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Problems in the Code

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Solving the *Ruti-Sweetwater* Problem

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Section 1129 of the Bankruptcy Code provides two routes to confirmation of a plan after the votes of creditors have been solicited and tabulated. When a plan is largely consensual, under § 1129(a) it could be confirmed if it is accepted by every impaired class.[2] A class "accepts" a plan when class members holding two-thirds in dollar amount, and one-half in number, of allowed claims in the class vote in favor.[3] For this purpose, only class members that actually submit valid votes are counted.[4]

Alternatively, if not all impaired classes vote to accept the plan, the debtor can nevertheless confirm the plan by satisfying the "cramdown" provisions of § 1129(b). In this scenario, if at least one impaired class (not comprising insiders of the debtor) accepts the plan, it might be confirmed over the rejection of the other impaired classes, provided that the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such non-accepting impaired classes.[5]

What happens when no creditor in an impaired class returns a ballot? The Code is silent on this question. If an impaired class does not vote to accept or reject the plan, the bankruptcy court must decide whether (1) it is an "accepting" class, in which case the plan may be confirmed under § 1129(a) (unless other impaired classes have voted against the plan); or (2) it is a "rejecting" class, in which case the plan can only be confirmed after the debtor has satisfied the cramdown requirements of § 1129(b)?

The *Ruti-Sweetwater* Decision

In 1988, the U.S. Court of Appeals for the Tenth Circuit considered exactly this question. At that time, the modern Bankruptcy Code had been law for less than a decade,[6] and the bankruptcy, district and appellate courts had been occupied with litigation over ambiguities in the language of the new statute since its enactment.

The Tenth Circuit addressed this question in *In re Ruti-Sweetwater*,[7] a chapter 11 case. The debtor entities were collectively engaged in a vacation timeshare business in Utah.[8] Their proposed reorganization plan classified their creditors into 83 classes, one of which was composed of members of the Hein family, who held a judgment lien on a property.[9] Their claim was impaired under the plans, and they were therefore entitled to vote.[10] The Heins did not vote, nor did 19 other classes (all of which were also composed of impaired secured creditors).[11] The Heins also did not object to the plan, nor did they appear at the confirmation hearing.[12] The bankruptcy court ruled that the creditors who failed to vote, including the Heins, were deemed to have accepted the plan, such that the debtors were not obligated to meet the cramdown requirements of § 1129(b).[13]

Shortly after confirmation, when the debtors moved forward with implementing the plan through a sale of property free and clear of the Heins' lien, the Heins appeared for the first time to object.[14] The bankruptcy court overruled the objection on grounds that the Heins were bound by the provisions of the plan, which permitted the free-and-clear sale.[15]

In upholding the bankruptcy court's decision, the district court observed that the Bankruptcy Code was silent on whether a nonvoting, nonob-

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2 11 U.S.C. § 1129(a).
3 11 U.S.C. § 1126(c).
4 *Id.*
5 11 U.S.C. § 1129(b).
6 1 *Collier on Bankruptcy* ¶ 20.03 (16th ed. 2025).
7 *Heins v. Ruti-Sweetwater Inc. (In re Ruti-Sweetwater Inc.)*, 836 F.2d 1263 (10th Cir. 1988).
8 *Id.*
9 *Id.* at 1264.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.* at 1264-65.
15 *Id.* at 1265.

jecting creditor, who is the sole member of a class, is deemed to have accepted the plan for purposes of § 1129.[16] Despite this silence, the district court held that to deem a nonvoting class as having *rejected* a plan would "reward [the] apathy or carelessness" of a class of members that fails to vote.[17] The Tenth Circuit, in upholding the district court's ruling, observed that the outcome sought by the Heins would permit a creditor to "sit idly by" as a plan is negotiated and confirmed, then challenge it after the fact, "effectively plac[ing] all reorganization plans at risk in terms of reliance and finality."[18]

Subsequent Treatment

Ruti-Sweetwater remains good law in the Tenth Circuit.[19] In the nearly 40 years since the decision, no other circuit has ruled on the issue. *Ruti-Sweetwater* has been followed by bankruptcy and district courts in the majority of circuits, including the First, Second, Third, Fifth, Eighth and Eleventh Circuits.[20]

