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Class Claims: Estimation, Classification, and Confirmation

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I. Overview

- i. Section 502(c) of the Bankruptcy Code provides for the estimation of contingent or unliquidated claims for the purpose of allowance if the liquidation of such claims would unduly delay the administration of the case.
- ii. Bankruptcy cases will often involve a need to address aggregated claims, class action or otherwise, including antitrust claims, product liability claims, mass tort claims, and securities claims. With the potential exception of securities claims (which are often subordinated under Bankruptcy Code section 510(b)), aggregated claims often drive the bankruptcy case, such that any progress towards reorganization is dependent on the liquidation or estimation of such claims.
- iii. The determination whether to liquidate or estimate a class claim may depend, in large part, on whether, and to what extent, a parallel class action is proceeding and has been certified outside of bankruptcy.¹
 - a. If, prior to the petition date, a class has been certified in a non-bankruptcy forum, liquidation may be preferable to estimation. Particularly if the class action is trial ready, the bankruptcy court can lift the automatic stay and allow the trial to proceed efficiently. Any verdict—or settlement—can then be incorporated into the debtor’s plan of reorganization.
 - b. On the other hand, if a class has yet to be certified, liquidation in the non-bankruptcy forum may unduly delay the case. In these circumstances, the bankruptcy court is likely to determine that the underlying claims should be addressed in the bankruptcy process, through motions for summary judgment (to determine whether the claims are legally valid and need to be quantified at all) and/or through some form of estimation.
- iv. There is little case law on the estimation of class claims, but the estimation of mass tort and other aggregated claims provides a useful reference. The estimation of such claims is heavily dependent on expert testimony and the use of statistical models. The methodologies of estimation are discussed later in this outline.

¹ This may also influence the bankruptcy court’s decision whether to permit a class claim to be filed. This issue is addressed elsewhere in these materials. See Leonard H. Gerson, *Class Proofs of Claim and Class Actions in Bankruptcy: Clarifying the Law, Improving the Process, and Expanding the Use of Class Actions*.

- v. Upon the reduction of an aggregated claim to a numerical value, whether through liquidation or estimation, interesting issues arise as to classification and voting.
 - a. With respect to classification, it is permissible and fairly common to classify aggregated claims separately. In the case of a settled class action, separate classification may be a condition of the settlement.²
 - b. With respect to voting, questions arise as to: (i) who is entitled to vote; (ii) whether the vote of a class claim constitutes a single vote or multiple votes; and (iii) how votes are to be weighted. These issues are discussed later in this outline. It should be noted, however, that such issues are generally addressed in the case of a settlement because the settlement agreement is likely to contain provisions governing the voting and treatment of the class claim.

II. The Decision to Liquidate or Estimate

- i. In determining whether to lift the automatic stay and allow liquidation of a claim, or instead to estimate such claim, a court must balance the competing interests of reaching accurate and final valuation of claims and the need to expedite the bankruptcy case. In the class action context, the decision will likely be dictated in large part by how far the class action has progressed in the non-bankruptcy forum. If the class action is trial ready, or nearly so, the court is likely to lift the automatic stay to permit liquidation by trial.
- ii. Although it is often assumed that estimation will be ordered with respect to aggregative claims that have not advanced very far in a non-bankruptcy forum, this is not always the case, for several reasons.³
 - a. First, estimation proceedings, like liquidation, can be time-consuming and inefficient. Indeed, merely deciding on an appropriate estimation methodology may involve costly and prolonged litigation.
 - b. Second, in some cases estimation for purposes of allowance may lack the finality of liquidation and create the potential need for largely duplicative proceedings at the time of distribution.⁴

² Class action settlements are addressed elsewhere in these materials.

³ *In re Dow Corning Corp.*, 211 B.R. 545, 563-66 (Bankr. E.D. Mich. 1997), contains a useful analysis of the costs and benefits of estimation and liquidation.

