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Eric W. Lam

ON THE RIVER OF ARTIFICIAL AND ARBITRARY IMPAIRMENT: AN ERRONEOUS ANALYSIS

ERIC W. LAM*

I. INTRODUCTION

A Chapter 11 bankruptcy case culminates in a plan that proposes to restructure the debtor's assets and liabilities. Ideally, the Chapter 11 bankruptcy plan is conceived by negotiation and consensus among classes of creditors, debtors, and equity holders.[1] Chapter 11 of the Bankruptcy Code[2] does not, however, require unanimous acceptance by all creditor classes for a plan to achieve confirmation. For example, a class of claims is deemed to have accepted the plan if, within the class, more than one half of voting creditors holding at least two-thirds of the dollar amounts of the claims in that class vote to accept the plan.[3] Similarly, if the plan contains one or more *impaired* classes of non-insider claims, an affirmative vote by only one impaired non-insider class can (assuming other confirmation requirements have been met)[4] produce confirmation.

On October 8, 1993, a panel of the Eighth Circuit Court of Appeals redefined the impairment concept. The Eighth Circuit panel opinion in

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* Member, Moyer & Bergman P.L.C., Attorneys at Law, Cedar Rapids, Iowa. B.A. (cum laude) Macalester College 1979; J.D. (with distinction) University of Iowa College of Law 1982. The author thanks Stanley M. Herkelman, Thomas G. McCuskey, Mary Louise Taylor, and Brenda K. Werner for their comments on earlier drafts of this Article.

1. *See, e.g.*, Meltzer, *Disenfranchising the Dissenting Creditor Through Artificial Classification or Artificial Impairment*, 66 AM. BANKR. L.J. 281, 312 (1992) (stating that "chapter 11 is intended to foster plans of reorganization which are consensual to the greatest possible extent").

2. The term "Bankruptcy Code" or "Code" refers to Title 11 of the United States Code, as enacted by P.L. 95-598, 92 Stat. 2631 (1978), and subsequent amendments through and including September 1, 1994. The term "Bankruptcy Act" or "Act" refers to the Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978). Cases decided under the Bankruptcy Act continue to be influential in interpreting Bankruptcy Code provisions. This is so because

> [w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate.' [The Supreme] Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.

Dewsnup v. Timm, 112 S. Ct. 773, 779 (1992).

3. 11 U.S.C. § 1126(c) (1988).

> "[T]he principal purpose of any Chapter 11 case is the formulation of a plan of reorganization . . . . Within every plan is a description of how each class of creditors and equity security holders are to be treated with regard to their claims or interests. The plan must classify each claim and interest as well as state whether the class will be impaired or unimpaired. If any class of claims is impaired, the plan must further set forth the way in which each impaired class will be treated."

K. Mallory & R. Phelan, *To Impair or Not to Impair — That Is the Question in Chapter 11 Reorganization*, 17 ST. MARY'S L.J. 869, 871 (1986).

4. *E.g.*, 11 U.S.C. § 1129(a)(1) - (a)(9), (a)(11) - (a)(13) (1988).

In re Windsor on the River Associates, Ltd.[5] held that "for purposes of 11 U.S.C. § 1129(a)(10), a claim is not impaired if the alteration of rights in question arises solely from the debtor's exercise of discretion."[6] *Windsor* involved a real estate partnership that owned an apartment complex in Cedar Rapids, Iowa. Other than the apartment complex, the debtor had no asset. The Chapter 11 petition was filed to toll foreclosure endeavors exerted by the secured creditor. The trial court confirmed the debtor's plan of reorganization. The Eighth Circuit panel reversed, held confirmation could not be achieved, and dismissed the case.

