Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

Numerosity Unwound: Counting Votes on a Chapter 11 Plan

By Stephen D. Zide, Joseph A. Shifer, and Benjamin S. Sieck

I. Introduction

The voting by creditors on a Chapter 11 plan is a critical component of the Chapter 11 confirmation process. For a plan to be confirmed, it must either be accepted by each class of impaired creditors[1] or satisfy the stringent "cram-down" standards under section 1129(b) of the Bankruptcy Code, including carrying the vote of at least one class of impaired creditors.[2] To determine whether a class of creditors has voted in favor of a plan one must look to section 1126(c) of the Bankruptcy Code. It requires that the plan be 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 such plan."

The "at least two-thirds in amount" requirement is relatively straightforward. The debtor must tabulate the votes of a given class and determine whether the accepting claims in a class constitute more than two-thirds of the amount of all allowed claims in the class that were voted. The "more than one-half in number" requirement (commonly referred to as the "numerosity" requirement), is not as straightforward. The plain text of the statue indicates that the test looks to claims, not creditors, and every case to address this issue has followed the clear wording of the statute. Therefore, one creditor can have—and vote—more than one claim.

Still, this initial observation gives rise to numerous other questions, such as what constitutes a claim for voting purposes and how broadly or narrowly is it defined? If a creditor has multiple contractual relationships with a debtor, does each relationship translate into a separate claim or does the creditor have one claim for all amounts it is owed? Relatedly, can a single creditor acquire and then vote additional claims within a class to ensure it will sway the vote? Moreover, what happens if a creditor sells a portion of its claim - does the buyer gain a vote for purposes of the numerosity requirement while the seller retains a vote for the unsold portion? The answers to each of these questions are obviously very important. If a creditor can assert or acquire multiple claims or split its claims, it may have an outsized voice in the voting process.

Given the centrality of these questions to the plan confirmation process, it is surprising how little case law there is on these topics. All told, the authors of this article have been able to identify only a handful of cases since the enactment of the Bankruptcy Code in 1978 that address the intricacies of the numerosity requirement.[3] To fill the gap on what little guidance there is, this article describes the purpose and precursors to the numerosity requirement,

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

provides an overview of the limited case law addressing issues that have arisen with respect to the numerosity requirement, and concludes with a series of observations.

II. The Purpose and History of the Numerosity Requirement

The purpose of the numerosity requirement is to prevent a single creditor or small group of creditors that control the required two-thirds in claim amount of a given class from accepting a plan over the objection of a greater number of creditors who hold lesser amounts.[4] Although this requirement is intended to be protective of smaller creditors, the statute has shortfalls, particularly if a larger creditor holds multiple claims within the same class because the plain text of section 1126(c) refers to one-half of the "number of the allowed claims" held by creditors in a class rather than holders of claims (i.e., creditors).

The phrasing of "number of the allowed claims" in section 1126(c) is a departure from other formulations in the Bankruptcy Code that focus on the holders of claims. For example, section 303 of the Bankruptcy Code requires a vote by three or more entities that hold claims to commence an involuntary case against a debtor.[5] By using the term "claims" in section 1126(c), it appears the drafters of the Bankruptcy Code purposefully drafted the statute so that a plan must enjoy the support of a majority of claims rather than a majority of creditors.

The wording of section 1126(c) is the product of the gradual evolution of bankruptcy law. The Bankruptcy Act of 1898, for example, required voting approval by a "majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims."[6] Under this construct, it was required that a plan enjoy the support of a majority of *all* creditors with allowed claims (not just those voting) and the majority in amount of allowed claims.

The corporate reorganization provisions of the Bankruptcy Act, first enacted in 1934 and amended by the Chandler Act in 1938, contained no numerosity requirement. Instead, plan confirmation required acceptance by creditors holding two-thirds in amount in each class affected by the plan.[7] Section 179 of the Chandler Act provided as follows (emphasis provided):

> After a plan has been accepted in writing, filed in court, by or on behalf of creditors holding ***two-thirds in amount of the claims filed and allowed of each class***, . . . the judge shall fix a hearing . . . for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation.[8]

Notably, this standard did not focus on the number of creditors or claims, but solely on the amount of claims. Furthermore, it continued the Bankruptcy Act's requirement to take into account all allowed claims, rather than claims that were actually voted.

It was not until the Bankruptcy Code was enacted in 1978 that the current version of the voting requirement was instituted. Section 1126(c) combined and modified the concept of a "majority in number" from the Bankruptcy

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

Act of 1898 with the concept of "two-thirds in amount" from the Chandler Act. However, only claims—not creditors—satisfy the majority in number requirement. In addition, the Bankruptcy Code added an important new feature, requiring that only the claims and creditors who actually vote on a plan are to be tallied in determining whether the relevant thresholds have been met.

III. Case Law

The few cases that address Section 1126(c) provide what guidance there is for creditors and debtors alike in navigating the numerosity requirement. The cases and their main holdings are summarized below:

A. *Gilbert*[9]

Gilbert is the first published decision to address the application of section 1126(c)'s numerosity requirement. The Gilberts were husband and wife chapter 11 petitioners. Under the plan proposed by the Gilberts, four creditors were placed in a class of unsecured creditors: (1) Christine Gilbert, the debtors' daughter, (2) Jim Stulz, a business associate of the debtors, (3) the Farmers Home Administration ("FHMA"), and (4) the Commodity Credit Corporation ("CCC"). Stulz held two separate claims that were both purchased from third parties with the admitted purpose of assisting the debtors in confirming their plan. The other three creditors each held one claim. When the votes on the plan were tallied, more than two-thirds in amount of the claims voted to accept and, on a claim-by-claim basis, the claims voted 3-2 to accept. The two votes to reject came from the government entities, FHMA and CCC.

Among other objections, the government entities argued that it was improper to allow one vote per claim to a holder of multiple claims. The government entities argued that Stulz should be limited to a single vote for purposes of the numerosity requirement because at the time of the vote the two claims were no longer held by the original two separate payees, but by a single creditor.

The bankruptcy court characterized the government entities' argument as "magic" that is not in the Bankruptcy Code.[10] The court began by pointing out "[s]ection 1126(c) speaks in terms of the number of claims, not the number of creditors, that actually vote for or against the plan."[11] Therefore, a debtor should count claims in tabulating votes under a plan. The court then considered Stulz's two claims to determine if they were legitimately distinct claims. The court stated that the separateness of the claims was not the "result of any legal fiction or product of some form of bifurcation," rather, "[e]ach claim arose out of a separate transaction, evidencing separate obligations for which separate proofs of claim were filed."[12] The court found that Stulz's claims represented two distinct rights to payment that were acquired through "two separate and unrelated" arm's length transactions.[13] The fact that the claims were held by the same creditor did not affect the analysis.

B. *Figter*[14]

In *Figter*, the Ninth Circuit became the only circuit court to address the

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

numerosity requirement. There, the debtor owned a 198-unit rental apartment complex in Los Angeles, California. It had one secured creditor, Teachers Insurance and Annuity Association of America ("Teachers"), which was owed $15.6 million secured by a lien on the complex. At some point in the case, the bankruptcy court determined that Teachers was oversecured. The debtor then proposed a plan by which Teachers would receive full payment on its claim, but at a disputed rate of interest. It further provided that the rental units in the complex would gradually convert into condominiums with the proceeds of any sale used to pay down Teachers' claim. Unsecured creditors were to receive payment for 80 percent of their claim amount.

Teachers opposed the plan and offered to purchase all unsecured claims at 100% of face value. Ultimately, 21 of the 34 unsecured claims were purchased by Teachers. Because it controlled the votes of more than half of all unsecured claims, Teachers was able to block confirmation of the plan. The debtor sought to preclude Teachers from voting each of the purchased unsecured claims on the basis that all of the purchased claims should be aggregated for purposes of the numerosity requirement. The debtor's argument was rejected by the bankruptcy court and the district court.

