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Just Following Orders: The Fifth Circuit's Incomplete Analysis of Chapter 11 Bankruptcy Cramdown in *In re Village at Camp Bowie*

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JUST FOLLOWING ORDERS: THE FIFTH CIRCUIT’S INCOMPLETE ANALYSIS OF CHAPTER 11 BANKRUPTCY CRAMDOW IN *IN RE VILLAGE AT CAMP BOWIE*

Abstract: On February 26, 2013, the U.S. Court of Appeals for the Fifth Circuit in *In re Village at Camp Bowie* held that the Bankruptcy Code cramdown requirement in 11 U.S.C. § 1129(a)(10) that at least one impaired class accept the reorganization plan did not distinguish between economic and discretionary impairment. Rejecting the Eighth Circuit’s holding that § 1129(a)(10) included a motive inquiry, the Fifth Circuit instead held that no policy implications could be read into the plain language of the provision. This Comment argues that the Fifth Circuit correctly interpreted § 1129(a)(10) as allowing artificial impairment, but missed the opportunity to influence other courts by not adequately supporting its conclusion with an analysis of the Bankruptcy Code’s structure or historical development.

INTRODUCTION

The Bankruptcy Code requires a court to confirm a debtor’s Chapter 11 plan for reorganization if, among other requirements, the debtor can satisfy 11 U.S.C. § 1129(a)(10) by securing a vote in favor of the plan from at least one class of impaired creditors.¹ In many bankruptcy cases, particularly when a single-asset real estate debtor files a plan, a great deal rests on creating an im-

¹ See 11 U.S.C. § 1129(a)(10) (2012). The purpose of Chapter 11 bankruptcy reorganization is to allow a financially troubled enterprise to rehabilitate its equity and debt and to continue operating. See Ali M.M. Mojdehi & Janet Dean Gertz, *The Implicit “Good Faith” Requirement in Chapter 11 Liquidations: A Rule in Search of A Rationale?*, 14 AM. BANKR. INST. L. REV. 143, 151 (2006); Paul J. Unger, *Prohibiting Multiple Classification and Artificial Impairment in Single Asset Chapter 11 Cases: The Creditor’s Veto—Its Power Congress Did Not Intend*, 23 CAP. U. L. REV. 541, 544 (1994). An entity may reorganize under Chapter 11 only when the value of continuing its operation exceeds its liquidation value. See 11 U.S.C. § 1129(a)(7)(A)(ii). A plan will group claims—rights to payment—that are substantially similar to one another into a single class. *Id.* § 101(5)(A) (2012) (defining “claim”); *id.* § 1122 (2012) (regarding classification). A class is impaired if the plan does not leave the rights of the creditors in that class unaltered. *Id.* § 1124 (2012). A plan can be confirmed if all classes accept the plan. *Id.* § 1129(a). Alternatively, pursuant to § 1129(b)(1), if “at least one class of claims that is impaired under the plan has accepted the plan” and all the requirements of § 1129(a)—other than paragraph 8, which requires that all impaired classes accept the plan—are met, then the court “shall confirm the plan” as long as it is “fair and equitable.” *Id.* § 1129(a)(8), (a)(10), (b)(1). Throughout this Comment, “11 U.S.C.” will be referred to as the “Bankruptcy Code.”

paired class that is not dominated by a secured creditor so that this class will vote in favor of the plan.²

Chapter 11 of the Bankruptcy Code governs reorganization proceedings and protects the debtor throughout the bankruptcy process.³ The Bankruptcy Code provides the debtor a right to be heard in reorganization and gives the debtor the exclusive right to file a plan for 120 days.⁴ Further, the Bankruptcy Code requires that a plan contain provisions that are consistent with the creditors' interests as well as the equity holders' interests.⁵ Nevertheless, in cramdown—which is a plan confirmation process under § 1129(b) in which a plan can be confirmed over the objections of creditors—even where a debtor's interests are fully protected by a reorganization plan, a single impaired creditor may still have the power to prevent a plan from being confirmed.⁶ In these cases, artificially impairing these creditors may be the only practical tool the debtor has to protect itself.⁷

The concept of impairment in the Bankruptcy Code has evolved through a series of congressional amendments.⁸ Over time, Congress has consistently removed constraints on a plan's ability to impair creditors.⁹ For example, be-

² Peter E. Meltzer, *Disenfranchising the Dissenting Creditor Through Artificial Classification or Artificial Impairment*, 66 AM. BANKR. L.J. 281, 281–82 (1992) (stating that single-asset debtors often find § 1129(a)(10) the biggest barrier to plan confirmation because a single creditor's large-value loan dominates both the secured and unsecured classes).

³ See 11 U.S.C. §§ 1101–1174 (2012); *id.* § 1109(b) (stating that a debtor has a right to be heard on the matter of reorganization); Denise R. Polivy, *Unfair Discrimination in Chapter 11: A Comprehensive Compilation of Current Case Law*, 72 AM. BANKR. L.J. 191, 194–95 (1998) (stating that Chapter 11 promotes consensual reorganization plans, but the court may nonetheless confirm a debtor's plan over the objections of some creditors).

⁴ See § 1109(b); *id.* § 1121(c) (right to file).

⁵ See *id.* § 1123(a)(7) (imposing this requirement); Jennifer Kent, Comment, *Quality, Not Quantity: The Implications of Redefining Insurance Neutrality in In Re Global Industrial Technologies, Inc.*, 53 B.C. L. REV. 345, 345 (2012) (noting the importance of parties impacted by Chapter 11 reorganizations having a voice in reorganization); see also *In re Vill. at Camp Bowie I*, L.P. (*Bowie I*), 454 B.R. 702, 709–10 (Bankr. N.D. Tex. 2011), *aff'd*, 710 F.3d 239 (5th Cir. 2013) (concluding that Congress created numerous provisions to protect equity holders).

⁶ See Meltzer, *supra* note 2, at 281–82.

⁷ See Unger, *supra* note 1, at 576–78 (noting that without artificial impairment, the undersecured creditor has complete power to veto a reorganization plan). See generally *infra* notes 14–15 and accompanying text (defining “artificial impairment”).

⁸ See *In re L & J Anaheim Assocs.*, 995 F.2d 940, 942–43 (9th Cir. 1993) (stating that the Bankruptcy Code's “old ‘material and adverse effect’ standard” in the former § 507 (repealed 1979) required a negative impact to a creditor whereas the impairment standard in the current § 1124 does not); David Gray Carlson, *Artificial Impairment and the Single Asset Chapter 11 Case*, 23 CAP. U. L. REV. 339, 355–56 (1994) (noting that the 1994 amendment to the § 1124 definition of impairment has made it an easily met standard).

