

March 1995

"Cramdown" Confirmation of Single-Asset Debtor Reorganization Plans Through Separate Classification of the Deficiency Claim - How In Re U.S. Truck Co. Was Run off the Road

King F. Tower

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Bankruptcy Law Commons](#)

Repository Citation

King F. Tower, *"Cramdown" Confirmation of Single-Asset Debtor Reorganization Plans Through Separate Classification of the Deficiency Claim - How In Re U.S. Truck Co. Was Run off the Road*, 36 Wm. & Mary L. Rev. 1169 (1995), <https://scholarship.law.wm.edu/wmlr/vol36/iss3/6>

"CRAMDOWN" CONFIRMATION OF SINGLE-ASSET DEBTOR REORGANIZATION PLANS THROUGH SEPARATE CLASSIFICATION OF THE DEFICIENCY CLAIM—HOW *IN RE U.S. TRUCK CO.*¹ WAS RUN OFF THE ROAD

Fifteen years after the enactment of the Bankruptcy Code (the Code),² controversy over the plan confirmation process for single-asset debtors³ in Chapter 11 reorganizations has reached a fever pitch. A particularly volatile issue today is the practice of separately classifying the unsecured deficiency claim of an undersecured creditor⁴ from the claims of other unsecured creditors for the purpose of "cramming down"⁵ the debtor's proposed

1. 800 F.2d 581 (6th Cir. 1986).

2. 11 U.S.C. §§ 101-1330 (1988).

3. The "single-asset" debtor is one who holds real estate as its primary, if not only, asset. Typically, the real estate served as security for a mortgage loan facilitating the purchase of the property. In addition, the single-asset debtor's trade debts tend to be minimal. See Stephen W. Sather & Adrian M. Overstreet, *The Single-Asset Real Estate Debtor: A Selective Overview*, 2 J. BANKR. L. PRAC. 343, 343 (1993); *infra* notes 31-63 and accompanying text.

4. See 11 U.S.C. §§ 506(a), 1111(b) (1988). Section 506(a) grants an undersecured creditor a secured claim up to the value of the collateral and an unsecured claim in the amount of its deficiency unless the creditor qualifies for and elects treatment under § 1111(b). If it elects such treatment, it has a secured claim up to the full amount of the indebtedness.

Code § 506(a) provides, in relevant part:

(a) An allowed claim of a creditor secured by a lien on property . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

Id. § 506(a).

Code § 1111(b) provides, in relevant part:

(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

Id. § 1111(b).

5. See *id.* § 1129(b). "Cramdown" refers to the use of § 1129(b) to obtain plan confirmation. Section 1129(b) operates to excuse the otherwise required acceptance of

reorganization plan past the objections of the undersecured creditor. This separate classification strategy enables the debtor to gain acceptance from an impaired,⁶ non-insider⁷ class of claims, a prerequisite to plan confirmation.⁸ Depending upon which court hears the case, such separate classification amounts to either an improper manipulation of the Code's voting process⁹ or a legitimate use of the Code's unambiguous provisions on reorganization.¹⁰

The Third,¹¹ Fourth,¹² Fifth,¹³ and Eighth¹⁴ Circuits have rejected the separate classification strategy as abusive of the bankruptcy process, and numerous lower courts have followed suit.¹⁵ The foundation for this line of cases, *Phoenix Mutual*

all impaired classes of creditors, see *id.* § 1129(a)(8), so long as the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan," *id.* § 1129(b); see *infra* notes 79-111 and accompanying text. See generally Kenneth Klee, *All You Ever Wanted To Know About Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133 (1979).

6. 11 U.S.C. § 1124 (1988). Section 1124 provides that "a class of claims or interests is impaired under the plan unless, with respect to each claim or interest of such class, the plan—(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." *Id.*

7. *Id.* § 101(31). Section 101(31) defines an insider as, essentially, an individual or an entity associated with the debtor. *Id.*

8. *Id.* § 1129(a)(10). Section 1129(a)(10) provides that:

(a) The court shall confirm a plan only if all of the following requirements are met:

(10) 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.

Id.

9. See *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 72 (1992); Peter E. Meltzer, *Disenfranchising the Dissenting Creditor Through Artificial Classification or Artificial Impairment*, 66 AM. BANKR. L.J. 281, 301-02 (1992).

10. See, e.g., *In re SM 104 Ltd.*, 160 B.R. 202 (Bankr. S.D. Fla. 1993).

11. *John Hancock Mut. Life Ins. Co. v. Route 37 Business Park Assocs.*, 987 F.2d 154 (3d Cir. 1993).

12. *Travelers Ins. Co. v. Bryson Properties, XVIII (In re Bryson Properties, XVIII)*, 961 F.2d 496 (4th Cir.), *cert. denied*, 113 S. Ct. 191 (1992).

13. *Greystone*, 995 F.2d 1274.

14. *Lumber Exch. Bldg. Ltd. v. Mutual Life Ins. Co. (In re Lumber Exch. Bldg. Ltd.)*, 968 F.2d 647 (8th Cir. 1992).

15. *E.g.*, *California Fed. Bank v. Moorpark Adventure (In re Moorpark Adventure)*,

Life Insurance Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture),¹⁶ provided the catch phrase for separate classification opponents, declaring that "thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan."¹⁷ However, in 1993, three bankruptcy courts asserted that the Code permits, and may in fact require, the separate classification strategy.¹⁸ More recently, the Seventh Circuit openly repudiated *Greystone*,¹⁹ and the Fifth Circuit apparently has softened its prior stance in *Greystone*.²⁰ Clearly, the more persuasive argument supports these latest challenges to *Greystone's* commandment.

Ironically, the first case to address such a separate classification controversy, *Teamsters National Freight Industry Negotiating Committee v. U.S. Truck Co. (In re U.S. Truck Co.)*,²¹ offered guidance that future courts foolishly ignored.²² The *U.S. Truck* decision permitted the separate classification of claims, even if admittedly done for the purpose of achieving plan confir-

161 B.R. 254 (Bankr. C.D. Cal. 1993); *Boston Post Rd. Ltd. Partnership v. FDIC (In re Boston Post Rd. Ltd. Partnership)*, 154 B.R. 617 (Bankr. D. Conn. 1993); *In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010 (Bankr. S.D.N.Y. 1993); *John Hancock Mut. Life Ins. Co. v. Roswell-Hannover Joint Venture (In re Roswell-Hannover Joint Venture)*, 149 B.R. 1014 (Bankr. N.D. Ga. 1992); *In re Cantonwood Assocs. Ltd. Partnership*, 138 B.R. 648 (Bankr. D. Mass. 1992).

16. 995 F.2d 1274.

17. *Id.* at 1279.

18. *In re SM 104 Ltd.*, 160 B.R. 202 (Bankr. S.D. Fla. 1993); *In re D & W Realty Corp.*, 156 B.R. 140 (Bankr. S.D.N.Y. 1993), *rev'd*, 165 B.R. 127 (S.D.N.Y. 1994); *In re ZRM-Okla. Partnership*, 156 B.R. 67, 71 (Bankr. W.D. Okla. 1993).

19. *In re Woodbrook Assocs.*, 19 F.3d 312, 318 (7th Cir. 1994).

20. *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)*, 994 F.2d 1160, 1167 (5th Cir. 1993) (holding that the debtor's separate classification of the undersecured creditor's deficiency claim was justified under the circumstances).

21. 800 F.2d 581 (6th Cir. 1986). Although *U.S. Truck* did not involve a single-asset debtor, the court was nevertheless presented with the issue of the propriety of separate classification as a strategy to effect a Chapter 11 plan confirmation. *Id.* at 584.

22. Although *Greystone* purported to rely on *U.S. Truck* in delivering its "one clear rule" condemning separate classification for the purpose of "gerrymander[ing]," *Greystone*, 995 F.2d at 1279, it is not at all clear that the court in *U.S. Truck*, which confirmed a plan that used the separate classification strategy, would have approved of such an interpretation. See *U.S. Truck*, 800 F.2d at 586 n.8 (noting that the debtor's purpose in employing separate classification in this case was admittedly "to line up the votes in favor of the plan").

mation, provided that the separated classes of claimants possessed distinct interests in the outcome of the reorganization.²³ This holding balanced a respect for both the classification flexibility obviously intended by the wording of the Code²⁴ and the congressional intent that lay behind the requirement of one assenting, impaired class.²⁵ The *U.S. Truck* case, this Note will suggest, provides the best framework for resolving classification issues in the future.

This Note examines the Bankruptcy Code provisions relating to the rights of secured creditors, the classification of claims, and the confirmation of reorganization plans. Several circuit court decisions have ruled on these issues, and recent bankruptcy court decisions have allowed the separate classification strategy. In analyzing these cases, this Note weighs the policy ramifications of each potential outcome. The Note concludes that (1) the Code's classification and confirmation provisions²⁶ do not prohibit the separate classification of like claims,²⁷ (2) the separate classification of unsecured deficiency claims and other unsecured claims is mandated in any case because these claims are dissimilar in their legal rights,²⁸ and (3) in light of the bankruptcy system's goal of balancing the interests of creditors with the interest in facilitating reorganizations to preserve going concern value,²⁹ the wisest policy is to require that claims be

23. *U.S. Truck*, 800 F.2d at 586-87.

