accepts" requirement fails in such a situation because no class affirmatively accepts the plan turns that Code section into a requirement that at least one class accept the plan. Such a reading arguably renders § 1129(a)(10)'s requirement of "at least one" accepting impaired class superfluous by making both require the consent of one class.[163] But § 1129(a)(8) goes further than § 1129(a)(10) in requiring that no class vote *against* the plan. The two sections are only redundant in a situation with only one voting class since, in such a situation, if that one class votes in favor of the plan, no class can reject it.

b. The zero-denominator argument

Those courts utilizing ignored-class approaches have looked to the "zero-denominator" problem. This concern arises based on the application of § 1129(a)(8) as a formulaic calculation where the number of creditors (or value of claims) voting in favor of a plan serves as the numerator in a fraction and the number of creditors (or value of claims) voting within the class serves as the denominator for that fraction. When no creditor in the class votes, the denominator in either calculation equals zero,[164] and mathematics recognizes that as an impossibility.[165] Section 1129(a)(8), however, does not mandate that calculation.

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[162] *See supra* Part IV.B.1.

[163] *See* Corley v. U.S., 556 S.Ct. 303, 314 (2009) (statutes should be interpreted to prevent superfluous language). Note, however, that there is a purpose in distinguishing § 1129(a)(8) from § 1129(a)(10) in traditional chapter 11 cases because approval by all classes allows for consensual reorganization, while approval by a single class is necessary to initiate cramdown when not all classes approve.

[164] *See, e.g.*, DISH Network Corp. v. DBSD N. Am., Inc., 634 F.3d 79 (2d Cir. 2011); *In re* Franco's Paving LLC, 654 B.R. 107, 109–10 (Bankr. S.D. Tex. 2023); *see also* Sather & Barron, *supra* note 52, at 12 ("If no creditors vote within a class, it makes for a difficult math problem. In that case, the fraction is 0/0, an equation that mathematicians struggle to solve. Since bankruptcy law should not require an advanced degree in mathematics, a more practical approach is thus required.").

[165] More technically, a zero denominator creates an "undefined" fraction in mathematics.

In determining whether a class accepts, § 1126 requires that at least two-thirds in value and one-half in number of the class creditors vote in favor of the plan for the class to accept the plan.[166] Of course, common sense suggests that if no one votes, you cannot meet the two-thirds in value or one-half in number thresholds required to meet § 1129(a)(8). But to simply jump to that conclusion ignores the *process* that must occur in all other cases—a calculation to determine what percentage of the voting creditors submit a "yes" vote in favor of a plan. How, then, is the vote calculated? Consider two alternatives:

Alternative 1: Creating a fraction from votes of creditors

For this alternative, determination of the voting percentages requires putting the number or value of claims voting in favor of the plan as the numerator in a fraction with the total number or value of claims voting on the plan as the denominator in a fraction, and then comparing those fractions with the required minimums indicated in § 1126. For the requisite number of creditors voting in favor of the plan, the fraction would consider whether:

$$\frac{\text{Number of creditors in class voting in favor of plan}}{\text{Number of creditors in class voting on plan}} > \frac{1}{2}$$[167]

Looking at the prior example to calculate whether the requisite number of creditors voted in favor of the plan:

Creditor	Value of claim	Vote
A	$100,000	Reject
B	$40,000	Accept
C	$40,000	Accept
D	$30,000	Accept
E	$100,000	No vote submitted
F	$20,000	No vote submitted

See Michael J. Neely, *Why We Cannot Divide by Zero*, USC, available at https://ee.usc.edu/stochastic-nets/docs/divide-by-zero.pdf (last accessed May 22, 2025).

[166] 11 U.S.C. § 1126.

[167] There would then be a corresponding formula for the value of claims voting: value of claims of creditors in class voting in favor of plan/value of claims of creditors in class voting on plan $\geq$ 2/3.

Such a calculation would demonstrate that three-fourths of the voting creditors in this scenario voted in favor of the plan, and since three-fourths exceeds one-half, the required number of creditors have accepted.

This type of calculation gives rise to the zero-denominator problem. When no creditors vote on the plan, the calculation asks whether 0/0 exceeds one-half. Ordinarily, a number divided by itself equals 1, suggesting that 0/0=1; that calculation would exceed the one-half threshold. But zero divided by any number equals 0, suggesting that 0/0=0; that calculation would fail to meet the one-half threshold.[168] This paradox provides the mathematical impossibility when using a fraction-based calculation to determine the percentage of voting creditors to accept the plan.