⁹ See Unger, *supra* note 1, at 576 (arguing that because Congress did not retain language that would have prohibited slight impairment, Congress did not intend to prohibit slight impairment). Compare 11 U.S.C. § 507 (repealed 1979) (stating that only creditor materially and adversely impacted by a plan are affected), with *id.* § 1124 (2012) (stating that any change to a creditor's interest impairs the creditor). See generally *In re Polytherm Indus., Inc.*, 33 B.R. 823, 834 (W.D. Wis. 1983)

fore 1978, the Bankruptcy Code only allowed a “materially and adversely affected” creditor to vote on a plan.¹⁰ Today, the “materially and adversely affected” standard has been replaced by impairment in 11 U.S.C. § 1124, which classifies a class as impaired if the plan does not leave the rights of the creditors in that class unaltered.¹¹ Moreover, for a plan to be confirmed in cramdown, § 1129(a)(10) requires that “at least one class” of impaired creditors must vote in favor of the plan.¹² In addition to changing the standard governing which creditors can vote in a cramdown, in 1994, Congress again liberalized the cramdown requirements when it repealed § 1124(3), thus further broadening the concept of impairment.¹³ As a result, any change of a creditor’s rights is considered “impairment,” including paying a creditor in full at the effective date of a plan rather than the originally scheduled payment date.¹⁴ Because this type of legal impairment has minimal factual impact on a creditor, it is considered “artificial impairment.”¹⁵

Federal appeals courts disagree regarding whether § 1129(a)(10) prevents a debtor from impairing a class merely to create one accepting vote for a reorganization plan.¹⁶ In 2013, the U.S. Court of Appeals for the Fifth Circuit held in *In re Village at Camp Bowie I, L.P. (Bowie II)* that the plain language of § 1129(a)(10) is unambiguous, and so no motive inquiry could be read into the provision.¹⁷ In so holding, the Fifth Circuit rejected the U.S. Court of Appeals for the Eighth Circuit’s 1993 *In re Windsor on the River Associates, Ltd.* hold-

(explaining that the concept of impairment derives from the older bankruptcy term “affected creditor”).

¹⁰ See 11 U.S.C. § 861 (repealed 1978); *In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 131 (8th Cir. 1993) (explaining changes to the Bankruptcy Code).

¹¹ See § 1124. See generally *id.* § 507 (repealed 1979) (stating the material and adverse effect standard).

¹² *Id.* § 1129(a)(10) (2012); *In re Polytherm*, 33 B.R. at 834. Section 861 was removed, as it allowed debtors to prevent creditors from recouping the full value of their investment by paying out the value of a secured interest based upon the valuation of the property at the time of filing for Chapter 11 bankruptcy. *In re Windsor*, 7 F.3d at 131; see Carlson, *supra* note 8, at 353–54 (stating that prior to 1984, it was not necessarily true that a yes-voting class needed to be impaired).

¹³ 11 U.S.C. § 1124(3) (repealed 1994) (stating that a creditor is not impaired if it receives cash equal to its claim).

¹⁴ See *id.* § 1124 (2012); see also Carlson, *supra* note 8, at 369–71 (explaining that under § 1124(3), a creditor could be cashed out at a plan’s effective date without being paid interest starting from the date of the initial proceeding because this provision deemed the class to be unimpaired).

¹⁵ See Eric W. Lam, *On the River of Artificial and Arbitrary Impairment: An Erroneous Analysis*, 70 N.D. L. REV. 993, 1005 (1994). See generally *id.* at 1003 (arguing that Congress specifically abandoned the “materially and adversely affected” standard of the Bankruptcy Act to remove any question of degree of impairment when determining if a class has the power to vote).

¹⁶ See Meltzer, *supra* note 2, at 311. Compare *In re Vill. at Camp Bowie I, L.P. (Bowie II)*, 710 F.3d 239, 245 (5th Cir. 2013) (holding that any class impaired under § 1124 satisfies § 1129(a)(10)), with *In re Windsor*, 7 F.3d at 132 (holding that impairment driven by debtor discretion does not satisfy § 1129(a)(10)).

¹⁷ See 710 F.3d at 245.

ing that § 1129(a)(10) incorporates an inquiry into a plan proponent's motive for impairing a class to ensure that it is driven by economic necessity.¹⁸

Part I of this Comment provides the procedural history of the Chapter 11 reorganization plan for Village at Camp Bowie I, L.P. (the "Debtor").¹⁹ Part II then analyzes the Eighth Circuit's rationale for holding that § 1129(a)(10) incorporates a motive inquiry, and how the Fifth Circuit came to the opposite conclusion.²⁰ Lastly, Part III argues that although a motive inquiry should not be read into the § 1129(a)(10), the Fifth Circuit missed the opportunity to influence other courts by failing to analyze the structure and historical development of the Bankruptcy Code in reaching its decision.²¹

I. PROBLEMS WITH CRAMDOWN: WESTERN'S OBJECTIONS TO THE DEBTOR'S REORGANIZATION PLAN

In 2004, the Debtor in *In re Village at Camp Bowie I, L.P. (Bowie I)* purchased a mixed-use development in Fort Worth, Texas.²² The Debtor funded the acquisition with \$10,000,000 in equity and two promissory notes allowing it to borrow up to \$36,535,000.²³ When the notes came due on February 11, 2010, the Debtor defaulted.²⁴ After the last of a series of forbearance agreements expired on July 9, 2010, Western Real Estate Equities, LLC ("Western"), purchased the notes for a discount at auction.²⁵ Western then posted the property for foreclosure sale in August 2010.²⁶ The day before the sale, the Debtor filed a voluntary Chapter 11 bankruptcy petition with the U.S. Bankruptcy Court for the Northern District of Texas, seeking relief from the foreclosure proceedings.²⁷

¹⁸ See *id.*; *In re Windsor*, 7 F.3d at 132.

¹⁹ See *infra* notes 22–51 and accompanying text.

²⁰ See *infra* notes 52–88 and accompanying text.

²¹ See *infra* notes 89–105 and accompanying text.

²² 454 B.R. at 705. The property is 23.08 acres. *Id.*

²³ *Id.* The Debtor executed a promissory note for approximately \$10,000,000 with SouthTrust Bank and a promissory note for \$26,535,000 with Texas Capital Bank, National Association. *Id.* Wachovia Bank then became the successor of both notes by merger and by assignment, respectively. *Id.* Subsequently, Wachovia modified the notes' original maturity date of January 22, 2008, a number of times before the maturity date was finally set for February 11, 2010. *Id.*

²⁴ *Id.* at 705–06. The Debtor still owed \$31,292,824 on the notes. *Id.*

²⁵ *Id.* at 706.