24. See 11 U.S.C. § 1122 (1988). Section 1122 provides:

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

Id.

25. See *id.* § 1129(a)(10); Linda J. Rusch, *Gerrymandering the Classification Issue in Chapter Eleven Reorganizations*, 63 U. COLO. L. REV. 163, 185-89 (1992); *infra* notes 116-27 and accompanying text (discussing § 1129(a)(10) and its legislative history).

26. 11 U.S.C. §§ 1122, 1129 (1988).

27. *E.g.*, *In re ZRM-Okla. Partnership*, 156 B.R. 67, 70 (Bankr. W.D. Okla. 1993).

28. *E.g.*, *In re SM 104 Ltd.*, 160 B.R. 202, 218-19 (Bankr. S.D. Fla. 1993).

29. Linda J. Rusch, *Single Asset Cases and Chapter 11: The Classification Quan-*

classified together only to the extent that the claim-holders possess substantially similar interests.³⁰

THE ISSUE

The purpose of this Note is to examine the separate classification issue in the context of the single-asset real estate case. The recently-proposed bankruptcy reform legislation would define single-asset real estate as "real property, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no business is being conducted by a debtor other than the business of operating the real property and activities incident thereto"³¹ Typically, the debtor is a partnership formed to operate a hotel or office building and has suffered substantially from a decline in real estate property values.³²

When a single-asset real estate debtor files a petition under Chapter 11 of the Code, it generally does so because it has defaulted on the mortgage secured by the property and seeks to avoid foreclosure by its mortgagee.³³ In general, the debtor has good relationships with its trade creditors who hold only minimal claims at the time of the filing.³⁴

The present controversy results from the fact that the interests of the undersecured mortgagee, who generally opposes any plan of reorganization,³⁵ are different from those of the trade

dary, 1 AM. BANKR. INST. L. REV. 43, 58-59 (1993).

30. See *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co.* (*In re U.S. Truck Co.*), 800 F.2d 581, 587 (6th Cir. 1986).

31. S. 8247, 102d Cong., 2d Sess. § 211(a)(2) (1992).

32. See, e.g., *In re D & W Realty Corp.*, 156 B.R. 140, 144 n.9 (Bankr. S.D.N.Y. 1993), *rev'd*, 165 B.R. 127 (S.D.N.Y. 1994); Sather & Overstreet, *supra* note 3, at 343-45.

33. Sather & Overstreet, *supra* note 3, at 343-45. The automatic stay provided by Code § 365 prevents the foreclosure during the pendency of the bankruptcy case. 11 U.S.C. § 365 (1988).

34. For example, in the landmark *Greystone* case, the trade creditors held claims totaling only \$10,000, while the undersecured creditors deficiency claim was about \$3.5 million. *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture* (*In re Greystone III Joint Venture*), 995 F.2d 1274, 1276-77 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 72 (1992).

35. An undersecured creditor possesses this motivation because it desires to continue its proceedings against the property under state law, which it sees as more

creditors, who likely support the debtor's plan.³⁶ As discussed further below,³⁷ the classification issue arises out of the plan confirmation requirement that at least one impaired class of creditors accept a plan of reorganization.³⁸ If the debtor's plan places the undersecured creditor's deficiency claim in the same class as the claims of the trade creditors, the size of the deficiency claim usually will enable the undersecured creditor to block acceptance of the plan by that class.³⁹ On the other hand, if the unsecured deficiency claim is placed in a class separate from the other unsecured claims, the debtor likely will gain acceptance of the plan by the class including only the trade creditors and will have met the confirmation requirement of acceptance by at least one impaired class.⁴⁰

favorable. Rusch, *supra* note 25, at 166-68 & n.18. In fact, the laws of every state enforce a mortgagee's valid contractual right to foreclose upon collateral pursuant to a default by the mortgagor. *E.g.*, CAL. CIV. CODE § 2924 (West 1993). In some instances, the undersecured creditor, desiring to end its association with the debtor, may prefer its state law remedy even though it will provide a lower payout than the proposed plan of reorganization. Rusch, *supra* note 25, at 168 n.18.

36. Trade creditor support is generally the result of favorable treatment, usually bordering on non-impairment. *See, e.g., In re ZRM-Okla. Partnership*, 156 B.R. 67, 68 (Bankr. W.D. Okla. 1993).

37. *See infra* notes 97-111 and accompanying text.

38. 11 U.S.C. § 1129(a)(10) (1988). For the language of § 1129(a)(10), *see supra* note 8.

39. *See* 11 U.S.C. § 1126 (1988). Section 1126 provides that a class accepts the plan if creditors "that hold at least two-thirds in amount and more than one-half in number of the allowed claims" in that class vote to accept the plan, provided there is no bad faith. *Id.* §§ 1126(c), 1126(e).

Importantly, if the other unsecured creditors can outvote the undersecured creditor, the plan will likely be accepted by that class even without separate classification. Similarly, if there is another accepting class of claims whose existence is not subject to objection by the undersecured creditor, then the separate classification issue is moot. *See* Rusch, *supra* note 25, at 166-75.

40. *See, e.g., ZRM-Okla.*, 156 B.R. at 68.

Another issue, beyond the scope of this Note, is that of "artificial impairment" to achieve the required impaired accepting class. *See* Windsor on the River Assocs., Ltd. v. Balcor Real Estate Finance, Inc. (*In re Windsor on the River Assocs., Ltd.*), 7 F.3d 127, 130-32 (8th Cir. 1993); Meltzer, *supra* note 9, at 310-21. "Artificial impairment" describes a debtor's strategy whereby the plan proposes a slight alteration in the rights of the class of general unsecured creditors despite the availability of resources sufficient to leave that class unimpaired. *Windsor*, 7 F.3d at 131. The class of general unsecured claims is, therefore, an impaired class, *see* 11 U.S.C. § 1124 (1988), and may cast its vote for the debtor's plan, allowing compliance with Code § 1129(a)(10), *id.* § 1129(a)(10). However, the Eighth Circuit Court of Appeals held

The traditional arguments in favor of permitting single-asset debtors to classify the unsecured portion of an undersecured creditor's claim separately from the other unsecured claims focus on the strict interpretation of the Bankruptcy Code encouraged in several Supreme Court decisions.⁴¹ Accordingly, separate classification is permissible because the Code does not explicitly prohibit it, even in those instances where the debtor intends thereby to create the assenting impaired class required by the confirmation provisions.⁴² In addition, debtors have argued that, for a variety of reasons, unsecured deficiency claims are dissimilar from other unsecured claims and therefore must be classified separately.⁴³

Single-asset, undersecured creditors, however, maintain that the Code provisions concerning the classification of claims⁴⁴ and plan confirmation requirements⁴⁵ make it clear that substantially similar claims should be part of the same class.⁴⁶ They dispute assertions that their deficiency claims are legally different from general, unsecured claims and contend that there is no basis for the separate classification.⁴⁷

With respect to the policy debate, single-asset debtors argue that separate classification allows them to retain some leverage in the reorganization negotiations by leaving open the possibility

recently 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." *Windsor*, 7 F.3d at 132 (rejecting confirmation of the debtor's plan).

41. *E.g.*, *Toibb v. Radloff*, 507 U.S. 157, 160 (1991) (holding that "the plain language of the Bankruptcy Code disposes of the question before us"); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989) (insisting that "the plain meaning of legislation should be conclusive").

42. *In re ZRM-Okla. Partnership*, 156 B.R. 67, 70-71 (Bankr. W.D. Okla. 1993).

43. *In re SM 104 Ltd.*, 160 B.R. 202, 214-15, 218-19 (Bankr. S.D. Fla. 1993); *In re D & W Realty Corp.*, 156 B.R. 140, 141 (Bankr. S.D.N.Y. 1993), *rev'd*, 165 B.R. 127 (S.D.N.Y. 1994).

Recall that Code § 1122, with one exception, allows only "substantially similar" claims to be classified together. 11 U.S.C. § 1122 (1988).

44. 11 U.S.C. § 1122 (1988). For the language of Code § 1122, see *supra* note 24.

45. 11 U.S.C. § 1129 (1988); see *infra* notes 80-111 and accompanying text.

46. See, *e.g.*, *Travelers Ins. Co. v. Bryson Properties, XVIII (In re Bryson Properties, XVIII)*, 961 F.2d 496, 501-02 (4th Cir.), *cert. denied*, 113 S. Ct. 191 (1992); *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1278-81 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 72 (1992).