⁴ This caveat is especially true in the case of personal injury claims. *See, e.g., In re Hoffinger Indus., Inc.*, 307 B.R. 112, 118 (Bankr. E.D. Ark. 2004) (“This Court may not estimate contingent or unliquidated personal injury or wrongful death claims for purposes of distribution, but may do so for purposes of determining the feasibility of a plan of reorganization.”); *In re Dow Corning Corp.*, 211 B.R. 546, 566 (Bankr. E.D. Mich. 1997) (“[O]ne must add to the list of time considerations associated with estimation the fact that once estimation is completed and a plan of reorganization confirmed, individual tort claims would still have to be liquidated.”). In addition, under section 502(j) of the Bankruptcy Code, any claim that is incorrectly estimated may be subject to reconsideration. *See Woburn Assocs. v. Kahn (In re Hemingway Transport, Inc.)*, 954 F.2d 1, 8 n 8 (1st Cir. 1992).

- c. Third, estimation is an imperfect process, and the best estimates may prove to be erroneous.
 - d. Fourth, the court in which the class action is pending may have a greater familiarity with the case, making it better suited to oversee it.
 - e. Finally, courts have different levels of tolerance for delay.⁵
- iii. In addition to the factors that a court must consider, there are often strategic considerations to the choice between estimation and liquidation. With respect to personal injury claims, one of the most important considerations is the impact that estimation will have on the claimants' right to a jury trial. While that right cannot be abrogated, at least for personal injury claimants, an estimation for the purposes of allowance and plan confirmation may effectively resolve the claim. Thus, from a debtor's perspective, estimation avoids the uncertainties of a jury trial.⁶

III. Liquidation

- i. Class actions are typically resolved by motion practice or settlement. Perhaps for this reason, there are few, if any, instances of a bankruptcy court lifting the automatic stay to permit trial of a class action in a different forum. However, it is not uncommon for a plan of reorganization to incorporate the terms of a class action settlement.
 - a. Elite Model Management Corp.
 - At the time Elite Model filed for bankruptcy, three class actions were pending against it, including one in federal court that had been pending for a year-and-a-half and in which class certification had been ordered. Given the stage to which the federal court class action had progressed, there were potentially strong arguments for lifting the automatic stay and allowing liquidation of the claim, rather than pursuing estimation. However, the decision whether to liquidate or estimate was mooted by a class settlement.
 - Approval of the settlement was pursued concurrently in bankruptcy court and the district court in which the class action was pending. Elite's plan provided that "[c]ounsel to the [class] Representative shall use its best efforts to have the terms of the global settlement set forth in the Plan approved by the United States District Court overseeing the [class action] . . . within thirty (30) days

⁵ Compare *In re Dow Corning Corp.*, 211 B.R. 545, 565 (Bankr. E.D. Mich. 1997) (court refused to conduct estimation proceedings in spite of recognition that adjudication of tort claims pending against debtor could take "several years") with *In re G-I Holdings, Inc.*, 323 B.R. 583, 600 (Bankr. D. N.J. 2005) (court held that estimation was appropriate in light of hundreds of thousands of asbestos claims, liquidation of which would "undoubtedly cause undue delay in the administration of the bankruptcy case").

⁶ A full discussion of the impact of estimation on jury trial rights is beyond the scope of this outline. The following cases are instructive: *In re G-I Holdings, Inc.*, 323 B.R. 583 (Bankr. D. N.J. 2005); *In re Dow Corning Corp.*, 211 B.R. 545, 561, 569 (Bankr. E.D. Mich. 1997).

after the Confirmation Date.” Approval by the district court was a condition precedent to the effectiveness of the plan.

b. Cumberland Farms, Inc.

