

By **ASHLEY D. CHAMPION** AND **NATHAN JUSTER**¹

Drafting Around the Problem of the Nonparticipating Class in Subchapter V



Ashley D. Champion
Polsinelli PC; Atlanta



Nathan Juster
U.S. District Court
(N.D. Ga.); Atlanta

A key component to subchapter V of chapter 11 is its approach to consensual confirmation. If its creditors accept the plan, a subchapter V debtor can obtain a discharge on confirmation rather than in the three to five years mandated by a cramdown confirmation, discharge the subchapter V trustee on substantial consummation, and avoid possible nondischargeability claims otherwise potentially applicable in a cramdown scenario. What if a class of creditors fails to participate at all?

The result might differ depending on the court or circuit that the debtor files in, with some courts holding that such classes should not be considered for confirmation purposes and others holding that the failure of an impaired class to vote renders consensual confirmation impossible.² This article explores potential drafting solutions to reach outcomes as close as possible to consensual confirmation and minimize the disruptive effect of a cramdown for those debtors who have a blank space in their ballot reports.

The Tilted Stage: The Problem of the Absent Class

Class acceptance is calculated based on the number of holders of allowed claims that have voted to accept the plan.³ “Acceptance” is undefined in the Bankruptcy Code, and voting is permissive rather than mandatory.⁴ Further, Rule 3018(c) of the Federal Rules of Bankruptcy Procedure only defines the parameters for submitting acceptance or rejection of a plan for participating creditors, leaving open the question of how to construe inaction from nonparticipating creditors.⁵ Thus, creditors are not required to participate in the voting process, and the Code does not specify how to construe such nonparticipation in terms of acceptance or rejection of the plan.

Without clear guidance on whether acceptance requires active participation, courts have been predictably split over their approach to this question. For example, two recent opinions from the Eleventh Circuit have indicated an inclination toward requiring affirmative acceptance to achieve consensual confirmation rather than excluding such classes for the purposes of the analysis under § 1129(a)(8).⁶ As the law is still developing, and as there is no way to predict whether creditors will fail to return ballots, it might be difficult to counsel a prospective debtor on what the post-confirmation responsibilities will be going into the case. It raises this question: How do you advise a small business owner to plan out their next three to five years?

Getting Smarter in the Nick of Time: Drafting Solutions to the Nonvoting Class Problem

The answer is good plan drafting. There are several provisions that clever counsel for a subchapter V debtor can include in the plan that help mitigate the risk and expense ordinarily associated with cramdown confirmation, such as: (1) providing for lump-sum payment at confirmation constituting the debtor’s projected disposable income; (2) minimizing the post-confirmation responsibilities of the subchapter V trustee to terminate their services shortly after confirmation; and (3) avoiding nondischargeability problems down the road through a plan sale to a new operating entity.

Long Story Short: Utilizing a Lump-Sum Payment to Avoid a Delay in Discharge

The starkest difference between consensual confirmation and cramdown is the delay of discharge during the repayment period, but what if that delay could be reduced to mere moments? Good drafting can accomplish completion of payments and substantial consummation all at once. A subchapter V debtor required to contribute its projected disposable income to the plan has two options: It can periodically pay the amount in installments from its future income, or it can distribute property equal to the value of its projected future income.⁷ The second

Ashley Champion is an associate with Polsinelli PC in Atlanta, and her practice includes financial restructuring, bankruptcy and commercial transactions. Nate Juster is a judicial law clerk to Hon. Victoria Marie Calvert of the U.S. District Court for the Northern District of Georgia in Atlanta. He also is a co-author of the *National Consumer Law Center’s Bankruptcy Basics* (3d ed. 2023).

1 The opinions expressed in this article are solely those of the authors and do not reflect those of the court.

2 For a more expansive discussion of the disparate approaches courts have taken to the nonparticipating class problem, see Patricia A. Redmond & Ashley D. Champion, “You’re Killing Me, Smalls!: The Problem of the Nonparticipating Class in Subchapter V,” *XLIII ABI Journal* 10, 20-21, 55-56, October 2024, [abi.org/abi-journal/youre-killing-me-smalls-the-problem-of-the-nonparticipating-class-in-subchapter-v](https://www.abi.org/abi-journal/youre-killing-me-smalls-the-problem-of-the-nonparticipating-class-in-subchapter-v) (unless otherwise specified, all links in this article were last visited on Aug. 21, 2025).

3 See 11 U.S.C. § 1126(c).

4 11 U.S.C. § 1126(a) (holders of allowed claims or interests “may accept or reject a plan”).

5 See Fed. R. Bankr. P. 3018(c) (“[A]n acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form.”).

6 See *In re M.V.J. Auto World Inc.*, No. 23-11612-LMI (Bankr. S.D. Fla. June 24, 2024); *In re Florist Atlanta Inc.*, No. 24-51980-PWB (Bankr. N.D. Ga. Aug. 7, 2024).

