

Student Gallery

BY GEORGE GIBSON

Subchapter V's Silent Roadblock

Subchapter V's goal is to provide eligible business debtors with a quicker, less costly and more feasible path to reorganization than a standard chapter 11 case. However, in confirming a plan, § 1191(a) requires a debtor to comply with § 1129(a) to receive acceptance from each class of impaired claims for the plan to be considered consensual. Failure to do so requires the debtor to “cram down” the plan on unconsenting creditors.

Courts are split on what is considered acceptance of the plan when members of the impaired class do not vote under § 1191(a). A majority of the courts find that acceptance of the plan must be affirmative, and that a failure by an impaired class of creditors to vote (those who constitute the “silent class”) cannot be deemed acceptance of the plan.¹ A minority finds that the failure to vote or object is instead considered consent to the plan, especially if notice is given to the creditors of the debtor's intention to do so.² A third group of courts finds that because § 1126 requires that the vote be divided by the amount of votes tallied, considering the silent class at all could lead to an absurd result of dividing by zero, and thus the silent class should be disregarded entirely.³

This article agrees with the minority stance that a failure to disagree should be held as acceptance of the plan, because this best achieves the legislative goal of expediting bankruptcy and forces creditors who are impaired under the plan to take an active role in shaping the bankruptcy. For example, under the majority approach, a plan in which even a simple impaired class of creditors is fully silent must necessarily become a cramdown, to the detriment of the debtor, regardless of the contents of the plan. This runs counter to the subchapter V goals of an expeditious and economical bankruptcy administration.

Subchapter V is “designed to facilitate the efficient and economical administration of the case and the prompt confirmation of a plan.”⁴ A hallmark of the American system of bankruptcy is that a baseline level of trust is necessary to make the system run, otherwise necessary protections would be far too onerous and expensive. However, courts and Congress acknowledged that chapter 11 business reorganization had become too bloated and expensive to suit the needs of small businesses, so subchapter V was created to address their unique needs.

The creation of subchapter V explicitly excluded many mechanisms in chapter 11 to produce a leaner, more efficient and economic bankruptcy plan for small businesses. Subchapter V removed several core features of a traditional chapter 11, including (1) the disclosure statement, (2) formation of an official committee of unsecured creditors, and (3) the ability of creditors or other parties in interest to file a competing plan.⁵ This reallocation of leverage is meant to favor small businesses and to reduce the likelihood of liquidation driven by the cost and complexity of a traditional chapter 11 case. These developments reinforce the assumption that it is the debtor who should move a bankruptcy forward, not its creditors.

For every reorganization, the plan must be accepted. Section 1191 governs the acceptance of a consensual plan, requiring all subparts of § 1129(a) other than subsection (15) to be fulfilled. Section 1129(a)(8) requires that each class of claims either accept the plan or not be impaired under it. However, the Code gives no guidance as to what constitutes “acceptance” of the plan. Finding creditor silence as acceptance of the plan is not only consistent with, but also furthers, the legislative goals of subchapter V.

However, a significant portion of general unsecured creditors fail to vote on a plan. This silent class of creditors might force a debtor to proceed with a nonconsensual plan, with increased burdens, delays and costs. Treating a creditor's silence as rejection thus functionally reinstates the creditor leverage that Congress deliberately removed.

Incentives for Creditors to Act

Subchapter V emphasizes a consensual acceptance of the plan. Cramdown is meant to be an incentive to



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Debtor-Friendly Bankruptcy

¹ See, e.g., *In re Cheerview Enters. Inc.*, 586 B.R. 881, 894 (Bankr. E.D. Mich. 2018); *In re Vita Corp.*, 380 B.R. 525, 528 (C.D. Ill. 2008); *In re Creason*, No. 22-00988-SWD, 2023 WL 2190623, at *1 (Bankr. W.D. Mich. Feb. 23, 2023); *In re M. Long Arabians*, 103 B.R. 211, 211 (B.A.P. 9th Cir. 1989); *In re Townco Realty Inc.*, 18 C.B.C.2d 13, 81 B.R. 707, 707 (Bankr. S.D. Fla. 1987). Mahalo to Prof. **Charles D. Booth** of the University of Hawaii William S. Richardson School of Law and Hon. **Robert J. Faris** of the U.S. Bankruptcy Court for the District of Hawaii for their feedback, and for teaching the corporate reorganization course that inspired this article.

