Fall 2020

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-chief,
Erik Johanson, Erik Johanson PLLC

PRESIDENT'S MESSAGE

by Kathleen L. DiSanto
Bush Ross, P.A.

Warmest holiday wishes to you and your loved ones, even if the holiday season looks a little different this year.

Scrolling through my Facebook feed late one night, I was drawn to one my friend's posts. It said "I thought 2020 would be the year I got everything I wanted. Instead, I found out I had everything that I needed." While this year has been marked with disappointment and loss, there are still so many things for which to be thankful. Whether it is our careers, or our health, or our families, we are so very fortunate compared to many other Americans this holiday season.

These were surely not the circumstances under which I imagined serving as president of the TBBBA. It has been nearly nine months since our membership has been able to gather—no Annual Dinner, no holiday party, no in-person CLE lunches, no happy hours. Nor did we have the opportunity to properly celebrate the appointment to the bench of our dear colleague and past president, Judge Vaughan, or to gather to mourn the losses of Mrs. Rose Paskay or Denise Martin. Undeniably, 2020 has been an immensely difficult year, challenging each of us to grow and adapt.

And grow and adapt is just what the TBBBA has done. I could not be more proud or more grateful for my fellow officers and board members who are committed to make this year a meaningful one for our members and have risen to the challenge of taking our traditional activities virtual. In a typical year, the Board does not meet in June or August. But this year, your Board worked straight through the summer to find creative solutions to the challenges bar associations face across the nation. I am so very grateful to have had the true and constant support and the benefit of the collective wisdom and counsel of our chair, Jake Blanchard, and our officers, Noel Boeke, Barbara Hart, and Megan Murray.

Thanks to the efforts of Angelina Lim, our numbers are just a little smaller than they were last year, which is really a testament to our wonderful members, who were willing to renew their memberships and provide sustaining support to our organization, even when no one knew what the year would hold. Also, if someone in your office has not renewed their membership, please remind them to do so—it is not too late, and there are many reasons to do so (see below).

Dan Fogarty and Nicole Noel have an entire line up of virtual CLE programs set for the year. They have used the opportunity to foster better relationships with the other bankruptcy bars across the state and have expanded our network by cohosting programs with other bar groups. On the consumer front, Christie Arkovich has taken what was once a consumer brown bag lunch, which evolved into a pizza lunch (and more) to the next level—the consumer CLE lunches are now virtual too.

John Landkammer has worked very hard to open our Pro Bono Clinic virtually. We are still working out the kinks in the new system, but so much progress has been made to offer a safe and meaningful clinic experience to those in the community who need our assistance.

As evidenced by this issue reaching your desk (whether at home or in your office), we are happy to report that The Cramdown is alive and well and has not fallen victim to the pandemic. Erik Johanson kept the publication of this fine newsletter on track and even hosted a Zoom meeting to solicit potential authors for future issues.

We continue to connect meaningfully with our judiciary, as Denise Barnett recently coordinated a judicial liaison meeting for chapter 13 issues and conducted the meeting quite successfully via Zoom. Our normal cycle of judicial liaison meetings will continue in the new year.

Ryan Reinert, our technology chair, thought he was getting one of the easier positions on the Board. Usually, this position just entails making sure the computer and printer are functional in the Attorney Resource Room. Little did Ryan know that he would be providing all the behind-the-scenes support to take our events and operations virtual, or that he would become our in-house Zoom expert. We are lucky to be in such capable technological hands.

Ryan Yant, our newest board member, has hosted several virtual happy hours with our bankruptcy judges (and we even snuck in a socially distanced live happy hour with Judge McEwen!).

The TBBBA is also fortunate to have the unwavering support of our bankruptcy judges and the clerk's office. Chief Judge Delano and Judges Williamson, McEwen, and Colton have continued to be so very generous in actively participating in the modified slate of TBBBA events.