On appeal, the Ninth Circuit found the wording of Section 1126(c) clear and held that there should be no aggregation. Citing *Gilbert*, the court noted that the statute explicitly refers to claims and concluded that it would not make sense to count claims but limit a creditor who had more than one claim to only one vote.[15] The court stated that if "claims are to be counted, they must be counted regardless of whose hands they happen to be in."[16]

In addition, the Ninth Circuit rejected an argument made by Figter that pre-Bankruptcy Code statutes, which tallied creditors (not claims), should be followed because the Bankruptcy Code is ambiguous on the issue. The court stated that the Bankruptcy Code was not ambiguous as it clearly applied to claims, not creditors. Further, the court pointed out that the pre-Bankruptcy Code language on which Figter relied was from the Bankruptcy Act of 1898, which required a "majority in number of all creditors whose claims have been allowed."[17] The court stated it was "pellucid" that the Bankruptcy Act's language considered creditors, while the Bankruptcy Code considered claims.[18]

Lastly, the court distinguished the facts before it from other cases such as *Latham*[19] and *Gilbert*,[20] which dealt with a single creditor splitting its claim to engineer additional entities in the context of section 303 of the Bankruptcy Code (and its precursor) which requires three "entities" to initiate an involuntary proceeding.[21] The court acknowledged that a creditor could not "get away with splitting one claim into many," but pointed out that it is exactly the opposite of what happened with respect to Figter, where Teachers was not accused of splitting claims but buying the separately incurred claims of many other creditors.

C. *Kreider*[22]

Kreider took place in connection with a chapter 11 plan confirmation

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

dispute on grounds other than numerosity. In the context of resolving that dispute, the bankruptcy court specifically addressed the proper method to determine whether the numerosity requirement is satisfied when tabulating creditor votes.

The Kreiders were husband and wife chapter 11 debtors. In connection with the hearing to confirm their proposed chapter 11 plan, they submitted a voting declaration that showed five votes in favor of the plan totaling $670,000 in claim amount and one vote against the plan totaling $105,000. The declaration disclosed that the debtors had consolidated four rejecting ballots into the single rejecting vote for numerosity purposes because they believed the rejecting creditor was "the same party."[23] The rejecting ballots were submitted by: (1) American Express Travel Related Services Company, (2) American Express Bank, FSB, and (3) American Express Centurion Bank (voting two claims).

Although the four rejecting ballots, consolidated or not, were still outvoted, the court pointed out that the debtors appeared to have mistabulated the vote. The court stated that while the rejecting creditors may appear to be related entities, there was "no basis in the record" to conclude that they were the same party.[24] What's more, the court explained that even if the claims were from the same party, the debtors' unstated premise that multiple claims by the same party should be consolidated for numerosity purposes was incorrect.[25]

D. *Jones*[26]

Charles Jones filed for chapter 11 relief in September 2010. As part of the bankruptcy filing, he listed 23 general unsecured claims owed to Atlantic Southern Bank. Atlantic Southern then filed a proof of claim for a single liquidated amount, listing 17 unsecured loans on an exhibit to the proof of claim form. The claim was later sold to Certus Bank, which filed an amended proof of claim that reflected its ownership. In February 2012, the debtor sought confirmation of its chapter 11 plan, which included a class of unsecured creditors. Thirty ballots were cast in the class, including 17 by Certus in favor of confirmation. The final tally was 23-7 in favor.

William and Jane Rivers were unsecured creditors that voted against the plan. They objected to the debtor's tabulation of the vote, arguing that Certus was entitled to a single vote because it had only one proof of claim for its unsecured debt.[27] The debtor and Certus argued the tabulation was correct because while Certus only had one proof of claim, that single proof of claim represented several distinct claims for debts arising from separate transactions owed to the original creditor (Atlantic Southern).

The court ruled in favor of the Rivers and refused to split out the individual claims from a consolidated proof of claim. The court began by stating that both facts - the number of proofs of claim and the number of separate obligations - are pertinent to the inquiry.[28] The court acknowledged that each obligation "capable of satisfaction separate from other debts" may be filed as a separate proof of claim but nothing in the Bankruptcy Code or Bankruptcy

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

Rules expressly requires or prohibits a creditor to file such claims on a single proof of claim form or multiple forms.[29] A creditor, such as Certus, may file only one proof of claim for all its debt or file separate proofs of claim for each debt. Regardless, each proof of claim filed "results in a single allowed claim, so long as it represents an obligation capable of full satisfaction independent of any other debt."[30]

The court came to this conclusion by focusing on the fundamentals of what it means to have a claim under the Bankruptcy Code and the particulars of the official proof of claim form. Under section 101(5)(A), a claim includes any "right to payment."[31] The court then looked at the proof of claim form—Official Bankruptcy Form 10 - and took notice that it requires the creditor to list the amount owed and permits the creditor to attach supporting documentation, but nowhere does it require that the creditor list additional claims.[32] Accordingly, although a creditor may have the option of filing a single proof of claim or multiple proofs of claim, each proof of claim, when allowed, only represents a single vote.[33] The court concluded with the observation that "[s]uch a rule prohibits a creditor from multiplying the effect of its vote by splitting a single liability across multiple proofs of claim, while allowing the creditor to limit its vote by consolidating multiple liabilities into a single proof of claim."[34] The court did not give any guidance on what would constitute a distinct "right of payment" eligible for its own proof of claim.

E. *Meridian*[35]

Meridian is the only reported case found by the authors that addressed the numerosity requirement in connection with a syndicated credit facility. In *Meridian*, the debtor owned a shopping mall in Puyallup, Washington. The debtor had borrowed $75 million in the form of a secured note from U.S. Bank to construct the mall. After making the loan, U.S. Bank assigned 66.67% of the loan to Guaranty Bank (20%), Citizens Business Bank (20%), and Bank of America (26.67%).

Meridian filed chapter 11 bankruptcy in 2013. After the filing, Bank of America assigned its portion of the loan to N.B. Distressed Debt Investment Fund Limited, which in turn sold a portion to N.B. Distress Master Fund, L.P. and Strategic Value Special Situations Master Fund II LP (the "Funds"). The debtor objected to the sale, arguing that the Funds were not "Eligible Assignees" as defined in the underlying loan documentation, and commenced an adversary proceeding seeking to enjoin the Funds from exercising rights as lenders, including voting on a chapter 11 plan. The bankruptcy court granted the injunction and the Funds appealed to the district court.

In the meantime, the debtor solicited votes on a proposed chapter 11 plan. With the Funds enjoined from voting, there were now three lenders eligible to vote in the lenders' class. U.S. Bank and Guaranty Bank, which controlled more than two-thirds of the dollar amount and more than one-half in number of voting claims, voted in favor of the plan. Citizens voted against the plan and objected to confirmation on a number of grounds. It primarily argued that the agent under the loan facility was the only party entitled to vote on

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

the plan. The specific language of the credit agreement stated "[i]n the event [of] a bankruptcy . . . Agent shall have the sole and exclusive right to file and pursue a joint proof of claim on behalf of Lenders. Each Lender irrevocably waives its right to file or pursue a separate proof of claim in any such proceedings."[36] Further, Citizens argued, that the agent was unable to vote in favor of the plan because it was subject to a unanimity requirement that required the consent of all lenders for certain material modifications to the loan (such as the interest rate and term of the loan).