Alternative 2: Using fractions from Section 1126 in formula

Although the first calculation alternative created a mathematical impossibility, another alternative means of calculation exists that avoids the problem. Rather than creating a fraction from the number of creditors voting, one could instead write the voting formula for the requisite number of creditors voting in favor of the plan as:

Number of creditors approving > ½ * Number of creditors voting[169]

With the prior example, three creditors approved, and four creditors voted (half of which equals two). Because three is greater than two, the required number of creditors have accepted. And, unlike the fractional method, a no-vote class would not create a zero-denominator problem. The number of creditors approving would equal zero, and half of the zero voting creditors also equals zero. Because zero is not greater than zero, the plan fails to meet the required creditor acceptance. This calculation method works because the only fraction involved in the calculation is one-half (or two-thirds for the value of claims), essentially eliminating any possibility of zero in the denominator.

The Code does not dictate *how* to calculate the required acceptance other than providing the one-half and two-thirds fractions. While this creates

[168] *See* Dave Peterson, *Zero Divided by Zero: Undefined and Indeterminate*, THE MATH DOCTORS, available at https://www.themathdoctors.org/zero-divided-by-zero-undefined-and-indeterminate/ (last accessed Nov. 9, 2025) (copy on file with author).

[169] There would then be a corresponding formula for the value of claims voting: value of claims approving $\geq$ 2/3 * value of claims voting.

some vagueness in the Code, to the extent possible a Code section should be interpreted to avoid absurd results.[170] As a result, the second alternative calculation should be used to eliminate the zero-denominator problem.

2. Code language on nonvoting classes

The Code provides no guidance on how to handle a nonvoting class in the chapter 11 process. Although at least one court resisted treating nonvoting classes as accepting classes because doing so requires reading a presumption into the Code that does not exist,[171] treating the class as rejecting the plan also reads a presumption into the Code. Congress knows how to write a presumption into the Code, and in fact does exactly that for the situation in which a creditor fails to submit a vote within a class with voting creditors.[172] But Congress created no presumption here—either in favor of deemed acceptance *or* of deemed rejection. Because the language of § 1129 focuses on acceptance, however, the lack of affirmative acceptance creates a larger issue than the lack of affirmative rejection.

V. Reconsidering the Intersection of Section 1129(A)(8) and Section 1129(A)(10) Based on Bankruptcy Policy

A. Impact of Deemed Acceptance, Deemed Rejection, and Ignored-Class Approaches

Section 1129(a) allows confirmation of a plan if "[w]ith respect to each [impaired] class of claims . . . such class has accepted the plan" and "at least one class of claims that is impaired under the plan has accepted the plan." The language of each provision of § 1129(a) requires that the class "has accepted the plan." If acceptance focuses on affirmative voting, using Alternative 2's calculations, neither provision is met with a nonvoting class of creditors. Such a result, though perhaps more justifiable under a strict reading of the statute, fails to meet the policies and objectives of chapter 11 and, in particular, of subchapter V proceedings. The ignored-class approach better meets these goals.

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[170] Nat'l Resources Defense Council, Inc. v. U.S. Dept. of the Interior, 478 F. Supp. 3d 469, 487 (S.D.N.Y. 2020).

[171] *See, e.g.*, *In re* Augusto's Cuisine Corp, No. 15-09390 (ESL), 2017 WL 1169537, at *7 (Bankr. D.P.R. Mar. 28, 2017).

[172] 11 U.S.C. § 1126(c).

Consider the impact of the three approaches (deemed acceptance, deemed rejection, and ignored creditor) in each of four contexts: (1) all voting classes vote in favor of the plan, (2) all voting classes vote against the plan, (3) some voting classes vote in favor of the plan and some voting classes vote against the plan, and (4) no classes vote on the plan.

1. All voting classes vote in favor of the plan

If each voting class favored the plan, at least one class voted in favor of the plan, meeting § 1129(a)(10)'s requirement. But whether § 1129(a)(8) is met depends on the approach used. In the deemed acceptance and ignored-class approaches, the nonvoting classes are not treated as dissenting classes and, thus, § 1129(a)(8) is met. Conversely, the deemed rejection approach would treat the nonvoting classes the same way as if they had voted against the plan, such that not "all" classes vote in favor of the plan. If one class fails to vote, that failure would lead to a cramdown situation, essentially allowing the creditors' failure to vote to require that the debtor meet the fair and equitable standards of cramdown. This scenario belies the primary issue with the deemed rejection approach—it potentially allows creditors who fail to cast a vote to prevent a consensual confirmation despite the overwhelming support of all voting creditor classes.