47. See, *e.g.*, *Bryson*, 961 F.2d at 501-02; *Greystone*, 995 F.2d at 1278-81.

of a plan confirmation by cramdown.⁴⁸ If debtors are not permitted to classify the claims in this manner, they argue, the undersecured creditor will routinely dominate the confirmation proceedings as a result of its ability to block any proposed plan of reorganization.⁴⁹ The undersecured creditors have a simple response: "Exactly!" In other words, they contend that it is entirely proper for an undersecured creditor to dominate the confirmation process if its voting power under the Code allows it to do so.⁵⁰

As discussed below,⁵¹ three recent, single-asset real estate decisions by the Bankruptcy Court upheld the separate classification of the mortgagee's deficiency claim. In *In re ZRM-Oklahoma Partnership*,⁵² the court held that the plain meaning of the relevant Code provision, section 1122, simply does not prohibit separate classification of similar claims.⁵³ Taking a different approach, the Bankruptcy Court for the Southern District of New York held in *In re D & W Realty Corp.*⁵⁴ that such a separate classification scheme is not only permitted, but required by related provisions of the Code.⁵⁵ In addition, the court in *In re SM 104 Ltd.*⁵⁶ found that unsecured deficiency claims are fundamentally dissimilar from general unsecured claims and that these two types of claims, therefore, cannot be classified together by the terms of Code section 1122(a).⁵⁷

At stake in this debate is the ability of single-asset debtors to use the Chapter 11 reorganization provisions. Should the circuit court cases denying single-asset debtors the ability to employ separate classification prevail, the ensuing domination of such cases by undersecured creditors will effectively remove the

48. Sather & Overstreet, *supra* note 3, at 370.

49. Rusch, *supra* note 29, at 60.

50. Meltzer, *supra* note 9, at 305-06.

51. See *infra* notes 182-98 and accompanying text.

52. 156 B.R. 67 (Bankr. W.D. Okla. 1993).

53. See *id.* at 70; *supra* note 24 (excerpting statutory language).

54. 156 B.R. 140 (Bankr. S.D.N.Y. 1993).

55. *Id.* at 141.

56. 160 B.R. 202 (Bankr. S.D. Fla. 1993).

57. *Id.* at 218-19. The opinion in *In re SM 104 Ltd.* was persuasive in the Seventh Circuit's recent decision to join the opposition to *Greystone*. See *In re Woodbrook Assocs.*, 19 F.3d 312, 318-19 (7th Cir. 1994).

Chapter 11 alternative for single-asset debtors⁵⁸ because the undersecured creditor will have the power to block confirmation of any plan by the debtor, severely limiting the prospect of reorganization.⁵⁹ On the other hand, proponents of the separate classification strategy predict that it will merely allow single-asset debtors a fair chance to reorganize.⁶⁰ They argue that "[n]egotiation is most likely to occur in a situation where there is uncertainty"⁶¹ and that prohibition of the separate classification strategy removes any doubt about the outcome of the case.⁶² Finally, single-asset debtors claim they merely wish to use Chapter 11 as it is written.⁶³

THE CODE

As with most statutory subjects, an overview of the relevant Code provisions must precede the analysis of the separate classification issue. In particular, the treatment of secured creditors under the Chapter 11 reorganization provisions creates friction when single-asset real estate cases enter bankruptcy.

Code section 506(a) provides that, for bankruptcy purposes, a secured creditor has a secured claim "to the extent of the value of such creditor's interest" in the encumbered property.⁶⁴ In addition, if the value of the collateral is less than the amount of the creditor's claim (the creditor is undersecured) section 506(a) grants the creditor an unsecured claim to the extent of the deficiency.⁶⁵ In other words, an undersecured creditor will have its claim bifurcated into a secured claim and an unsecured claim, and the present value of the encumbered property is the upper limit of the secured claim.⁶⁶

58. See Rusch, *supra* note 29, at 43-45.

59. *Id.* at 45. See *supra* notes 35-40 and accompanying text.

60. Sather & Overstreet, *supra* note 3, at 370.

61. *Id.*

62. *Id.*

63. See, e.g., *In re ZRM-Okla. Partnership*, 156 B.R. 67, 70-71 (Bankr. W.D. Okla. 1993) (arguing that § 1122 does not prohibit separate classification of similar claims).

64. 11 U.S.C. § 506(a) (1988). For the language of § 506(a) see *supra* note 4.

65. *Id.* § 506(a) (1988).

66. *Id.*

In a Chapter 11 case, however, Code section 1111(b) gives the holder of a secured claim an alternative to the section 506(a) claim bifurcation process.⁶⁷ Section 1111(b) provides that if the "class of which such claim is a part [so] elects,"⁶⁸ the claim may be treated as secured to the full extent that the claim is allowed notwithstanding section 506(a).⁶⁹ If this election is made, although the creditor retains a lien against the property in the full amount of the indebtedness, there is no unsecured claim, and the separate classification issue is not implicated.⁷⁰ A secured creditor will elect treatment under this section to prevent being "cashed out" by the debtor, who must pay only the present value of the collateral to retire the lien if the creditor has chosen to stay with the claim bifurcation process.⁷¹

In the typical single-asset real estate case, because of the decline in property values, the mortgagee may be vastly undersecured.⁷² Thus, assuming it does not elect treatment under section 1111(b)(2), the mortgagee will often have a large unsecured deficiency claim.⁷³ The manner in which the debtor addresses such claims in its plan of reorganization determines whether the separate classification issue arises.

A debtor's plan of reorganization must place each claim into a class.⁷⁴ As the Code section prescribing the classification of

67. *Id.* § 1111(b). For the language of § 1111(b), see *supra* note 4. Note that § 1111(b)(1) also "creates a right of similar recourse in favor of lenders whose claims would otherwise be non-recourse," Meltzer, *supra* note 9, at 297, a situation common to the single-asset real estate case, see, e.g., *John Hancock Mut. Life Ins. Co. v. Route 37 Business Park Assocs.*, 987 F.2d 154, 155 (3d Cir. 1993).

68. 11 U.S.C. § 1111(b)(1)(A)(i) (1988).

69. *Id.* § 1111(b)(2).

70. *Id.*; Rusch, *supra* note 29, at 45.

71. Rusch, *supra* note 25, at 175-80. Rusch notes that a secured creditor will not make the § 1111(b) election, but will seek to defeat the separate classification strategy, "(a) when the property will depreciate after confirmation and the debtor is likely to default on the plan, or (b) when the property will appreciate after confirmation and the debtor is not likely to default on the plan." *Id.* at 180.

72. See *In re D & W Realty Corp.*, 156 B.R. 140, 144 n.9 (Bankr. E.D.N.Y. 1993), *rev'd*, 165 B.R. 127 (S.D.N.Y. 1994).

73. *Id.*

74. 11 U.S.C. § 1123(a)(1) (1988). In addition, § 1123(a)(4) provides that a plan must "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment" *Id.* § 1123(a)(4).

claims, section 1122 naturally has been the focus of much of the controversy regarding plans that classify undersecured deficiency claims separately from general unsecured claims.⁷⁵ Section 1122 is a rather simple Code provision:

Section 1122. Classification of claims or interests.

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.⁷⁶

Obviously, this section prohibits the placing of unlike claims together in one class.⁷⁷ In addition, the exception in section 1122(b) for "administrative convenience" provides that unsecured claims below a court-approved amount, even if dissimilar, may be classified together.⁷⁸

75. See, e.g., *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture* (*In re Greystone III Joint Venture*), 95 F.2d 1274, 1277-78 (5th Cir. 1991), cert. denied, 113 S. Ct. 72 (1992); *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co.* (*In re U.S. Truck Co.*), 800 F.2d 581, 584-85 (6th Cir. 1986); *In re SM 104 Ltd.*, 160 B.R. 202, 216-21 (Bankr. S.D. Fla. 1993); *D & W Realty*, 156 B.R. at 143.

76. 11 U.S.C. § 1122 (1988).

77. See *id.* § 1122(a).

78. *Id.* § 1122(b). The exception in § 1122(b), therefore, would appear to be irrelevant to the issue of separate classification of similar claims. Nevertheless, the Fifth Circuit has held that a reading of § 1122(a) that would permit the separate classification of similar claims would render § 1122(b) "superfluous." *Greystone*, 995 F.2d at 1278 (noting that such a reading is therefore improper). The court in *Greystone* reasoned that, if § 1122(a) may be read to require classification of all similar claims in one class, then the exception in § 1122(b) should be interpreted as allowing small claims to be split away from their otherwise mandatory class. *Id.* It follows that reading § 1122(a) to allow separate classification of similar claims would make the exception in § 1122(b) unnecessary, thus providing evidence that such an interpretation of § 1122(a) is invalid.

Of course, any interpretation of one part of a statute that would render another part of the statute unnecessary would be evidence that such a construction is improper. *Id.* at 1278. However, § 1122(b) is an exception to § 1122(a) that expressly prohibits only the placement of dissimilar claims in a single class. Even if § 1122(a) is read to allow separate classification of similar claims, it would remain true that § 1122(b) could be read to mean that no *dissimilar* claims could be classified *together*

Despite this apparent clarity, courts have failed to reach an agreement over the degree of latitude a debtor has in filing a plan that separately classifies substantially similar claims.⁷⁹ The classification issue is significant, however, only for the role it plays in a debtor's attempt to achieve confirmation of its reorganization plan. It is necessary, therefore, to examine the confirmation process before discussing the dynamics of the debate over separate classification.

To obtain confirmation of a Chapter 11 reorganization plan, a debtor must meet a number of requirements set out in Code section 1129.⁸⁰ Subsection 1129(a) establishes the regular method of confirmation, and subsection 1129(b) creates the "cramdown" alternative.⁸¹ The distinction between the two methods is that under section 1129(a)(8) each class of claims that is impaired⁸² under the plan must accept⁸³ it.⁸⁴ Conversely, the cramdown method under section 1129(b) removes this requirement, requiring instead that the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."⁸⁵ The plan must still meet all of the requirements of the regular method other than section 1129(a)(8) in order to be confirmed by cramdown.⁸⁶

Section 1129(a) grants the court some discretion in the confir-

except as provided for in § 1122(b). Thus, the "administrative convenience" exception is not superfluous, regardless of the amount of latitude given to debtors to place similar claims in separate classes. See *infra* notes 165-66 and accompanying text.