²⁶ *Id.*

²⁷ *Bowie II*, 710 F.3d at 242. Filing a petition in bankruptcy court automatically triggers a stay. 11 U.S.C. § 362(a) (2012). When the proceedings involve property, the stay suspends all action to possess or exercise control over the property. *Id.* § 362(a)(3). The stay remains in effect until the case is closed, dismissed, or until a discharge is granted. *Id.* § 362(c)(2)(A)–(C).

Subsequently, the Debtor filed a reorganization plan on November 29, 2010 to allow it to continue operating the property and to repay its creditors.²⁸ After a series of court-directed modifications, the Debtor filed the plan at issue (the “Plan”) on May 7, 2011.²⁹

The Plan impaired two creditor classes by delaying or reducing payment of their claims.³⁰ Class 1, consisting of Western’s secured claim, would receive a new five-year note equaling the value of its secured claim with deferred interest payments.³¹ Class 2, consisting of thirty-eight unsecured trade creditors, would be fully paid three months after the effective date of the Plan, but would not receive interest payments for this delay.³² Because only impaired classes may vote on reorganization plans, and Western voted its higher-value claim against reorganization, there were insufficient votes to confirm the Plan under § 1129(a)—which requires the approval of each class of creditors.³³

Despite being voted down by an impaired class, the court found the plan could still be confirmed through a cramdown under § 1129(b).³⁴ Section 1129(b) requires a court to confirm a plan as long as it does not discriminate unfairly against classes, it is fair and equitable to the impaired classes that have not accepted the plan, and it conforms to all provisions in § 1129(a), save the requirement that all impaired classes accept the plan.³⁵ Instead of requiring acceptance

²⁸ *Bowie II*, 710 F.3d at 242; *Bowie I*, 454 B.R. at 706. See generally 11 U.S.C. § 1121(b) (2012) (stating that the debtor has an exclusive right to file a reorganization plan for up to 120 days from the time the order of relief has been granted).

²⁹ *Bowie I*, 454 B.R. at 706; Appellant’s Brief at 10–11, *Bowie II*, 710 F.3d 239 (5th Cir. 2013) (No. 12-10271), 2012 WL 1965466, at *10–11 (May 25, 2012). The Debtor’s original plan for reorganization only called for a \$600,000 infusion of equity, and the court advised that an infusion of at least \$1,000,000 would be needed for confirmation. *Bowie I*, 454 B.R. at 706. The Plan subsequently called for a \$1,500,000 infusion of equity. *Id.*

³⁰ *Bowie II*, 710 F.3d at 243; see *supra* note 1 (defining impairment and classes of claims).

³¹ *Bowie II*, 710 F.3d at 243. A claim is secured if it is backed by an interest in property. See 11 U.S.C. § 506 (2012). Western’s new five-year note also provided for a balloon payment on the principal at the end of the five years. *Bowie II*, 710 F.3d at 243.

³² *Bowie II*, 710 F.3d at 243. In total, the Debtor owed the trade creditors approximately \$60,000. *Bowie I*, 454 B.R. at 706. Trade creditors provide goods and services that allow a business or property to operate. See *In re Greystone III Joint Venture*, 995 F.2d 1274, 1280 (5th Cir. 1991). A plan may create a class consisting of all unsecured claims if their value is under an amount set by the court such that grouping the claims is “reasonable and necessary for administrative convenience.” 11 U.S.C. § 1122(b) (2012).

³³ *Bowie I*, 454 B.R. at 707; 11 U.S.C. § 1126(f) (2012) (stating that any class not impaired is presumed to have accepted a plan); *id.* § 1129(a) (2012). Only where each class has accepted the plan, by at least one-half in number of the claims in that class and two-thirds in amount of the total value of that class, can the court confirm the plan without resorting to § 1129(b), the cramdown provision. See 11 U.S.C. § 1126(c)–(d). See generally *id.* § 1129(b). Classes that are not impaired are deemed to impliedly accept the reorganization plan and so have no voting power. See *id.* § 1126(f).

³⁴ See *Bowie I*, 454 B.R. at 711; *supra* note 1 (explaining confirmation through § 1129(b)).

³⁵ See 11 U.S.C. § 1129(b)(1). See generally *id.* § 1129(a)(8) (requiring that all classes of creditors either accept the plan or are not impaired by the plan). The unfair treatment requirement ensures that a plan does not treat members of a class in a different manner from other claims in the same class.

by all impaired classes, § 1129(b) requires only that a plan satisfy § 1129(a)(10), which is met if at least one impaired class accepts the plan.³⁶ Because the court can thus have the plan “crammed down the throats” of objecting classes, the § 1129(b) confirmation process is popularly termed “cramdown.”³⁷

Because the Debtor was financially capable of leaving the unsecured trade creditors unimpaired, Western argued that the Plan failed to meet the standards of § 1129(a)(10) and was thus unconfirmable.³⁸ Western claimed that because the Debtor had sufficient funds to pay the trade creditors at the Plan’s effective date, the Debtor artificially impaired Class 2 by deferring payment merely to create an accepting impaired class for cramdown confirmation.³⁹ This, Western argued, is an improper motive for impairing a class, as the Debtor did not have an economic motive for impairing the unsecured trade creditors.⁴⁰

The bankruptcy court rejected Western’s argument, found that the Plan conformed to the requirements of § 1129(a)(10), and thereafter confirmed an amended version of the Plan on January 9, 2012.⁴¹ Allowing the artificially impaired class to satisfy § 1129(a)(10), the court relied on the U.S. Court of Appeals for the Fifth Circuit’s 1985 ruling in *In re Sun Country Development, Inc.*⁴² There, the Fifth Circuit noted that artificially impairing classes is per-

Richard Maloy, *A Primer on Cramdown—How and Why it Works*, 16 ST. THOMAS L. REV. 1, 7 (2003). The fair and equitable requirement protects classes against losing their priority claims from classes of a different rank. *Id.* at 13.

³⁶ See 11 U.S.C. § 1129(a)(10), (b).

³⁷ See Maloy, *supra* note 35, at 3–4 (internal quotations omitted) (stating that the Bankruptcy Code does not refer to § 1129(a)(10) as “cramdown;” it is only a term of art).

³⁸ *Bowie II*, 710 F.3d at 243.

