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Section 1126 - Acceptance of plan

1126(a)

The holder of a claim or interest allowed under S. 502 may accept or reject a plan

1126(b)

If the holder of the claim or interest accepted or rejected the plan prior to filing, then
he is deemed to have accepted or rejected the plan if:

The solicitation of such acceptance or rejection was in compliance with any nonbankruptcy law
If there is not any such law, such acceptance or rejection was solicited after disclosure of sufficient info (1125(a))

1126(c)

A class has accepted if accepted by those other than in 1126(e)
Representing at least 2/3 by amount ***and*** at least 1/2 by number

1126(d)

Similar for a class of interests as to a class of claims in 1126(c)

1126(e)

On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such a plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title

1126(f)

A class that is not impaired under a POR and each holder of a claim or interest in such a class presumed to accept POR
Solicitation of acceptances with respect to such class is not required

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1126(g)

A class is deemed not to have accepted a plan if such plan proviides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan

Section 1129 - Confirmation of plan
1129(a)

The court shall only confirm a POR if the following requirements (among others) are met:

POR has been proposed in good faith and not by any means forbidden by law
Any payment for services or costs or expenses is subject to approval by the court as reasonable
Plan proponent has disclosed the identity and affiliations of any individual to be a director or officer
The appointment of such individual is consistent with the interests of creditors, equity and public policy
Plan proponent has disclosed the identity of any insider (and comp) that will be employed by the reorg entity
Each holder of an impaired claim has either voted in favor or will receive at least what he would in liquidation
If a secured claim, each holder receives no less than the value of such holder's interest in estate's property
For each class, such class has accepted the POR or such class is not impaired under the plan
If a class is impaired under the POR, at least one class that is impaired has accepted the POR, determined without including any acceptance of the POR by any insider
Confirmation of the POR is not likely to be followed by the liquidation or need for further reorg

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1129(b)

"Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph 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.

Fair and equitable meets the following requirements:

For secured claims, holders retain liens to extent of the allowed amount of such claims, regardless of sale of prop
Each holder of a secured claim receive on account of such claim
Deferred cash payments totaling at least the allowed amount of such claim
Of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property
If property sold subject to liens, the liens attach to the proceeds of such sales

For unsecured claims:
Either receive the allowed amount of such claim or
The holder of any claim or interest that is junior will not receive any property

For interests:
Either receive the allowed amount of such interest or
The holder of any interest or interest that is junior will not receive any property

1129(c)

Court may only confirm one plan
If 1129(a) and 1129(b) are met with respect to more than one plan, the court shall determine which plan to confirm

Confirmability
A POR cannot be confirmed if it seeks to substantively consolidate the assets of one Debtor into the Debtors' other estates, where the creditors of the Debtor being consolidated substantively has exclusive rights to those assets

Gerrymandering
Gerrymandering classes in order to win confirmation is something that can be used to contest a confirmation (see the Third Circuit

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decision reversing confirmation In re Machne Manachem, Inc.

The Bankruptcy Code unequivocally states that only "substantially similar" claims or interest can be classified together
But, it never defines "substantial similar" nor requires that all claims or interests fitting the description be classified together

In the Machne Manachem, Inc. case, an insider of the debtor purchased unsecured claims during the case to ensure that an impaired unsecured class would vote in favor of the plan

An enduringly prominent bone of contention in the ongoing plan-classification dispute concerns the legitimacy of separately classifying similar, but arguably distinct, kinds of claims in an effort to create an accepting impaired class. This is referred to as class "gerrymandering".

Section 1122 provides that, except with respect to a class of "administrative convenience" claims (ie. relatively small unsecured claims, such as trade claims below a certain dollar amount), a plan may place a claim or interest in a particular class only "if such claim or interest is substantially similar to the claims or interest of such class."

Legal precedent and lawmakers' statements in connection with the enactment of the Bankruptcy Code indicate that the term should be construed to mean similar in legal character or effect as a claim against the debtor's assets or as an interest in the debtor

Courts generally examine the nature of the claim (e.g. senior or subordinated, secured or unsecured) and the relationship of the claim to the debtor's property (secured vs. unsecured, etc.)