And last, but in no way least, I am grateful for each of you. A wise friend of mine astutely noted that COVID has made us appreciate

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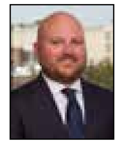

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President's Message

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community. I have always known our Bar is special, and even when I was law student, I could feel the warmth and collegiality of our community. But what I did not realize was how much joy and comfort our every day, ordinary interactions brought me. Whether it was seeing you in Court, meeting you for lunch, or catching up at a happy hour, those interactions were real, genuine, and were actually quite extraordinary and incredibly important to fully enjoying the practice of law. I miss each of you, and look forward to the day when it is safe for us to gather again.

I am also grateful for your continued support as a member of the TBBBA. Without you, there also would not be a bankruptcy bar organization. Thank you for attending our events, providing your honest feedback about our virtual activities, and granting us grace as we navigate uncharted territory.

And we begin a new year, I offer you a challenge, so that we can all continue to grow in gratitude and take the time to recognize that we are fortunate enough to have the things that we need. As those of you who follow Judge McEwen on Twitter already know, Judge McEwen posts something good that happened each day under the handle #SilverLining, and she has done so almost each day of the pandemic. I think I am going to follow her lead in the new year, and would invite you to do the same. Let's connect virtually and share the good!

I wish each of you a wonderful holiday season and here's to a better 2021.

People on the Move!

Townsend J. Belt joins Anthony & Partners, Attorneys at Law. Mr. Belt represents clients in a broad spectrum of matters including commercial litigation, insurance litigation, real estate litigation, bankruptcy, personal injury, tax, and other general civil matters in state courts, federal courts, and on appeals.

Court Admissions and Professional Associations
Mr. Belt is admitted to practice in all state courts of Florida, the United States District Court for the Middle District of Florida, the United States Bankruptcy Court for the Middle District of Florida, United States District Court for the Southern District of Florida, and the United States Bankruptcy Court for the Southern District of Florida, and the United States Tax Court. Mr. Belt is also a member of the Business Law, General Practice, Real Property, and Trial Lawyers sections of the Florida Bar and of the Tampa Bay Bankruptcy Bar Association

Background
Mr. Belt is a Tampa native, and a graduate of Jesuit High School and the University of South Florida. Mr. Belt graduated cum laude from St. Thomas University School of Law and holds an LL.M in Taxation from New York University. Mr. Belt is committed to serving Tampa Bay community and serves on the board of directors for The Italian Club of Tampa, and on the board of the Italian Invitational Golf Tournament

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Florida's new receivership act provides a new option for lenders

By Alexander Zesch
Trenam Law

On July 1, 2020, the Uniform Commercial Real Estate Receivership Act ("UCRERA" or the "Act") became law in Florida. Florida is the ninth state to adopt a version of the Act. The Act provides a formal process for the appointment and operation of a receiver over commercial real estate, an area that has been plagued by inconsistency because Florida's courts were bound by case law and the varying specific contract provisions before them. Now, the Act provides criteria for courts to appoint receivers and enumerates powers receivers possess once appointed.

An Alternative to Commercial Foreclosure Sales

In a typical default on a commercial real estate loan, a lender will file a lawsuit on its promissory note and mortgage, obtain a foreclosure judgment, and often take title to the property after a foreclosure sale – a process that can be lengthy and unattractive, especially if the lender wants to be paid rather than own the property.

UCRERA provides an alternative: The lender can ask a court to appoint a receiver, who will step into the shoes of the borrower-owner and manage the receivership property. Significantly, under UCRERA, a court may authorize a receiver to sell receivership property, even before a judgment is entered against the owner, and the court may order such sales to be free and clear of liens and encumbrances.

Owners and Lienholders Get a Say

For a sale before judgment, the owner of the real property must either consent in writing or fail to object at a hearing. The Act does not appear to permit sales when the borrower/owner objects. In some cases, the borrower/owner will benefit from having a receiver sell its assets, such as when such sales will satisfy the indebtedness and personal guarantees. In those cases, the borrower/owner may consent to the receiver's proposed sale. If the borrower/owner fails to consent but also does not object, the court can approve the sale if the receiver demonstrates that the owner received adequate notice and that the sale is necessary to prevent waste, loss, or other negative impacts on the property.