This article begins with a brief study of the development of the "impairment" concept.[7] The article then examines the *Windsor* facts and holding[8], and illustrates that application of the *Windsor* rule will lead to unrealistic and unworkable results.[9] The article concludes that the *Windsor* analysis is flawed and should not be followed by other courts.[10]

II. IMPAIRMENT AND CONFIRMATION

In a typical Chapter 11 proceeding, the debtor proposes a plan of reorganization. The plan may contain many features, ranging from a complete liquidation of the debtor's business to a total restructuring of the debtor's obligations and business operations.[11] During the first 120 days after the filing of a voluntary Chapter 11 petition, the debtor enjoys the exclusive right to file a plan.[12] Such temporal plan-filing exclusivity may be reduced "for cause," and similarly may be extended "for cause."[13] After this exclusivity period has expired, any "party in interest" may file a plan.[14]

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5. 7 F.3d 127 (8th Cir. 1993).
6. *In re* Windsor on the River Assocs., Ltd., 7 F.3d 127, 132 (8th Cir. 1993).
7. *See infra* notes 11-28 and accompanying text.
8. *See infra* notes 29-50 and accompanying text.
9. *See infra* notes 51-66 and accompanying text.
10. *See infra* notes 67-83 and accompanying text.
11. 11 U.S.C. § 1123 (1988). For example, the plan may

> provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or the retention and enforcement by the debtor . . . of any such claim or interest; [or] provide for the sale of all or substantially all of the property of the estate . . . ; and include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code.]

11 U.S.C. § 1123(b)(3) - (5) (1988).

12. *Id.* § 1121(b).
13. *Id.* § 1121(d). *See generally* Lam, *Of Exclusivity and for Cause: 11 U.S.C. Section 1121(d) Re-Examined*, 36 DRAKE L. REV. 533 (1987). "Cause" includes size and complexity of the case and nature of the debtor's business. *Id.* at 541-45.
14. 11 U.S.C. § 1121(c) (1988). The debtor, a creditor, a creditors' committee, and an indenture trustee are "parties in interest." *See* 11 U.S.C. § 1109 (1988).

Plan confirmation requirements are enunciated in section 1129 of the Bankruptcy Code. Germane to this discussion is section 1129(a)(10), which provides that:

> The court shall confirm a plan only if all of the following requirements are met:
>
> . . . .
>
> If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.[15]

In other words, assuming all other plan confirmation requirements are met, if the plan contains one class of impaired non-insider claims, then the plan may be confirmed only if that impaired class of non-insider claims accepts the plan. If the plan contains two impaired classes of non-insider claims, then the plan may be confirmed only if at least one of the two impaired classes accepts the plan.[16] Similarly, if the plan contains ten impaired classes of non-insider claims, then the plan may be confirmed only if at least one of those ten impaired classes of claims accepts the plan. The other nine impaired classes of claims will receive treatment pursuant to the terms of the confirmed plan, despite rejection of the plan by any of these nine impaired classes of claims.[17]

Impairment is defined in section 1124. In pertinent parts, section 1124 states:

> [A] class of claims . . . is impaired under a plan *unless*, with respect to each claim . . . of such class, the plan —
> (1) leaves unaltered the legal, equitable, and contractual rights to which such claim . . . entitles the holder of such claim . . . ;
> (2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim . . . to demand or receive accelerated payment of such claim . . . after the occurrence of a default . . . cures any such default. . . .

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15. 11 U.S.C. § 1129(a)(10) (1988). For a general discussion of other plan confirmation requirements, see J. Pearson et al, DRAFTING BANKRUPTCY REORGANIZATION PLANS (Wiley & Sons 1992 and Supp.).

16. *In re* Block Shim Development Co., 939 F.2d 289, 291 (5th Cir. 1991).

17. 11 U.S.C. § 1129(b) (1988). The power to impose confirmation against creditor rejection is referred to as "cram down." *See generally* K. Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133 (1978).

> (3) provides that, on the effective date of the plan, the holder of such claim . . . receives, on account of such claim . . . cash equal to . . . the allowed amount of such claim[.][18]

The legislative history accompanying section 1124 reveals congressional intent in three respects: departure from the old Bankruptcy Act approach; indicia of creditor support; and enhancement of creditor participation.