² See, e.g., *In re Ruti-Sweetwater Inc.*, 836 F.2d 1263, 1263 (10th Cir. 1988); *In re A/O US Inc.*, Case No. 24-11836 (CTG), 2025 WL 2426380, at *31 (Bankr. D. Del. Aug. 21, 2025).

³ See, e.g., *In re Franco's Paving LLC*, 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023).

⁴ *In re Robinson*, 632 B.R. 208, 220 (Bankr. D. Kan. 2021).

⁵ 11 U.S.C. §§ 1181(b), 1189(a).

negotiate, not an ideal solution for the confirmation of a plan. The Bankruptcy Code provides serious disincentives to forcing a nonconsensual plan, such as deferring discharge to “as soon as practicable” instead of immediately providing relief, providing that the estate retains post-petition property and allowing any holder of a claim or interest to modify the plan at any time.⁶ Further evidence of this is the duty of a subchapter V trustee to “facilitate the development of a consensual plan of reorganization” — a duty not held by trustees in any other bankruptcy case.⁷ However, the subchapter V trustee’s duty to *facilitate consensual plans* is often frustrated by the silent class, as its failure to act often leads to no other option but a nonconsensual cramdown.

The Code contemplates that concerned creditors will take an active role in protecting their claims. Section 1188 requires that status conferences further the *expeditious and economical resolution* of a case under subchapter V. This is further evident through the Federal Rules of Bankruptcy Procedure, such as under Rules 3017, which provides for fixing a deadline for filing rejections of a plan, and 3020(b), which provides for fixing a deadline for filing objections to confirmation, which would otherwise be significantly less important.⁸ Finding that a creditor’s silence is acceptance of the plan furthers the goal of expeditious resolution, as creditors who are impaired under the plan must now actively participate in the plan process, or accept the consequences of their own inaction. This also functions to remove creditors who are asleep at the wheel, or who otherwise choose not to participate, from being impediments to those in the class who are actively participating.

The Code also requires that creditors make affirmative objections throughout various Code sections to avoid a default outcome. Sections 1127(d) and 1193(d) hold that in the event of a plan modification, the creditors must actively express their change of heart, or be held to their previously held position on the plan. Section 1126(b) holds the same for creditors that have accepted or declined the plan prior to commencement of the case. Why should plan voting be any different? Requiring creditors to actively object to the proposed plan would not be any different than requiring creditors to actively change their position in the event of a modification or after commencement of the case, where silence is treated by the Code as acquiescence.

General unsecured creditors fail to vote on a plan for a number of reasons. Some, such as the government and credit card companies, do not vote as a policy — regardless of whether they would approve or disapprove of the plan. Other general unsecured creditors might prefer delaying the plan to force the debtor to provide better terms. To these creditors, allowing silence to act as disapproval strengthens their leverage without requiring the creditor to expend any negotiation costs.

Other general unsecured creditors, especially those that might have small claims or limited funds, have little reason to actively participate in the debtor’s bankruptcy due to the high monitoring costs of hiring legal representation. For

these creditors, the costs incurred by getting representation to act on their behalf often would exceed the amount they stand to gain under the plan. Thus, treating silence as rejection of the plan gives free leverage to creditors at no cost to stall the confirmation of the plan, increasing costs and decreasing the efficiency of subchapter V.

There might be legitimate concerns that adopting the *de facto* rule that taking creditor silence as acceptance would deprive creditors of notice, especially those that are unsophisticated or have limited financial means. However, several bankruptcy courts in Delaware and New York have allowed the enforcement of a variation of the rule deeming the impaired, nonvoting class to have accepted on a case-by-case basis *when* the rule is included “in the solicitation procedures that were approved by the Court, without objection, on notice to all parties-in-interest.”⁹

Allowing creditor silence to be taken as rejection also reduces creditor equality. In contrast to those that do affirmatively accept or reject the plan, and that might work with the debtor to create a plan better suited for their needs, a silent creditor might derail the entire bankruptcy. Each added procedural hurdle and burden of a nonconsensual cramdown drives the debtor, already in a precarious enough situation to undertake bankruptcy, closer to dissolution rather than reorganization.