2. All voting classes vote against the plan

When every voting class rejects the plan, § 1129(a)(8) is clearly not met because there is no way that all classes accept the plan. Whether the plan can move to any type of confirmation depends on the approach used. In either the deemed rejection or the ignored-class approach, the nonvoting classes are not counted as accepting classes. Without any accepting classes, the plan fails to meet § 1129(a)(10)'s requirements and, thus, a chapter 11 cramdown is not possible and the plan fails (though, because § 1129(a)(10) is not required in subchapter V, cramdown is still possible in that chapter). Conversely, under the deemed acceptance approach, the nonvoting class constitutes an accepting class, meeting § 1129(a)(10)'s requirements and moving the plan into cramdown regardless of the type of bankruptcy case. Such a result demonstrates the primary issue with the deemed acceptance approach—it allows a reorganization, albeit in a cramdown context, over the objection of all voting classes.

3. Voting creditor classes are split on the plan

In the third scenario, where some of the voting classes accept the plan and others reject it, if you ignore the voting classes, the plan fails as to § 1129(a)(8) because not all voting classes favored the plan. But it meets § 1129(a)(10) because at least one class voted in favor of the plan. Under either a traditional chapter 11 or subchapter V case, the plan can only be confirmed in a cramdown proceeding. The result is no different regardless of the approach used for nonvoting classes of creditors.

4. No classes vote on the plan

The final scenario in which no creditors vote, and thus no classes vote, creates the most difficulty.[173] The deemed acceptance approach would find that all classes voted in favor of the plan, leading to consensual reorganization. The deemed rejection approach would find that all classes voted against the plan, leading to plan failure in a traditional chapter 11 case and cramdown proceedings in a subchapter V case. When ignoring the nonvoting classes, the plan fails under § 1129(a)(10). There are essentially no voting classes and inherently without any voting classes you cannot have a class that voted in favor of the plan. Without meeting the § 1129(a)(10) requirement, confirmation is not possible—even in a cramdown—in a traditional chapter 11 case and confirmation is possible—without meeting either subsection—as a cramdown in a subchapter V case. This mirrors the deemed rejection approach.

Arguably in the no-creditor-vote context, the deemed acceptance approach provides the best result. If creditors fail to protect their own interests by the simple act of voting, why should they be permitted to receive the benefits of cramdown (in a subchapter V case) or prevent the confirmation of the plan altogether (in a traditional chapter 11 case)? The answer lies in the purpose of § 1129(a)(10)—to ensure some modicum of support from the creditors for the plan of reorganization. In the no-vote situation, the debtor has failed to garner even the slightest indication of such support, justifying a higher burden on the debtor to prove fairness of the plan or create a new plan.

Under § 1129(a)(10), ignoring the nonvoting classes means that at least one class must affirmatively accept the plan to meet the requirement. Ignoring the nonvoting classes means that as long as one class votes in favor

[173] *See In re* Sushi Zushi of Texas, LLC, No. 24-51147-MMP, 2025 WL 957792, *4 (Bankr. W.D. Tex. Mar. 28, 2025) (discussing "absurd" scenario if plan could be approved as consensual when no creditors vote).

of the plan and no classes reject it, the plan satisfies both of § 1129's requirements, moving the plan into consensual confirmation. But if any class affirmatively rejects the plan, that rejection will require cramdown or, if all voting classes reject the plan in a traditional chapter 11 case, lead to failure to confirm the plan.