- At the time of its bankruptcy, Cumberland Farms was the subject of a class action suit. The class action was subsequently settled, and as part of the proposed settlement, the parties filed a joint motion in bankruptcy court requesting the creation of a mandatory class that would include all claimants who had previously filed proofs of claim arising out of the subject matter of the class action suit. The bankruptcy court granted the motion and, at the request of the parties to the settlement, the court used the class action settlement agreement as a vehicle for estimating the class claim. *See Adams v. Cumberland Farms, Inc.*, 86 F.3d 1146, 1996 WL 228567, *1 (1st Cir. May 7, 1996) (unpublished).
- In addition to using the class action settlement agreement as a vehicle for estimating the claims of the individuals who were involved in the class action lawsuit, the bankruptcy court also used the settlement agreement as a basis for estimating the claim of a claimant who had brought a separate lawsuit against Cumberland Farms arising out of similar facts. This claimant appealed the court’s use of the settlement agreement for purposes of the estimation of her claim. On appeal, the First Circuit affirmed the estimation, noting that “we find no reason to think that a court-approved settlement in such a strikingly parallel proceeding would not provide a reasonable benchmark for estimating the value of [the individual claimant’s] claims.” *Id.* at *4.

IV. Summary Judgment

- i. Even if the bankruptcy court does not lift the stay to permit liquidation of aggregated claims in the non-bankruptcy forum, it is not necessarily the case that the claims will thereafter be addressed solely through estimation proceedings. Frequently a debtor will seek to have an aggregated claim disallowed prior to estimation as a matter of law. For example, a debtor may move for summary judgment to disallow some or all pending claims on the ground that they are not supported by sufficient admissible scientific evidence, necessitating a *Daubert*⁷ hearing or “science trial.” This technique may be used on its own in an attempt to render estimation unnecessary or in tandem with other estimation proceedings.
- ii. The W.R. Grace Science Trial
 - a. As of the petition date in the W.R. Grace bankruptcy, several property damage class actions were pending against the debtors concerning an attic insulation product called ZAI. Before permitting the filing of individual or class claims arising out of the debtors’ production of ZAI, the court decided to conduct a

⁷ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

science trial regarding “the threshold issue of what science demonstrates with regard to whether or not the presence of ZAI in the home creates an unreasonable risk of harm.” The court was concerned, based on the huge number of potential ZAI claims, that special procedures would be needed to administer the ZAI claims process; it was the court’s view that the type of process that was needed would be informed by the science trial. The science trial—which was decided on cross motions for summary judgment—amounted to a contest of experts. The court concluded, based on the expert evidence that was offered and its evaluation of the evidence in accordance with the standards enunciated in *Daubert*, that ZAI home attic insulation did not create an unreasonable risk of harm. While this determination did not fully dispose of all ZAI claims, it amounted to a substantial hurdle for ZAI claimants and led to settlement of the claims.

- iii. Because a *Daubert* hearing or science trial may result in the disallowance of a claim, some have questioned whether, in the case of personal injury claims, such proceedings violate 28 U.S.C. §§ 157(b)(2)(B), 157(b)(5) and 1411(a), which preserve the right to a jury trial in personal injury cases. The most comprehensive treatment of this issue came in the Dow Corning bankruptcy. There, the bankruptcy court addressed the difference between “allowance or disallowance” and “liquidation,” and concluded that it was authorized to enter a final order on a motion for summary judgment disallowing personal injury claims. The court interpreted “allowance” quite broadly, writing that the term “subsumes ‘liquidation,’ since the latter involves fixing the amount of a claim, but does not involve the determination of its validity.” *In re Dow Corning Corp.*, 215 B.R. 346, 359 (Bankr. E.D. Mich. 1997). The court noted parenthetically that it was “curious” that “extensive protection [was] afforded to the quantification of a tort creditor’s claim, yet denied in large part to the even more critical question of whether the claim is legally valid.” *Id.* at 359, n 14. Nevertheless, the court appears to have concluded that allowance would be stripped of its meaning if it did not include within its scope the ability to determine the validity of a claim. The court noted that “if a claim is disallowed on summary judgment, there is no longer a claim in existence to ‘liquidate.’” *Id.* at 361.