The receiver must also notify any parties with an interest in the property. Ideally – and in foreclosure cases almost certainly – the lender should sue the lienholders and effect service of process, making them parties to the lawsuit. In those cases, the receiver can notify the lienholders by mail or through their attorneys if they have participated in the case. Otherwise, the receiver will need to provide notice of the proposed sale through formal service of process. Depending on the number of lienholders, this can be time-consuming and frustrate buyers that are eager to close.

One reason for the notice requirement to lienholders is that the court may order the sale to be free and clear of liens and encumbrances. Such liens attach instead to the sale proceeds, with the same validity, perfection, and priority relative to each other. (Readers will recognize this procedure as similar to sales pursuant to 11 U.S.C. § 363 in bankruptcy cases.)

Sale proceeds flow into the receivership and can be disbursed with court approval. In smaller cases involving a limited number of real properties or in cases where the receiver is able to sell multiple properties in batches – thus limiting the number of times court approval is required – a lender may be able to get paid without having to obtain a foreclosure judgment against the borrower/owner and having to market the property itself after taking title. In addition, because the receiver can market the property in different channels than foreclosure sales, sale prices may be closer to market value, increasing the chance of full recovery for the lender and lienholders.

In short, the court-approved sale of real property by a receiver should be an attractive option for most lenders. A few questions remain, however, and possible obstacles include owners or lienholders objecting to the proposed sale, title insurers hesitating to issue title policies under this new process, and owners claiming redemption rights.

Potential Hurdles

As noted, the Act does not appear to authorize pre-judgment sales when the property owner objects. In addition, courts may be less willing to approve such sales over the objections of lienholders. If the receiver can show the sale is necessary to prevent waste and that the sale will ultimately benefit the receivership estate and creditors, however, judges should exercise this new statutory authority.

Another hurdle could be title insurers' hesitation to write title policies for receiver's deeds coming out of this process. Insurers will likely analyze proposed sales on a case-by-case basis and could impose requirements in addition to the issuing of a final and non-appealable court order. Some title insurers may distrust this process altogether if the underlying loan documents do not address the lender's right to a receiver.

Finally, Florida's version of UCRERA does not address an owner's right to redeem property after the court has approved a sale. Property owners have a statutory right to redeem property after a foreclosure judgment until a certificate of sale is issued, but such rights do not automatically exist for other judicially sanctioned sales. The Legislature's decision not to address this question in the Act leaves judges and attorneys having to balance conflicting interests: On the one hand, the inclusion of a redemption right in a sale order may better protect sales against later claims by owners. On the other hand, though, a buyer's interest may wane, and market values suffer, if the owner can stop the sale, even after court approval, by exercising a right to redeem.

Conclusion

Even with these caveats, by allowing receivers to sell receivership property before judgment, Florida's new Uniform Commercial Real Estate Receivership Act potentially provides an attractive way for lenders to turn real property collateral into cash faster and more efficiently than the traditional foreclosure process.

1 Fla. Stat. §§ 714.01 et seq. • 2 In addition to Florida, Arizona, Maryland, Michigan, Nevada, North Carolina, Oregon, Tennessee, and Utah have enacted versions of UCRERA, and Connecticut has introduced legislation that would do so. • 3 Fla. Stat. 714.06 • 4 Fla. Stat. § 714.12 • 5 Id. • 6 Id. • 7 Fla. Stat. § 714.16(2)(b) • 8 Fla. Stat. § 714.16(2) • 9 Fla. Stat. § 714.16(2) • 10 Fla. Stat. § 714.16(4) 11 Id. • 12 Fla. Stat. 714.12(2) • 13 The model act drafted by the National Conference of Commissioners on Uniform State Laws does address redemption rights. See Uniform Commercial Real Estate Receivership Act (available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=aabad179-18cd-4935-0482-6339f2cfba69&forceDialog=0 (last accessed December 1, 2020)). • 14 Fla. Stat. § 43.0315

Warmest wishes for a happy holiday season

and a wonderful New Year!