In overruling the objection, the bankruptcy court first focused on what it means to have a claim with a syndicate of lenders on a single loan. The court pointed out that in a syndicated loan, each lender has a contractual relationship with the borrower.[37] Since each lender has a direct contractual relationship with the borrower, "each is the holder of a claim or interest against that borrower."[38] Furthermore, holders of an allowed claim or interest are entitled to vote on a plan unless they specifically agree to authorize the agent to vote on their behalf.[39]

The court then carefully looked at the language in the underlying credit agreement to see if it gave the agent the right to vote the lenders' claims. The court noted that the language only gave the agent the right to file a "joint proof of claim," which indicated that each lender had its own individual claim under the rubric of the joint claim with the agent having only a delegated duty to file one proof of claim on behalf of the lenders.[40] Moreover, the court found that designating an agent to file a joint claim does not equate to giving that agent the sole right to vote on behalf of the syndicate.[41] The court stated that each lender in a syndicate may vote its proportionate share of the loan "in the absence of an agreement among syndicate lenders specifically bargaining away the right to vote separately on a borrower's bankruptcy plan."[42] As the credit agreement did not authorize the agent to vote the entirety of the loan or even address plan voting, each member was entitled to vote its own claim for its portion of the loan.[43]

Lastly, the court stated that a chapter 11 plan may modify the rights of lenders without satisfying the voting requirements set forth in a credit agreement so long as the plan complies with the confirmation requirements of the Bankruptcy Code.[44] The court pointed out that modifications to a credit agreement outside of bankruptcy is a consensual process that is subject to the choice of each lender to "agree or not agree, according to the terms of the Loan Agreement."[45] Whereas in bankruptcy, the debtor can seek to modify its obligations and have a class of creditors vote in favor of new terms under 1126(c), regardless of whether each individual lender agrees.

After the bankruptcy court confirmed the plan over the objection of Citizens, the district court heard the Funds' appeal of the preliminary injunction.[46] The Funds argued that they fell within the definition of "Eligible Assignee" because they, as investment managers, were "financial institutions" under that term.[47] In affirming the decision of the bankruptcy court, the district court found that a broad reading of the phrase "financial institution" would render the rest of the definition unnecessary and "nonsensical"

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

and be contrary to the intent of the provision, which was to prevent "assignment to distressed asset hedge funds."[48]

Remarkably, the district court went one step further and held that even if the assignment to the Funds was proper, the Funds would still be entitled to only one vote because a lender could not assign greater voting rights than it possessed (i.e., a single vote on the plan).[49] According to the court: "A creditor does not have the right to split up a claim in such a way that artificially creates voting rights that the original assignor never had."[50] The court theorized that if a creditor could create more votes via simple assignment, then it could assign its interest to multiple parties to increase its voting power and manipulate the numerosity requirement.[51] To avoid such an "arbitrary" result, the court held that creditors cannot create artificial voting rights by splitting their claims.[52] Therefore, the validity of the assignment before the court was moot because that one vote would have been insufficient to block plan confirmation.[53]

F. *Young Men's Christian Ass'n of Topeka*[54]

YMCA is the only reported case found by the authors that addressed the numerosity requirement in connection with bonds under an indenture. In *YMCA*, the Young Men's Christian Association of Topeka, Kansas issued approximately $7 million in industrial revenue bonds through the city of Topeka to build and operate a gym facility. CoreFirst served as the trustee under the bond indenture. After several years of financial hardship, the YMCA filed for chapter 11 bankruptcy.

YMCA proposed a chapter 11 plan to restructure its debt, which was accompanied by a motion for approval of voting procedures, under which the debtor would provide only CoreFirst, and not the individual bondholders, with the opportunity to vote on the plan. The debtor's position was that CoreFirst, who filed a proof of claim on behalf of the bondholders, had a broad grant of authority under the indenture to, among other things, "exercise any available remedy at law" available to the bondholders following an event of default, and that voting on the plan was one such remedy.[55] In addition, the debtor pointed to language in the indenture which provided: "[the bondholders] shall have no right to enforce the provisions of the Indenture or to institute action to enforce the covenants therein, or to take any action with respect to any event of default under the Indenture."[56] CoreFirst, therefore, was the proper party to vote on the plan.

Both CoreFirst and the United States Trustee objected to the request arguing that bondholders are creditors with a right to vote on the plan. They argued that even though the indenture delegated to CoreFirst the right to file a proof of claim on behalf of the bondholders and to enforce the bond claims, it did not delegate the right to vote on the plan to CoreFirst.

The court began by analyzing who has the right to vote on a plan under the Bankruptcy Code. The court first looked at section 1126, which provides "[t]the holder of a claim or interest allowed under section 502 . . . may vote to accept or reject a plan."[57] It considered the definition of a "claim" under

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

the Bankruptcy Code, which is defined in pertinent part as a "right to payment."[58] It then concluded that the bondholders are creditors of the debtor with a right to vote on a plan because they have a right of payment under the indenture.[59]

In coming to its decision, the court stated that CoreFirst's filing of the proof of claim was of no moment because Bankruptcy Rule 3003(c)(1) and the indenture specifically authorized an indenture trustee to file a proof of claim on behalf of bondholders.[60] The court cited to a number of commentators and a Second Circuit decision under the Bankruptcy Act which state that although an indenture trustee may file a proof of claim for bondholders, it is not the holder of the claim and may not vote the claim unless "specifically" authorized under the indenture.[61] The court found that none of the provisions in the indenture addressed the bondholder's participation in the bankruptcy process, let alone granted "the Indenture Trustee specific authority to vote on behalf of the bondholders."[62] Therefore, the court found that the debtor had to provide individual bondholders with an opportunity to vote their claims under the plan.[63]

To avoid any further confusion on the voting process with respect to the bondholders, the court went a step further to point out that the beneficial holders of the bonds, not the record holders, should be entitled to vote.[64] According to the bond documents, the beneficial owners had the power to vote the bonds and receive distributions on the bonds. Because the beneficial holders have the "right to payment" on account of the bonds, they hold the claims entitled to vote on the plan.[65]

IV. Observations

A. Claims, Not Creditors, Vote

The case law is clear that each separate claim is entitled to a vote on a plan. This is true regardless of whether a single entity or affiliated entities hold multiple claims in the same class. As the courts ruled in *Gilbert*, *Figter*, *Kreider* and *Jones*, section 1126(c) requires a majority of claims not creditors.[66] An individual creditor that holds multiple, distinct claims "may vote each claim separately even though the claims may be in the same class."[67] Further, as demonstrated by *Kreider*, courts will not consolidate the claims held by affiliated entities merely because they are affiliates.[68]

The question then becomes what is the governing principle a creditor must follow when determining if more than one claim can be filed with respect to a multifaceted relationship with the debtor. Courts have provided little guidance on this question. The only cases to have addressed this issue are *Jones* and *Gilbert.* In *Gilbert*, the creditor held two proofs of claim against the debtor, each arising out of a separate transaction and "evidencing separate obligations."[69] The court allowed both proofs of claim for voting purposes, as the creditor "acquired two distinct rights to payment through two separate and unrelated arms [sic] length transactions."[70] *Jones* determined that an independent proof of claim is allowable for Section 1126 purposes, so long as it "represents an obligation capable of satisfaction sepa-

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

rate from other debts that are the subject of proofs of claim filed by the creditor."[71]

However, neither *Gilbert* nor *Jones* analyzed the issue in depth.[72] In *Gilbert*, the analysis was straightforward because the creditor there had acquired what were unquestionably two separate claims that arose under two separate transactions from two unrelated creditors. *Jones* also skirted the issue by focusing and relying on the fact that the creditor there only filed one proof of claim for what appeared to be numerous independent claims.

An analysis of the language of the statute itself is not decisive either. The term "claim" is defined as a "right to payment," which can conceivably be interpreted broadly or narrowly depending on the circumstances.[73] If read narrowly, the phrase might mean that each right to payment a creditor has against a debtor, even if arising under the same contract or transaction, can be asserted as its own claim. If read broadly, the phrase might mean all rights to payment a creditor has against a debtor, even if arising under disparate rights, such as a trade contract and a bond indenture, should be asserted in the same claim.