7 Compare 11 U.S.C. § 1191(c)(2)(A), with *id.* § 1191(c)(2)(B).

option allows for a single, lump-sum payment equal to the debtor's total projected disposable income.⁸

Critically, this sum is a measurement of the minimum total amount to be paid into the plan.⁹ While the specific number is based on a range of three-to-five years' worth of income as fixed by the judge, it can overlap with other measurements such as the liquidation test.¹⁰ If the plan already provides for a large lump-sum payment to be funded by the voluntary return of an avoidable transfer from an insider or through exit financing, the debtor could be eligible for an immediate discharge upon confirmation and substantial consummation.¹¹

Even if the plan is not sufficiently funded to allow for a lump-sum payment, the Bankruptcy Code's definition of "property" is broad enough to include distribution of intangible property (such as notes¹²), although the bare issuance of unsecured notes to creditors that do not permit the creditor to seek repayment of their claim under applicable non-bankruptcy law in the event of default is unlikely to satisfy another part of the cramdown inquiry: the requirement that "the plan provides appropriate remedies ... to protect the holders of claims or interests in the event that the payments are not made."¹³

If the numbers do not add up to pay the projected disposable income in a lump sum, the Code provides options to reduce the disruption caused by the delayed discharge. For example, while § 1186(a) appears to keep post-confirmation property in the estate in cramdown cases, § 1141(b)'s revesting provision might be used to override the post-confirmation property default if the plan and confirmation order so provide, allowing the reorganized debtor to use their property without court oversight.¹⁴ To avoid expenses at the end of the repayment period, courts also have permitted confirmation orders to provide for the advance waiver of reopening fees for the purposes of entering discharge.¹⁵ Another solution is minimizing the post-confirmation duties of the subchapter V trustee so that they might be terminated shortly after confirmation, thus reducing the administrative costs and oversight.

Taking Back Your Kingdom Keys: Termination of the Subchapter V Trustee

The subchapter V trustee is discharged after substantial consummation of a confirmed consensual plan, but there is

not a similar termination provision under § 1191(b) for cramdown plans, and unless the plan or confirmation order otherwise provides, the subchapter V trustee makes payments to the creditors under the confirmed plan.¹⁶ As a result, the subchapter V debtor will have to pay the subchapter V trustee to make plan payments unless the plan or confirmation order provides otherwise.

The *Florist Atlanta* case explores an effective way to avoid the ongoing expense of a subchapter V trustee post-confirmation: termination of the subchapter V trustee's services as early as possible.¹⁷ This was accomplished in the *Florist Atlanta* case shortly after the first plan payment was made, because the plan provided that the debtor would make plan payments and there were no post-confirmation duties for the subchapter V trustee to carry out.

First, the debtor's plan specified that the debtor — rather than the subchapter V trustee — would make post-confirmation payments to creditors.¹⁸ No party-in-interest objected to its inclusion, and the court confirmed the plan with this provision. Further, the court concluded that substantial consummation would occur when the debtor made its first plan payment. Substantial consummation under § 1102 of the Bankruptcy Code requires the transfer of all or substantially all of the property proposed to be transferred, and assumption by the debtor of the business or of the management of all or substantially all of the property dealt with by the plan.¹⁹ Thus, because the *Florist Atlanta* plan did not provide for the transfer of any property and the debtor would manage and operate the business under the plan, the court concluded that substantial consummation would occur upon the occurrence of the first plan payment.²⁰

Next, the court explored whether and to what extent the subchapter V trustee's services were needed post-confirmation. Specifically, the court noted that nothing in the Code limits termination of the subchapter V trustee's services when the debtor, rather than the trustee, will make plan payments and the subchapter V trustee will not have post-confirmation duties to perform. Such duties include the filing of a final report and final account of the estate's administration²¹ and post-confirmation reports as necessary or as ordered by the court,²² appearing and being heard at hearings involving post-confirmation plan modification or the sale of estate property,²³ and the performance of certain duties if the debtor is removed as a debtor in possession.²⁴ Observing that no party objected to the debtor making plan payments or requested the performance of post-confirmation duties, the court concluded that it was appropriate to terminate the subchapter V trustee's services upon substantial consummation and the filing of the subchapter V trustee's final report without prejudice to

8 8 *Collier on Bankruptcy* ¶ 1191.04[2][b].

9 11 U.S.C. § 1191(c)(2)(B).

10 *Id.*

11 If an insider is willing to finance a large, lump-sum payment at confirmation, there is always the option of revoking the subchapter V election and using the payment as a new value contribution toward the absolute-priority rule. See Vincent J. Roldan & Ava Goldberger, "Eletson Results: SDNY Bankruptcy Court Issues Decision on New Value," *XLIV ABI Journal* 2, 14-15, 59-60, February 2025, abi.org/abi-journal/eletson-results-sdny-bankruptcy-court-issues-decision-on-new-value. Revoking the election is an option that can deal with many of the obstacles posed by a nonvoting class, but it is not covered in this article. *In re Nat'l Small Bus. All.*, 642 B.R. 345, 348-49 (Bankr. D.D.C. 2022).

