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Feature

By Todd M. Goren and Daniel J. Harris

# Choose Your Own Adventure

## Cash-Out Elections Do Not Violate § 1123(a)(4)

**Todd M. Goren**
*Morrison & Foerster LLP*
*New York*

**Daniel J. Harris**
*Morrison & Foerster LLP*
*New York*

*Todd Goren is a partner and Daniel Harris is an associate with Morrison & Foerster LLP's Business Restructuring and Insolvency Practice in New York.*

In an effort to obtain the maximum support possible, debtors frequently offer creditors the ability to "choose their own adventure" and select the form and timing of their recoveries and distributions under a plan. Disgruntled parties-in-interest have argued that such plans violate § 1123(a)(4) of the Bankruptcy Code because, by definition, not all creditors in the same class receive the requisite "same treatment." However, well-settled case law has interpreted § 1123(a)(4) narrowly, concluding that this "equality" concept permits bankruptcy plans to treat creditors differently, so long as the claims held by such creditors are treated similarly.

Consistent with this principle, debtors can offer general unsecured creditors within the same class the ability to "cash out" their allowed claims on the plan's effective date and avoid the risks associated with the claims-reconciliation process, or to receive equity under a plan, as a long as such option is offered equally to all general unsecured creditors. A ruling in *In re Ciber*[1] recently affirmed this concept and provides comfort to debtors that even in the face of changed circumstances between solicitation and confirmation, cash-out elections do not violate § 1123(a)(4).

Section 1123(a)(4) requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to less favorable treatment of such particular claim or interest."[2] The Bankruptcy Code does not define the standards of "equal treatment," but it is generally understood that "[t]he equality addressed by section 1123(a)(4) extends only to the treatment of members of the same class of claims and interests, and not to the plan's overall treatment of the creditors holding such claims or interests.... Creditors should not confuse equal treatment of claims with equal treatment of claimants."[3] A holder of a claim or interest might agree to less favorable treatment of their claim or interest, which might be attractive in the context of the settlement or a decision by a claimant to "cash out" one's claim to obtain an immediate recovery.

Based on the foregoing, case law has established two cardinal principles relating to the "same treatment" requirement of § 1123(a)(4). First, several courts have held that § 1123(a)(4) only applies to a plan's treatment on account of claims or interests in a specific class — not to the treatment that members within a class separately receive under a plan on account of other rights or contributions.[4] This principle was recently tested and upheld in the *CHC Group*[5] and *Peabody*[6] cases. Both courts concluded that a plan that provided additional benefits and enhancements to creditors that committed to finance a transaction implemented through a plan is not "on account of" one's claim, but rather separate consideration payable for such creditor's funding obligation.

The second general proposition evident from the current case law is that in certain instances, § 1123(a)(4) is more of a process-driven requirement than a substantive one. Several courts have held that so long as each claimant within a class has the "same opportunity to receive equal treatment," there is no violation of § 1123(a)(4).[7] A recent ruling in *Ciber* further amplifies this notion.

1 Morrison & Foerster LLP served as counsel to the debtors and debtors-in-possession in the *Ciber* chapter 11 cases and continues to serve as counsel to the post-effective-date debtors in the claims-reconciliation and wind-down processes.

2 11 U.S.C. § 1123(a)(4); *see also Ad Hoc Comm. of Personal Injury Asbestos Claimants v. Dana Corp. (In re Dana Corp.)*, 412 B.R. 53, 61 (S.D.N.Y. 2008).

3 7 *Collier on Bankruptcy* ¶ 1123.01 (16th ed. rev'd 2018) (citation and internal quotations omitted).

4 *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 249-50 (Bankr. S.D.N.Y. 2007); *In re TCI 2 Holdings LLC*, 428 B.R. 117, 130 (Bankr. D.N.J. 2010); *In re Aleris Int'l Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at *14 (Bankr. D. Del. May 13, 2010).

5 *In re CHC Group Ltd.*, No. 16-31854 (SGJ) (Bankr. N.D. Tex.).

6 *In re Peabody Energy Corp.*, No. 16-42529 (Bankr. E.D. Mo.). The bankruptcy court ruling in *Peabody* is currently on appeal before the U.S. Court of Appeals for the Eighth Circuit.

7 *See In re Emerald Oil Inc.*, No. 16-10704 (Bankr. D. Del. 2017); *In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3d Cir. 2013); *In re Wash. Mut. Inc.*, 442 B.R. 314, 356 (Bankr. D. Del. 2011); *In re Dana Corp.*, 412 B.R. at 62; *In re Dow Corning Corp.*, 255 B.R. 445, 497 (E.D. Mich. 2000), *aff'd*, 280 F.3d 648 (6th Cir. 2002).

In June 2017, after a successful auction process, Ciber Inc. consummated a sale of substantially all of its assets and commenced the process of negotiating and implementing a liquidation plan that would distribute the sale proceeds and other available assets to creditors.[8] Before soliciting creditors, however, Ciber entered into negotiations with one of its largest creditors regarding the settlement of its general unsecured claims arising from the rejection of its contract.[9]

As part of these negotiations, the creditor indicated a desire to receive a distribution before the end of 2017 and that it was willing to accept a discount to the anticipated recoveries under the plan in order to make that happen.[10] As a result, Ciber amended the proposed liquidation plan to provide all holders of general unsecured claims with the ability to elect to receive cash in an amount equal to 35 percent of such holders allowed general unsecured claim on the later of the effective date of the plan or allowance of the claim.[11] As part of the settlement, a creditor agreed to make the cash-out election under the plan.[12]