79. E.g., *California Fed. Bank v. Moorpark Adventure (In re Moorpark Adventure)*, 161 B.R. 254, 258 (Bankr. C.D. Cal. 1993) (declining to follow the persuasive authority of *In re D & W Realty Corp.*, 156 B.R. 140 (Bankr. S.D.N.Y. 1993), *rev'd*, 165 B.R. 127 (S.D.N.Y. 1994)).

80. 11 U.S.C. § 1129 (1988).

81. *Id.*

82. *Id.* § 1124. For the language of § 1124, see *supra* note 6.

83. 11 U.S.C. § 1126; see *supra* note 39.

84. 11 U.S.C. § 1129(a)(8). Section 1129(a)(8) provides that:

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

Id.

85. *Id.* § 1129(b)(1).

86. *Id.*

mation process by mandating that both the plan⁸⁷ and its proponent⁸⁸ comply with all applicable provisions of the Code and by establishing a good faith requirement.⁸⁹ Although some creditors have argued that use of the cramdown provision to confirm a plan over the objection of the undersecured senior lender may constitute bad faith in itself,⁹⁰ courts generally acknowledge that the good faith standard demands only a genuine intent to reorganize.⁹¹ Thus, if a debtor truly intends to reorganize, separate classification to achieve a cramdown is improper only if it is limited by a provision other than the good faith requirement.⁹²

Another significant requirement for confirmation by either method is the "best interests" test found in section 1129(a)(7).⁹³ This test, which protects individual claimholders rather than members of a class, establishes a minimum amount that an indi-

87. *Id.* § 1129(a)(1).

88. *Id.* § 1129(a)(2).

89. *Id.* § 1129(a)(3).

90. *Little Creek Dev. Co. v. Commonwealth Mortgage Corp.* (*In re Little Creek Dev. Co.*), 779 F.2d 1068, 1072-73 (5th Cir. 1986). See generally Brian S. Katz, *Single-Asset Real Estate Cases and the Good Faith Requirement: Why Reluctance To Ask Whether a Case Belongs in Bankruptcy May Lead to the Incorrect Result*, 9 BANKR. DEVS. J. 77 (1992) (discussing factors courts consider as indicative of bad faith).

91. See *Albany Partners Ltd. v. Westbrook* (*In re Albany Partners, Ltd.*), 749 F.2d 670, 674 (11th Cir. 1984); Sather & Overstreet, *supra* note 3, at 358-60.

92. Sather & Overstreet, *supra* note 3, at 358-60.

93. 11 U.S.C. § 1129(a)(7). Section 1129(a)(7) provides that:

(7) With respect to each impaired class of claims or interests-

(A) each holder of a claim or interest of such class-

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

Id.

This test is a carryover from Chapter XI of the Bankruptcy Act, the Code's predecessor. See Bankruptcy Act of 1898, ch. 541, § 366(2), 30 Stat. 544 (repealed 1979).

vidual claimholder must be paid under a plan not accepted by that individual claimholder.⁹⁴ Such a dissenting claimholder must receive property of a value not less than that which that claimholder would receive if the case were a Chapter 7 liquidation.⁹⁵ A plan that meets this test is, therefore, in the "best interests" of the creditors in that each one has either accepted the plan or will do no worse than if the debtor were liquidated.⁹⁶

The crux of the controversy over the classification issue is the requirement of section 1129(a)(10) that at least one impaired, non-insider class accept the plan before it can be confirmed.⁹⁷ Acceptance of the reorganization plan requires that (1) a majority of the class members and (2) members of the class representing two-thirds of the dollar amount of the class' claims vote to accept the plan.⁹⁸ Accordingly, a creditor with a large claim relative to the class has greater influence over the outcome of the vote. The undersecured lender in a single-asset case generally will vote against the plan, and, because such a lender likely will have a large claim, its class probably will reject the plan.⁹⁹ Thus, the debtor, despite the support of the individual holders of the other unsecured claims, is almost certain to fail the section 1129(a)(8) requirement of acceptance by all impaired classes and will be forced to attempt to gain confirmation of the plan through the cramdown method.¹⁰⁰ Classifying the deficiency

94. 11 U.S.C. § 1129(a)(7) (1988).

95. *Id.*; see *id.* §§ 701-766 (1988). A liquidation analysis (a study of how the debtor's assets would be distributed under a Chapter 7 proceeding) is the basis for determining compliance with the best interests test. See JAMES J. WHITE & RAYMOND T. NIMMER, *CASES AND MATERIALS ON BANKRUPTCY* 555 (2d ed. 1992).

96. See 11 U.S.C. § 1129(a)(7).

97. *Id.* § 1129(a)(10); Meltzer, *supra* note 9, at 301.

98. 11 U.S.C. §§ 1126(c), 1126(e) (1988).

99. See, e.g., *Heartland Fed. Sav. & Loan Assoc. v. Briscoe Enters., Ltd. II* (*In re Briscoe Enters., Ltd. II*), 994 F.2d 1160, 1166 (5th Cir.) (noting that the undersecured creditor's \$10 million deficiency claim would prevent a class that included all unsecured creditors from approving the plan), *cert. denied*, 114 S. Ct. 550 (1993).

Recall that if the undersecured creditor's unsecured deficiency claim is not large enough to out vote the other unsecured creditors, or if there is yet another impaired, accepting class, then the debtor's plan will succeed in achieving cramdown confirmation, at least as far as § 1129(a)(10) is concerned, despite the dissent of the undersecured creditor. Rusch, *supra* note 29, at 45.

100. See 11 U.S.C. § 1129(b) (1988); *infra* notes 107-10 and accompanying text.

claim separately from the other (supportive) unsecured creditors presents a means of compliance with section 1129(a)(10),¹⁰¹ which must be satisfied even under the cramdown method.¹⁰² Interestingly, as discussed below, both sides of this debate point to section 1129(a)(10) to support their cause.¹⁰³

The remaining relevant provision of section 1129(a) is subsection (11), which requires that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor"¹⁰⁴ The plan, therefore, must be feasible.¹⁰⁵ Advocates of the separate classification strategy often cite this provision to emphasize that single-asset debtors in this situation seek only to proceed with a plan that the court has found likely to work.¹⁰⁶ The feasibility requirement is also heralded as one of several protections for a creditor facing cramdown, which militates in favor of allowing flexible classification.¹⁰⁷

The cramdown provision of the Code maintains all of the requirements of section 1129(a)—except the requirement of accep-

101. The unsecured creditors other than the undersecured creditor are, for the most part, trade creditors who will approve the plan in the hope of continuing to do business with the debtor. Meltzer, *supra* note 9, at 300. This accepting class effects the debtor's compliance with Code § 1129(a)(10), despite the dissent of the separately classified deficiency claim. See 11 U.S.C. § 1129(a)(10).

102. 11 U.S.C. § 1129(b) (1988).

103. See *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1278 (5th Cir. 1991) (insisting that allowing separate classification defeats the congressional intent behind § 1129(a)(10) that there be support for the plan among more than a single impaired creditor), *cert. denied*, 113 S. Ct. 72 (1992); *In re ZRM-Okla. Partnership*, 156 B.R. 67, 68 (Bankr. W.D. Okla. 1993) (noting that if Congress had wanted to give the majority or the largest creditor veto power over confirmation proceedings it could have done so explicitly but that the Code provides for no such thing).

104. 11 U.S.C. § 1129(a)(11) (1988).

105. See *Heartland Fed. Sav. & Loan Assoc. v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160, 1165-66 (5th Cir.), *cert. denied*, 114 S. Ct. 550 (1993). Courts have interpreted this "feasibility" requirement to mandate no less than "a reasonable assurance of commercial viability" *Id.* at 1166 (quoting *In re Lakeside Global II, Ltd.*, 116 B.R. 499, 507 (Bankr. S.D. Tex. 1989)).

106. See *Rusch*, *supra* note 29, at 56-58.

107. *Id.* at 56-57 (noting that creditors who oppose the separate classification strategy are seeking to substitute their judgment on the feasibility of the plan for that of the bankruptcy judge).

tance by all impaired classes¹⁰⁸—and adds the requirements that the plan not “discriminate unfairly” and that the plan be “fair and equitable” to the dissenting, impaired classes.¹⁰⁹ Subsection 1129(b)(2)(B) goes on to define fair and equitable treatment of a class of unsecured claims as either (1) paying each claim in the class in full or (2) providing no property to the holder of any claim junior to the claims of the class.¹¹⁰ The effect of this provision is to institute the “absolute priority rule,” whereby senior creditors must be paid in full before junior creditors, such as the debtor’s shareholders, can receive anything.¹¹¹ Needless to say, this imposition provides a powerful incentive for the debtor to negotiate a plan acceptable to as many classes as possible.