A. DEPARTURE FROM BANKRUPTCY ACT APPROACH

Section 107 of the old Bankruptcy Act stated that creditors "shall be deemed to be 'affected' by a plan only if their . . . interests shall be *materially and adversely* affected thereby."[19] Congress did not enunciate what specific methods of treatment would produce "material and adverse" effect. As a result, the concept of "material and adverse" effect was developed by caselaw interpretation. Such case-by-case interpretation, however, generated "inherent ambiguities."[20] To resolve these ambiguities, Congress enacted new Code section 1124 "to indicate when contractual rights of creditors . . . are not materially affected."[21] Specifically, the three methods of treatment described in section 1124 are the only "ways in which [a] plan may leave a claim or interest unimpaired."[22] In essence, new Code section 1124 provides three exclusive statutory methods of unimpaired treatment. The section 1124 statutory definition approach therefore represents a departure from the case-by-case approach under the old Bankruptcy Act.[23]

B. INDICIA OF CREDITOR SUPPORT

A second purpose of enacting section 1124 was to generate indicia of creditor support. Specifically, in enacting Chapter 11 of the Bankruptcy Code, Congress was cognizant that

> [m]ost business arrangements, that is, extensions or compositions (reduction) of debts, occur out-of-court. The outof-court

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18. 11 U.S.C. § 1124 (1988).

19. 11 U.S.C. §§ 507, 708 (1976) (Bankruptcy Act §§ 107, 108; repealed 1978) (emphasis added).

20. Fortgang & King, *The 1978 Bankruptcy Code: Some Wrong Decisions*, 56 N.Y.U. L. REV. 1148, 1154 (1981).

21. H. R. REP. No. 95-595, 95th Cong., 1st Sess., at 408 (1977)

22. *Id.*

23. *See* 124 CONG REC. H1113 (Sept. 28, 1978).

> procedure, sometimes known as a common law composition, is quick and inexpensive. However, it requires near universal agreement of the business's creditors, and is limited in the relief it can provide for an over-extended business. When an out-of-court arrangement is inadequate to rehabilitate a business, the bankruptcy laws provide an alternative. An arrangement or reorganization accomplished under the Bankruptcy Act binds nonconsenting creditors, and permits more substantial restructuring of a debtor's finances than does an out-of-court work-out.[24]

While recognizing the problem associated with the "near universal agreement" of out-of-court workouts, Congress also was cautious not to grant plan proponents the unfettered ability to confirm plans over unanimous rejection.[25] The "one impaired class acceptance" requirement of section 1129(a)(10) is therefore designed to grant confirmation only to those plans that "provide some indicia of support by affected creditors."[26]

C. CREDITOR PARTICIPATION

Under the old Bankruptcy Act, unless the creditor's rights were "affected," the creditor's vote did not count toward satisfying a confirmation requirement.[27] To disenfranchise creditors from participating in the plan process, plan proponents would simply propose plans that did not "affect" the disenfranchised creditors. To provide creditors, "affected" and "unaffected," a larger voice in the plan confirmation process, section 1124 permits creditors to vote on plans when there exists the "*slightest* impairment."[28] Only when the section 1124(1)-(3) unimpairment provisions are met would a creditor's voice be denied reception. The net

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24. H. R. REP. No. 95-595, 95th Cong., 1st Sess., at 220 (1978).

25. *In re* Polytherm Industries, Inc., 33 B.R. 823, 835 (W.D. Wis. 1983) (finding "nothing in the Bankruptcy Reform Act to indicate that Congress intended that the bankruptcy courts could saddle creditors with a stake in a reorganized corporation under a plan that had received no acceptances from impaired classes of creditors[.]").

26. *In re* Lettick Typografic, Inc., 103 B.R. 32, 38 (Bankr. D. Conn. 1989).

27. *See* 11 U.S.C. § 579 (1976) (Bankruptcy Act § 179; repealed 1978) ("After a plan has been accepted . . . by . . . creditors . . . , exclusive of creditors . . . who are not affected by the plan . . . , the judge shall fix a hearing . . . for the consideration of the confirmation of the plan."); *see also In re* Barrington Oaks General Partnership, 15 B.R. 952, 963 n.26 (Bankr. D. Utah 1981) ("under the Act, if a claim was not materially and adversely affected, it did not count"); 6 J. MOORE & L. KING, COLLIER ON BANKRUPTCY ¶ 7.41, at 1343 (14th ed. 1978); 11 U.S.C. § 579 (1976) (Bankruptcy Act §179; repealed 1978).