Moreover, if nonvoting, nonobjecting creditors are not deemed to have accepted the plan, the debtor would be placed in the unique position of anticipating these creditors’ objections to the plan, and of presenting evidence and arguments to refute those hypothetical objections in the confirmation hearing. By forcing creditors that hold legitimate objections to the confirmation of the plan to voice their dissatisfaction prior to the confirmation hearing, the debtor will be better able to anticipate and respond to their objection before the judge.

Why the Silent Class Should Not Be Disregarded

Some courts have decided to disregard the silent class because its inclusion, when determining the acceptance or rejection of the plan under § 1126, would lead to an absurd result requiring the division by zero. Section 1126 requires a calculation that the number of accepting votes be divided by the number of total votes cast, which in the event of a total silent class would be zero votes cast. However, this mathematical sleight of hand is inconsistent with the statute’s text, while also both being too narrow in application and failing to address the policy considerations that should compel an understanding that the silent votes be held in acceptance.

Section 1126(a) states that “[t]he holder of a claim or interest allowed under section 502 ... may accept or reject a plan.” The Code thus defines “eligibility” by status (“holder of a claim”), not by action (casting a vote). The Code also explicitly states that class members “*may* accept or reject a

6 11 U.S.C. §§ 1192, 1186(a), 1193(c).

7 Compare 11 U.S.C. § 1183(b)(7), with 11 U.S.C. §§ 704, 1106, 1202 and 1302.

8 *In re Ruti-Sweetwater Inc.*, 836 F.2d at 1264.

9 *In re A/O US Inc.*, 2025 WL 2426380 at *3; see also *In re Adelpia Commc'ns Corp.*, 368 B.R. 140, 259-63 (Bankr. S.D.N.Y. 2007).

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plan,” rather than provide an affirmative obligation to do so. Given the rules of statutory construction, it flows that Congress still intended for the silent class to be considered in the calculation for plan confirmation. If Congress intended that only creditors that voted should be considered, it could have said so explicitly, as it did in other areas of the Code, such as where action is required to preserve rights (*i.e.*, objections to exemptions or proofs of claim). By contrast, § 1126(a) defines the universe of voters by the existence of the claim alone, not by whether the creditors took action.

Disregarding the silent class fails to address the policy considerations at the core of holding the silent class's silence affirmative — that creditors who are impaired should take an active role in the development of the plan. However, subchapter V lacks incentives built into a traditional chapter 11 that require unsecured creditor involvement, such as an official committee of unsecured creditors. Deeming creditor silence to be acceptance would provide this incentive for creditors to become active in the development of the plan, especially if they have reservations about it. By contrast, disregarding the silent class of creditors fails to provide this incentive.

One last important consideration is the general dearth of precedential guidance on the issue of interpretation regarding impaired nonvoters for the last 40 years. *Ruti-Sweetwater* remains the only circuit case to definitively

weigh in on the issue. While a number of courts have rejected the assertion in *Ruti-Sweetwater*, including a bankruptcy appellate panel and district court, none have had the effect of binding precedent — and none have been decided since Congress's creation of subchapter V in 2019.¹⁰

Conclusion

Congress created subchapter V as an alternative to traditional chapter 11 bankruptcies for small businesses, designing it to be faster, cheaper and more suited for their unique needs. However, Congress has not given clarification on what it means for an impaired class to “accept” a plan for bankruptcy, under either chapter 11 or subchapter V. Given the options for when a class remains silent, considering its silence as acceptance of a plan best fulfills Congress's intent for subchapter V by decreasing the delay from parties that are indifferent or inattentive, and forces creditors to be active participants in the debtor's bankruptcy.

Treating creditor silence as acceptance of the plan also functions within the general principles of bankruptcy law. It maximizes the estate's value through reorganization, increases the speed of administration, and provides the most equitable treatment among the debtor, the silent impaired creditors and the active impaired creditors. **abi**

¹⁰ See *In re M. Long Arabians*, 103 B.R. 211, 211 (B.A.P. 9th Cir. 1989); *In re Vita Corp.*, 380 B.R. 525, 527-28 (C.D. Ill. 2008).

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