However, a fair number of courts in the majority of these circuits have declined to follow *Ruti-Sweetwater*, largely on grounds that its holding is insufficiently rooted in the language of the Bankruptcy Code.[21] In support of this conclusion, many cite § 1126(c)'s provision that a class of claims is an accepting class where the plan "has been accepted by creditors ... that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such *class held by creditors ... that have accepted or rejected*" the plan.[22] Read together with Rule 3018(c) of the Federal Rules of Bankruptcy Procedure, which provides that "[a]n acceptance or rejection of a plan must ... be in writing ... be signed by the creditor ... [and] conform to Form 314," some courts find that the Code is clear that acceptance means actual acceptance and cannot be inferred from silence.[23]

Courts rejecting *Ruti-Sweetwater* generally cite the aforementioned textual analysis (and the line of cases that come out the same way), and their decisions also often appear rooted in equitable considerations. In particular, in smaller cases in which the provision of additional due process for the benefit of a nonvoting creditor will not threaten the type of carefully negotiated resolution that often underpins a plan structure in a complex case, some courts will not follow *Ruti-Sweetwater*.

As a general matter, in larger cases, courts follow *Ruti-Sweetwater* where they find that a cramdown litigation could threaten a delicately negotiated plan that embodied a complex multipart settlement. One prominent example is *Adelphia Commc'ns. Corp.*,[24] in which the U.S. Bankruptcy Court for the Southern District of New York decided to follow *Ruti-Sweetwater* after careful analysis, but left open the possibility that *Ruti-Sweetwater*'s top-line holding might not be equally applicable in all cases.

Specifically, the bankruptcy court observed that both the *Adelphia* and *Ruti-Sweetwater* debtors had complex capital structures and complicated reorganization plans, and many classes of creditors voted on the plan. The court found that the voting creditors' will would be frustrated by requiring a cramdown analysis with respect to a nonvoting class.[25] In addition, the *Adelphia* court gave some weight in its analysis to the fact that the debtor's plan included language expressly stating that failure to vote would be deemed acceptance.[26] In a case like *Adelphia*, the due-process concerns raised in those decisions rejecting *Ruti-Sweetwater* are mitigated by additional notice of the consequences of not voting, and by clarifying that the provision of additional due process to nonparticipating holders could be tremendously costly to the debtors and other participating parties.[27]