V. Estimation

A. Overview

- i. The estimation of aggregated claims is a complicated endeavor that is often prolonged by spirited litigation concerning the appropriate method of estimation. Courts are afforded wide discretion to choose the method they deem appropriate. However, regardless of the method employed, the evidence will consist primarily of expert reports and expert testimony. Statistical models are almost certain to play an important role.
- ii. Class claims appear to have been an infrequent subject of estimation. This is not surprising, given that: (i) a class claim that is related to a certified class action in a non-bankruptcy forum is likely to be resolved through settlement or motion practice in the non-bankruptcy forum; and (ii) a class claim that has no non-bankruptcy analog

is rather unlikely to be certified in bankruptcy.⁸ In the absence of case law on the estimation of class claims, the estimation of mass tort claims and other aggregated claims provides a useful analogy.

B. Methodology and Guiding Principles

- i. While there are many ways to estimate the aggregate value of claims that are too numerous to analyze individually, two strategies predominate. The first relies upon historical data to predict current (and, if necessary, future) liability. The second utilizes what could be described as truncated discovery to obtain a snapshot of the most important characteristics of existing claims. Often the two are used in tandem, and the details of the procedures vary somewhat from case to case. Regardless of the procedure used, the goal is to appraise the claims on the basis of what would have been a fair resolution of the claims in the absence of bankruptcy.⁹

a. Historical Data

- Litigation history (including settlement history) is relevant to estimation.¹⁰ However, there are caveats, the most notable being a general recognition that litigation and settlement strategies in the run-up to bankruptcy are often influenced by the overwhelming number of lawsuits that have been filed.¹¹
- Claimants tend to favor the use of historical data to extrapolate current liabilities, for two reasons. First, it minimizes the burden of discovery and helps shield from scrutiny types of claims that debtors may attack as questionable.¹² Second, debtors who are forced into bankruptcy by mass tort liability will often have settled claims in bulk and sometimes with limited consideration of the merits of the claims in the years prior to bankruptcy, with the resulting effect that historical settlement values will be somewhat exaggerated.

⁸ See generally Leonard H. Gerson, *Class Proofs of Claim and Class Actions in Bankruptcy: Clarifying the Law, Improving the Process, and Expanding the Use of Class Actions* (discussing the reluctance of bankruptcy courts to certify class claims) (included as part of these materials).

⁹ See *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 722 (D. Del. 2005) (rejecting notion that estimation should reflect value of claims as measured by reorganization plan's trust distribution procedures); *In re Eagle-Picher Indus., Inc.*, 189 B.R. 681, 683 (Bankr. S.D. Oh. 1995) (same).

¹⁰ See *In re Eagle-Picher Indus., Inc.*, 189 B.R. 681, 686 (Bankr. S.D. Oh. 1995); *In re Federal-Mogul Global Inc.*, 330 B.R. 133, 140, 157 (D. Del. 2005).

¹¹ See generally *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723-24 (D. Del. 2005) (discussing various factors that may contribute to inflated settlements and verdicts in years prior to bankruptcy).

¹² See *In re G-I Holdings, Inc.*, 2006 WL 2403531, at *12 (Bankr. D. N.J. Aug. 11, 2006) (in which asbestos claimants' committee argued that court should estimate debtors' asbestos liability based on its claim resolution and litigation history, without resorting to claimant discovery with attendant costs and delays).

b. Questionnaires and Claim Forms

- In many cases, historical data is supplemented by a limited amount of data regarding the actual still-pending claims. In the case of aggregated claims, it is impractical to engage in exhaustive discovery and evidence-gathering with respect to each individual claim. Instead, as a means of obtaining certain basic information about the claims, a number of courts have employed questionnaires and/or claim forms, which are sent to known and potential claimants.¹³ (As an alternative to seeking information from all claimants, the court may authorize discovery from a representative sampling of claimants.¹⁴) The questionnaires and claim forms request certain critical information concerning the claims, which is then entered into a database for analysis by experts.
- Debtors may insist on the use of questionnaires and claim forms to supplement historical data (provided it can be accomplished expeditiously), in the belief that historical data is skewed.