Based on the concerns articulated by the courts in *Figter*, *Jones*, and *Meridian* regarding "splitting" a claim to engineer extra votes, we would expect courts to read the statute on the broader side to limit a creditor's ability to assert numerous claims that inflate its vote for numerosity purposes. A broad reading would also align with the purpose and policy behind the numerosity requirement, which is to protect smaller creditors. At the same time, the courts clearly do not appear to be adopting the position that all rights to payments accruing to the same creditor must be consolidated into the same claim. In *Gilbert*, the court was satisfied with separate claims because the court identified them as based on separate "transactions" and "obligations."[74] The court in *Jones* appears to have had a similar perspective when it stated that any claims "capable of satisfaction separate from other debts" may be separate.[75]

To provide guidance, there appears to be a doctrine in civil litigation addressing an analogous issue. Under the "claim splitting doctrine," a plaintiff must bring all claims arising from a particular nexus of facts in a single proceeding, as opposed to splitting claims up across multiple proceedings.[76] It is an equitable rule premised on the principle that a lawsuit should be tried in one court and the case should end once the rights of the parties have been decided in that court. In short, the rule bars separate suits involving the same underlying facts. Plaintiffs must bring all related claims presently materialized in the same pleading or lose them.[77] The Tenth Circuit summed up the rule against claim splitting as follows:

> The rule against claim-splitting requires a plaintiff to assert all of its causes of action arising from a common set of facts in one lawsuit. By spreading claims around in multiple lawsuits in other courts or before other judges, parties waste "scarce judicial resources" and undermine "the efficient and comprehensive disposition of cases" . . . [T]he test for claim splitting is . . . whether the first suit, assuming it were final, would preclude the second suit. This makes sense, given that the claim-splitting rule exists to allow district courts to manage their

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

docket and dispense with duplicative litigation.[78]

In the bankruptcy context, courts already follow a similar approach in connection with requests to amend a proof of claim after the bar date has passed. In determining whether a creditor has the ability to amend its proof of claim, one of the factors courts will focus on is the relationship between the original claim and the claim in the proposed amendment, and analyze whether the same conduct, transaction, or occurrence underlies both the original and the amended claim.[79] To the extent the claims in the amended proof of claim arise from the same conduct, transaction, or occurrence, the amendment will generally be allowed.[80]

Putting this all together, we expect bankruptcy courts will likely take a similar approach in the numerosity context and conduct an analysis that requires claims based on the same underlying facts to be consolidated. Thus, as a general rule of thumb, if potential claims clearly arise from the same underlying facts, they should be filed as a single proof of claim. But, if the claims clearly arise from different facts, i.e., a bond claim and a trade claim, then they may be filed as separate proofs of claim.

Jones also highlights that at least some courts may focus on form over substance when deciding whether a creditor can vote more than one claim. In *Jones*, the secured creditor had what appeared to be several distinct claims, but consolidated them when it lumped them together as a single proof of claim. It is therefore important for a creditor to decide whether to file a single proof of claim or multiple proofs of claim at the time proofs of claim are filed, much earlier in a chapter 11 case than plan solicitation. Had the creditor in *Jones* elected to file multiple proofs of claims for those distinct claims earlier in the case, it may well have had the ability to vote each of those claims at the time of confirmation.[81] Instead, when it was time to vote on the plan, the creditor was only entitled to one vote, and the plan it supported was incapable of confirmation. It follows that courts may analyze whether a creditor can vote more than one claim by reviewing not only the extent to which the underlying claims arise from independent transactions with the debtor, but also more formally if separate proofs of claim were actually filed for each claim.[82]

B. Beneficial Holders Vote

Most complex chapter 11 cases involve structured debt, including loans or bonds issued under credit facilities or indentures, for which the agents and trustees can act on behalf of the lenders and bondholders. As we saw in *YMCA* and *Meridian*, it is the beneficial owners - the bondholders and lenders—not their trustees or agents, that have the right to vote on a plan and count as distinct votes for purposes of numerosity. This is so even if, as is usually the case, the trustee or agent is empowered to file proofs of claim on behalf of bondholders or lenders, or has a broad grant of powers to enforce the rights of the creditors.[83] The case law is clear that only if the credit facility or indenture specifically empowers the trustee or agent to vote on behalf of the holders, then the bondholders or lenders may be unable to vote on a

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

chapter 11 plan.[84]

What's more, the *YMCA* case indicates that publicly traded bonds may pose a unique challenge when it comes time to counting the vote for numerosity purposes. The key issue is that generally publicly traded bonds are held by the Depository Trust Company (the "DTC"), which is the central depository for "virtually all securities held by banks and brokerage firms" and holds legal title of the bonds on behalf of brokers, dealers, and banks.[85] Those brokers, dealers, and banks are referred to as the record-holders of the bonds, who in turn hold the bonds on behalf of the actual investor entities, referred to as the "beneficial owners," that have the "ultimate interest in the bond."[86]

A debtor soliciting support for a chapter 11 plan will receive a list of the record-holders from DTC, (i.e., the brokers, dealers, and banks), which typically does not include the identity of the beneficial holders.[87] The debtor provides the record-holder with a "master ballot" and individual ballots to be distributed to the beneficial holders. The record holder distributes the individual ballots to the beneficial holders to vote on the plan. After collecting the individual ballots from the beneficial holders, the record holder then summarizes the individual votes on the master ballot for submission to the debtor, but does not necessarily include the names of the individual holders on the master ballot.[88] A voting agent will review the master ballot and compare the votes cast with the record-holders' position in the bonds, according to the DTC's records. This ensures that record-holders "do not vote more bonds than they hold."[89]

As one author points out, depending on the requirements of the master ballot, this practice may make it difficult to aggregate claims held by a particular beneficial holder.[90] The issue is that although the voting agent can ensure that the record-holders do not vote more bonds than they hold, unless the names of the beneficial holders are reported on the master ballots, the voting agent will be unable to aggregate the claims of beneficial holders if they vote on account of bonds held at different brokerage firms. As bondholders may hold bonds at more than one brokerage firm (or in separate accounts within the brokerage firm), it is possible that one bondholder casts votes for each separate account or brokerage firm. In this scenario, the votes by a single bondholder on account of a single bond issuance held at different accounts may come up as multiple votes on the voter list. Thus, even though a single bondholder should represent only one vote with respect to its holding of a single bond issuance, unless the names of the beneficial holders are reported on the master ballots, votes on account of the same bond issuance held in numerous brokerage accounts may result in multiple votes being tallied.[91]

C. Splitting Claims

A creditor's ability to "split" a claim against a debtor, i.e., to sell or transfer only a portion of claim, is an issue that was explored in early bankruptcy case law, but has not received extensive analysis in the Bankruptcy Code

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

era.[92] Although splitting a claim does not have the effect of increasing a debtor's aggregate liabilities, as the split claim amounts cannot logically total more than the amount of the original claim, claim splitting does have a potential impact on matters that involve creditor votes, such as numerosity, appointment of a trustee, or the commencement of an involuntary proceeding.[93]

In the one case that addresses splitting a claim in the plan confirmation context—*Meridian*—the district court ruled that assignees of portions of a bank claim would not be able to vote those portions because "[a] creditor does not have the right to split up a claim in such a way that artificially creates voting rights that the original assignor never had."[94] In explaining its decision, the court stated that it was concerned that "any creditor could assign its interest to multiple parties to increase its voting power."[95]

The only other two cases that touched on the point, *Figter* and *Jones*, also indicated a resistance to permitting splitting a claim. In *Figter*, the court stated in dicta that a creditor could not "get away" with splitting its claim as if it was obvious that there was something to get away with.[96] Likewise, in *Jones*, the rationale articulated by the court for its ruling was that it "prohibits a creditor from multiplying the effect of its vote by splitting a single liability across multiple proofs of claim."[97]

Given the scant legal authority on this topic, the *Meridian* decision and dicta from *Figter* and *Jones* calls into question the ability of buyers of portions of a claim to vote the portion they purchased. In particular, by excluding syndicated loan buyers from voting the claims they purchase, the *Meridian* court appears to adopt a per se rule that is not supported by any other authority. And while the *Meridian* decision has been criticized for the aspect of its decision holding that hedge funds are not "eligible assignees," its ruling on numerosity has received little attention.[98]

Yet, claim splitting is a relatively routine affair in the business of buying and selling bankruptcy claims. Creditors regularly sell portions of their claims to multiple creditors rather than sell their entire claim to a single creditor.[99] This is especially true when the underlying claim is a syndicated loan or a security such as a bond claim. Claim trading plays an important role in permitting a debtor's original creditors to minimize their exposure to the vagaries of the bankruptcy process by exchanging the possibility of future recovery against the certainty of immediate payment by the buyers of the claims. The *Meridian* decision casts doubt on this process.