³⁹ *Id.* The effective date of the plan is the date on which the court-approved reorganization plan takes effect. See Kenneth N. Klee, *Adjusting Chapter 11: Fine Tuning the Plan Process*, 69 AM. BANKR. L.J. 551, 560 (1995). Artificial impairment occurs when the value of the entity is greater than its outstanding debt. See *In re Windsor*, 7 F.3d at 131–32.

⁴⁰ See Appellant’s Brief, *supra* note 29, at 13–14. Western argued that because the Debtor owed the unsecured trade creditors approximately \$60,000, and that cash flow projections showed that the Debtor would be holding \$1,419,281 after paying the unsecured trade creditors and all other projected payments at the effective date of the plan, there was no economic motivation for impairing the unsecured trade creditors. *Id.*

⁴¹ *Bowie I*, 454 B.R. at 710 (confirming the plan in part because it conformed to § 1129(a)(10)); *id.* at 715 (denying the plan in part without prejudice because the court found that the proposed interest rate of 7.44% on the Class 1 notes was too high); see Appellant’s Brief, *supra* note 29, at 4 (noting confirmation of the amended plan). The bankruptcy court stated it would only confirm the amended Plan if Western and the Debtor agreed on a cramdown interest rate of between 6.27% and 6.59% for the five-year note. *Bowie I*, 454 B.R. at 715. For the January 9, 2012 plan, the parties agreed to a 6.4% interest rate. *Bowie II*, 710 F.3d at 243 n.2; Appellant’s Brief, *supra* note 29, at 4.

⁴² *Bowie I*, 454 B.R. at 710–11; see *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985). The bankruptcy court noted that the ruling was not based on precedent, as the Fifth Circuit had not yet directly addressed the issue of artificial impairment. *Bowie I*, 454 B.R. at 710.

missible, as it merely involves using a tool that Congress created in the Bankruptcy Code.⁴³

On January 17, 2012, Western appealed to the U.S. District Court for the Northern District of Texas to stay the bankruptcy court's confirmation order.⁴⁴ On January 25, the bankruptcy court ordered sua sponte that the case be directly appealed to the Fifth Circuit.⁴⁵ Both parties then filed joint requests for direct appeal, which the Fifth Circuit granted.⁴⁶

In *Bowie II*, the Fifth Circuit affirmed the bankruptcy court's decision to confirm the plan.⁴⁷ The *Bowie II* court held that, because the Bankruptcy Code definition of impairment is purposefully broad, and impairment is the only requirement to be eligible to vote to accept the plan and meet § 1129(a)(10), placing any further restrictions on impairment would limit its role.⁴⁸ In reaching this conclusion, the court rejected the Eighth Circuit's holding in *In re Windsor* that § 1129(a)(10) incorporates a motive inquiry into the concept of impairment.⁴⁹ The Eighth Circuit reasoned that this motive inquiry is incorporated to ensure that an accepting impaired class indicates some support for a reorganization plan.⁵⁰ In contrast, the Fifth Circuit reasoned that because the plain language of § 1129(a)(10) is unambiguous, reading any further requirement into the provision would violate elementary principles of statutory interpretation.⁵¹

⁴³ *In re Sun Country*, 764 F.2d at 408. Although the court in *In re Sun Country* did note that artificial impairment was permissible, this statement had no precedential value since the court found the impairment at issue to be economically motivated, i.e., the impairment was not based solely on the discretion of the debtor and so was not artificial impairment. *Id.*

⁴⁴ Appellant's Brief, *supra* note 29, at 5.

⁴⁵ *Id.* at 6. A court of appeals may have jurisdiction over a judgment otherwise under the jurisdiction of the district court if it involves a question of law where there is no controlling decision in the circuit. 28 U.S.C. § 158(d)(2)(A)(i) (2012). A court of appeals may also have jurisdiction if an immediate appeal would "materially advance" the proceedings. *Id.* § 158(d)(2)(A)(iii).

⁴⁶ Appellant's Brief, *supra* note 29, at 6.

⁴⁷ 710 F.3d at 249.

⁴⁸ *See id.* at 245. Section 1124 of the Bankruptcy Code defines impairment in the negative, stating that a claim is impaired unless the "legal, equitable, and contractual rights" of the claim are left unaltered. 11 U.S.C. § 1124 (2012). Although the Fifth Circuit explained that it was joining in the Ninth Circuit's 1993 decision in *In re L & J Anaheim Associates*, that case did not make a determination on § 1129(a)(10), but rather only held that the § 1124 definition of impairment includes no distinction of impairment "of a particular kind or degree." *See Bowie II*, 710 F.3d at 245; *In re L & J Anaheim Assocs.*, 995 F.2d at 943.

⁴⁹ *Bowie II*, 710 F.3d at 245; *In re Windsor*, 7 F.3d at 131.

⁵⁰ *Bowie II*, 710 F.3d at 245; *In re Windsor*, 7 F.3d at 131. The Eighth Circuit held that allowing § 1129(a)(10) to be manipulated would lead to inequitable cramdowns, which Congress expressly tried to prevent by including § 1129(a)(10) in the Bankruptcy Code. *In re Windsor*, 7 F.3d at 131 (citing Meltzer, *supra* note 2, at 311-12).

⁵¹ *See Bowie II*, 710 F.3d at 245-46.

II. THE DISAGREEMENT REGARDING MOTIVE INQUIRY IN IMPAIRMENT

The U.S. Court of Appeals for the Fifth Circuit had the opportunity in *Bowie II* to take a stand on impairment.⁵² The *Bowie II* court primarily rejected the Eighth Circuit's policy-based interpretation of 11 U.S.C. § 1129(a)(10) because the Fifth Circuit found the language there, and in relevant provisions, clear and unambiguous.⁵³ To support this decision, the Fifth Circuit explained that this reading did not rob § 1129(a)(10) of any purpose, and that the good faith requirement for plan confirmation adequately protects creditors from inequitable cramdowns.⁵⁴

Section A of this Part explains the Eighth Circuit's reasoning for holding that § 1129(a)(10) requires that impairment arise from something more than merely a debtor's "exercise of discretion."⁵⁵ Section B then examines the Fifth Circuit's justification for its plain reading of § 1129(a)(10).⁵⁶

A. *The Eighth Circuit: The Bankruptcy Code Inquires into a Plan's Motive for Impairing a Class*

In 1993, in *In re Windsor on the River Associates, Ltd.*, the U.S. Court of Appeals for the Eighth Circuit interpreted § 1129(a)(10) in light of congressional intent for this provision to ensure creditor support for a plan.⁵⁷ The *In re Windsor* court held that, to be consistent with congressional intent, there must be a motive inquiry in § 1129(a)(10).⁵⁸ A motive inquiry both ensures that classes are only impaired when doing so is economically necessary and discourages "side dealing" in bankruptcy proceedings.⁵⁹ According to the *In re Windsor* court, artificially impairing a class is inconsistent with this congressional

⁵² See 710 F.3d 239, 244–45 (5th Cir. 2013). The Fifth Circuit had this opportunity because it was reviewing the issue of impairment de novo. See *id.*

⁵³ See *Bowie II*, 710 F.3d at 245–46; *In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 132 (8th Cir. 1993). See generally 11 U.S.C. § 1129(a)(10) (2012).