28. *In re* Wilhelm, 101 B.R. 120, 122 (Bankr. W.D. Mo. 1989). Indeed, the unimpairment provisions of sections 1124(1), (2), and (3) are "three narrow exceptions" to voting entitlement. *Id.*

effect is that more creditors may participate, via plan voting, in the plan confirmation process.

Bearing in mind these congressional objectives, the *Windsor* facts and holding will now be examined.

III. IN RE WINDSOR ON THE RIVER

Windsor on the River Associates, Ltd. ("Windsor") owned an apartment complex in Cedar Rapids, Iowa.[29] The apartment complex was "essentially the only asset" of Windsor.[30] Windsor owed approximately $10 million to Balcor Real Estate Finance ("Balcor").[31] The $10 million Balcor claim was secured by a mortgage on the apartment complex. The note to Balcor was scheduled to balloon in May 1991.[32] Between March 1991 and May 1991, Windsor "tried unsuccessfully to negotiate a loan extension with Balcor. . . ."[33] Five days before the maturity date of the note, Windsor filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the Northern District of Iowa.[34]

Windsor filed a reorganization plan, consisting of six creditor classes of claims.[35] Germane to this analysis are Class I, consisting of Balcor's claim,[36] and Class III, consisting of the claims of several unsecured trade creditors.[37] The total amount of the unsecured trade debts in Class III was $13,000.[38] The total amount of Balcor's claim in Class I was $10 million. However, Balcor was scheduled to receive only $500,000 on the plan's effective date.[39] Part of this $500,000 would be derived from a new $1 million capital contribution from the limited

29. *In re* Windsor on the River Assoc., Ltd., 7 F.3d 127, 129 (8th Cir. 1993).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *In re Windsor*, 7 F.3d at 129.
35. *Id.* The claim held by Class II was disallowed, and was therefore not germane to the plan confirmation process. *Id.* Class IV contained the claims of tenants for return of their tenant security deposits. *Id.* The plan provided for payment of those deposits in accordance with the leases. *Id.* Class IV was therefore not impaired, because its treatment "leaves unaltered the legal, equitable, and contractual rights to which such claim ... entitles the holder of such claim," within the meaning of section 1124(1) of the United States Code. *Id.* Classes V and VI contained interests held by the general and limited partners, i.e. insiders. *Id.* Since section 1129(a)(10) of the United States Code provides that the "one impaired class acceptance" requirement applies only to *non*-insider classes, Classes V and VI were also not germane to the *Windsor* analysis.
36. *Id.*
37. *Id.*
38. *Id.*
39. *In re Windsor*, 7 F.3d at 129.

partners.[40] Further, the plan proposed to extend the Balcor note maturity date ten years, and called for Windsor to make monthly payments to Balcor on a thirty-year amortization schedule.[41]

The unsecured trade debts in Class III were scheduled to be paid in full sixty days *after* the plan's effective date.[42] Because the Class III unsecured trade creditors would not receive cash *on* the effective date of the plan, Windsor argued that the treatment of this class did not meet the definition of "unimpaired" under section 1124(3). Windsor therefore contended the Class III claims were impaired.[43]

Class III voted to accept the plan.[44] Balcor, the Class I creditor, voted to reject the plan.[45] Because Class III (which, according to Windsor, was an impaired class) voted to accept the plan, Windsor theorized that the "one impaired class acceptance" requirement of section 1129(a)(10) had been met.[46] Windsor therefore sought confirmation of its plan. The trial court confirmed Windsor's plan, and Balcor appealed.[47]

On appeal, an Eighth Circuit panel held that "for purposes of section 1129(a)(10) of Title 11 of the United States Code, a claim is not impaired if the alteration of rights in question arises solely from the debtor's exercise of discretion."[48] The panel reasoned:

> [t]he face of Debtor's . . . plan . . . clearly shows that the unsecured trade creditors' claims of Class [III] . . . were arbitrarily and artificially impaired. Simple remanipulation of the plan demonstrates this. Had Debtor's plan allowed for a smaller payment to Balcor, say, $400,000 instead of $500,000, Debtor could have paid . . . the Class . . . [III] claimants on the effective date. Balcor would have been the only impaired claimant. As the only impaired claimant, and as a secured claimant, it is likely that Balcor would have rejected Debtor's plan. . . . Oddly, Balcor was placed in the position of possibly

40. *Id.*
41. *Id.* at 130.
42. *Id.* at 129.
43. *See id.* at 130.
44. *See In re Windsor*, 7 F.3d at 130.
45. *See id.*
46. *See id.*
47. Judge Melloy served as United States Bankruptcy Judge from 1986 through 1992. In 1992, he was appointed to serve on the United States District Court. 1 ALMANAC OF THE FEDERAL JUDICIARY, 8TH CIRCUIT-13 (1994). The *Windsor* bankruptcy case was filed while he was the Bankruptcy Judge. Upon appointment to the District Court, Judge Melloy retained the *Windsor* case, and held the confirmation hearing in his capacity as District Judge.
48. *In re Windsor*, 7 F.3d at 132.

> having to argue that it should receive *less* under the plan in the hope that its interests might be protected. The only purpose to be served by the delay in payment to the Class . . . [III] payments was, therefore, to ensure approval by at least one "impaired" class as required by Section 1129(a)(1). Debtor never presented a plausible alternative explanation.[49]

The panel then concluded "[i]t is therefore unlikely that Balcor would accept any plan Debtor might propose. Since it is apparent that there is no plan Debtor would propose which the only impaired creditor . . . would approve, remand for further proceedings would be futile. Accordingly, the cause is reversed and dismissed."[50]

IV. WINDSOR'S FAUX PAS

Windsor's analysis is erroneous. Its illogic can be illustrated by three hypothetical examples:

A. HYPOTHETICAL EXAMPLE NO. 1

Assume Windsor can raise $10 million. In its plan, Windsor must deal with at least[51] two classes of claims: the unsecured trade creditor claims of $13,000 and Balcor's secured claim of $10 million. Since Windsor can only raise $10 million, it does not currently have $ 10,013,000 to pay both classes of claims. Bearing in mind that confirmation may be achieved only if one impaired class accepts the plan, Windsor proposes the following: pay Balcor $9,987,000 cash on the plan's effective date; one month after the plan's effective date, pay Balcor the remaining $13,000 with one month's interest;[52] and on the plan's effective date pay $13,000 to the unsecured creditors. Since Balcor would not receive its total $10 million secured claim *on* the effective date but rather $9,987,000 on the effective date and $13,000 one month later, Balcor's claim is impaired.[53] Even though desiring total payment of its $10 million secured claim on the effective date, Balcor

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49. *Id.* at 132-33.

50. *Id.* at 133.

51. *See supra* note 35 (discussing briefly the other four classes of claims that are either not impaired or disallowed or composed of insider claims (whose votes do not count toward the "one impaired class acceptance" requirement), and are therefore not germane to our analysis).

52. The $13,000 with interest may, for example, be derived from operating revenues generated during the one month after the effective date.

53. *See* 11 U.S.C. § 1124(3) (1988) (providing that a class of claims is impaired unless "on the effective date of the plan, the holder of such claim receives . . . cash equal to . . . the allowed amount of such claim").

nonetheless votes to accept the plan treatment. Balcor so voted because a wait of merely thirty days to receive its total $10 million is, in Balcor's judgment, not unreasonable.