Moreover, *Meridian*'s putative per se rule would have equal application with respect to publicly traded securities such as bond claims, but, as discussed above, would be difficult to enforce because the debtor (or any other party) is unable to track each transaction. The beneficial owner of a bond claim may sell its entire position into the market to numerous buyers, transforming its original single claim and single vote into numerous claims and numerous votes. There is nothing in the case law to support consolidating these claims for purposes of numerosity, nor would such a scheme be practical, as it may be impossible to track the chain of title for each voting claim.

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

Looking more closely at the *Meridian* decision, the court appeared to be focused on the ability of a hypothetical creditor to increase its voting power through multiple assignments of its claim. However, the fact remains that such assignments would actually have a dilutive effect by allowing more creditors to vote on a plan, unless the transferor and the transferee had a previous arrangement that the transferee would vote in a particular manner, a fact that was not apparent in the *Meridian* case. A more thoughtful analysis would scrutinize whether the partial assignment of the claim was done to artificially inflate the assignor's voting right or for some other nefarious purpose. This analysis would be in accordance with the concerns expressed in pre-Bankruptcy Code case law over transfers "made for [the] purpose" of gerrymandering a vote.[100]

For example, in *Latham Lithographic Corp.*, a Second Circuit case from 1939, the bankruptcy referee held an election for a bankruptcy trustee, in which he permitted a creditor, Fisher, to cast a vote.[101] The voting was split between Fisher and another creditor, and as a result, the election did not result in any candidate garnering majority support, so the referee appointed the trustee. The other creditor petitioned the district court to overturn the appointment on the basis that Fisher was not entitled to vote. Fisher's claim was based on a beneficial interest in a trust that held various security interests against the debtor. The original beneficiary of the trust was an insider of the debtor who would not have been able to cast a vote for trustee, and assigned half of its interest in the trust to Fisher.

The district court overturned the election results, and the Second Circuit affirmed on appeal.[102] In addition to ruling that beneficiaries of a trust were unable to enforce rights reserved to a trustee, the Second Circuit squarely addressed the ability to vote a partially assigned claim:

> The argument of the appellant is that since a partial assignee may sue in his own name in the state courts, he must also be entitled to file a proof of claim in bankruptcy and to vote upon it unless personally disqualified. On the other hand, the appellee argues that a single claim may not be split up so as to increase the number of the bankrupt's creditors and, since the assignor is disabled to vote, the partial assignee may not vote a part of the single claim. ***It is by no means clear that by a partial assignment of a single claim the number of the bankrupt's creditors may be increased. When the assignment is made for that purpose, the courts will not recognize it as effective to accomplish the purpose.***[103]
>
> (emphasis added) (citations omitted)

The Second Circuit's ruling regarding votes by creditors who hold the partial assignment of a claim is in accordance with other pre-Bankruptcy Code cases.[104]

Eschewing a per se rule for an analysis that focuses on whether the claim splitting was done in good faith rather than for nefarious reasons is supported by the courts' authority under section 1126(e) of the Bankruptcy Code, which authorizes the court to designate the vote of any entity whose acceptance or rejection of a plan was not in good faith. It is also an analysis the courts perform in a similar context: the acquisition of additional claims

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

by existing creditors to ensure the approval or rejection of a plan. The *Gilbert* and *Figter* cases are instructive by way of analogy.

In *Gilbert*, the court permitted the purchase of multiple claims for the purpose of protecting an existing claim against the debtor. The court held that whether "a creditor has cast his vote with an 'ulterior purpose' aimed at gaining some advantage to which he would not otherwise be entitled in his position," is the key issue in determining whether a creditor has acted in good faith with respect to voting its claims in respect of a plan.[105]

In *Figter*, the Ninth Circuit permitted the purchase of multiple claims by a creditor to block confirmation of a plan, but recognized that the "concept of good faith is a fluid one."[106] It then cited some examples of bad faith actions that would be prohibited, such as purposely destroying an enterprise for anti-competitive purposes or the insider of a debtor purchasing claims to block confirmation of a plan.

While these cases do not directly address a creditor's ability to split its claim when transferring to others, the reasoning of these cases suggests that the courts should look to the purpose of a claim splitting transaction to determine whether it is done in good faith or whether the parties were seeking to rig a creditor vote or for some other illegitimate purpose.

D. Voting Procedures

A crucial aspect of plan confirmation are the procedures proposed by the debtor for soliciting and tabulating votes by its creditors. As seen in *YMCA*, the debtor typically seeks approval of the procedures in connection with approval of the disclosure statement. The procedures generally deal with three critical phases of the solicitation process: First, they set forth how the debtor will provide creditors with notice of the confirmation hearing and the solicitation materials. Second, they provide for the approval of the various ballots that will be distributed to creditors and the instructions for completing and returning the ballots to the debtor. Third, they provide the rules by which the debtor (or its agent) will tabulate the ballots.

Navigating the procedures can be tricky to the unwary creditor because they may deviate from the case law. As we saw in the *YMCA* case, the procedures can dictate whether a beneficial holder of a security will even receive notice or a ballot to vote on the plan, or whether the voting notices and ballots will be provided only to a trustee or agent.

In addition, we reviewed the tabulation rules from several of the largest chapter 11 cases in 2020–21.[107] Contrary to the case law, each of these procedures provided that multiple claims held by a single creditor in a particular class would be consolidated into a single claim for purposes of numerosity.[108] Further, they often provided that where a claim was transferred, all holders of a portion of the claim would be treated as a single creditor and required to collectively vote the claim as accepting or rejecting the plan.[109] The rules also frequently provided that a single creditor holding multiple claims against multiple debtors must vote all of its claims the same way; all claims must be either voted for or against confirmation.[110] Notably,

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

the rules did not consolidate the separate claims of affiliated entities.

With respect to funded debt and beneficial holders, the procedures generally tracked with the voting process outlined in Section IV.B above.[111] The party of record for the beneficial holders, often referred to as the "nominee," will receive and distribute a ballot and solicitation package to each beneficial holder entitled to vote (referred to as a "Beneficial Holder Ballot"). That nominee will in turn collect beneficial holder ballots voted by the beneficial holders, and then submit a "Master Ballot" reflecting the votes to the debtor's noticing and claims agent. If votes are submitted in excess of the amount of the claims held by the nominees, then the debtor will work with the nominee to resolve that discrepancy, but ultimately may reserve the right to consider the votes in the proportion that they were voted but only to the extent of the nominee's position. In the case of a syndicated loan, the agent on the loan will receive the Master Ballot and will be responsible for transmitting and collecting Beneficial Holder Ballots to the lenders based on the holdings information kept by the agent.

The ballots themselves are critical documents that must be carefully considered by the voting creditor. In addition to allowing a creditor to accept or reject a plan, a ballot may include other important options available to creditors, such as whether to agree to opt in or out of a release, or elect to receive alternative treatment of its claim, such as receiving cash rather than securities, or receive convenience class treatment.