Having reviewed the relevant Code sections, the primary question relating to the separate classification strategy is whether section 1129(a)(10) sheds any light on the classification parameters of section 1122. Although the language of section 1129(a)(10) supports arguments for both sides of the classification controversy, proponents of separate classification put forth the more persuasive rationale.¹¹²

Those opposing the separate classification strategy cite the section 1129(a)(10) requirement that at least one impaired class accept the plan as a necessary context for any construction of

108. See 11 U.S.C. § 1129(a)(8).

109. *Id.* § 1129(b)(1).

110. *Id.* § 1129(b)(2)(B).

111. *Id.* However, the debtor’s equity holders often will attempt to retain control of the debtor entity by employing the “new value exception” to the absolute priority rule. See, e.g., *In re Creekside Landing, Ltd.*, 140 B.R. 713, 715 (Bankr. M.D. Tenn. 1992). Under this exception, a contribution of new value to the debtor by the equity holders justifies their continued control of the entity despite the failure to pay fully the claims of senior lienholders. Mark E. MacDonald et al., *Confirmation by Cramdown Through the New Value Exception in Single Asset Cases*, 1 AM. BANKR. INST. L. REV. 65, 69-70 (1993). The continued vitality of the new value exception has been the topic of a vast amount of debate. *Id.* at 65. See generally Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988) (holding that “sweat equity” did not constitute a contribution of new value but otherwise avoiding a ruling on the doctrine); Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. CHI. L. REV. 738 (1988); David A. Skeel, *The Uncertain State of an Unstated Rule: Bankruptcy’s Contribution Rule Doctrine After Ahlers*, 63 AM. BANKR. L.J. 221 (1989).

112. See *supra* note 103.

the classification provision found in section 1122.¹¹³ Creditors such as the one in *Greystone* believe that allowing unlimited discretion in the classification of similar claims runs counter to section 1129(a)(10) because such a liberal reading would permit a debtor to isolate a small group, or even one individual claimant, classify it separately, and thereby comply with section 1129(a)(10) by procuring as little as one acceptance.¹¹⁴ Such a result, they argue, amounts to "gerrymandering" the confirmation vote and is evidence that section 1122 does not allow unfettered discretion with regard to separate classification.¹¹⁵

This argument, however, is premised on a belief that the results of allowing separate classification of deficiency claims are, in fact, anomalous.¹¹⁶ Actually, an investigation of the legislative purpose behind the Code demonstrates that the requirement of acceptance by at least one impaired class remains meaningful even if the Code allows the separate classification of unsecured deficiency claims.¹¹⁷

First, the legislative history behind section 1129(a)(10) reveals that Congress did not intend for section 1129(a)(10) to facilitate the domination of the confirmation process by a large undersecured creditor.¹¹⁸ According to one representative, Congress intended that section 1129(a)(10) mandate that "a creditor whose claim is impaired . . . must first accept the debtor's plan before the plan can be crammed down with respect to other impaired nonaccepting creditors."¹¹⁹ This statement clearly indicates that a minority of the creditors, or in fact a sole creditor,

113. *E.g.*, *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1278 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 72 (1992). Section 1122 is so clear that a direct challenge to its scope would appear impossible. *See* 11 U.S.C. § 1122 (1988); *supra* note 24. However, creditors maintain that the section should be interpreted to prohibit separate classification of like claims based on other provisions of the Code. *Greystone*, 995 F.2d at 1278-79.

114. *See Greystone*, 995 F.2d at 1279; *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 586 (6th Cir. 1986).

115. *Greystone*, 995 F.2d at 1279.

116. *See, e.g.*, Meltzer, *supra* note 9, at 300 (decrying such a "strange result").

117. *See infra* notes 122-28 and accompanying text.

118. Sather & Overstreet, *supra* note 3, at 369-70.

119. 126 CONG. REC. 31,917 (1980) (statement of Rep. Edwards regarding S. 658, 96th Cong., 2d Sess. tit. 1, § 107(a)(1) (1980)). S. 658 did not differ materially from the present § 1129(a)(10). *See* Rusch, *supra* note 25, at 185-89.

could suffice for compliance with section 1129(a)(10). As the bankruptcy court declared in *In re SM 104 Ltd.*,¹²⁰ "[s]ection 1129(a)(10) was intended not to give the real estate lobby a veto power, but merely to require 'some indicia of creditor support' for confirmation of a proposed Chapter 11 plan."¹²¹

The larger context of the Code's enactment, however, truly undermines the contention that the plain meaning of the Code is inconsistent. Congress designed the Code as a system of compromises between the interests of creditors in receiving payment for their claims and the broader interest in equitable treatment of debtors.¹²² This balance permeates the Code and explains situations such as exist with the interplay of sections 1122 and 1129(a)(10).¹²³ In this instance, the Code offers flexibility in the classification process, which it counterbalances by requiring that all classes accept the plan, or, under a cramdown, that at least one impaired, non-insider class accept the plan.¹²⁴ With the cramdown alternative, in return for softening the class acceptance requirement, the Code mandates the fair and equitable treatment of dissenting classes and proscribes unfair discrimination.¹²⁵

The essence of the debtor's contention is that Congress adopted the Code's provisions with the full knowledge that certain sections would counteract others in some ways.¹²⁶ The conclusion to be drawn from this seeming contradiction is not that the Code is ambiguous, but that it is, like much legislation, the product of compromises.¹²⁷ Therefore, the assertion that the Code is incoherent, and must be fleshed out judicially, is not persuasive in light of the congressional intent to establish a system that balances the various interests involved.¹²⁸

120. 160 B.R. 202 (Bankr. S.D. Fla. 1993).

121. *Id.* at 218.

122. *In re ZRM-Okla. Partnership*, 156 B.R. 67, 70 (Bankr. W.D. Okla. 1993).

123. *See* Rusch, *supra* note 29, at 60-64.

124. *See supra* notes 80-111 and accompanying text.

125. 11 U.S.C. § 1129(b) (1988).

126. *See* Rusch, *supra* note 29, at 60-64.

127. *See* *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61 n.12 (1982).

128. Of the 1993 bankruptcy court challenges to the *Greystone* line of cases, the most direct was certainly *In re ZRM-Okla.*, 156 B.R. 67 (Bankr. W.D. Okla. 1993).

The Code's plain meaning, however, does not resolve the issue of what the classification rules should be. Clearly, a certain balance is necessary. As discussed below,¹²⁹ permitting single-asset real estate debtors to classify deficiency claims separately from general unsecured claims is desirable. However, this desirability does not mean that courts should permit debtors to act in bad faith in order to attain the desired flexibility in the classification process. In all likelihood, the first court to address the separate classification issue came the closest to striking the proper balance.¹³⁰

THE CASES

The Sixth Circuit Court of Appeals laid the foundation for the current debate over the separate classification strategy in *In re U.S. Truck Co.*¹³¹ Although not a single-asset real estate case, the debtor classified one creditor, who was certain to reject the plan, separately from a similar group of claims that the debtor expected would approve the plan.¹³² The debtor, a trucking company, admitted that it isolated the claim of the Teamsters Committee from other similar claims for the purpose of creating an impaired, accepting class.¹³³

In response to the Teamsters Committee's objection that the debtor's plan improperly manipulated the classification of claims to comply with Code section 1129(a)(10), the court examined the issue of which strictures apply to the classification process.¹³⁴

Rather than entering the fray over whether deficiency claims were substantially similar to other unsecured claims, the court in *ZRM-Okla.* chose to draw a line in the Code on the issue of § 1122's "plain meaning." *Id.* at 70.

129. See *infra* notes 201-16 and accompanying text.

130. Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (*In re U.S. Truck Co.*), 800 F.2d 581 (6th Cir. 1986); see *infra* notes 131-54 and accompanying text.

131. 800 F.2d 581.

132. *Id.* at 583-84.

133. *Id.* at 586 n.8.

134. *Id.* at 585-86. In doing so, the court recognized that the legislative intent with regard to separate classification is difficult to interpret. Although the Bankruptcy Act forbade the practice, Congress omitted the prohibition in drafting the Code. Even more confusing are the Notes of the Senate Judiciary Committee on § 1122, which state that the "section codifies the current case law." S. REP. NO. 989, 95th Cong., 2d Sess. 118 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5904. The court was natu-

The court held that Congress purposefully did not forbid the separate classification of similar claims,¹³⁵ and that the "plain language" of Code section 1122 does not support the contention that classification based on any criterion other than legal right to the debtor's assets is prohibited.¹³⁶

Nevertheless, the court did agree with the Teamsters Committee that "there must be some limit on a debtor's power to classify creditors" for the purpose of gaining an impaired, accepting class to achieve a cramdown confirmation.¹³⁷ The court found that the "one common theme in the prior case law" was that "lower courts were given broad discretion to determine proper classification according to the factual circumstances of each individual case."¹³⁸ Moreover, the court held that such a determination is properly informed by an evaluation of the *interests* of the creditors.¹³⁹

The Sixth Circuit upheld the lower court's decision that the Teamsters Committee's interests were substantially different from those in the other impaired class.¹⁴⁰ According to the court, the Teamsters Committee's interests were distinct because of (1) its "unique continued interest in the ongoing business of the debtor," (2) the substantially different "mechanics of the Teamsters Committee's claim," and (3) the likelihood that the claim would "become part of the agenda of future collective bargaining sessions."¹⁴¹ Therefore, the court held that the Teamsters Committee's claim was "in a different posture" than

rally unsure of how to address the directive, in light of the fact that the case law referred to by the Committee came from "two provisions with different language, that were adopted for different purposes, and that have been interpreted to mean different things." *U.S. Truck*, 800 F.2d at 586.