These voting scenarios when ignoring nonvoting classes in calculating plan acceptance show that:

	Impact on § 1129(a)(8)	Impact on § 1129(a)(10)	Traditional chapter 11 case	Subchapter V
No classes vote	*Requirement met*	*Requirement not met*	***Plan cannot be confirmed***	***Plan can only be confirmed in cramdown***
All voting classes reject plan (regardless of the existence of nonvoting classes)	*Requirement not met*	*Requirement not met*	***Plan cannot be confirmed***	***Plan can only be confirmed in cramdown***
At least one class votes in favor of plan, and remaining classes either vote in favor of plan or do not vote at all	*Requirement met*	*Requirement met*	*Plan can be confirmed as consensual*	
At least one class votes in favor of plan, and at least one class votes against plan (regardless of the existence of nonvoting classes)	*Requirement not met*	*Requirement met*	*Plan can only be confirmed in cramdown proceeding*	

B. Bankruptcy Policies

The creditor voting process in either traditional chapter 11 or subchapter V cases provides an important opportunity for creditors to voice their opinions in the reorganization of their claims, particularly when their relationship with the debtor will continue post-bankruptcy. This voice ensures "some minimal level of support from parties whose rights are being

altered"[174] by ensuring that at least *one* impaired class accepts the plan under § 1129(a)(10). Further, the debtor structures the classes and can group creditors to maximize the chances that at least one class approves of the plan.[175] Both of these suggest that, at least for the purposes of § 1129(a)(10), at least one class of creditors should *affirmatively* voice their support for the plan for confirmation purposes. Congress, however, expressly noted its intent to simplify the reorganization process for small businesses, particularly given the fact that creditors often fail to participate in the process for small business debtors.[176] These goals support allowing a reorganization plan to move into a cramdown in subchapter V cases—even without a single impaired class accepting the plan.

Extension of those same rules to require that *every* class vote affirmatively for the plan to avoid cramdown creates problems. Creditors fail to vote on a plan for a variety of reasons, including reasons completely unrelated to the merits of the plan or a lack of support for its contents.[177] To the extent that a creditor has an opinion on the merits of the plan, that creditor is more likely to skip voting when it favors the plan (or is truly agnostic toward the plan) than when it opposes it.[178] Although the primary burden of getting a plan approved lies with the debtor,[179] creditors also carry a burden to actively participate if they wish to protect their claims.[180] Allowing a single class of nonparticipating creditors to force a plan into cramdown proceedings creates inefficiency and adds time and expense in the bankruptcy process.[181]

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[174] Sather & Barron, *supra* note 52, at 53 (citing *In re* Combustion Eng'g Inc., 391 F.3d 190 (3d Cir. 2004); *In re* A&B Assocs. LP, 2019 Bankr. LEXIS 988 (Bankr. S.D. Ga. 2019); *In re* Cajun Elec. Power Coop., 230 B.R. 715 (Bankr. M.D. La. 1999)).

[175] *In re* Vita Corp., 358 B.R. 749, 751 (Bankr. C.D. Ill. 2007), *aff'd In re* Vita Corp., 380 B.R. 525 (C.D. Ill. 2008) (discussing ability to create plan that maximizes ability to obtain affirmative class voting needed for confirmation).

[176] *See supra* Part I, discussing Congressional concern regarding the lack of participation by creditors and the necessity of helping small businesses succeed in bankruptcy reorganizations.

[177] Sather & Barron, *supra* note 52, at 12.

[178] *In re* Franco's Paving LLC, 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023) ("From a practical perspective, a creditor that agrees to a debtor's plan may express its consent by affirmatively voting for a plan or by simply choosing not to file an objection.").

[179] *In re Vita Corp.*, 358 B.R. at 751 (noting debtor's burden to obtain votes in favor of plan or create a "fair and equitable" plan).

[180] *In re* Ruti-Sweetwater, 836 F.2d 1263, 1266–67 (10th Cir. 1988) (noting that "[a]doption of the Heins' approach would relieve creditors from taking an active role in protecting their claims").

[181] *See In re* Campbell, 89 B.R. 187, 188 (Bankr. N.D. Fla. 1988) ("A single creditor or class of creditors should not, by their total inaction, be able to force a debtor to have to resort

It also creates situations, as was attempted in *Ruti-Sweetwater*, where a creditor who failed to participate in the acceptance process essentially gains a second chance to reject the plan by objecting to confirmation.[182]

In addition to the extra time and expenses involved in any cramdown process,[183] the goals of subchapter V specifically favor consensual confirmation even in the face of nonvoting classes:

> Applying *Ruti-Sweetwater*'s deemed acceptance rule to subchapter V cases is consistent with the realities of modern bankruptcy practice for individuals and small businesses, where many general unsecured creditors (e.g., credit card companies) do not vote. There is nothing wrong with not voting, but the confirmation process should not be derailed as a result.[184]

Though ignoring nonvoting classes differs from *Ruti-Sweetwater*'s deemed acceptance rule, the case actually recognized Congressional intent to ignore nonvoting creditors in the acceptance process. *Ruti-Sweetwater* went awry only in that it assumed it must designate acceptance or rejection when no creditors vote within class:

> The presumption under the prior law that non-voting creditors rejected the plan has been removed. Non-voting creditors are deemed neither to have accepted the plan nor rejected it; they are simply bound by the result produced by those who vote. *The necessity of deeming a failure to vote as either an acceptance or a rejection of a plan arises only when [as here] no members of a class cast a vote*.[185]

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to the cram down process to obtain confirmation of a plan when all of the other confirmation requirements, including the affirmative acceptance of the plan by at least one impaired class, have been met.").