No notary? No problem: Declarations in Bankruptcy During COVID-19 and After

By Krystle Cacci
Federal Judicial Graduate Intern (WMU Cooley Law School 2020) for the Tampa Division of the United States Bankruptcy Court for the Middle District of Florida

Bankruptcy, as with many other areas of law, is fraught with signature requirements. A 2013 Federal Judicial Center report indicated that, at the time, more than one-third of the bankruptcy courts had provisions on signatures of debtors and other non CM/ECF registrants both in a local bankruptcy rule and in an administrative procedures document, general order, or another non-rules mechanism.[1] The rest of the courts addressing these issues use only a local rule or one of the non-rules-based approaches.[2] About one-quarter of the courts had local forms to implement some of the procedures, particularly those requiring a signed and filed declaration in which the non-registrant attests to the truth and validity of electronically filed documents.

During the nation's current climate of social distancing, practitioners and their staff may, in lieu of filing notarized affidavits, file declarations under penalty of perjury pursuant to 28 U.S.C. § 1746. The practice in the Middle District of Florida, until now, has been to require the filing of notarized affidavits when a matter requires the support of a sworn declaration.[3] The Middle District, however, has recently deviated from its practice during COVID-19 by encouraging parties and attorneys to file declarations under penalty of perjury in line with the permissions of the federal statute. The statute affords that the declaration should contain the following language:

"I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (insert date)."
________________________ (Signature)

It is also possible to take the templated language a step further to explicitly consider the COVID-19 pandemic; for example, the Florida Board of Bar Examiners amended its applicant procedures by constructing the following language to use on its numerous forms:

"I submit this document signed, but not notarized, as a result of the current status of the COVID-19 public health emergency. Under penalty of perjury, I declare that I have read the foregoing [document], that the facts stated in it are true, and that the signature on this [document] is my signature."
________________________ (Signature)

As with an affidavit, the declarant must have personal knowledge of the matter as to which he or she is swearing or personal knowledge of a record qualifying under Rule 803(6), Federal Rules of Evidence, as an exception to the ban against hearsay evidence. Note that a client's business record concerning a default on an adequate protection order does not qualify as a business record under Rule 803(6) of an affiant lawyer whose firm represents the client. Similarly, a client's affidavit of telephonic notice of a default given by the client's lawyer is not sufficient; the client has no personal knowledge of the notice (unless the client was present with the lawyer and participated in the phone call).

The Florida state court equivalent of 28 U.S.C. § 1746 is found at section 92.525(2),
Florida Statutes, for papers filed with the state court. It contains similar language to that included in its federal statute counterpart. There is no specific signature requirement for a handwritten signature under that section, so an electronic signature should be sufficient for verification purposes. For certificates of parties and the form of signatures used in state court documents, the Florida Rules of Judicial Administration govern:

(1) The signatures required on documents by subdivisions (a) [signatures by attorneys] and (b) [signatures of pro se litigants] of this rule may be:

(A) Original signatures.

(B) Original signatures that have been reproduced by electronic means, such as on electronically transmitted documents or photocopied documents.

(C) An electronic signature indicator using the "/s/", "s/", or "/s" [name] formats authorized by the person signing a document electronically served or filed.

(D) Any other signature format authorized by general law, so long as the clerk where the proceeding is pending has the capability of receiving and has obtained approval from the Supreme Court of Florida to accept pleadings and documents with that signature format.

Fla. R. Jud. Admin. 2.515.

As added guidance, section 668.004, Florida Statutes provides that "unless otherwise provided by law, an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature." Section 668.003 (1), Florida Statutes defines an electronic signature as "any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing." Further, "[a] writing is electronically signed if an electronic signature is logically associated with such writing."