135. *U.S. Truck*, 800 F.2d at 585 (quoting *Barnes v. Whelan*, 689 F.2d 193, 201 (D.C. Cir. 1982)) ("Section 1122(a) specifies that only claims which are 'substantially similar' may be placed in the same class. It does not require that similar claims *must* be grouped together, but merely that any group created must be homogeneous.").

136. *Id.*

137. *Id.* at 586.

138. *Id.*

139. *Id.* at 587.

140. *Id.*

141. *Id.* at 584.

those of the other class and was properly separated.¹⁴² Importantly, the court emphasized that the feasibility provision of section 1129(a)(11) and the "fair and equitable" provision of section 1129(b)(1) would protect the Teamsters Committee's class.¹⁴³

Quite possibly, the *U.S. Truck* decision was the high-water mark of separate classification jurisprudence. The court accurately recognized that the "plain language" of the Code simply does not require joint classification of all similar claims.¹⁴⁴ Nevertheless, the court gave some credence to what it perceived to be the legislative intent behind the Code's classification scheme by announcing that lower courts should not tolerate abusive classification.¹⁴⁵ Apparently, the court did not define such abusive classification by reference to the intent of the debtor, but rather looked to the lack of any difference in interests between an isolated dissenting creditor and the interests of the other creditors with similar claims.¹⁴⁶

Under this analysis, the relevant question is: What interests, if divergent, justify separate classification? Particularly significant in this regard is the court's statement that the Teamsters Committee's interests were distinct from those of the other claims because the union "may choose to reject the plan not because the plan is less than optimal, but because the Teamsters Committee has a noncreditor interest—e.g., rejection will benefit its members in the ongoing employment relationship."¹⁴⁷ This statement foreshadowed the comparable argument advanced in some single-asset cases that an undersecured creditor's interests are different because it will be motivated to vote its unsecured claim to benefit its secured creditor status.¹⁴⁸

The parallels to the single-asset real estate situation are easily drawn. The court in *U.S. Truck* did not imply that the

142. *Id.* at 587.

143. *Id.* In fact, the Teamsters Committee objected unsuccessfully on both of those grounds as well. *Id.* at 587-89.

144. *Id.* at 585.

145. *Id.* at 586.

146. See *supra* notes 140-41 and accompanying text.

147. *U.S. Truck*, 800 F.2d at 587.

148. *E.g.*, *In re Aztec Co.*, 107 B.R. 585, 587 (Bankr. M.D. Tenn. 1989).

Teamsters' voting incentives were improper; rather, they provided ample justification for separate classification of the Teamsters' claim.¹⁴⁹ Likewise, although an undersecured creditor properly may look to its overall economic interest in voting its deficiency claim, its interest in voting its unsecured claim to affect its secured claim gives it a different stake in the reorganization.¹⁵⁰ Consequently, consistent with the analysis of *U.S. Truck*, a plan may place a deficiency claim in a separate class from other unsecured claims.

Although the Code itself does not support any limitation of the separate classification of similar claims,¹⁵¹ the *U.S. Truck* decision, when honestly read, would place only a small and reasonable burden on the practice. The requirement of *U.S. Truck*—that there be a divergence of interests among the holders of similar claims as a prerequisite for separate classification—is a far lower burden than a mandate that the claims be dissimilar with respect to their strict legal rights. Furthermore, this interpretation is true to the rationale behind section 1129(a)(10) that there be “some indicia of creditor support” for the plan.¹⁵²

If all the claims sharing the same interests in the debtor's plan must be in the same class, the debtor's plan must gain the acceptance of at least one of these interest-based classes.¹⁵³ This acceptance would enforce the spirit of Code section 1129(a)(10). At the same time, claims with divergent interests would be classified separately, allowing the debtor to confirm a plan opposed by the majority creditor, or by most creditors, so long as one interest-based class approved the plan. Considering the strong arguments that deficiency claims are in fact legally different,¹⁵⁴ *U.S. Truck's* relatively minor proviso should be no

149. *U.S. Truck*, 800 F.2d at 587.

150. See *Aztec*, 107 B.R. at 587.

151. See 11 U.S.C. § 1122 (1988).

152. *In re Polytherm Indus., Inc.*, 33 B.R. 823, 835 (W.D. Wis. 1983); *supra* notes 117-20 and accompanying text (discussing the legislative intent behind the amendment of Code § 1129 to include the requirement of acceptance by at least one impaired class).

153. 11 U.S.C. § 1129(a)(10) (1988).

154. See, e.g., *In re SM 104 Ltd.*, 160 B.R. 202, 218-19 (Bankr. S.D. Fla. 1993).

threat to single-asset debtors employing the separate classification strategy. As intellectually consistent as it may be to support unlimited separate classification, the adoption of an unrestricted abuse-prevention standard is a more reasonable position that also serves to ensure that Code section 1129(a)(10) is not reduced to an absurdity.

The current controversy over single-asset cases arose with *In re Greystone III Joint Venture*¹⁵⁵ and the line of cases that followed in its wake. *Greystone's* fact pattern was archetypal. In the late 1980s, as the real estate markets began to crumble, a debtor owning only an Austin, Texas, office building sought and received relief from its creditors under Chapter 11.¹⁵⁶ The debtor, *Greystone*, had borrowed \$8.8 million from *Phoenix*, a lender, and secured it by a first lien on the property, which was worth only \$5.8 million at the date of bankruptcy. *Phoenix's* total claim at the time of bankruptcy exceeded the value of the collateral by approximately \$3.5 million, and, having not elected treatment under Code section 1111(b)(2), *Phoenix* had an unsecured deficiency claim in that amount.¹⁵⁷ Meanwhile, *Greystone's* trade creditors held claims of approximately \$10,000.¹⁵⁸ When the plan was submitted, *Phoenix* protested *Greystone's* decision to classify its claim separately from the trade creditors who supported the plan.¹⁵⁹

The court in *Greystone* took *U.S. Truck* and drove it into a ditch. Writing for a three-judge panel, Fifth Circuit Judge Edith Jones claimed the support of *U.S. Truck* in holding that Code section 1122 should be read to prohibit the separate classification of similar claims unless "undertaken for reasons independent of the debtor's motivation to secure the vote of an impaired, assenting class of claims."¹⁶⁰ In the opinion, the court surprisingly announced that "one clear rule" had emerged from the caselaw on § 1122: "[T]hou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorga-

155. 995 F.2d 1274 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 72 (1992).

156. *Id.* at 1276-77.

157. *Id.* In other words, *Phoenix* was somewhat undersecured.

158. *Id.* at 1276.

159. *Id.* at 1277.

160. *Id.* at 1279.

nization plan.”¹⁶¹ The court immediately followed this assertion with the quotation from *U.S. Truck* that “[t]here must be some limit on a debtor’s power to classify creditors in such a manner.”¹⁶² Ironically, the court then proceeded to establish a “limit” entirely inconsistent with the holding in *U.S. Truck*.¹⁶³ The court in *U.S. Truck* had, in fact, approved the confirmation of the debtor’s plan before it, one which admittedly gerrymandered an affirmative vote.¹⁶⁴

In contrast to *U.S. Truck*, the court in *Greystone* began by holding that a “fair reading” of section 1122, when read in conjunction with section 1129(a)(10), was that similar claims “ordinarily . . . should be placed in the same class.”¹⁶⁵ The court then offered the section 1122(b) exception as evidence of the correctness of its narrow reading, apparently confusing section 1122(a)’s actual language with the court’s preferred reading of the provision.¹⁶⁶ The court did not disguise its disdain for the debtor’s practice, insisting that separate classification renders the deficiency claim’s vote “meaningless” and allows debtors to “disenfranchise” undersecured creditors.¹⁶⁷ The court added that, “[w]ith its unsecured voting rights effectively eliminated, the . . . creditor’s ability to negotiate a satisfactory settlement of either its secured or unsecured claims would be seriously undercut.”¹⁶⁸

The court’s opinion in *Greystone* deserves criticism because, first, the opposition of any class of impaired claims is far from meaningless.¹⁶⁹ Even with separate classification allowed, the undersecured creditor may still dissent with its deficiency claim

161. *Id.*

162. *Id.* (quoting *U.S. Truck*, 800 F.2d at 586).

163. See *U.S. Truck*, 800 F.2d at 587.

164. *Id.* at 586-87.

165. *Greystone*, 995 F.2d at 1278.

166. See *supra* note 78. This convoluted logic has proved a target for several commentators and jurists wishing to underscore the overreaching nature of the court’s holding. See *In re SM 104 Ltd.*, 160 B.R. 202, 217 (Bankr. S.D. Fla. 1993); Sather & Overstreet, *supra* note 3, at 365-66.

167. *Greystone*, 995 F.2d at 1280.