Under the Eighth Circuit analysis, the impairment of Balcor's claim obviously "arise[s] solely from the debtor's exercise of discretion."[54] This is so because, instead of paying $9,987,000 to Balcor and $13,000 to the unsecured creditors on the plan's effective date, Windsor could have paid the entire $10 million to Balcor on the effective date. Windsor's plan would not be confirmable,[55] because Balcor, in the Eighth Circuit's view, is not truly impaired given "the alteration of rights . . . aris[ing] solely from the debtor's exercise of discretion."[56]

B. HYPOTHETICAL EXAMPLE NO. 2

Assume Windsor cannot raise any new capital. Instead, Windsor demonstrates to the satisfaction of the bankruptcy court that projected cash flow will support repayment in full of Balcor's $10 million secured debt over a ten-year period and the unsecured trade creditors' $13,000 debt over a two-year period. The cash flow further projects that during the first month of post-confirmation operation, a surplus of $13,000 after routine operating expenses would be available. Windsor proposes to use the surplus $13,000 for extraordinary but necessary repairs and upgrades of the apartment units and building premises. For whatever reason—economic or otherwise—Balcor rejects the plan. The unsecured creditors, however, accept the plan. Since the unsecured creditors would not receive "on the effective date of the plan . . . cash equal to . . . the allowed amount of such claim," the unsecured creditor class is impaired within the meaning of section 1124(3).[57] Similarly, the unsecured class is impaired within the meaning of section 1124(1) because the plan does not "leave[] unaltered the legal . . . rights to which [the unsecured] claim [is] . . . entitle[d]."[58] Section 1124(2) is likewise not met, since a two-year payout does not "reinstate[] the maturity of such claim[.]"[59]

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54. *In re Windsor*, 7 F.3d at 132.

55. The plan is not confirmable even if no creditor objects. This is so because title 11, section 1129(a) of the United States Code permits confirmation "only if all" of the requirements of section 1129(a) are met. 11 U.S.C. § 1129 (a) (1988). Given the bankruptcy court's duty to independently scrutinize the plan for confirmation infirmities, *see, e.g., In re* Moore, 81 B.R. 513, 517 (Bankr. S.D. Iowa 1988); *In re* Holthoff, 58 B.R. 216, 218 (Bankr. E.D. Ark. 1985), under the Eighth Circuit *Windsor* rule, the bankruptcy court must find that Balcor's "impairment" fails to meet section 1129(a)(10) of the United States Code. *In re Windsor*, 7 F.3d at 131.

56. *In re Windsor*, 7 F.3d at 132.

57. 11 U.S.C. § 1124(3) (1988).

58. 11 U.S.C. § 1124(1) (1988).

59. 11 U.S.C. § 1124(2) (1988).

Windsor therefore contends that the "one impaired class acceptance" rule of section 1129(a)(10) is satisfied.

Applying the *Windsor* analysis, the two-year unsecured repayment period would have "arise[n] solely from the debtor's exercise of discretion."[60] Instead of spending $13,000 on repairs and upgrades during the first plan month, Windsor could have paid the $13,000 to the unsecured creditors. Acceptance by the unsecured creditors would therefore not satisfy the "one impaired class acceptance" requirement of section 1129(a)(10).

C. HYPOTHETICAL EXAMPLE NO. 3

Windsor convinces its limited partners to inject $13,000. The $13,000 injection could, in Windsor's discretion, be directed to at least three expenditures: apply towards Balcor debt; repay the unsecured claims; or pay for repairs and upgrades to the apartment. For whatever reason—economic, evil, or otherwise—Windsor chooses to spend the $13,000 for repairs and upgrades. Windsor then proposes to pay Balcor over ten years and the unsecured creditors over five years. Balcor rejects the plan, and the unsecured creditors accept the plan.

Under the *Windsor* analysis, the acceptance by the unsecured creditors would not meet the "one impaired class acceptance" requirement of section 1129(a)(10). The alteration of the unsecured creditors' right by paying them over five years, instead of using the $13,000 to pay them immediately, would have arisen "solely from the debtor's exercise of discretion."[61] The debtor could have, and under the Windsor opinion should have, paid the $13,000 to the unsecured creditors.

The three hypothetical examples, and other variants the limits of which are bound only by imagination, illustrate that the *Windsor* analysis is unrealistic and unworkable. For example, while a negotiated, consensual plan treatment is the ideal,[62] a consensual plan is not always attainable. Indeed, unless the plan confirmation vote is effectuated "not in good faith,"[63] the vote is valid even if the vote is based on the voter's self interest.[64] In formulating a non-consensual plan, the plan proponent must necessarily consider how a class of non-consenting creditors will be treated. How can the plan proponent not exercise discretion when determining whom and how to impair?