Creditors should read these procedures carefully because absent a timely objection, they may change the rules provided by law. By placing the burden on the creditor body to oppose departure from those rules, these procedures can provide debtors with a considerable tool to influence the outcome of a plan vote, including limiting the influence of any single claim holder in the voting process.

V. Conclusion

In 2015, the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 released a report on proposed modifications to the Bankruptcy Code.[112] One of its recommendations is that the numerosity requirement be replaced with a "one creditor, one vote" concept that would aggregate all claims in a particular class held by an entity and its affiliates that are subject to common investment management.[113] It would not matter how many claims a creditor holds. The creditor and its affiliated entities would be allowed only one vote. The Commissioners found that the "one creditor, one vote" rule was less susceptible to abuse than the current rule.[114]

As of this writing, however, Congress has no plans to alter the numerosity requirement.[115] As such, it will continue to play a critical role in determining whether a proposed chapter 11 will be confirmed, and given the limited case law, is largely unchartered territory in which creditors and debtors may both seek advantages in the confirmation process. Nonetheless, a review of the existing cases allows for several conclusions.

First, a creditor that holds multiple claims or affiliated entities that hold

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

multiple claims should be allowed separate votes for each claim. Indeed, in *Kreider*, the only case to address the affiliate issue, the court sua sponte admonished the debtor for miscalculating the vote by consolidating the claims of affiliated entities. Further, creditors seeking to sway voting on a plan will generally be permitted to do so through the purchase of claims of other, perhaps uninterested creditors, and vote those claims in the manner of their choosing.

Second, since claims are often filed well in advance of voting on a chapter 11 plan, it is important for bankruptcy practitioners to consider the impact of having multiple votes when filing proofs of claim. A creditor should carefully determine whether it has a good faith basis to file more than one claim. While there is limited case law on the issue, claims that arise from different facts may generally be permitted to be filed separately. Moreover, as we saw in *Jones*, to the extent a creditor combines what could be two claims in one proof of claim, the court may not thereafter consider any argument that the claims should be separated.

Third, a debtor and its creditors would all be well-served to analyze the debtor's claims pool prior to seeking confirmation of a plan and consider the potential expansion of voting power by an entity that files numerous claims. Creditors filing multiple claims for illegitimate reasons or seeking to split claims for reasons that may be considered bad faith, such as to achieve anti-competitive objectives or to artificially rig the vote, run the risk of having the claims disregarded for numerosity purposes. At the same time, a review of the case law reveals that this issue rarely comes up, presumably because creditors do not want to risk vote designations under section 1126(e).

Lastly, both creditors and debtors should carefully consider proposed voting procedures in relation to the debtor's claims pool. The voting procedures can be of critical importance where there are few creditors in a voting class, especially where there is the necessity of carrying a particular class to achieve a cramdown of dissenting creditors. These procedures may fill in the blanks left by the plain text of the statute in a manner that is different from the case law.

NOTES:

[1]11 U.S.C.A. § 1129(a)(8).

[2]11 U.S.C.A. § 1129(b).

[3]There have been attempts to synthesize the case law on this topic previously. See e.g. David M. Feldman and Keith R. Martorana, The Pervasive Problem of Numerosity, Law360 (June 2, 2010).

[4]Am. Bankr. Inst. Comm'n to Study the Reform of Chapter 11: 2012–14 Final Report & Recommendations, 23 Am. Bankr. Inst. L. Rev. 1, 282 (2015) ("The Commissioners noted that the original purpose of classification was to provide equal treatment for similarly situated creditors. Likewise, the dollar amount and numerosity requirements of section 1126(c) were intended to protect minority holders.").

[5]See 11 U.S.C.A. § 303(b)(1) ("An involuntary case against a person is commenced by

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

the filing with the bankruptcy court of a petition . . . by three or more entities, each of which is either a holder of a claim against such person").

[6]Bankruptcy Act of 1898, Ch. 541, § 12, 30 Stat. 544, 549–50.

[7]Act of June 7, 1934, Pub. L. No. 296, § 77B(e) (1934).

[8]Chandler Act, Pub. L. 75-696, 52 Stat. 840, § 216 (1938); H.R. Rep. 95-595, at 410 (1977) (House Report to the Reform Act of 1978).

[9]In re Gilbert, 104 B.R. 206, 19 Bankr. Ct. Dec. (CRR) 1183 (Bankr. W.D. Mo. 1989).

[10]Gilbert, 104 B.R. at 211.

[11]Gilbert, 104 B.R. at 211.

[12]Gilbert, 104 B.R. at 211 (citations omitted).

[13]Gilbert, 104 B.R. at 211.

[14]In re Figter Ltd., 118 F.3d 635, 31 Bankr. Ct. Dec. (CRR) 17, Bankr. L. Rep. (CCH) P 77470 (9th Cir. 1997).

[15]Figter, 118 F.3d at 640.

[16]Figter, 118 F.3d at 640.

[17]Figter, 118 F.3d at 640.

[18]Figter, 118 F.3d at 640.

[19]In re Latham Lithographic Corp., 107 F.2d 749, 750–51 (C.C.A. 2d Cir. 1939).

[20]In re Gilbert, 115 B.R. 458, 460 (Bankr. S.D. N.Y. 1990).

[21]Figter, 118 F.3d at 641.

[22]In re Kreider, 47 Bankr. Ct. Dec. (CRR) 41, 2006 WL 3068834 (Bankr. E.D. Pa. 2006).

[23]Kreider, 2006 WL 3068834 at *3.

[24]Kreider, 2006 WL 3068834 at *3.

[25]Kreider, 2006 WL 3068834 at *3.

[26]In re Jones, 2012 WL 860325 (Bankr. M.D. Ga. 2012), subsequent determination, 2012 WL 1345500 (Bankr. M.D. Ga. 2012).

[27]Ironically, the Rivers voted five claims against the plan, which were tabulated separately, but this was not addressed in the decision. The bankruptcy court later struck two of the Rivers' votes, as the Rivers asserted three claims on the basis of a state court judgment on a single lawsuit, which the bankruptcy court held warranted only a single vote. See In re Jones, 2012 WL 1345500 (Bankr. M.D. Ga. 2012)

[28]Jones, 2012 WL 860325 at *3.

[29]Jones, 2012 WL 860325 at *3.

[30]Jones, 2012 WL 860325 at *2. The court also pointed out that while Certus may have had 17 separate claims based on the debtor's schedule, once Atlantic Southern (and later Certus) filed a proof of claim, it superseded the debtor's schedule under Bankruptcy Rule 3003(c)(4).

[31]Jones, 2012 WL 860325 at *2.

[32]Jones, 2012 WL 860325 at *2.

[33]Jones, 2012 WL 860325 at *2.

[34]Jones, 2012 WL 860325 at *3.

[35]In re Meridian Sunrise Village, 2013 WL 4447010 (Bankr. W.D. Wash. 2013).

[36]Meridian Sunrise, 2013 WL 4447010 at *4 (alteration in original).

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

[37]Meridian Sunrise, 2013 WL 4447010 at *3.

[38]Meridian Sunrise, 2013 WL 4447010 at *3.

[39]Meridian Sunrise, 2013 WL 4447010 at *3.

[40]Meridian Sunrise, 2013 WL 4447010 at *5.

[41]Meridian Sunrise, 2013 WL 4447010 at *6 ("Each Lender in the syndicate may thus vote its proportionate share of the syndicated loan, i.e. its claim").

[42]Meridian Sunrise, 2013 WL 4447010 at *6.

[43]Meridian Sunrise, 2013 WL 4447010 at *5.

[44]Meridian Sunrise, 2013 WL 4447010 at *6.

[45]Meridian Sunrise, 2013 WL 4447010 at *6.