168. *Id.*

169. See *In re D & W Realty Corp.*, 156 B.R. 140, 141-42 (Bankr. S.D.N.Y. 1993), *rev’d*, 165 B.R. 127 (S.D.N.Y. 1994).

and thereby force the debtor to employ the cramdown confirmation method, with its additional protections for dissenting creditors.¹⁷⁰ Moreover, although an unsecured creditor truly would be in a better negotiating position if it alone could dictate whether a debtor's plan is confirmed, the Code inconveniently does not grant it that power by implication or otherwise.¹⁷¹

The cramdown provisions were expressly instituted to provide for plan confirmation even when some, or most, of the creditors dissent.¹⁷² If Congress intended to allow the largest creditor or the majority of creditors to block cramdown confirmation, then it would have drafted section 1129(a)(10) to require more than the assent of a single class of creditors.¹⁷³ Furthermore, when Congress did draft section 1129(a)(10), it was presumably fully aware of the restrictions, or lack thereof, that it included in section 1122.¹⁷⁴

Having mangled both the Code and the holding in *U.S. Truck*, the court in *Greystone* proceeded to rebuke hypocritically the bankruptcy court for its approval of the plan.¹⁷⁵ Because the bankruptcy court based its decision, in part, on the "Code's policy of facilitating reorganization," the Fifth Circuit excoriated it for the sin of "resort[ing]" to a policy argument.¹⁷⁶ Without disputing the existence of such a policy, the circuit court stated that "[p]olicy' considerations do not justify preferring one section of the Code, much less elevating its implicit 'policies' over other sections, where the statutory language draws no such distinctions."¹⁷⁷ This declaration is, shamelessly, only a few paragraphs after the court "elevated" its own idea of the policies underlying section 1129(a)(10) over the statutory language of section 1122.¹⁷⁸

It is not clear exactly what reasons the debtor advanced in

170. See 11 U.S.C. §§ 1129(a)(8), 1129(b)(1) (1988).

171. See *id.* § 1129 (providing for cramdown despite the existence of a dissenting class).

172. See *In re ZRM-Okla. Partnership*, 156 B.R. 67, 71 (Bankr. W.D. Okla. 1993).

173. *Id.*

174. *Id.*

175. *Greystone*, 995 F.2d at 1280.

176. *Id.*

177. *Id.*

178. *Id.* at 1278-80.

arguing that the deficiency claim was dissimilar from the other secured claims, mainly because they were summarily dismissed by the circuit court. Nonetheless, Greystone apparently maintained that Phoenix's lack of recourse for its loan under state law rendered Phoenix's claim "[legal[ly] differen[t]" from the claims of the trade creditors.¹⁷⁹ As the court held, the simple fact that Phoenix had no recourse under state law is not sufficient to make the claim substantially dissimilar from the other unsecured claims. Presumably, a distinction sufficient for separate classification must lie between the legal rights of the claims *as they exist* in the bankruptcy proceeding.¹⁸⁰ Despite this requirement, the fact that Code section 1111(b) creates an unsecured deficiency claim where it would not otherwise exist does affect the legal rights of the claim in several other ways, which became the basis of several of the ensuing defections from Greystone's mandate.¹⁸¹

Although *In re ZRM-Oklahoma Partnership*¹⁸² carried the banner for unlimited discretion regarding classification of similar claims,¹⁸³ two other 1993 cases mounted challenges to Greystone's basic assumption that deficiency claims are substantially similar to other unsecured claims in their legal rights. In *In re SM 104 Ltd.*,¹⁸⁴ the bankruptcy court accurately described Greystone and its progeny as turning more on "notions of basic fairness and good faith" than on principles of statutory construction.¹⁸⁵ The court cited as persuasive the argument found in *In re Aztec*, and inspired by *U.S. Truck*, that unsecured deficiency claims are properly placed in a separate class due to the claimholder's unique interest in affecting its secured claim

179. *Id.* at 1279. In addition, Greystone advanced "good business reasons" for the classification. *Id.* at 1280.

180. *Id.* at 1278. The court also implicitly recognized that the existence of good business reasons would provide a justification for separate classification but held that the lower court's finding of fact in this regard was clearly erroneous. *Id.* at 1280-81.

181. See *In re D & W Realty*, 156 B.R. 140 (Bankr. S.D.N.Y. 1993), *rev'd*, 165 B.R. 127 (S.D.N.Y. 1994).

182. 156 B.R. 67 (Bankr. W.D. Okla. 1993).

183. The court based its holding on the plain meaning of Code § 1122. *Id.* at 71.

184. 160 B.R. 202 (Bankr. S.D. Fla. 1993).

185. *Id.* at 217.

by preventing the confirmation of any plan.¹⁸⁶ Nonetheless, the court chose to base its holding on the "significant differences between the legal rights of a general unsecured claim and an unsecured deficiency claim created for the nonrecourse lender by section 1111(b)."¹⁸⁷

Foremost among those differences was the section 1111(b) aspect itself and in particular the fact that such a claim would not exist under a different chapter of the Code.¹⁸⁸ Distinguishing its criticism from a mere assertion that a deficiency claim is different because of how it is created, the court in *SM 104 Ltd.* explained that the present rights of the deficiency claimholder are affected by its status.¹⁸⁹ The court used the "best interests of the creditors" test to demonstrate the continuing viability of the distinction, noting that joint classification could lead to an undersecured creditor demanding to receive better treatment than it would deserve under Chapter 7, a result clearly not contemplated by the Code.¹⁹⁰ Thus, the court reasoned, the legal rights of the two categories are sufficiently divergent to render the claims substantially dissimilar and to require separate classification under section 1122.¹⁹¹

The court in *In re D & W Realty Corp.*¹⁹² created an entirely

186. *Id.* at 218.

187. *Id.* at 219.

188. See 11 U.S.C. § 1111 (1988). Section 1111 only applies to Chapter 11 cases, and, according to Code § 502(b)(1), nonrecourse lenders would otherwise, for example in Chapter 7 cases, have no unsecured claim at all. *Id.* §§ 502, 1111.

189. *SM 104 Ltd.*, 160 B.R. at 218-21.

190. *Id.* at 219-20. Under any liquidation analysis that demonstrated that the unsecured creditors would receive a distribution from the Chapter 7 estate, the unsecured deficiency claim, if required to be in the same class, can piggyback onto some undeserved benefits. *Id.* Code § 1123 requires that each claim within a class receive the same treatment or agree to accept the plan. 11 U.S.C. § 1123 (1988). Thus, when the general unsecured creditors demand, for example, a 15% payment on their claims based on the best interests test, the deficiency claimant can demand the same and block confirmation if not paid. See *SM 104 Ltd.*, 160 B.R. at 219-20. This situation is true despite the fact that, under Chapter 7, the nonrecourse undersecured creditor would have no unsecured claim and could look only to the collateral to satisfy its lien. *Id.*

191. *SM 104 Ltd.*, 160 B.R. at 221.

192. 156 B.R. 140 (Bankr. S.D.N.Y. 1993), *rev'd*, 165 B.R. 127 (S.D.N.Y. 1994). Although the district court reversed the bankruptcy court's decision in *D & W Realty*, the bankruptcy court's opinion remains an interesting criticism of the *Greystone* line

new approach to the issue. The court admitted that there could be some limitation of separate classification¹⁹³ but nonetheless maintained that the separate classification of deficiency claims of undersecured mortgagees "is not only appropriate, it is in fact mandated" by the *election* provision of Code section 1111(b).¹⁹⁴

Section 1111(b), which gives effect to unsecured deficiency claims through its recourse provision, also directs that a claim may forego such recourse and be treated as secured to the full extent of the allowed claim. To select this status, "the *class* of which such claim is a part" may elect treatment under section 1111(b)(2). The court in *D & W Realty* reasoned that if the election is to be made by a class, then only claimants entitled to make the election should be in that class.¹⁹⁵ Noting that the section 1111(b) election cannot be required before the plan and disclosure statement are filed,¹⁹⁶ the court held that unsecured deficiency claims must be classified separately in the plan in order to preserve the right of election in the future.¹⁹⁷ In mandating such classification, the court found the issue of the debtor's subjective intent to be irrelevant.¹⁹⁸

SM 104 Ltd. and *D & W Realty* successfully challenge *Greystone* on its own terms. Even if section 1122 does contemplate some restriction on separately classifying similar claims, *SM 104 Ltd.* and *D & W Realty* both convincingly establish that classifying deficiency claims separately from general unsecured

of cases.

193. *Id.* at 143. In fact the decision leaves intact an earlier holding by the same bankruptcy court that general unsecured claims may not be separately classified from each other. See *In re Mastercraft Record Plating, Inc.*, 32 B.R. 106 (Bankr. S.D.N.Y. 1983), *rev'd on other grounds*, 39 B.R. 654 (S.D.N.Y. 1984).

194. *D & W Realty*, 156 B.R. at 141.

195. *Id.* at 144. Understating the matter somewhat, the court noted that "[a]ny secured creditor wishing to make the election would surely object to its election being defeated by the votes of claimants not personally entitled to make the election." *Id.*

196. *D & W Realty* arose at the hearing on the disclosure statement, when the § 1111(b) election was still clearly in prospect. Nevertheless, the court noted that Bankruptcy Rule 3014 provides that the election may be made "at any time prior to the conclusion of the hearing on the disclosure statement or within such *later* time as the court may fix," and that Bankruptcy Rule 9006(c)(2) precludes the reduction of the time to take action under Bankruptcy Rule 3014. *Id.*

197. *Id.* at 145.