c. Other Approaches

- Bellwether Trials
 - An estimation that proceeds by using historical data to make predictions about current claims suffers from at least two flaws. First, questionnaires and claim forms, even detailed ones, are a weak proxy for the test of a full-blown trial or evidentiary hearing on each claim. Second, even assuming the accuracy of the information concerning a given claim, it may not necessarily be the case that such claim, if tried or settled today, would receive the same payout as similar claims have in the past.
 - One technique that attempts to address these shortcomings is to lift the stay selectively to permit full trials of a representative sampling of the aggregated claims. Although such “bellwether trials” have been used in class actions outside of bankruptcy,¹⁵ the idea of employing them in aid of estimation has not gained significant traction in bankruptcies involving aggregated claims. However, the concept has been proposed in several cases and was endorsed by the court in *In re Dow Corning Corp.*, 211 B.R. 545 (Bankr. E.D. Mich. 1997). The court in *Dow Corning* proposed the following procedures:

¹³ See, e.g., *In re USG Corp.*, 290 B.R. 223, 227-29 (Bankr. D. Del. 2003).

¹⁴ See, e.g., *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 699 (4th Cir. 1988).

¹⁵ See *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-86 (9th Cir. 1996); *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 653 (E.D. Tex. 1990).

- “If liability is found at the general causation stage, the sampling process could begin with the development of a detailed informational questionnaire that each claimant would be required to complete. The completed questionnaires would be used to divide the tort claimants into appropriate subgroups. Next, a random sample of tort claimants would be chosen from each subgroup. The number chosen would have to be sufficient to create statistically relevant results that could then be extrapolated to the rest of the members of the subgroup. Each of the randomly selected tort claimants would then receive a jury trial. Based on the jury findings, linear regression equations would be developed. If the process is determined to be an estimation, the juries could even be asked to decide questions not specific to the individual plaintiffs before them. For example, the plaintiff may be 36 years old. However, the jury could be asked to decide how their determination would have been affected if the plaintiff had been 44 years old, etc. By doing this, more detailed linear regression formulas could be developed that take account of a larger number of factors bearing upon both specific causation and damages. This, in turn, could lead to a greater accuracy in the results extrapolated to each tort claimant.”
Dow Corning, 211 B.R. at 597.

d. Court-appointed Experts

- Regardless of the method of estimation that is chosen, the court may find it useful to invoke its authority under Rule 706 of the Federal Rules of Evidence to enlist the assistance of a court-appointed expert.
- The A.H. Robins bankruptcy provides a good example. There, the court appointed an independent expert to develop a data base regarding Dalkon Shield claims. The interested parties all retained experts to assist the court-appointed expert. Over the course of a year and a half, the experts collected data, primarily through the use of questionnaires and claim forms which were sent to over 195,000 claimants. Each of the experts hired by the parties-in-interest then used the data in the database to arrive at an estimation. On appeal, the Fourth Circuit approved of the use of the court-appointed expert, succinctly stating the benefits of such utilization as follows: “the procedural steps which were taken were all done by consensus among the experts representing all of the interests, so that the conclusions which the various experts drew from the evidence or the findings of the court from the evidence were the only things left open to exception.” *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 699 (4th Cir. 1988).
- Court-appointed experts may also provide the court with input in connection with *Daubert* motions.