⁵⁴ See *Bowie II*, 710 F.3d at 246–48. The Fifth Circuit assessed good faith by considering whether the totality of the circumstances suggested that the Plan was proposed to provide the entity a reasonable chance of success at rehabilitation. *Bowie II*, 710 F.3d at 247; see 11 U.S.C. § 1129(a)(3) (defining the good faith requirement for plan confirmation).

⁵⁵ See *infra* notes 57–71 and accompanying text.

⁵⁶ See *infra* notes 72–88 and accompanying text.

⁵⁷ 7 F.3d at 131; see also Meltzer, *supra* note 2, at 320 (stating that if the purpose of § 1129(a)(10) is to establish support from creditors, the section should not be interpreted in a manner that defeats that purpose). See generally S. REP. NO. 95-989, at 128 (1978), reprinted in 1978 U.S.C.A.N. 5787, 5914 (stating that at least one class must accept the plan).

⁵⁸ 7 F.3d at 132.

⁵⁹ See *id.* (internal quotation marks omitted) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 375 (4th ed. 1992)) (holding that a plain language interpretation of § 1129(a)(10) would defeat the purpose of the provision). See generally *id.* at 130 (stating that though statutory construction begins with the language of the statute itself, it is equally true that courts must also interpret a statute to give effect to its purpose).

intent as it enables confirmation of inequitable cramdown plans despite a lack of real support from any impaired class.⁶⁰ Thus, the court held that if a legal, equitable, or contractual claim is changed solely as an exercise of the debtor's discretion, then that class is not impaired for the purpose of satisfying § 1129(a)(10).⁶¹

According to the Eighth Circuit, a debtor's artificial impairment of a class is problematic because it enables confirmation with only fabricated support from creditors.⁶² The Eighth Circuit reasoned that because Congress enacted § 1129(a)(10) to indicate creditor support for a plan, the same provision cannot allow artificial impairment so as to contravene this policy goal.⁶³ In *In re Windsor*, the debtor scheduled repayment to the class of low-value unsecured trade creditors for sixty days after the plan's effective date.⁶⁴ Because the debtor had more than sufficient capital on hand to pay the trade creditors in full, the debtor artificially impaired the class.⁶⁵ Artificial impairment, according to the *In re Windsor* court, allows a debtor to unfairly silence a lender's valid objections to a plan, especially when a lender holds the majority of the debt at stake.⁶⁶

In addition, the Eighth Circuit articulated three arguments against allowing artificial impairment to satisfy § 1129(a)(10) because such impairment could lead to negative impacts on financial markets.⁶⁷ First, a debtor could use § 1129(a)(10) to achieve favorable refinancing terms when the entity might not otherwise be robust enough to survive in the marketplace.⁶⁸ Second, a lender might acquiesce to refinancing simply because the lender is aware that a debtor can easily achieve plan confirmation through § 1129(a)(10).⁶⁹ Third, debtors could barter for a small-value unsecured creditor's acceptance of a plan in exchange for providing the creditor amenable impairment terms.⁷⁰ In sum, the Eighth Circuit believed that all three concerns demonstrate how the Bankruptcy Code could become an alternative vehicle for entities to achieve refinancing through the courts rather than the marketplace.⁷¹

⁶⁰ *See id.* at 131. The Eighth Circuit further determined that artificial impairment could negatively impact financial markets. *See id.*

⁶¹ *Id.* at 132.

⁶² *See id.*

⁶³ *See id.* at 130–31; *see also* S. REP. NO. 95-989, at 128 (stating that at least one class must accept the plan). *But see In re Polytherm Indus., Inc.*, 33 B.R. 823, 834–35 (W.D. Wis. 1983) (stating that the legislative history of § 1129(a)(10) is “not particularly informative”).

⁶⁴ 7 F.3d at 129.

⁶⁵ *See id.* at 129–30.

⁶⁶ *See id.* at 131–33.

⁶⁷ *Id.* at 132.

⁶⁸ *Id.*

⁶⁹ *Id.*; *cf.* Meltzer, *supra* note 2, at 304–05 (explaining that in the typical artificial impairment case the debtor can easily obtain consent from an unsecured creditor).

⁷⁰ *In re Windsor*, 7 F.3d at 132; *see* POSNER, *supra* note 59, at 375.

⁷¹ *See In re Windsor*, 7 F.3d at 132.

B. *The Fifth Circuit: The Bankruptcy Code Plainly
Allows Impairment of Any Kind*

In *Bowie II*, the Fifth Circuit flatly rejected the Eighth Circuit's interpretation of § 1129(a)(10).⁷² Instead, the Fifth Circuit held that the Bankruptcy Code clearly defines impairment as *any* alteration to existing rights, even if this alteration is merely an exercise of discretion rather than based on economic necessity.⁷³ Furthermore, the court held that, when read plainly, § 1129(a)(10) retains a purpose in the Bankruptcy Code.⁷⁴ Lastly, the court dismissed the Eighth Circuit's policy concerns, explaining that the Bankruptcy Code's good faith requirement adequately protects against confirming inequitable plans through cramdown.⁷⁵

The Fifth Circuit first concluded that the Bankruptcy Code's definition of impairment does not contain any qualifications beyond its plain meaning.⁷⁶ Under the fundamental rules of statutory interpretation, a statute must be read literally where there is no ambiguity.⁷⁷ Accordingly, the *Bowie II* court observed that 11 U.S.C. § 1124 states unambiguously that any alteration of a right, even an enhancement, constitutes impairment, and thus declined to read any other qualifications into the statute.⁷⁸ Turning to 11 U.S.C. § 1123(b)(1), the court did not find any ambiguity introduced by the provision's statement that a plan may "impair or leave unimpaired" any class.⁷⁹ Because § 1129(a)(10) only requires one impaired class to accept the plan for it to be confirmed, the court explained that § 1129(a)(10) does not narrow the meaning of impairment under § 1124 and § 1123(b)(1).⁸⁰

⁷² See 710 F.3d at 245. See generally Meltzer, *supra* note 2, at 310 (noting that few cases have directly addressed this issue).