[46]In re Meridian Sunrise Village, LLC, 2014 WL 909219 (W.D. Wash. 2014).

[47]Meridian Sunrise, 2014 WL 909219 at *1.

[48]Meridian Sunrise, 2014 WL 909219 at *4, *5.

[49]Meridian Sunrise, 2014 WL 909219 at *5.

[50]Meridian Sunrise, 2014 WL 909219 at *5.

[51]Meridian Sunrise, 2014 WL 909219 at *5.

[52]Meridian Sunrise, 2014 WL 909219 at *5.

[53]Meridian Sunrise, 2014 WL 909219 at *6.

[54]In re Young Men's Christian Association of Topeka, Kansas, 2020 WL 7483739 (Bankr. D. Kan. 2020) ("YMCA").

[55]YMCA, 2020 WL 7483739 at *4.

[56]YMCA, 2020 WL 7483739 at *3.

[57]YMCA, 2020 WL 7483739 at *3.

[58]YMCA, 2020 WL 7483739 at *3.

[59]YMCA, 2020 WL 7483739 at *3.

[60]YMCA, 2020 WL 7483739 at *3.

[61]See YMCA, 2020 WL 7483739 at *3–4 (the court also noted that the Model Simplified Indenture form provides "that an indenture trustee's authority to file a proof of claim on behalf of bondholders does not authorize the trustee to accept or consent to any plan of reorganization or to vote to the claim of any bondholder in any proceeding").

[62]YMCA, 2020 WL 7483739 at *4.

[63]YMCA, 2020 WL 7483739 at *5.

[64]YMCA, 2020 WL 7483739 at *5.

[65]YMCA, 2020 WL 7483739 at *5.

[66]In re Gilbert, 104 B.R. 206, 211, 19 Bankr. Ct. Dec. (CRR) 1183 (Bankr. W.D. Mo. 1989); In re Figter Ltd., 118 F.3d 635, 641, 31 Bankr. Ct. Dec. (CRR) 17, Bankr. L. Rep. (CCH) P 77470 (9th Cir. 1997); In re Kreider, 47 Bankr. Ct. Dec. (CRR) 41, 2006 WL 3068834 (Bankr. E.D. Pa. 2006); In re Jones, 2012 WL 860325 (Bankr. M.D. Ga. 2012), subsequent determination, 2012 WL 1345500 (Bankr. M.D. Ga. 2012); see also In re Concord Square Apartments of Wood County, Ltd., 174 B.R. 71, 74 (Bankr. S.D. Ohio 1994) (holding same and citing Gilbert).

[67]7 Collier on Bankruptcy P 1126.02 (16th 2021).

[68]In re Kreider, 47 Bankr. Ct. Dec. (CRR) 41, 2006 WL 3068834 (Bankr. E.D. Pa. 2006).

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

[69]Gilbert, 104 B.R. at 211.

[70]Gilbert, 104 B.R. at 211.

[71]Jones, 2012 WL 860325 at *3.

[72]The creditor in *Gilbert* acquired its claims, and the banks in *Jones* both filed and held a single, consolidated claim. See infra Sections III.A. and III.B.

[73]See 11 U.S.C.A. 1126(c) ("A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, 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, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan").

[74]Gilbert, 104 B.R. at 211.

[75]Jones, 2012 WL 860325 at *3.

[76]Katz v. Gerardi, 655 F.3d 1212, 1214, Fed. Sec. L. Rep. (CCH) P 96522 (10th Cir. 2011); Restatement (Second) of Judgments § 25 (1982).

[77]See e.g. Ellis v. Gallatin Steel Co., 390 F.3d 461, 479, 59 Env't. Rep. Cas. (BNA) 1400, 65 Fed. R. Evid. Serv. 773, 34 Envtl. L. Rep. 20125 (6th Cir. 2004); Nestor v. Pratt & Whitney, 466 F.3d 65, 70, 98 Fair Empl. Prac. Cas. (BNA) 1817, 88 Empl. Prac. Dec. (CCH) P 42535 (2d Cir. 2006); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 421, 17 Bankr. Ct. Dec. (CRR) 1272, Bankr. L. Rep. (CCH) P 72329 (3d Cir. 1988); see also Wright & Miller, 18 Federal Practice & Procedure Jurisdiction 4406 (3d ed. 2002) ("[i]n dealing with simultaneous actions on related theories, courts at times express principles of 'claim splitting' that are similar to claim preclusion, but that do not require a prior judgment").

[78]Katz, 655 F.3d at 1217–19 (citations omitted).

[79]See 9 Collier on Bankruptcy P 3001.04 (16th 2021) (citing Matter of Unroe, 937 F.2d 346, 348, 21 Bankr. Ct. Dec. (CRR) 1462, 25 Collier Bankr. Cas. 2d (MB) 84, Bankr. L. Rep. (CCH) P 74091, 20 Fed. R. Serv. 3d 1026 (7th Cir. 1991); In re International Horizons, Inc., 751 F.2d 1213, 1216, 12 Bankr. Ct. Dec. (CRR) 1022, 12 Collier Bankr. Cas. 2d (MB) 91, Bankr. L. Rep. (CCH) P 70245, 85-1 U.S. Tax Cas. (CCH) P 9212, 55 A.F.T.R.2d 85-1038 (11th Cir. 1985)).

[80]9 Collier on Bankruptcy P 3001.04 (16th 2021).

[81]See Kreider, 2006 WL 3068834, at *2–3 (declining to consolidate claims filed by affiliated entities).

[82]This requirement may vary where an agent of syndicated debt is empowered to file a joint proof of claim on behalf of several creditors, see In re Meridian Sunrise Village, LLC, 2014 WL 909219 (W.D. Wash. 2014).

[83]See, e.g., Adam J. Levitin, Bankruptcy Markets: Making Sense of Claims Trading, 4 Brook. J. Corp. Fin. & Com. L. 67, 77 (2009) ("[O]nly the administrative agent for the syndicate (typically the lead bank) will file a claim in the bankruptcy"); Anne Marrs Huber & Thomas H. Young, The Trading of Bank Debt in and out of Chapter 11, 15 J. Bankr. L. & Prac. 1 Art. 3, n. 101 (2006) ("Normally, in the case of a syndicated loan the administrative agent will file a proof of claim that covers all participants").

[84]YMCA, 2020 WL 7483739 at *3–5; see also In re Rosewood at Providence, LLC, 470 B.R. 619, 627 (Bankr. M.D. Ga. 2011) (holding that a syndicate member empowered the agent to file a proof of claim and vote on its behalf under the loan agreement).

[85]Jason A. Cohen, Melissa Jacoby, & Jane Sullivan, Soliciting Bondholders Pre-Petition: Understanding the Basics, 22 Am. Bankr. L.J. 28 (Dec./Jan. 2004); see also The Mechanics of Private Debt Exchange Offers and Consent Solicitations, Practical Law Practice Note (2021), Westlaw 017-6356, https://us.practicallaw.thomsonreuters.com/w-017-6356.

[86]Cohen and Jacoby, 22 Am. Bankr. L.J. 28.

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

[87]Cohen and Jacoby, 22 Am. Bankr. L.J. 28 ("In essence, you will need to structure a solicitation process that uses the record-holders as conduits to transmit the disclosure statement, reorganization plan and ballots . . . to the beneficial owners").

[88]Stuart Gilson, Creating Value Through Corporate Restructuring, (2001); Cohen and Jacoby, 22 Am. Bankr. L.J. 28 ("A master ballot is essentially a score sheet that lists the following information for each beneficial owner represented by the record-holder: (a) either the name of the beneficial owner, or more likely, the beneficial owner's account number with the record-holder, (b) the principal amount of bonds held by beneficial owner and (c) whether the beneficial owner has accepted or rejected the debtor's proposed plan.").