- The appointment of an expert is to be distinguished from the appointment of a special master, the latter being specifically forbidden in bankruptcy cases under Rule 9031 of the Federal Rules of Bankruptcy Procedure.¹⁶

C. The Difficulty of Estimation as Grounds for Rejecting a Class Claim

- i. As is discussed elsewhere in these materials, many bankruptcy courts are somewhat disinclined to permit the use of class claims. Not surprisingly, then, there is some suggestion in the case law that the delay that would be caused by estimation of a class claim might factor in a court's analysis of whether to permit the use of the class claim format in a particular case.
 - a. In *In re Chateaugay Corp.*, 104 B.R. 626 (S.D.N.Y. 1989), the court rejected the general argument that class claims were impermissible in bankruptcy due to the excessive delays and valuation problems that would result. The court wrote that “[g]iven that § 502(c)(1) specifically provides for the expeditious estimation of unliquidated contingent claims such as the class claims made in the case at hand . . . there is no reason to think that permitting the filing of class claims will cause special delay or uncertainty in settling the debtor’s estate.” *Id.* at 633. However, the court noted, without further elaboration, that “the right to file class proofs of claim will not impose any significant additional burden on the bankruptcy court because it retains discretion to reject proofs of claim filed on behalf of a class in appropriate circumstances.” *Id.*
 - b. In *In re Mortgage & Realty Trust*, 125 B.R. 575 (Bankr. C.D. Cal. 1991), in determining the propriety of certification of a class claim, the court indicated that it was required to consider the benefits that generally support class certification, including, among others, the “efficiency of a class proof of claim.” *Id.* at 580. The court then found that the proposed class claim would promote efficiency: “While it may frequently be necessary to hold up distribution under a plan of reorganization until the merits of a class claim are determined or estimated, no such delay is necessary in this case. All other creditors are members of higher-ranking classes, and may be paid whatever the result of the class claim. In addition, because of the minor exposure of the debtor to the class claim in this case, in relation to the assets of the debtor, the debtor can simply reserve an appropriate fund to cover the entire exposure on the class claim without impacting the remainder of the plan.” *Id.*¹⁷
- ii. The disallowance of a class claim on the basis that its estimation would be difficult would seem to be an extreme measure. A possible alternative would be to allow the

¹⁶ See *In re G-I Holdings, Inc.*, 2006 WL 2403531, at *20 (Bankr. D. N.J. Aug. 11, 2006) (rejecting proposed estimation procedures which called for appointment of independent expert medical panel to evaluate asbestos claims).

¹⁷ Compare *In re A.H. Robins Co.*, 89 B.R. 555, 562 (E.D. Va. 1988) (disallowing claims based on perceived impossibility of estimating punitive damages).

claim, but defer estimation until after voting on a plan of reorganization, in the hopes that the outcome of voting would render estimation unnecessary. Several courts have adopted this “wait and see” approach.¹⁸

VI. Classification and Confirmation

A. Classification

- i. Under basic principles of bankruptcy law, it is generally permissible to classify class claims separately in a plan of reorganization. By the same token, classification with other similar claims is permissible.¹⁹ The decision whether to create a separate class may be dictated by whether or not the class action has settled.
 - a. In the case of a settled class action, the terms of the settlement are likely to include provisions governing classification and treatment in a plan of reorganization.
 - In the Elite Model bankruptcy, the claim of the settled class action was separately classified.
 - By contrast, in the W.R. Grace bankruptcy, the proposed plan of reorganization provides for the classification of a settled asbestos property damage class action in the same class as other asbestos property damage claims. However, the other asbestos property damage claims are to be paid in full, while the class action claims are impaired and are to be paid in accordance with the terms of the settlement.
 - b. If a class action has not settled—or if the settlement contains no terms relating to classification—then the usual statutory standards and strategic considerations will govern classification of the claim.

B. Confirmation

- i. The presence of class claims in a bankruptcy can lead to certain unique complications in voting and confirmation. Among other things, the inclusion of a class claim can lead to questions concerning: (i) who is permitted to (or likely to) vote the class claim; and (ii) whether the class of claims that includes the class claim has accepted the plan under the requirements of 11 U.S.C. § 1126(c).

¹⁸ See *In re Frascella Enterprises, Inc.*, 360 B.R. 435, 453 (Bankr. E.D. Pa. 2007) (no need to estimate class claim because regardless of outcome of estimation, plan was unconfirmable under sections 1129(a)(3) and (11)); *In re Dow Corning Corp.*, 211 B.R. 545, 573 (Bankr. E.D. Mich. 1997) (“Only if the outcome of the ‘2/3 by amount’ vote is unclear will it be necessary to embark upon this burdensome task.”).