[182] *Ruti-Sweetwater*, 836 F.2d at 1264–65. Note, however, that the court has a duty to consider the confirmation requirements *sua sponte* regardless of whether anyone objects to confirmation of the plan. *See In re* Adkisson Village Apartments of Bradley Co., Ltd., 133 B.R. 923, 924 (Bankr. S.D. Ohio. 1991) (considering confirmation elements without creditor or trustee objection to confirmation). The true challenge lies in what requirements must be met—cramdown or consensual reorganization requirements.

[183] *See In re Franco's Paving*, 654 B.R. at 109 (citing 11 U.S.C. §§ 1186, 1192, 1194(b), 1193).

[184] *In re* Jaramillo, No. 21-10306-T11, 2022 WL 4389292, at *3 (Bankr. D.N.M. Sept. 22, 2022).

[185] *Ruti-Sweetwater*, 836 at 1265–66 (quoting Heins v. Ruti-Sweetwater (*In re* Ruti-Sweetwater, Inc.), 57 B.R. 748, 750 (D. Utah 1985) (emphasis added)).

Ignoring nonvoting classes provides consistency with how nonvoting creditors are treated within a voting class. To treat them differently—ignoring their vote if other creditors in the class vote but somehow counting their failure to vote when no one else in the class votes either—creates an odd situation in which whether that nonvoting creditor's failure to vote prevents confirmation depends on what other creditors do in the acceptance process. The impact depends not on *how* but *whether* other creditors in the class vote. If the creditor fails to vote and falls in a nonvoting class, the deemed rejection approach would prevent consensual confirmation. Conversely, if just one other creditor in the class votes and votes in favor of the plan, the failure of that creditor to vote has no impact on the plan. Under § 1126, a creditor who elects not to vote in a multi-creditor class inherently accepts placement of the fate of the plan in the remaining creditors within the class. But if a nonvoting class can block consensual confirmation, the fact that the creditor failed to vote (as long as the other creditors in the class do the same) gives the nonvoting creditor an impact that would not have been anticipated under § 1126 by allowing the failure to vote to count in the acceptance process.

Does this approach undermine the rights of creditors? An incentive to vote already exists due to the risk of being outvoted by classmates in the determination of plan acceptance. For creditors in a single-creditor class, the ignored-creditor approach does undermine their ability to not vote and use § 1129(a)(8) to force the plan into a cramdown or prevent confirmation. But in most cases,[186] the creditor in its own class can already force the plan into cramdown or prevent confirmation simply by taking the time to vote—a simple means of having a voice in the reorganization of the debtor, and the means Congress clearly anticipated when a creditor does not agree with the proposed plan.

[186] For a creditor whose vote is designated, the deemed rejection theory would prevent cramdown, while simply ignoring the vote would not automatically lead to cramdown. But to allow a designated vote to lead to cramdown would undermine the point of designating the vote in the first place. The vote is designated because the creditor's vote against the plan is motivated by goals outside of the best interest of the bankruptcy reorganization. *See* Pacific Western Bank v. Fagerdala USA, 891 F.3d at 854 (designation occurs when creditor seeks "to obtain some benefit to which they were not entitled"); *In re* Bataa/Kierland, LLC, 476 B.R. at 575 (lack of good faith indicated by ulterior motive "whenever a party is motivated by interests that are not common to the class of votes that it seeks to dominate, even if that motive may be entirely appropriate in light of the party's other interests"). Both cite Figter Ltd. v. Teachers Ins. and Annuity Assoc. of Am. (*In re* Figter Ltd.), 118 F.3d 635, 638 (9th Cir. 1997). A creditor in its own class should not be able to use a designation to cause a cramdown when their nonvote would be ignored for purposes of determining acceptance if they were within a class with other voting creditors.