Separate classification of substantially similar unsecured claims has been approved where:

Certain unsecured creditors, such as unionized employees or vendors, will continue to have a relationship with the debtor after confirmation of a plan

Separate classification is necessary to preserve the debtor's ability to leave unimpaired low-interest long-term bond debt by reinstating the maturity of the obligation

Separate classification of unsecured debt is necessary to enforce the terms of a pre-bankruptcy subordination agreement;

The unique nature of "future claims" in mass tort cases (esp 524(g) asbestos claims) makes it appropriate to classify such claims apart from general unsecured claims that are matured, liquidated and uncontingent

Generally, shared interest in voting for or against a plan is a prerequisite to jointly classifying clamis or interests so that dissenting

creditors or shareholders can be outvoted in their class only by creditors or shareholders with similar economic interests with respect to the debtor and/or its assets

A classification scheme designed to fabricate an accepting impaired class under S. 1129(a)(10) ("cramdown") iis referred to as class gerrymandering. It can involve the following:

> Joint classification of claims whose holders are favorable to a plan with the claims of creditors who are not, with the expectation that supporting claims will sufficiently outnumber dissenting claims to ensure acceptance of the plan by the class as a whole;
>
> Separately classifying the claims of dissenting creditors from the claims of creditors favorable to the plan to ensure that the dissenting creditors cannot defeat cramdown confirmation (a form of gerrymandering that has arisen almost exclusively in single-asset real estate cases, where the plan proponent attempts to classify the mortgagee's unseucred deficiency claim apart fro mthe claims of other unsecured creditors). This practice has been invalidated by a majority of the circuit courts of appeal that have faced the issue, including the Fifth Circuit in In re Greystone III Joint Venture and the Fourth Circuit in In re Bryson Properties, XVIII. A slightly different form of class gerrymandering was the subject of the Third Circuit's unpublished ruling in Machne Manachem.

As a general rule, acquiring claims for the purpose of facilitating or blocking confirmation of a plan does not amount to bad faith under S. 1129 (a)(3). However, buying claims with an ulterior motive (i.e. intent other than to protect a legitimate interest as a creditor) is generally deemed to be objectionable. In re Machne Manachem, the Third Circuit adopted the approach taken by other courts that have found the existence of bad faith in cases involving a debtor that arranges for an insider or affiliateto purchase claims for the purpose of blocking or confirming a Chapter 11 plan.

Feasibility

Section 1129 (a)(11) states thata court should confirm a plan of reorganization only if confirmation "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan." The feasibility requirement is "not optional" (*In re Granite Broad. Corp.*, 369 B.R. 120, 146 (Bankr. S.D.N.Y. 2007) and also *In re Moore*, 81 B.R. 513, 517 (Bankr. S.D. Iowa 1988)):

> From *Moore*, "In addition to any objection raised by creditors, the court has a mandatory independent duty to determine whether the plan meets all of the requirements necessary for confirmation."

Courts routinely deny confirmation of plans of reorganization that leave the Debtor with insufficient liquidity to service its debt or to adapt to unexpected adverse market conditins. See *In re Landmark at Plaza Park, Ltd.*, 7 B.R. 653, 661-663 (Bankr. D. N.J. 1980) (even assuming a low interest rate, coverage factor would not justify debt service maximums sufficient to service mortgages

contemplated in debtor's plan)

See *In re Nw. Timberline Enters.*, 348 B.R. 412 (Bankr. N.D. Tex. 2006) (prospect for very slim margins and high interest rate post-confirmation made debtors' plan unfeasible, even when accepting debtors' projections).

See *Moore*, 81 B.R. at 513 (record does not support debtor's ability to meet proposed payments).

See *In re Rack Eng'g Co.*, 200 B.R. 302, 306 (Bankr. W.D. Pa. 1996) (given lack of expected growth in company's industry, downward trend in previous three years, projected increase in earnings, court "simply cannot confirm a plan that has not properly allowed for unforeseen events")

Judge Gropper argued in *Granite Broadcasting* it is "no answer" for a group of creditors "in effect to assert that 'we'll buy out all the others and the problem will be ours.'" See 369 B.R. at 146. Gropper notes that S. 1129(a)(11) requires a court to consider not only the ability of the debtors to service their new financing arrangements, but also those other constituencies "with a stake in the enterprise, such as the employees, customers, and the public." See also *United States v. Whiting Pools, Inc.*, 674 F. 2d 144, 159 (2d Cir. 1982), *aff'd* 464 U.S. 198 (1983) (the Code is designed to "protect the investing public, protect jobs and help save troubled businesses"). See *In re Ponn Realty Trust*, 4 B.R. 226 (Bankr. D. Mass. 1980) (quoting House Report No. 95-595 at 220 (1977) *as reprinted in* 1978 U.S.C.C.A.N.5963, 6179 ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business' finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.")

Non-discrimination Intra-class

Section 1123(a)(4) requires that each claim or interest of a particular class receive the same treatment, unless the holder of a claim or interest agrees to receive a less favorable treatment. Courts have consistently held that the statute does not require identical treatment for all class members in all respects under a plan. *In re AOV Indus. Inc.*, 792 F. 2d 1140, 1154 (D.C. Cir. 1986) ("We do not hold that all class members must be treated precisely the same in all respects."). See *In re Dow Corning Corp.*, 255 B.R. 445, 497 (E.D. Mich. 2000).