[89]Cohen and Jacoby, 22 Am. Bankr. L.J. 28.

[90]Gilson, Creating Value Through Corporate Restructuring.

[91]Gilson, Creating Value Through Corporate Restructuring.

[92]See, e.g., In re Tribelhorn, 137 F. 3 (C.C.A. 2d Cir. 1905); Stroheim v. Lewis F. Perry & Whitney Co., 175 F. 52 (C.C.A. 1st Cir. 1910); Emerine v. Tarault, 219 F. 68 (C.C.A. 6th Cir. 1915).

[93]See, e.g., 11 U.S.C.A. §§ 303, 702, 1126.

[94]In re Meridian Sunrise Village, LLC, 2014 WL 909219, at *5 (W.D. Wash. 2014).

[95]In re Meridian Sunrise Village, LLC, 2014 WL 909219, at *5 (W.D. Wash. 2014).

[96]Figter, 118 F.3d at 641.

[97]Jones, 2012 WL 860325 at *3.

[98]The authors were able to locate only one article discussing *Meridian*'s impact on numerosity. The Meridian Sunrise Village Opinion Redux re: Bankruptcy and Distressed Debt Investors, IV The Nat'l L. Rev. 189 (July 8, 2014), https://www.natlawreview.com/article/meridian-sunrise-village-opinion-redux-re-bankruptcy-and-distressed-debt-investors.

[99]Bankruptcy Rule 3001(e), which applies to claims other than bond or bank debt, provides the procedure for noticing transfers of claims, but there is minimal legal authority setting out the requirements for processing transfers to multiple transferees. Generally, Bankruptcy Rule 3001(e) provides that the transferee file a notice of the transfer to give the transferor an opportunity to object to the transfer. Once the objection period lapses, the transfer will be deemed valid. Once notified that a claim will be split among several transferees, the agent responsible for administering the claims register will note in its records that the claim has been transferred and will track the amount of the claim transferred to each buyer.

[100]Latham Lithographic, 107 F.2d at 751.

[101]Latham Lithographic, 107 F.2d at 750.

[102]Latham Lithographic, 107 F.2d at 751.

[103]Latham Lithographic, 107 F.2d at 750–51.

[104]For example, in *Stroheim v. Lewis F. Perry & Whitney Co.*, a case from 1910, the First Circuit addressed an involuntary bankruptcy petition, which required that three creditors join the petition. 175 F. 52 (1st Cir. 1910). The debtor alleged that two of the three petitioners, Skelly and Baumont, were not bona fide creditors, but instead held partial assignments of the other creditor's claim and obtained those assignments to ensure that the original creditor had sufficient creditor support for the involuntary petition. The court found that the claims were transferred for no substantial consideration and were transferred only to ensure there were a sufficient number of petitioning creditors and therefore disregarded those claims, as those creditors "merely collusively accepted nominal transfers of parts of a claim or the purpose of enabling one creditor to appear as three." Similarly, in *In re Messengill*, the court found that following the sale of an allowed claim to several purchasers, the purchasers would constitute a single creditor for purposes of voting on a plan of composition. 113 F. 366 (E.D.N.C. 1902).

Reprinted from "Numerosity Unwound: Counting Votes on a Chapter 11 Plan," from Norton Journal of Bankruptcy Law and Practice, Vol. 31, No. 1 (February 2022) with permission of Thomson Reuters. Copyright © 2022. Further use without the permission of Thomson Reuters is prohibited.
For further information about this publication, please visit https://legal.thomsonreuters.com/en/products/law-books or call 800.328.9352.

[105]Gilbert, 104 B.R. at 216.

[106]Figter, 118 F.3d at 639; see also Meridian Sunrise, 2014 WL 909219 at *5 ("A creditor does not have the right to split up a claim in such a way that artificially creates voting rights.").

[107]See, e.g., Solicitation Procedures, In re Intelsat S.A., Case No. 20-32299 (KLP) (Bankr. E.D. Va. Sept. 7, 2021), ECF No. 2815_2; Solicitation Procedures, In re The Hertz Corp., Case No. 20-11218 (MFW) (Bankr. D. Del. April 22, 2021), ECF No. 4111_1; Solicitation Procedures, In re Chesapeake Energy Corp., Case No. 20-33233 (DRJ) (Bankr. S.D. Tx. Oct. 30, 2020), ECF No. 1633_2; Solicitation and Voting Procedures, In re Valaris plc, Case No. 20-34114 (MI) (Bankr. S.D. Tx. Dec. 30, 2020), ECF No. 884_2; Solicitation Procedures, In re J.C. Penny Co., Inc., Case No. 20-20182 (DRJ) (Bankr. S.D. Tx. Oct. 26, 2020), ECF No. 1655_3; Solicitation and Voting Procedures, In re Seadrill Ltd., Case No. 21-30427 (DRJ) (Bankr. S.D. Tex. Sept. 1, 2021), ECF No. 968_2; Solicitation Procedures, In re Katerra Inc., Case No. 21-31861 (DRJ) (Bankr. S.D. Tex. Aug. 25, 2021) ECF No. 938_2.

[108]See supra, note 107.

[109]See, e.g., Solicitation and Voting Procedures, In re Valaris plc, Case No. 20-34114 (MI) (Bankr. S.D. Tx. Dec. 30, 2020), ECF No. 884_2; Solicitation and Voting Procedures, In re Seadrill Limited, Case No. 21-30427 (DRJ) (Bankr. S.D. Tex. Sept. 1, 2021) ECF No. 968_2; Solicitation Procedures, In re Katerra Inc., Case No. 21-31861 (DRJ) (Bankr. S.D. Tex. Aug. 25, 2021) ECF No. 938_2; Solicitation Procedures, In re J.C. Penny Co., Inc., Case No. 20-20182 (DRJ) (Bankr. S.D. Tx. Oct. 26, 2020), ECF No. 1655_3; Solicitation Procedures, In re Intelsat S.A., Case No. 20-32299 (KLP) (Bankr. E.D. Va. Sept. 7, 2021), ECF No. 2815_2; Solicitation Procedures, In re Chesapeake Energy Corp., Case No. 20-33233 (DRJ) (Bankr. S.D. Tx. Oct. 30, 2020), ECF No. 1633_2.

[110]See e.g. Solicitation Procedures, In re J.C. Penny Co., Inc., Case No. 20-20182 (DRJ) (Bankr. S.D. Tx. Oct. 26, 2020), ECF No. 1655_3; Solicitation Procedures, In re Katerra Inc., Case No. 21-31861 (DRJ) (Bankr. S.D. Tex. Aug. 25, 2021) ECF No. 938_2; Solicitation and Voting Procedures, In re Seadrill Ltd., Case No. 21-30427 (DRJ) (Bankr. S.D. Tex. Sept. 1, 2021), ECF No. 968_2; Solicitation and Voting Procedures, In re Valaris plc, Case No. 20-34114 (MI) (Bankr. S.D. Tx. Dec. 30, 2020), ECF No. 884_2.

[111]See supra, note 109.

[112]Am. Bankr. Inst. Comm'n to Study the Reform of Chapter 11: 2012–14 Final Report & Recommendations ["ABI Commission Report"], 23 Am. Bankr. Inst. L. Rev. 1, 279–82 (2015).

[113]ABI Commission Report at 279.

[114]ABI Commission Report at 282.

[115]Congress is currently considering altering other parts of the Bankruptcy Code. See, e.g., Kyle F. Arendsen & Peter R. Morrison, Congress Proposes Significant Bankruptcy Code Changes to Protect Tort Claimants and Creditors, but What are the Real Consequences?, XI Natl. L. Rev. 223 (Aug. 2021); Kurt Mayr, Sabin Willett and David Riley, What the Nondebtor Release Bill Means for Chapter 11 Filings, Law360 (Aug. 2021).