198. *Id.*

claims cannot fall within any such restriction. The two cases travel different but equally valid paths to reach the same legal conclusion: Deficiency claims must be separately classified regardless of whether the debtor intends to obtain thereby an assenting, impaired class.

POLICY CONSIDERATIONS

The primary policy consideration in this area is well stated by the court in *D & W Realty*: "Does the right to vote on a Chapter 11 plan mean the right to control the process?"¹⁹⁹ In other words, does allowing the undersecured mortgagee in a single-asset real estate case to block any proposed plan of reorganization produce a desirable outcome?²⁰⁰

Because single-asset debtors employing the classification strategy usually seek to effect a cramdown confirmation, such debtors truly are attempting to manipulate the voting process. Similarly, however, when undersecured creditors vote their unsecured claims in a manner that benefits their secured creditor status, they too are taking advantage of the tools that the Code provides them. Accordingly, courts must determine whether the rule should allow both practices and open the possibility of confirmation over the objection of the undersecured creditor.

Significant in this regard is the relationship between state property law rights and the policies of the Code. The status that secured creditors enjoy under state property law constitutes one rationale for prohibiting separate classification.²⁰¹ Because the Code's provisions generally accord creditors recognition reflective of their state law rights,²⁰² those rights are important in evaluating how the Code should treat a particular creditor. In addition, state law arguably indicates the policies that are in the best interests of all concerned.

Nevertheless, the status of an undersecured nonrecourse mortgagee under state property laws should not be exaggerated.

199. *Id.* at 143.

200. See Rusch, *supra* note 29, at 60-64 (asserting that rejecting separate classification effectively eliminates the possibility of cramdown).

201. *E.g.*, CAL. CIV. CODE § 2924 (West 1993).

202. See, *e.g.*, 11 U.S.C. §§ 501-560 (1988).

If permitted to block plan confirmation, such a creditor will be entitled only to foreclose on the property and will therefore be limited in its recovery to the value of the collateral.²⁰³ In contrast, the bankruptcy law potentially facilitates the reorganization of the debtor but subjects the debtor to numerous protections offered to the undersecured creditor.²⁰⁴ Under the cramdown alternative, the creditor is the beneficiary of the section 1129(b) requirement that the plan be fair and equitable and not discriminate unfairly, the good faith requirement of section 1129(a)(3), the "best interests" test of section 1129(a)(7), the feasibility requirement of section 1129(a)(11), and the section 1111(b) recourse election.²⁰⁵ Thus, the Code offers significant concessions to the creditor in exchange for the creditor's losing only the power to dictate the terms of reorganization. Nonetheless, perhaps secured creditors should not be forced into the bargain no matter how reasonable their treatment.²⁰⁶

The ultimate question, then, is whether single-asset debtors merit the opportunity to reorganize at the expense of the secured creditor's right to foreclose. Congress, and in fact the nation, has been well served by the policy of attempting to strike a balance between the interests of creditors and the interest in allowing debtors to reorganize under conditions that indicate the prospect of an equitable and successful rehabilitation. In this way, the benefits of maintaining the going concern value of a debtor-entity are achieved with the least possible disruption of the state law rights of creditors. Reserving the possibility of reorganization for single-asset debtors advances such a balance.

The principle benefit of allowing separate classification of deficiency claims is to prevent the secured creditor from possessing a "plan veto"²⁰⁷ that it may exercise without regard to the merits of the plan. Toward the end of encouraging a negotiated

203. *E.g.*, CAL. CIV. CODE § 2924.

204. 11 U.S.C. §§ 1111(b), 1129(a)(3), 1129(a)(7), 1129(a)(11), 1129(b) (1988).

205. See statutes cited *supra* note 204.

206. See *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 72 (1992).

207. See *In re ZRM-Okla. Partnership*, 156 B.R. 67, 70-71 (Bankr. W.D. Okla. 1993).

reorganization plan, if an equitable plan is feasible, the Code ideally should allocate some leverage to both sides. The cramdown confirmation process promotes such a balance. Although permitting separate classification opens the prospect of a reorganization, it does not approximate "disenfranchisement" of the secured creditor.²⁰⁸ The protections enumerated above, principally the ability to preclude regular confirmation, place the creditor in a position to object to any plan that is unfair, discriminatory, or not feasible.²⁰⁹ The result will be a plan that ultimately may or may not gain confirmation but will remain consistent with the values that inspired the creation of the cramdown confirmation process.

The final issue is whether there should exist any restraint whatsoever on a debtor's ability to separately classify similar claims. Stated differently, as a matter of policy, are the concerns Congress sought to address through Code section 1129(a)(10)²¹⁰ frustrated by permitting total freedom of classification?

Although the requirement of section 1129(a)(10) (that there be one assenting, non-insider, impaired class) is indicative at least of an intention to check the ability of a debtor to cramdown a plan to which no creditor would agree, arguably, the debtor's freedom is otherwise not limited.²¹¹ Courts such as *Greystone* have chosen to read the section 1129(a)(10), in conjunction with section 1122, as proscribing the separate classification strategy mostly on the theory that all unsecured claims are legally similar and that the debtor has no good reason to separately classify the deficiency claimant.²¹² According to these courts, it follows that such separate classification offends section 1129(a)(10).²¹³ Nevertheless, a scheme that provides meaning to section 1129(a)(10) while permitting the separate classification strategy

208. *But see* Meltzer, *supra* note 9, at 301-02 (arguing that permitting separate classification disenfranchises a dissenting lender).

209. *See* 11 U.S.C. §§ 1129(a)(11), 1129(b)(1) (1988).

210. *Id.* § 1129(a)(10).

211. *Id.*

212. *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1276-81 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 72 (1992).

213. *Id.*

is conceivable.

The interest-based approach of *U.S. Truck* fills this role superbly.²¹⁴ By focusing the inquiry on the interests of the claimholders placed in each class, the purpose of requiring at least one impaired class to accept the plan is achieved. Under this scheme, the class of creditors representing at least one set of interests must accept the plan, an idea remarkably in line with the congressional intent of ensuring that there was "some indicia of . . . support" for the plan among impaired creditors.²¹⁵ The interest-based approach of *U.S. Truck* honors this intent, while retaining the flexibility of classification inherent in the words of the Code.²¹⁶

RECOMMENDATIONS

The Code as written fairly may be interpreted to place absolutely no restriction on the separate classification of similar claims.²¹⁷ As discussed above,²¹⁸ however, Code section 1129(a)(10)—requiring the acceptance of at least one class of non-insider, impaired claims—is meaningful only if there is some restriction on the ability of a debtor to isolate one or more selected claims in a class by itself. Where *Greystone* ignored the real differences between deficiency claims and general unsecured claims that mandate their separate classification,²¹⁹ other courts have not heeded the intent behind Code section 1129(a)(10).²²⁰

This Note argues that a return to the jurisprudence of *U.S.*

214. See *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co.* (*In re U.S. Truck Co.*), 800 F.2d 581 (1986); *supra* notes 130-53 and accompanying text.

215. *In re SM 104 Ltd.*, 160 B.R. 202, 218 (Bankr. S.D. Fla. 1993).

216. See 11 U.S.C. § 1122 (1988).

217. *Id.*

218. See *supra* notes 199-208 and accompanying text.

219. *SM 104 Ltd.* and *D & W Realty Corp.* properly determined that, regardless of a deficiency claim holders' interests, a deficiency claim is legally dissimilar from those of general unsecured claims. *In re SM 104 Ltd.*, 160 B.R. 202, 218-19 (Bankr. S.D. Fla. 1993); *In re D & W Realty Corp.*, 156 B.R. 140, 141 (Bankr. S.D.N.Y. 1993), *rev'd*, 165 B.R. 127 (S.D.N.Y. 1994).

220. Neither *SM 104 Ltd.* nor *D & W Realty* suggested any bar to the separate classification of even one trade creditor to meet the requirements of Code § 1129(a)(10). See *SM 104 Ltd.*, 160 B.R. 202; *D & W Realty*, 156 B.R. 140.

Truck, whether achieved by interpretation or Code amendment, is the best course. Courts should recognize that debtors generally have the right to classify separately those claims held by creditors with substantially different interests in the prospective reorganized debtor. By definition, holders of deficiency claims will always have distinct interests from other unsecured creditors. The result would be a meaningful requirement that there be support for the plan from at least one group of creditors situated similarly with respect to *both* legal rights and outlook on the reorganization. Such a system would prevent abuse yet still allow the option of a cramdown confirmation over the objection of any one creditor.

CONCLUSION

The separate classification of the unsecured claim of an undersecured creditor is simply not prohibited by the Code, nor should it be. A feasible and fair reorganization plan should not be subject to the veto power of the real estate mortgagee when no such provision exists in the Code. Moreover, the legal differences of deficiency claims and the section 1111 election process require separate classification in the single-asset real estate context. As a general rule, the *U.S. Truck* decision should be implemented, allowing the highest level of classification flexibility while still guarding against absurd classification schemes.

King F. Tower