1 See also Fed. R. Bankr. P. 5005 or 9011
2 Molly T. Johnson, Bankruptcy Court Rules and Procedures Regarding Electronic Signatures of Persons Other than Filing Attorneys: Report to the Subcommittee on Technology and Cross Border Insolvency of the Advisory Committee on Rules of Bankruptcy Procedure, Federal Justice Center, 3 (2013).
3 Truly the only difference between a declaration and a sworn affidavit is the use of a notary.

Student Loan Sidebar

by: Christie Arkovich
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The CARES Act signed into law on March 27, 2020 (the "Act"), provided for forbearance and interest waiver for all Direct Loans that are owned by the federal government. Older Federal Family Education Loans ("FFEL") were not protected by the Act, but the Department of Education encouraged servicers of these federal loans to take similar actions to relieve borrowers of the need to make payments during the pandemic. Those with Perkins loans or private loans also were not protected from interest accrual or the need to make payments and this resulted in a patchwork of forbearances and other temporary payment relief.

The CARES Act provided other relief such as no need to recertify income during the forbearance period, suspension of all ongoing collection activities, and for credit reporting purposes, any payment that was suspended would be treated as if the borrower made a regularly scheduled payment. President Trump extended the CARES Act as it related to student loans until the December 31, 2020.

As we near the end of the year, the payment due date is fast approaching for many private and federal student loans unless additional Congressional or Presidential action is taken to extend that date. In my own opinion, I believe the repayment of federal student loans will be suspended again for at least three if not six months starting for the January payment (although it could be retroactive due to the transition of power). There is likely to be much confusion in January as to whether a payment is due.

As a student loan advocate, our advice is to use this time wisely to try and eliminate or reduce student loan debt wherever possible rather than merely pushing the can down the road during this pandemic.

So what can be done about student loans in the meantime?

Some options include a consolidation of older FFEL loans to convert them to the newer Direct loans to be eligible for any future legislative efforts as well as Public Service Loan Forgiveness and the Paye/Repaye Plan which allows for 10% discretionary income driven payments. Care should be taken to ensure that the borrower does not lose the benefit of any accrued income driven payments however. Consolidation is essentially a new loan which replaces the older FFEL loans. Any accrued time toward forgiveness is lost. If the new payment term is shorter or the borrower is nearing retirement or will be retired at the time of forgiveness, that may be okay, but often it is not.

Other COVID-19 opportunities to reduce student loan debt include:

- Get the borrower in a rehab plan while the loans are in a CARES Act forbearance. Forbearance months during a rehab will count toward the nine month rehabilitation period to cure a default (and avoid a concurrent garnishment that has ceased during the CARES Act suspension on collection activities).
- If a bankruptcy is needed for consumer debt – why not include an adversary proceeding to

Student Loan Sidebar continued

discharge private student loan debt for a true clean slate?

• Recalculate an Income Driven Plan while income is reduced – for benefits that will last the remainder of the 12 month plan.

• CARES Act Forbearance months count toward PLSF forgiveness, usually forbearance does not.

• If a borrower is older, say in his/her 50s-60s, and suffers from underlying health conditions, perhaps the inability to return to full time work (due to their health concerns or that of a potential employer) in a COVID and even post-COVID era could be the basis for a Total and Permanent Disability?

• If a borrower is suffering from the long-hauler effect of COVID with persisting symptoms, it may not be possible for a Total and Permanent Disability right now due to the uncertainty of how long their symptoms will last, but this may be a remedy 1-3 years down the road if their inability to work persists.

Privatize the loans for lower interest rates: If the borrower has not suffered a reduction in income, but merely wants to pay their student loans down as fast as possible, the borrower may wish to refinance their federal loans to a private loan for a lower interest rate. While the rates do vary, a typical private loan interest rate may be around 4%, while the national average for federal loans is 6.8%, which is relatively high in today's marketplace. However, a refinance to a private loan will cause the borrower to lose any federal benefits such as 1) the ability to switch to extended payment terms; 2) lengthy forbearance or deferment options; 3) income driven payments; 4) forgiveness of various kinds; and 5) ability to discharge the loan(s) in full in the event of disability.