¹⁹ See *In re Frascella Enterprises, Inc.*, 360 B.R. 435, 442-43 (Bankr. E.D. Pa. 2007) (rejecting class claimants’ argument that separate classification was required).

a. Who May Vote

- Classes do not always speak with a unitary voice; often there are different factions within the same class. Thus, the question arises as to whether a class representative may vote on behalf of the entire class. The answer will likely depend on whether the members of the class have agreed to such an arrangement, through settlement or otherwise.
- In the bankruptcy of Mortgage & Realty Trust, certain members of a certified class that had apparently filed individual claims in addition to the class claim received solicitation materials and voted individually on the plan of reorganization. The court was called on to determine whether these individual votes should stand, or whether the class representative was entitled to vote on behalf of all class claimants. Addressing the issue as one of first impression, the court held that the class representatives could vote on behalf of class members who did not vote individually, but not on behalf of class members who had cast votes on their own behalf. *In re Mortgage & Realty Trust*, 125 B.R. 575, 583 (Bankr. C.D. Cal. 1991).
- In the Elite Model bankruptcy, the plan of liquidation provided that the class representative had sole authority to vote on the plan.

b. Acceptance by One-Half in Number

- Closely related to the issue of voting rights is the issue of whether a class claim counts as a single vote or multiple votes. This has obvious implications for the “one-half in number” requirement for acceptance by a class of claims. 11 U.S.C. § 1126(c).
- It would seem somewhat arbitrary if acceptance by a class of claims under § 1126(c) could turn on whether a class claim had been voted by a representative or by its members individually. On the other hand, if a class representative votes on behalf of the class, it may be difficult or impossible to tell how many individual class members “would have” voted had they been given the chance. Accordingly, the only practical solution may be to count each vote as a single vote, regardless of whether it is a representative vote or an individual vote.
- It appears that no court has directly addressed this issue, and only one has alluded to it. In *In re Frascella Enterprises, Inc.*, 360 B.R. 435, 453 (Bankr. E.D. Pa. 2007), the court noted in dicta that “there is support (albeit without addressing the question head on) for counting the . . . class claim as one vote.” However, the case the court cited for this proposition—*Trebol Motors Distributor Corp. v. Bonilla (In re Trebol Motors Distributor Corp.)*, 220 B.R. 500 (1st Cir. B.A.P. 1998)—held only that a single proof of claim, rather than multiple proofs of claim, could be filed on behalf of the class.

c. Acceptance by Two-Thirds in Amount

- Assuming that each class member is permitted to vote individually, an issue arises as to the weighting of such votes for purposes of the “two-thirds in amount” requirement of 11 U.S.C. § 1126(c).
- On the one hand, giving equal weight to each vote raises fairness concerns, because some class members may have more valuable claims than others.²⁰ On the other hand, the weighting of the votes of individual class members may be impractical. To implement this idea, the court might be required to estimate the claim of each individual within the class.²¹
- A court faced with this dilemma may determine to defer estimation until after voting was completed, in the hopes that the class would vote overwhelmingly in favor or against the plan, thereby obviating the need for estimation.²²

²⁰ See *In re Dow Corning Corp.*, 211 B.R. 545, 573 (Bankr. E.D. Mich. 1997) (noting that “a claimant with no discernible illness should not have a claim equal in amount to another claimant who is suffering grievously”).

²¹ See *In re Dow Corning Corp.*, 211 B.R. 545, 573 (Bankr. E.D. Mich. 1997) (“The estimation would then become extremely protracted as the Court would have to review the alleged symptoms of hundreds of thousands of claimants.”).

²² See *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 698 (4th Cir. 1988) (noting issue of weighted voting, but declining to address it in light of overwhelming vote in favor of plan).