⁷³ See *Bowie II*, 710 F.3d at 245; *infra* notes 76–80 and accompanying text.

⁷⁴ See *Bowie II*, 710 F.3d at 246–47; *infra* notes 81–85 and accompanying text. See generally *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985) (explaining that when statutory language allows cramdown, Congress intended debtors to use that provision).

⁷⁵ *Bowie II*, 710 F.3d at 247–48; see *infra* notes 86–88 and accompanying text. See generally 11 U.S.C. § 1129(a)(3) (2012) (defining the good faith requirement).

⁷⁶ *Bowie II*, 710 F.3d at 245.

⁷⁷ *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Statutory construction begins by analyzing whether the language has a plain and unambiguous meaning. *Id.*

⁷⁸ *Bowie II*, 710 F.3d at 246. See generally 11 U.S.C. § 1124 (2012) (stating that any alteration is an impairment); Meltzer, *supra* note 2, at 319 (explaining that the Bankruptcy Code cares neither how small the alteration is, nor even if the alteration benefits the impaired party). Moreover, even if the language is ambiguous, the court was not persuaded that the legislative history indicated any discernible intent behind § 1129(a)(10). *Bowie II*, 710 F.3d at 246.

⁷⁹ See *Bowie II*, 710 F.3d at 245 (stating that nowhere in the Bankruptcy Code is impairment distinguished as either economic or discretionary). See generally 11 U.S.C. § 1123(b)(1) (2012).

⁸⁰ See *Bowie II*, 710 F.3d at 245 (stating that reading a motive inquiry into the text of the Bankruptcy Code "warps" the text). See generally 11 U.S.C. § 1129(a)(10).

Second, the Fifth Circuit observed that, despite allowing artificial impairment, § 1129(a)(10) will retain a purpose.⁸¹ In the typical case involving an undersecured lender, the lender's unsecured deficiency claim often controls the unsecured class.⁸² This lender can prevent cramdown by voting against the plan to ensure that no class can accept and that the plan cannot satisfy § 1129(a)(10).⁸³ To satisfy § 1129(a)(10) and achieve confirmation in cases involving an undersecured lender, a debtor can create a small unsecured creditor class and artificially impair the class knowing that this class will accept the plan.⁸⁴ In contrast, prohibiting artificial impairment, as the *In re Windsor* court did, ignores this use of § 1129(a)(10).⁸⁵

Finally, the Fifth Circuit concluded that the Bankruptcy Code's good faith requirement will avoid confirming inequitable plans through cramdown that could otherwise arise from a plain reading of § 1129(a)(10).⁸⁶ For instance, if a debtor incurred a sham debt solely for the purpose of creating an impaired class to accept the plan, a court could block confirmation by finding that this plan was not proposed in good faith.⁸⁷ Although artificial impairment could alone cause a plan to fail the good faith requirement, the Bankruptcy Code does not per se disallow it under § 1129(a)(10).⁸⁸

III. THE BOWIE II DECISION: A GOOD DECISION, BUT HALF DONE

The Fifth Circuit's endorsement of a debtor's use of artificial impairment to satisfy 11 U.S.C. § 1129(a)(10) is consistent with the Bankruptcy Code's text,

⁸¹ See *Bowie II*, 710 F.3d at 245. See generally *In re Windsor*, 7 F.3d at 131 (noting that in typical single-asset bankruptcy cases, secured creditors often use § 1129(a)(10) to prevent cramdown and in so doing are employing the Bankruptcy Code's broad definition of impairment in § 1124 to effect a clear purpose).

⁸² *Bowie II*, 710 F.3d at 246–47; see Meltzer, *supra* note 2, at 281–82 (explaining that this is due to the large-value loan of the undersecured creditor); *id.* at 282–85 (outlining the typical fact pattern in a Chapter 11 bankruptcy case involving an undersecured creditor). A creditor is undersecured when the value of the underlying asset is less than the amount the debtor owes the creditor. See Meltzer, *supra* note 2, at 282–85.

⁸³ See Meltzer, *supra* note 2, at 281–82. An undersecured lender holds both a secured claim and an unsecured claim, and is able to prevent plan confirmation by exercising its right to vote pursuant to each claim. *Id.*

⁸⁴ *Id.* at 282–85. The strategic isolation of a creditor's unsecured deficiency claim from smaller creditor claims for the purpose of creating one class that the debtor knows will accept the plan is called "artificial classification." *Id.* at 282. The debtor must usually create a separate small unsecured creditor class because regulations incentivize the secured creditor to realize present losses through liquidation rather than reorganization. Carlson, *supra* note 8, at 340.

⁸⁵ *Bowie II*, 710 F.3d at 246–47; *In re Windsor*, 7 F.3d at 131.

⁸⁶ *Bowie II*, 710 F.3d at 247–48; see also Meltzer, *supra* note 2, at 314–15 (explaining that courts approving of artificial impairment do not treat it as a good faith issue, but rather determine if the good faith requirement is met by looking at the totality of the circumstances).

⁸⁷ 11 U.S.C. § 1129(a)(3) (2012); *Bowie II*, 710 F.3d at 248; see also Mojdehi & Gertz, *supra* note 1, at 150 (explaining that the good faith requirement presupposes a valid reorganizational purpose).

⁸⁸ See *Bowie II*, 710 F.3d at 248; *Bowie I*, 454 B.R. at 245 n.17.

history, structure, and policy.⁸⁹ The Fifth Circuit's insistence that the Bankruptcy Code "must be read literally," however, glosses over the more nuanced approach that the Supreme Court has undertaken when it examines the Bankruptcy Code.⁹⁰ In addition to the Bankruptcy Code text, the historical development of bankruptcy doctrine and the structure of the Bankruptcy Code indicate that Congress purposefully allows artificial impairment.⁹¹ Because the *Bowie II* decision did not analyze the structure and historical development of the Bankruptcy Code in this manner, it missed the opportunity to create a convincing argument that might sway other courts to adopt a plain meaning reading of § 1129(a)(10).⁹²

Both the historical development and the structure of the Bankruptcy Code indicate a policy in favor of permitting artificial impairment, which facilitates reorganization.⁹³ The U.S. Supreme Court has identified three interpretive el-

⁸⁹ See *infra* notes 90–105; Meltzer, *supra* note 2, at 316 (explaining that for a court to find that § 1129(a)(10) prohibits artificial impairment it must look past the "literal language" of the provision to a statutory purpose). See generally *Bowie II*, 710 F.3d 239, 245–46 (5th Cir. 2013) (holding that to find artificial impairment does not satisfy § 1129(a)(10) injects meaning into the definition of impairment that Congress explicitly rejected).