Therefore, this option is ill advised unless the borrower is young and healthy and not likely to receive forgiveness based upon a high income or public service.

As a student loan advocate, our advice is to use this time wisely to try and eliminate or reduce student loan debt wherever possible rather than merely pushing the can down the road during this pandemic. This will help those burdened with heavy student loan debt obtain a true clean slate in the future.

Per Plan vs. Per Debtor


By
Daniel Etlinger, Jennis Law Firm
&
S. Elizabeth King, Shutts & Bowen LLP

INTRODUCTION. Practitioners are accustomed to seeing multiple debtors opt to jointly administer or substantively consolidate their cases. Many of those cases progress to confirmation where typically a single plan is proposed. However, there is a split as to the confirmation requirements of that united plan. Per plan proponents believe only one impaired class is required for the plan as a whole. In contrast, per debtor advocates argue that despite a single plan, an impaired class for each debtor is necessary. This article is co-authored to present a balanced view amongst the two camps which are typically supported by debtors' counsel per plan and creditors' counsel per debtor.

JOINT ADMINISTRATION vs. SUBSTANTIVE CONSOLIDATION. Joint administration is a procedural mechanism meant to simplify management of estates when there are two or more petitions pending in the same court for spouses, partnerships or affiliates.[1] This enables the Court to place the cases on the same track for deadline and hearing purposes, and, ultimately for confirmation protocols. Notably, prior to entering a joint administration order "the court shall give consideration to protecting creditors of different estates against potential conflicts of interest."[2]

In contrast, substantive consolidation is not grounded in the Bankruptcy Code but rather is a common law construct rooted in equity.[3] It "treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor. Consolidation restructures (and thus revalues) rights of creditors and for certain creditors this may result in significantly less recovery."[4] In this way, unlike joint administration, consolidation does substantively effect the estate (hence the term substantive consolidation!).

OVERVIEW OF 1129(a)(10). Whether under substantive consolidation or joint administration, the debtor must satisfy the requirements set forth in Section 1129 of the Bankruptcy Code to confirm its plan.[5] Specifically, the "court shall confirm a plan only if all of the following requirements are met: . . . [i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by an insider."[6]

Under substantive consolidation, courts routinely apply the per plan approach. However, courts are split in analyzing the situation under joint administration. On the one hand, the per plan approach requires only one accepting impaired class for the entire plan (or put another way, an accepting impaired class for one debtor would satisfy confirmation requirements for all debtors). Conversely, the per debtor approach requires one accepting impaired class for each debtor involved in the joint administration.

PER PLAN. The earliest known case advancing the per plan approach was *In re SGPA, Inc.* in 2001.[8] The per plan rationale is best summed up as "the plain language and inherent fundamental policy behind Section 1129(a)(10)" supports the per plan approach.[9] The most recent case to address this issue expanded on this proposition.[10] The Arizona District Court found that the plain language

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1 Fed. R. Bankr. P. 1015(b). The rule has additional benefits such as reducing noticing costs for debtors and lessening administrative costs for the clerk by indexing all future filings on the same docket.
2 Id.
3 In re Owens Corning, 419 F.3d 195, 205 (3d Cir. 2005).
4 Id. (internal citations omitted).
5 11 U.S.C. § 1129.
6 Id. at § 1129(a)(10).
7 See, e.g., In re ADPT DFW Holdings LLC, 577 B.R. 232, 236-37 (Bankr. N.D. Tex. 2017).
8 2001 Bankr. LEXIS 229 at *12-22 (Bankr. M.D. Penn. 2001).
9 In re Station Casinos, Inc., 2010 Bankr. LEXIS 5380 at *81-83 (Bankr. Nev. 2010).
10 JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.), 554 B.R. 894, 899-901 (D. Ariz. 2016).

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only requires one impaired class "under the plan" despite Section 102(7) of the Bankruptcy Code stating the "singular includes the plural."[11] The Ninth Circuit Court of Appeals affirmed noting that the 1129(a)(10) does not "distinguish between single-debtor and multi-debtor plans."[12,13] Perhaps for no other reason than administrative ease, the majority of cases seem to support the per plan track.