12 8 *Collier on Bankruptcy* ¶ 1191.04[1] ("Alternatively, a plan may provide for the distribution of 'property' under § 1191(c)(2)(B) (such as, for example, the issuance of a note to satisfy the secured claim and distributions of cash to unsecured creditors)."); accord 7 *Collier on Bankruptcy* ¶ 1129.03[4][b][i][A] (16th ed. 2025) ("This 'property,' in turn, can be cash, notes, real estate, securities, equity interests in the reorganized debtor or some other entity issuing securities under the plan, or a combination of any or all of these items.")

13 11 U.S.C. § 1191(c)(3)(B)(ii).

14 *Mt. Meadow Mushroom Farms Inc. v. Smallhold Inc.* (*In re Smallhold Inc.*), Nos. 25-50491 (CTG), 25-50393 (CTG), 2025 Bankr. LEXIS 1792, at *24-25 (Bankr. D. Del. July 29, 2025).

15 1 *Collier on Bankruptcy* ¶ 9.05[2][a][iv] (16th ed. 2025).

16 See 11 U.S.C. §§ 1183(b), 1194(b).

17 *In re Florist Atlanta Inc.*, No. 24-51980-pwb, 2024 Bankr. LEXIS 1842, at *4 (Bankr. N.D. Ga. Aug. 6, 2024).

18 *Id.* at *3.

19 See 11 U.S.C. § 1101(2)(A), (B).

20 *Florist Atlanta*, 2024 Bankr. LEXIS 1842, at *4.

21 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(7)).

22 11 U.S.C. § 1183(b)(2) (incorporating 11 U.S.C. § 1106(a)(7)).

23 11 U.S.C. § 1183(a)(3)(C), (D).

24 11 U.S.C. § 1183(a)(5).

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reappointment upon the occurrence of any post-confirmation events implicating the subchapter V trustee's duties.²⁵

The lesson from *Florist Atlanta* is clear: Subchapter V debtors should include a plan provision specifying that the debtor will make post-confirmation plan payments. Further, subchapter V debtors faced with a nonparticipating class should endeavor to substantially consummate the plan as soon as possible following confirmation to minimize post-confirmation expenses attributable to ongoing subchapter V trustee duties.

I Bury Hatchets, but I Keep Maps of Where I Put 'Em: Avoiding Nondischargeability Issues Down the Road

Finally, in some circuits such as the Eleventh Circuit, a discharge under § 1192 is subject to the exceptions to discharge in § 523.²⁶ If you are in one of those circuits, it is likely that a creditor bringing a § 523(c) claim will participate in the case and vote against the plan.

However, there are other debts excepted from discharge under § 523 that need not be asserted during the bankruptcy case, and the holders of such claims may not participate in the case or vote. If there is a remote possibility of a future dischargeability claim, having to rely on the cramdown discharge as a result of nonvoting creditors could prove costly down the road. One possibility to get around this outcome is a plan sale to a new operating entity, because property dealt with by

the plan is free and clear of a creditor's claims.²⁷ While this could raise good-faith concerns, courts have held that a plan sale process involving arm's-length negotiations for the purpose of maximizing value to creditors is not proposed in bad faith solely because it cuts off otherwise-available remedies by creditors.²⁸ In the small business context where there is unlikely to be a robust market for the business, involving the subchapter V trustee in the negotiations for equity to fund the purchase of the business can lend credence to a sale process.

Conclusion: It Was All by Design

If you fail to plan, you plan to fail. When a class does not return any ballots, it can feel defeating. However, anticipating the problem in advance and drafting around it can make you feel like a mastermind. Absent legislative revision to §§ 1129 and 1191 clarifying treatment of nonparticipating classes, debtors should include plan provisions that help mitigate the risk and expense that is ordinarily associated with cramdown confirmation, such as (1) providing for a lump-sum payment equivalent to projected disposable income; (2) limiting the post-confirmation duties of the subchapter V trustee so that the subchapter V trustee can be terminated quickly after confirmation; and (3) if any of the discharge exceptions under § 523 are of concern, considering a plan sale to a new operating entity to eliminate such liability. **abi**

²⁵ *Florist Atlanta*, 2024 Bankr. LEXIS 1842, at *5.

²⁶ *Benshot LLC v. 2 Monkey Trading LLC (In re 2 Monkey Trading LLC)*, 142 F.4th 1323, slip op. 2-3 (11th Cir. 2025) (collecting cases); see also *id.* (Luck, J. dissenting) (collecting cases).

²⁷ *In re Ditech Holding Corp.*, 606 B.R. 544, 588 (Bankr. S.D.N.Y. 2019) (citing 11 U.S.C. § 1141(c)).
²⁸ *Id.* at 605-06.

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