⁹⁰ See *Bowie II*, 710 F.3d at 246; Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173, 275 (2000) (explaining that the Supreme Court decisions on the Bankruptcy Code usually involve determinations not only of the text, but of the structure and history of the Bankruptcy Code as well); see also *Johnson v. Home State Bank*, 501 U.S. 78, 87–88 (1991) (looking beyond the text of the Bankruptcy Code to its structure and finding that embedded policy decisions therein); *Grogan v. Garner*, 498 U.S. 279, 288–90 (1991) (analyzing historical revisions to the Bankruptcy Code to determine the meaning of the text at issue).

⁹¹ See Unger, *supra* note 1, at 579 (stating that the Bankruptcy Code provides no textual basis for prohibiting artificial impairment); *infra* notes 93–105. See generally Gebbia-Pinetti, *supra* note 90, at 297 (explaining that lower courts should develop structural and historical development analyses of the Bankruptcy Code in their opinions).

⁹² Cf. Gebbia-Pinetti, *supra* note 90, at 297 (discussing the importance of analyzing the structure and historical development of the Bankruptcy Code); see also *supra* notes 72–88 and accompanying text) (outlining the three major reasons the Fifth Circuit advances for finding artificial impairment permissible, none of which principally use the structure or historical development of the Bankruptcy Code as rationale). See generally Polivy, *supra* note 3, at 193 (stating that the majority of courts hold that artificial impairment does not satisfy § 1129(a)(10)); Unger, *supra* note 1, at 542 (discussing the disagreements over artificial impairment among federal courts). Compare *In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 132 (8th Cir. 1992) (looking to the effects on financial markets to say that Congress could not have allowed artificial impairment), with *Lam*, *supra* note 15, at 995, 1004–05 (determining that whether single-asset debtors should not be able to artificially impair a class is a policy decision to be left to Congress and that Congress established its position through gradual liberalization of cramdown and the concept of impairment). Importantly, single-asset real estate bankruptcies have become increasingly common, causing increased debate over artificial impairment. Joseph J. Wielebinski & Davor Rukavina, *Bankruptcy*, 65 SMU L. REV. 279, 287 (2012).

⁹³ See Unger, *supra* note 1, at 576–77 (detailing the historical developments to § 1124 and § 1129, resulting in the increased permissiveness of artificial impairment); *id.* at 544–45 (explaining that the purpose of Chapter 11 reorganization is to revitalize a failing enterprise and that cramdown is often the last hope for a debtor to achieve this goal). See generally *Johnson*, 501 U.S. at 87–88 (examining Bankruptcy Code policy through its structure); *Grogan*, 498 U.S. at 288–90 (examining historical revisions to the Bankruptcy Code); Gebbia-Pinetti, *supra* note 90, at 295–96 (stating that a strict tex-

ements for analyzing the Bankruptcy Code: its text, structure, and history.⁹⁴ Though the Court states that in some cases the text alone can determine the outcome, the Justices rarely agree on when the text is in fact determinative.⁹⁵ Problematically then, although the Fifth Circuit analyzed the text of 11 U.S.C. § 1124 and 11 U.S.C. § 1123(b)(1) in concert with § 1129(a)(10) to determine the definition of impairment, the court did little to bolster its textual reading.⁹⁶

The historical development of the term “impairment” reveals Congress’s intent to remove limitations on a plan’s ability to impair creditors.⁹⁷ Congress has consistently ensured minimal constraints on what constitutes impairment for a class to accept a plan and allow a debtor to satisfy § 1129(a)(10).⁹⁸ Had Congress not intended artificial impairment to be permissible, it would not have revised § 1124 to allow “any” change in a creditor’s rights to satisfy § 1129(a)(10).⁹⁹ Furthermore, the Eighth Circuit relied on unpersuasive legis-

tual approach usually split the Court, while opinions examining text, structure, and history together resulted in more near-unanimous opinions).

⁹⁴ See Gebbia-Pinetti, *supra* note 90, at 275; see also *Rake v. Wade*, 508 US 464, 471 (1993) (holding that the Court should first examine the text of the Bankruptcy Code); *Johnson*, 501 U.S. at 87–88 (holding that the Court can analyze Bankruptcy Code policy through its structure); *Grogan*, 498 U.S. at 288–90 (holding that the historical development of the Bankruptcy Code can determine textual meaning).

⁹⁵ See Gebbia-Pinetti, *supra* note 90, at 270–71 (explaining that the Court unanimously agreed in only four of the forty-one non-constitutional Bankruptcy Code cases it heard up through 2000 that the text alone was determinative). In total, sixty-three percent of the cases were decided on non-textual grounds, whereas only thirty-seven percent were decided on textual grounds. *Id.* at 275. See, e.g., *Rake*, 508 U.S. at 465–66 (holding unanimously that the text of the Bankruptcy Code at issue was clear); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 389–92 (1993) (holding that though the language of the Bankruptcy Code at issue alone was not determinative, the historical development of the Bankruptcy Code confirmed its meaning).

⁹⁶ See *Bowie II*, 710 F.3d at 246 (hinting merely that Congress had already considered a materiality requirement and rejected it); Gebbia-Pinetti, *supra* note 90, at 297 (explaining that courts should write opinions discussing Bankruptcy Code structure and the historical development of bankruptcy doctrine); *supra* notes 72–80 and accompanying text (detailing the *Bowie II* court’s analysis of impairment).

⁹⁷ See Unger, *supra* note 1, at 576 (explaining that because Congress did not retain language that would have prohibited artificial impairment, Congress did not intend to prohibit artificial impairment). Compare 11 U.S.C. § 507 (repealed 1979) (stating that only creditors materially and adversely impacted by a plan are affected), with *id.* § 1124 (2012) (stating that any change to a creditor’s interest impairs the creditor). See generally *In re Polytherm Indus., Inc.*, 33 B.R. 823, 834 (W.D. Wis. 1983) (explaining that the concept of impairment derives from the older bankruptcy term “affected creditor”).