Congress's change from the Bankruptcy Act to the Code to discount the vote of creditors within a voting class does not suggest a different result for nonvoting classes. The changes focused on a particular problem of nonvoting creditors modifying results within a class, and do not expressly answer the question of a nonvoting class of creditors. Although generally when Congress answers a question in one area and not in another, its silence is deemed to be intentional,[187] that presumption should not apply here. Under the Bankruptcy Act, the nonvoting class issue never existed, as every creditor in the class counted regardless of voting status. The change of that provision to ignore individual creditors who fail to vote within a class created the issue of how to count of a nonvoting class. Thus, Congress did not need to address an existing problem as it did in the partial-voting classes. If the changes provide any guidance on how to interpret the nonvoting class problem, at most the changes warn of the concerns regarding undue influence for nonvoting creditors in the acceptance process. Ignoring nonvoting classes in the determination of plan acceptance furthers this goal without requiring designation of a nonvoting class as an accepting or rejecting class. Such an interpretation will ensure the combination of some support for the plan without allowing a single nonvoting creditor to prevent confirmation, while also promoting the reorganization of small business debtors under subchapter V of the Code.

Conclusion

The challenge of the nonvoting class in calculating acceptance of the chapter 11 plan has presented problems for decades. The addition of subchapter V bankruptcies has brought renewed attention to the issue due to its primary goal of a consensual reorganization combined with the consequences of the alternative cramdown reorganization proceeding. The American Bankruptcy Institute's ("ABI") recent subchapter V Task Force Final Report recognized the problem and recommended that Congress address the problem specifically for subchapter V bankruptcy cases:

> The Task Force recommends an amendment to section 1191(a) to address the existing challenge of achieving a consensual confirmation where a class of creditors neither objects to the

[187] Russello v. United States, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

> plan nor votes to reject the plan. In this situation, the class is silent, and under the current Bankruptcy Code, the plan cannot be confirmed as a consensual plan even though technically, the plan is not nonconsensual.[188]

Though the ABI Task Force recommended that a plan in which every class that votes affirms the plan, essentially meeting § 1129(a)(8)'s requirement, it also noted that if *no* classes vote, § 1129(a)(10)'s affirmative-voting-class requirement should not be met.[189] To effectuate this result, the ABI Task Force suggested the following modified language for § 1191:

> § 1191. Confirmation of plan
> (a) Terms. – The court shall confirm a plan under this subchapter only if either
> (1) all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met; or
> (2) (A) all of the requirements of section 1129(a), other than paragraphs (8), (10), and (15) of that section, of this title are met;
> (B) all of the requirements of section 1191(b) are met; and
> (C) <u>no class of claims or interests that is impaired under the plan votes to reject the plan and no creditor within such class objects to confirmation of the plan</u>.[190]

This result mirrors the ignored-class approach by ensuring that nonvoting classes do not prevent consensual confirmation but also making sure that those same nonvoting classes do not constitute the affirming class required under § 1129(a)(10). Adding such provisions into § 1191 would remedy those concerns in the subchapter V context, and provides a viable option given the unique concerns in those bankruptcy cases. Many of the same policy concerns

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[188] AM. BANKR. INST., FINAL REPORT OF THE AMERICAN BANKRUPTCY INSTITUTE SUBCHAPTER V TASK FORCE 9, 56, 58 (2023–24) (noting that "a silent class should not prevent confirmation of a consensual plan because . . . the plan is effectively and practically consensual even if not statutorily consensual").

[189] *Id.* at 56, 58 ("Yet the Task Force also thinks that the absence of an affirmative vote on the plan should not allow the debtor to avoid payment of the minimum that Subchapter V requires for confirmation when an impaired class has not affirmatively accepted the plan. Therefore, regarding the silent class, the plan must comply with the cramdown requirements of section 1191(b).").

[190] *Id.* at 60–61 (modifying language, substantively including underlined content).

apply in traditional chapter 11 cases, however, and the issue could be addressed for both types of reorganizations by amending the Code to indicate that a class of creditors shall not be counted in tabulating acceptance of the plan if no creditors within the class vote. Such a provision would allow a plan in which some creditor classes affirmed the plan and no creditor classes rejected the plan to be confirmed as consensual. It would also ensure that when no classes vote, a traditional chapter 11 plan would not be able to be confirmed and that a subchapter V plan would only be confirmable in a cramdown proceeding due to the lack of an assenting creditor class.

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