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16 *Heins v. Ruti-Sweetwater Inc. (In re Sweetwater)*, 57 B.R. 748, 749-50 (D. Utah 1985).
17 *Id.* at 750.
18 *In re Ruti-Sweetwater*, 836 F.2d at 1266-67.
19 *See Wachovia Dealer Servs. v. Jones (In re Jones)*, 530 F.3d 1284, 1291 (10th Cir. 2008) (following *Ruti-Sweetwater* and holding that "failure to object constitutes acceptance of the plan").
20 *See In re Mid-State Plumbing Inc.*, No. 16-80392, 2017 Bankr. LEXIS 3179, at *9 (Bankr. W.D. La. Sept. 20, 2017); *In re TOUSA Inc.*, No. 08-10928, 2013 Bankr. LEXIS 3169, at *54 (Bankr. S.D. Fla. Aug. 5, 2013); *In re SW Boston Hotel Venture LLC*, 460 B.R. 38, 51 (Bankr. D. Mass. 2011); *In re C. Bean Transp. Inc.*, No. 10-71360, 2011 Bankr. LEXIS 1892, at *6 (Bankr. W.D. Ark. Jan. 25, 2011); *In re Adelphia Commc'ns. Corp.*, 368 B.R. 140, 261 (Bankr. S.D.N.Y. 2007); *In re Contempri Homes*, 247 B.R. 135, 137 (Bankr. M.D. Pa. 2000).
21 *See, e.g., In re Vita Corp.*, 380 B.R. 525, 528 (C.D. Ill. 2008) (holding that *Ruti-Sweetwater* is not in alignment with Bankruptcy Code and is "result-oriented" in its approach); *Dep't of Housing and Urban Dev. V. Westwood Plaza Apartments Ltd. (In re Westwood Plaza Apts.)*, 192 B.R. 693, 696 (E.D. Tex. 1996) (distinguishing *Ruti-Sweetwater* as applying only to cases where creditor fails to appear at any hearings); *Bell Rd. Inv. Co. v. M. Long Arabians (In re M. Long Arabians)*, 103 B.R. 211, 215 (B.A.P. 9th Cir. 1989) (holding that nonvoting creditor should not be "'deemed' to have accepted the plan"); *In re S B Bldg. Assocs. Ltd. P'Ship*, 621 B.R. 330, 374-75 (Bankr. D.N.J. 2020) (holding that affirmative acceptance of plan is required "and that the failure to object will not suffice"); *In re Augusto's Cuisine Corp.*, No. 15-093, 2017 Bankr. LEXIS 833, at *24 (Bankr. D.P.R. March 28, 2017) (holding that "failure to vote on confirmation of plan is not equivalent to acceptance of the plan"); *In re Jim Beck Inc.*, 207 B.R. 1010, 1015 (Bankr. W.D. Va. 1997) (holding that cases that "hold that failure of a creditor or class to ballot does not result in a default acceptance of the plan [are] better reasoned and more persuasive" than *Ruti-Sweetwater*); *In re Higgins Slacks Co.*, 178 B.R. 853, 856 (Bankr. N.D. Ala. 1995); (rejecting *Ruti-Sweetwater*'s holding as "clearly a case of the tail wagging the dog"); *In re Broad Assoc. Ltd. P'Ship*, 110 B.R. 632, 634 (Bankr. D. Conn. 1990) (holding that class that is impaired and failed to return ballot "is deemed to have rejected the Pending Plan").
22 *Vita Corp.*, 380 B.R. at 527 (affirming lower court that held § 1126(c) "plainly requires each creditor to affirmatively accept the plan in order to constitute acceptance"); *Jim Beck Inc.*, 207 B.R. at 1014 (citing cases approvingly that held § 1126(c) "require[s] that a plan be actively accepted"); *Higgins Slacks Co.*, 178 B.R. at 857 (holding that § 1126(c) "requires a plan to be actively accepted").
23 *Vita Corp.*, 380 B.R. at 528 (holding that Fed. R. Bankr. P. 3018(c) requires an affirmative writing); *In re Westwood Plaza Apts.*, 192 B.R. at 696 (holding that Fed. R. Bankr. P. 3018(c), when read together with § 1126(c), requires that plan be actively accepted); *In re S B Bldg. Assocs. Ltd. P'Ship*, 621 B.R. at 374-75 (holding that Bankruptcy Code has been mandated to be "read in accordance with its plain language" and therefore affirmative acceptance is required under Code and statutory law).
24 *Adelphia Commc'ns. Corp.*, 368 B.R. at 260 (Bankr. S.D.N.Y. 2007).
25 *Id.* at 260.
26 *Id.* at 261.
27 *See, e.g., Contempri Homes*, 247 B.R. at 137 (citing principle, articulated in *Ruti-Sweetwater*, that concerned creditors can be expected to actively protect their claims, such that nonparticipating creditors should not be afforded additional protection of requiring debtor to demonstrate satisfaction of cramdown standard as condition to plan approval).

The *Ruti-Sweetwater* Problem in the Chapter 11 Cases of Non-U.S. Debtors

The rise in large chapter 11 cases involving non-U.S. companies creates the conditions for a proliferation of *Ruti-Sweetwater* problems, as non-U.S. creditors might be less likely to participate in a chapter 11 case as a result of language barriers or a lack of familiarity with the U.S. bankruptcy system. As a result, some of these creditors may ignore ballots and not vote.[28]

Given the lack of guidance on the issue in the circuit courts, and conflicting case law within many circuits and even districts, these factors together create at a minimum a lack of regularity and predictability, which can hamper debtors' paths to plan confirmation. At worst, in the event that a debtor in a complex international chapter 11 case finds itself before a court that declines to follow *Ruti-Sweetwater*, the decision could add time, cost and uncertainty to an already difficult process.

A Balanced Solution to the Problem

Congress should amend the Bankruptcy Code to provide that silence equals acceptance for purposes of § 1129(a). Codifying *Ruti-Sweetwater* in this way would create predictability and finality where there has been little consistency for almost four decades. Moreover, clarification of the Code in this way would conform to the principle embodied throughout the Code that a creditor that has notice of proceedings must proactively assert its rights — whether by submitting a proof of claim or a plan ballot — in order to be afforded the full extent of the protections provided by the Code. abi

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28 *See, e.g., Hearing Tr., In re GOL Linhas Aereas Inteligentes S.A., et al.*, Case No. 24-10118-mg (Bankr. S.D.N.Y. May 20, 2024) at 54:10-60:4; 125:24-128:8 (discussing, in context of confirmation of chapter 11 plan, the *Ruti-Sweetwater* problem with respect to nonvoting single-member classes of non-U.S. creditors).