⁹⁸ See Lam, *supra* note 15, at 1003 (stating that Congress specifically abandoned the “materially and adversely affected” standard of the Bankruptcy Act to remove any question of degree of impairment when determining if a class has the power to vote); see also 11 U.S.C. § 1124 (indicating, without qualifications, that any change to a creditor’s interest is impairment).

⁹⁹ Cf. Unger, *supra* note 1, at 576 (explaining that because Congress did not retain language that would have prohibited artificial impairment, Congress did not intend to prohibit it); *id.* at 577 (stating that § 1124 does not expressly or impliedly prohibit impairment, and even specifies three ways in which a plan may leave claims unimpaired); see also John R. Clemency & Nancy J. March, “Artificial Impairment” and the Elusive Accepting Impaired Class in Single Asset Chapter 11 Bankruptcies, 12

lative history and economic policy to rule against allowing artificial impairment.¹⁰⁰ Conversely, the Fifth Circuit's textual reading is supported by the statutory development of bankruptcy doctrine.¹⁰¹

Furthermore, when a plan otherwise conforms to the requirements for a valid reorganization plan and furthers the purposes of Chapter 11 reorganizations, allowing artificial impairment to satisfy § 1129(a)(10) is consonant with the structure of the Bankruptcy Code.¹⁰² The Bankruptcy Code's structure indicates a policy towards both protecting the debtor's equity interest and avoiding an inequitable plan confirmation despite any real creditor support.¹⁰³ Indeed, the structure of the Bankruptcy Code as a whole indicates that artificial impairment serves a legitimate purpose, as it allows a debtor to create a small, secured class that will accept the plan and satisfy § 1129(a)(10).¹⁰⁴ Particularly

AM. BANKR. INST. J. 21, 21 (1993) (explaining that § 1129(a)(10) was changed partly because, under the old Bankruptcy Code, creditors wielded too much influence over creditors during reorganization). *But see* Meltzer, *supra* note 2, at 319–20 (arguing that allowing artificial impairment to satisfy § 1129(a)(10) defeats the provision's purpose and that bankruptcy courts should employ something akin to a reasonableness standard to ensure the provision is not deprived of all meaning).

¹⁰⁰ See Scott F. Norberg, *Debtor Incentives, Agency Costs, and Voting Theory in Chapter 11*, 46 U. KAN. L. REV. 507, 537–38 (1998) (explaining that the 1978 legislative report on the Bankruptcy Code provided no insight into § 1129(a)(10) and that there was no report on the 1984 revisions). See generally *In re Windsor*, 7 F.3d at 132 (citing to 1978 legislative history as support for its conclusion that Congress intended for § 1129(a)(10) to ensure creditor support for a plan); *supra* notes 57–71 (discussing the *In re Windsor* court's reasoning in full). Note that when the Supreme Court analyzes the Bankruptcy Code, it disfavors relying upon on isolated legislative history. Gebbia-Pinetti, *supra* note 90, at 296. Moreover, the Court disfavors appeals to policy concerns unsupported by the Bankruptcy Code itself. *Id.*

¹⁰¹ See *Bowie II*, 710 F.3d at 245; *supra* notes 97–99 and accompanying text; see also Unger, *supra* note 1, at 579 (stating that because the overriding purpose of the Bankruptcy Code is to rehabilitate debtors, allowing artificial impairment is consistent with this goal).

¹⁰² See Unger, *supra* note 1, at 576–78 (explaining that not allowing artificial impairment runs counter to policies embedded in the Bankruptcy Code because it gives a single creditor the power to veto a plan, even one that protects the hostile creditor's interest, where in all ways the plan fulfills the requirements of reorganization); *infra* notes 103–105 and accompanying text.

¹⁰³ See Mojdehi, *supra* note 1, at 151 (stating that a purpose of reorganization is to produce a return for equity investors); Unger, *supra* note 1, at 579 (concluding that because Chapter 11's purpose is the debtor's rehabilitation and ensuring an equitable plan, it is groundless to prohibit artificial impairment); see also 11 U.S.C. § 1129(a)(3) (2012) (establishing a good faith requirement for all plan confirmations). See generally *In re Windsor*, 7 F.3d at 132 (reasoning that the potential for this inequity supported its holding that Congress did not intend artificial impairment); Gebbia-Pinetti, *supra* note 90, at 280 (suggesting that the Court looks to the Bankruptcy Code to determine underlying policy, not to external sources).

¹⁰⁴ See Unger, *supra* note 1, at 577–78 (stating that the structure of the Bankruptcy Code indicates an embedded policy towards allowing artificial impairment); see also *supra* notes 81–85 and accompanying text (discussing this use of § 1129(a)(10) in full). The good faith requirement will prevent debtors from using artificial impairment to confirm a plan without any real creditor support. See 11 U.S.C. § 1129(a)(3); *Bowie II*, 710 F.3d at 248; see also Meltzer, *supra* note 2, at 314–15 (explaining that courts look to the totality of the circumstances to determine if the good faith requirement is met); Mojdehi & Gertz, *supra* note 1, at 150 (explaining that the good faith requirement presupposes a valid reorganizational purpose).

in cases involving an undersecured creditor with an opportunity to control multiple classes, artificial impairment may be the only practical tool the debtor has to protect itself.¹⁰⁵

CONCLUSION

Driven by basic principles of statutory interpretation, the U.S. Court of Appeals for the Fifth Circuit's 2013 decision *In re Village at Camp Bowie* held that the plain language of 11 U.S.C. § 1129(a)(10) is unambiguous, and so the provision does not involve a motive inquiry into impairment. In doing so, the court rejected the Eighth Circuit's holding that § 1129(a)(10) must incorporate a motive inquiry to protect congressional intent. Although the Fifth Circuit's statutory interpretation of § 1129(a)(10) is correct, the court could have bolstered its argument by explaining how the historical development of bankruptcy doctrine and the structure of the Bankruptcy Code supports a role for artificial impairment in certain situations. Thus, the court missed an important opportunity in the ongoing debate about the propriety of artificial impairment and the role that § 1129(a)(10) plays in plan confirmations.

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¹⁰⁵ See Unger, *supra* note 1, at 576–78 (explaining that without artificial impairment, the undersecured creditor has complete power to veto a reorganization plan). For instance, artificial impairment may protect a debtor where a vulture creditor is seeking a windfall through foreclosure at the debtor's expense, as Western attempted to do in *Bowie II*. See 710 F.3d at 247 (stating that Western did not dispute that the Debtor had significant equity in the project, nor that the reorganization plan would allow it to stay current on its restructured payments); *id.* at 242 (stating that Western purchased the notes at a face-value discount to displace the Debtor as the owner of the property).