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60. *In re Windsor*, 7 F.3d at 132.
61. *Id.*
62. *See, e.g.*, Meltzer, *supra* note 1, at 312.
63. 11 U.S.C. § 1126(e) (1988).
64. *See, e.g., In re* Gilbert, 104 B.R. 206, 216 (Bankr. W.D. Mo. 1989).

Similarly, how does one ascertain whether the impairment does not "arise *solely* from the debtor's exercise of discretion"? For example, perhaps the unsecured class treatment in *Windsor* was the result of negotiation between the debtor and the unsecured class. Specifically, perhaps Windsor originally proposed to pay the $13,000 unsecured claims 100 days, not sixty days, after the effective date, and after lengthy negotiations, the unsecured creditors and the debtor agreed to a sixty-day payout period. If indeed the unsecured class treatment was the result of negotiation between the debtor and the unsecured claimants, would the unsecured class impairment not "arise solely from the debtor's exercise of discretion"? Would the burden of proof on such an issue be borne by the plan objector, or by the plan proponent? Similarly, perhaps the unsecured creditors in *Windsor* realized they would receive nothing if the Chapter 11 plan was denied confirmation and instead the debtor would be liquidated in state court foreclosure proceedings. Given this realization, perhaps the unsecured creditors and Windsor negotiated and eventually agreed on the sixty-day plan treatment. Would such an agreement mean the impairment of the unsecured class did not arise "solely from the debtor's exercise of discretion"? Does not such negotiation indicate creditor support, consistent with the legislative policy of section 1124? Does not the affirmative vote of the unsecured creditors reflect creditor participation, consistent with the legislative policy of section 1124?

One wonders what result would have obtained if the unsecured class would *not* have received payment within sixty days of the effective date, but instead sixty-one days? Or sixty-two days? Or sixty-two years? The Eighth Circuit panel surmised that Windsor could have paid the unsecured claimants on the effective date and not on the sixtieth day after the effective date. Surely "a dollar in hand today is worth more than a dollar to be received a day, a month or a year hence."[65] To justify the court's holding, one must conclude that sixty days "hence" is not a material delay. Delay by degree, however, can only lead one back to measuring whether creditors are "materially or adversely affected" by the plan. The Bankruptcy Code specifically abandoned the "materially and adversely affected" approach of the Bankruptcy Act.[66] The Eighth Circuit's analysis is therefore contrary to express congressional intent.

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65. *In re* Doud, 74 B.R. 865, 867 (Bankr. S.D. Iowa 1987), *aff'd* 869 F.2d 1144 (8th Cir. 1989) (quoting 5 COLLIERS ON BANKRUPTCY ¶1129.03, at 1129-62 (15th ed. 1986)).

66. *See supra* notes 19-23 and accompanying text.

V. CONCLUSION

To be sure, the fact that "question[s] of degree . . . require subjective analysis by the bankruptcy court does not mean we should throw in the towel."[67] Indeed, the Bankruptcy Code "already contains numerous provisions which require subjective decisions by bankruptcy judges."[68] But these "numerous provisions" that require "subjective decisions" specifically vest the bankruptcy courts with the power and duty to make the subjective calls. For example, the bankruptcy court determines what constitutes "reasonable" compensation under section 330(a) of Title 11 of the United States Code.[69] The court also determines the extent of "reasonable" reliance under section 523(a)(2)(B) of Title 11 of the United States Code. Only "reasonable" fees may be allowed as part of an oversecured claim by operation of section 506(b) of Title 11 of the United States Code. Chapter 11 plans may be confirmed only if they are proposed in "good faith."[70] The bankruptcy court may "cram down" a plan only if the plan is "fair and equitable."[71] A Chapter 9 municipality petition may be dismissed if the debtor exhibited "unreasonable delay."[72] Unlike these and other Code provisions, however, nothing in the impairment definition of section 1124 submits to any "subjective analysis." Indeed, unlike the "material and adversely affected" impairment concept under the old Bankruptcy Act,[73] the three "narrow exceptions" in section 1124 are capable of only objective, not subjective, interpretation.