At the time the plan was solicited, Ciber estimated that recoveries for holders of allowed general unsecured claims would be between 37 and 100 percent, making the cash-out election below the estimated range of recoveries for general unsecured creditors under the plan.[13] However, by the time the confirmation hearing was held in December 2017, Ciber estimated that holders of general unsecured claims that did not make the cash-out election would recover between 27 and 89 percent, principally due to unanticipated litigation costs over the proposed plan and increased wind-down costs.[14]

The official committee of unsecured creditors objected to plan confirmation because, in its view, the proposed cash-out election violated the "same treatment" requirement of § 1123(a)(4).[15] The committee took the position that the plan failed to satisfy § 1123(a)(4) because there existed the possibility that general unsecured creditors could recover less than the 35 percent offered in the cash-out election.[16] In support of this argument, the committee pointed to the fact that updated financial information and results since the plan had been solicited showed that the potential range of recoveries decreased from approximately 37 percent to approximately 25 percent based on the committee's financial projections.[17] The committee also argued that the cash-out election violated § 1123(a)(4) because it was only available to creditors who voted to accept the plan.[18]

In response, Ciber argued that the cash-out election did not violate § 1123(a)(4) because (1) it was available to all holders of general unsecured claims, and (2) it represented "less favorable" treatment for holders of general unsecured claims.[19] Ciber analogized the cash-out election to a plan that offered creditors a choice between equity or cash at a discount to plan value, as there is always the possibility that creditors that take the equity will do better or worse than those that take the cash.

In this case, creditors were free to choose between a fixed amount of cash or taking the risk associated with the claims-reconciliation process.[20] With respect to the latter argument, Ciber recognized that holders of general unsecured claims that did not make the cash-out election could recover 27 percent on account of their claims at the low end.[21] According to Ciber, the uncontroverted evidence demonstrating that the likely midpoint recovery was 58 percent was sufficient for the purposes of determining whether creditors were electing "less favorable treatment" when making the cash-out election.[22]

At the confirmation hearing, the committee further refined its argument and took the position that the process employed by Ciber relating to the cash-out election was unfair, because creditors that received a ballot were asked to make the decision regarding whether to make the cash-out election during solicitation based on certain information. However, subsequent events reduced the potential low range of recoveries to lower than the 35 percent offered in the cash-out election.[23] In the committee's view, the plan failed to satisfy § 1123(a)(4) because creditors that made the cash-out election at 35 percent were not necessarily receiving "less favorable treatment" in light of the reduction to the estimated recovery range.[24]

To come up with a solution for these changed circumstances, the committee proposed that the cash-out election be reopened to all creditors for a short period of time.[25] Ciber argued that the creditors were armed with sufficient information at the time the disclosure statement was approved and that all parties were aware of the risks associated with the claims-reconciliation process when faced with the decision on the cash-out election.[26] Ciber further argued that other courts interpreting § 1123(a)(4) only require that creditors be provided the same opportunity.[27]

Ultimately, the bankruptcy court overruled the committee's objection, finding that § 1123(a)(4) did not "impose ... as rigorous a burden or a gating function as the Committee would articulate."[28] The court further noted that § 1123(a)(4) does not "require an absolute affirmative guaranty for [the] prospect of distribution" and that the ability to make the cash-out election "is an informed decision that a creditor will make and will make in one direction or another for a host of its own particular reasons."[29]

The bankruptcy court also noted that "a guaranty is not required and even if the range has shifted, the fact is that I don't believe § 1123(a)(4) requires an affirmative valuation exercise by a court, that would be a significant ... unprecedented burden on a debtor seeking confirmation of a plan."[30] From the court's perspective, § 1123(a)(4) required "optionality and the opportunity for all parties to participate," and, on this record, "all parties ... had that meaningful oppor-

8 *In re CMTSU Liquidation Inc. (f/k/a Ciber Inc.)*, No. 17-10772, Docket No. 916 (Bankr. D. Del.).
9 Docket No. 789.
10 *Id.*
11 Docket No. 638.
12 Docket No. 789.
13 Docket No. 672, Article I.D.
14 Docket No. 916 at ¶ 47; Docket No. 917 at ¶ 13.
15 Docket No. 896.
16 *Id.*
17 *Id.* at ¶ 7.
18 *Id.* at ¶ 3.
19 Docket No. 916 at ¶ 47.
20 *Id.* at ¶¶ 47-48.
21 *Id.*
22 *Id.*
23 Transcript of Hearing, Dec. 20, 2017, at 17:5-19:12.
24 *Id.* at 36:2-37:25.
25 *Id.* at 16:9-19:12.
26 *Id.* at 24:12-26:12.
27 *Id.*
28 *Id.* at 38:8-9.
29 *Id.* at 38:19-20 and 38:20-23.
30 *Id.* at 39:8-12.

tunity."[31] Thus, the court concluded that the plan satisfied § 1123(a)(4) and confirmed the plan.

## Conclusion

Section 1123(a)(4) codifies the unremarkable proposition that like claims must be treated equally for a plan to be confirmable. The *Ciber* decision endorses the procedural nature of § 1123(a)(4), which merely requires that creditors receive the opportunity to receive equal treatment. If properly implemented, a cash-out election will not violate § 1123(a)(4) — even if the potential recoveries for those not being cashed out could be lower than the amount of the cash-out election. Allowing creditors to "choose their own adventure" by choosing the form, timing or manner of their consideration can provide debtors with optionality in structuring a plan, which can enhance support for such a plan and might ultimately maximize recoveries for those involved. abi

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31 *Id.* at 39:17-20.