PER DEBTOR. The seminal case in the per debtor camp is *In re Tribune.*[14] Here, the Delaware Bankruptcy Court was tasked with addressing two competing plans for 111 jointly administered debtors.[15] Unlike the *Transwest* decisions in the Ninth Circuit, the *Tribune* court first found that Section 1129(a)(10) was not dispositive because "ascribing the plural to the meaning of 'plan' in § 1129(a)(10) is entirely logical and consistent with such a scheme" under § 102(7).[16] Second, the *Tribune* court explained that Section 1129(a)(10) must be read in conjunction with all subsections of Section 1129(a), and then asked, and answered in the negative, whether the requirements of Sections 1129(a)(1) or (a)(3) could "be met if only one or more—but fewer than all—debtors proposing a joint plan satisfies them[.]"[17] Third, the court found that convenience of a joint plan should not trump confirmation standards, especially in light of an alternative path of substantive consolidation.[18]

The issue resurfaced before the same court later that year in *In re Jer/Jameson Mezz Borrower II, LLC.*[19] Here, the Delaware Bankruptcy Court was not ruling on confirmation of a plan but rather a motion to dismiss.[20] However, in addressing the issues raised in the dismissal motion, the court pointed to the fact that the moving party was the only creditor for one of the debtors.[21] Therefore, the court found that "confirmation of a plan to which they do not consent is not possible."[22]
It also occurs to per debtor proponents that the plain language of the Bankruptcy Code supports the per debtor approach. Specifically, Section 1126, which sets forth the requirements for acceptance of a plan, provides that "[a] class of claims has accepted a plan if such plan has been accepted by *creditors*…"[23] And the term "creditor" refers to those with "a claim against the debtor[.]" If the per plan approach is taken, non-creditors would be approving the plan, which does not comport with Section 1126(c).

CONCLUSION. Supporters of the per plan approach will defend it both on statutory construction grounds and by appealing to the practical implications for administration, whereas those in favor of the per debtor stance primarily argue that to find otherwise would circumvent the protections of the Bankruptcy Code (such as cramming down only where there's at least some creditor support) and the formalities of substantive consolidation.[25] Regardless, debtors should carefully review the landscape when evaluating joint administration versus substantive consolidation and consider the impacts each may have on confirmation. And, creditors should studiously evaluate plans and their possible objections regarding the same.

11 Id.
12 JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.), 881 F.3d 724, 729 (9th Cir. 2018).
13 For additional cases supporting the per plan approach see JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns), 419 B.R. 221, 264-66 (Bankr. S.D.N.Y. 2009) and In re Enron Corp., 2004 Bankr. LEXIS 2549 at *234-235 (Bankr. S.D.N.Y. 2004).
14 464 B.R. 126 (Bankr. D. Del. 2011).
15 Id. at 180.
16 Id. at 182.
17 Id. at 183.
18 Id. at 183-84.
19 461 B.R. 293, 301-02 (Bankr. D. Del. 2011). See also In re Woodbridge Grp. of Companies, LLC, 592 B.R. 761, 778 (Bankr. D. Del. 2018) (restating finding in Tribune that "[i]n the absence of substantive consolidation, entity separateness is fundamental and the requirement of § 1129(a)(10) must be satisfied by each debtor in a joint plan." (internal citation and quotation marks omitted) (modification in original)).
20 Id.
21 Id.
22 Id. (citing In re 3 RAM, Inc., 343 B.R. 113, 119 (Bankr. E.D. Pa. 2006) (holding that where debtor has no operations and only one asset which is fully encumbered in favor of the only creditor, the debtor is unable to confirm a plan over creditor's opposition, thereby requiring mandatory dismissal under section 1112(b)(4)(A))).
23 11 U.S.C. § 1126(c) (emphasis added).
24 Id. at § 101(10)(a).

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