Windsor was a single-asset real estate partnership. Perhaps single asset debtors such as Windsor do not belong in the Chapter 11 arena.[74] Instead, such debtors perhaps should be liquidated under Chapter 7 or through state law foreclosures. To the extent one agrees with such a proposition, the *Windsor* result—dismissal and denial of confir

67. Meltzer, *supra* note 1, at 320.
68. *Id.*
69. 11 U.S.C. § 330(a)(1) (1988).
70. 11 U.S.C. §1129(a)(3) (1988).
71. 11 U.S.C. §1129(b)(1) (1988).
72. 11 U.S.C. §930(a)(2) (1988).
73. 11 U.S.C. §507 (1976) (Bankruptcy Act § 179; repealed 1978); *see supra* notes 19-23 and accompanying text.
74. *See, e.g.*, Cohn, *Single-Asset Cases in Chapter 11*, 26 TULSA L.J. 523 (1991); Molinaro, *Single-Asset Real Estate Bankruptcies: Curbing an Abuse of the Bankruptcy Process*, 24 UCC L.J. 161 (1991).

mation—may very well be correct.[75] Even if single-asset real estate partnership debtors should be denied Chapter 11 relief, however, that end should not justify the means. The availability of Chapter 11 relief to single-asset real estate partnership debtors is a congressional decision, not a judicial one.[76] To judicially interpret Code provisions with an eye toward a particular result, laudable or otherwise, is not the preferred method of policy-making.[77] To find impairment artificial and arbitrary,[78] creative,[79] intentional,[80] manufactured,[81] or transparent[82] because the impairment "arises solely from the debtor's exercise of discretion" is "not a rule of law. It is simply a license to make distinctions . . . based on subjective considerations that will vary more widely than the length of the chancellor's foot."[83] The *Windsor* analysis should not be followed, and should instead be rejected.

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75. *But see* Krause, *The Bias of the Courts Against Single-Asset Real Estate Cases Is Creating Bad Law in the Area of Classification*, 22 CAL. BANKR. J. 47, 56 (1994) (discussing the Eighth Circuit's demonstration of "open hostility to single-asset cases" in *Windsor*).

76. Indeed, Congress has proposed legislation to address single asset real estate cases. *See* S. 4666, Bankruptcy Amendments Act of 1993, § 202 *reprinted in* 140 CONG. REC. § 4666-4682 (providing that cases involving "single asset real estate" be subject to, inter alia, a shorter § 362 automatic stay than non-"single asset real estate" cases).

77. *Cf.* Krause, *supra* note 75, at 73 (stating that in the context of artificial *classification*—as distinguished from artificial *impairment*—courts, "[b]ased on a general animosity toward single-asset real estate cases and an unfounded concern that undersecured creditors do not have adequate safeguards, . . . have imposed a misguided classification analysis which creates limitations that appear nowhere in the Code[.]").

78. *In re Windsor*, 7 F.3d at 132.

79. *See* Meltzer, *supra* note 1, at 311 n.91 ("Plan proponents sometimes concoct various creative theories for why the most seemingly meaningless impairment of a class is 'necessary' rather than 'artificial.'").

80. *In re* Greystone III Joint Venture, 102 B.R. 560, 570-71 (Bankr. W.D. Tex. 1989), *aff'd*, 127 B.R. 138 (W.D. Tex. 1989), *rev'd on other grounds*, 948 F.2d 134 (5th Cir. 1991), *amended on petition for reh'g*, 948 F.2d 134, 142 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 72 (1992).

81. *In re Windsor*, 7 F.3d at 130.

82. *In re* Lettick Typografic, Inc., 103 B.R. 32, 38 (Bankr. D. Conn. 1989).

83. (*In re* Hanson), Hanson v. First Nat'l Bank in Brookings, 848 F.2d 866, 871 (Arnold, J., concurring).