Name that Tune: The Errors Tour Collected Bankruptcy Ethics Topics

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Bankruptcy Jeopardy: Answers in the Form of Questions

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I. NON-CONSENSUAL THIRD PARTY RELEASES

***Harrington v. Purdue Pharma L.P.*, 603 U.S. ____ (June 27, 2024)**

(5-4 decision, majority by Gorsuch).

Holding: **nonconsensual third-party releases not permitted** in Purdue's chapter 11 plan.

Facts: *Purdue Pharma* was a mass tort driven bankruptcy. The Debtor sold a painkiller opioid drug known as OxyContin. Marketed it as being less addictive than other opioids and safe for general use—FALSE! A barrage of criminal and civil litigation engulfed Purdue and its owners, the Sackler family.

During this prepetition legal firestorm, the Sacklers extracted $11 billion from Purdue. Then Purdue filed Chapter 11 in 2019 in SDNY. Therein, a settlement was reached, providing that the Sacklers would contribute ultimately $6 billion to a plan and, in return would get releases from Purdue and third parties.

Fewer than 20% of eligible creditors participated in the plan voting process. But the plan was widely approved by those voting.

BK Ct approved plan, D. Ct. reversed, then 2d Cir. reversed D. Ct. Then SCOTUS reversed 2d Cir.

<u>The SCOTUS Majority opinion focused purely on text of Bankruptcy Code.</u>

Section 1123(b) of Bankruptcy Code, which lists certain things that a chapter 11 plan *may* do: "a plan may–

> (1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
>
> (2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
>
> (3) provide for—
>
> (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
>
> (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;
>
> (4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;
>
> (5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and
>
> (6) include any other appropriate provision not inconsistent with the applicable provisions of this title."

Purdue argued that 1123(a)(6) permits a plan to include any term not expressly forbidden under the Bankruptcy Code. And since nothing in the Bankruptcy Code specifically prohibits non-consensual third-party releases, such releases are therefore permitted under section 1123(b)(6).

SCOTUS rejected this argument.

SCOTUS also noted that the Bankruptcy Code's discharge provisions typically apply only to the debtor and not to third parties, citing **section 524(e)** of the Bankruptcy Code.

SCOTUS also noted that Congress had specifically allowed for asbestos claims against third parties to be discharged under **section 524(g).** The inclusion of this specific provision suggests that Congress did not intend to allow other types of claims against third parties to be discharged.

Things not Addressed

What constitutes consent for a **consensual** release—are "opt-out" releases permissible?

What about **equitable mootness**—might this bar a challenge to third party releases where no stay pending appeal is obtained?

What about **full payment plans**—can third-party releases be used there?

II. STANDING OF INSURERS TO OBJECT TO PLAN CONFIRMATION

***Truck Ins. Exchange v. Kaiser Gypsum Co. Inc.*, 602 U.S. ___ (2024)**

(8-0 decision, authored by Sotomayor)

Holding: All about **standing**! Reversing a decision from Fourth Circuit, SCOTUS held that an insurer with financial responsibility for bankruptcy claims qualifies as a "party in interest" under §1109(b) of the Bankruptcy Code and, therefore, has standing to object to a chapter 11 plan.

Facts: Truck was the primary insurer for two companies, Kaiser Gypsum Co. and Hanson Permanente Cement (the "Debtors"), that sold asbestos-containing products. The Debtors filed for bankruptcy after facing thousands of lawsuits related to asbestos liability. The Debtors filed a chapter 11 plan which proposed a 11 U.S.C. § 524(g) channeling injunction and the establishment of an asbestos personal injury trust, by which significant asbestos-related liabilities would have been funded largely by Truck.

Pursuant to the insurance policies, Truck was contractually required to defend each covered asbestos personal injury claim and indemnify Debtors for up to $500,000, per claim. Debtors, in return, were required to pay a $5,000 deductible per claim and cooperate with Truck in defending these claims. The plan distinguished between insured and uninsured claims, mandating that insured claims be processed through the tort system while uninsured claims were submitted to the trust for resolution.

Truck objected to the plan, arguing that the plan (i) was not proposed in good faith under § 1129(a)(3) because it provided disparate treatment to insured and uninsured claims, exposing Truck to millions of dollars in fraudulent claims because the plan did not require the same disclosures and authorizations for insured and uninsured claims, (ii) impermissibly altered Truck's contractual rights under the insurance policies by barring Truck from raising the Debtors' bankruptcy conduct in future coverage disputes, and (iii) failed to comply with the requirement of § 524(g) to deal equitably with claims and future demands.

D. Ct., following BK Ct.'s recommendation, confirmed the plan over Truck's objection. D. Ct. found that Truck had limited standing and could only object on the grounds that the plan was not "insurance neutral." 4th Cir. agreed w/ D. Ct. and concluded that Truck was not a party in interest because the plan did not increase Truck's prepetition obligations or impair its prepetition contractual rights under its insurance policies. 4th Cir. found that the plan was "insurance neutral" because it did not alter Truck's pre-bankruptcy "quantum of liability," leaving Truck without standing to the plan.

SCOTUS reversed, holding that insurers like Truck, who have financial responsibility for bankruptcy claims, are considered parties in interest. These insurers can be directly and adversely affected by reorganization plans. Among other things, SCOTUS noted that a reorganization plan may impair an insurer's contractual right to control settlement or defend claims, abrogate an insurer's right to contribution from other carriers, violate the duty of cooperation or impair the insurer's financial interests by inviting fraudulent claims. SCOTUS also based its decision on 11 U.S.C. § 1109(b)'s broad language, historical context, and underlying purpose of promoting participation in reorganization proceedings.

Rejecting the 4th Cir.'s application of the insurance neutrality doctrine, SCOTUS noted that the 4th Cir. improperly focused on whether the plan altered Truck's contract rights or its "quantum of liability." SCOTUS explained that the insurance neutrality doctrine "is conceptually wrong and makes little practical sense."

SCOTUS further observed that a party in interest does not "include literally every conceivable entity that may be involved in or affected" by a bankruptcy case, and that there may be "difficult cases that require courts to evaluate whether truly peripheral parties have a sufficiently direct interest."

SCOTUS's decision makes clear that an insurer who has financial responsibility for claims in a bankruptcy case will have standing to assert its objections to the plan of reorganization as a party in interest.

III. Litigation Funding Agreements

Litigation Funding Agreements (sometimes known as Capital Provision Agreements, or "CPAs") have become more common in various types of litigation since the concept hit the U.S. shores in around the year 2010. More recently, it has made an entrance into the universe of mass torts litigation.

Plaintiffs' law firms have more and more started to rely on third-party financiers to provide capital in exchange for a share of the fees that the law firm ultimately realizes. Sometimes the financing is for one pending case, or more typically for a portfolio of cases where a law firm is the borrower. A financier may extend capital and receive the right to an "equity-like participation" in litigation proceeds upon resolution. In this regard, these finance relationships resemble contingency-fee arrangements.

These financiers have historically been passive or silent partners—at least that is what has usually been represented. But courts rarely have had occasion to inquire about these relationships or review the underlying funding agreements.

Concern is being raised lately that there is a new breed of "opaque capital" in some of these funding arrangements (e.g., private equity or hedge funds) that is not passive. Rather, some litigation funders are moving into mass-tort financing to "dictate outcomes"—having veto power over litigation decisions or settlements. *See Samir Parikh, Opaque Capital and Mass-Tort Financing*, Yale L.J. Forum (Oct. 2023).

Questions:

Should litigation funding agreements be disclosed in litigation or at least their details be discoverable?

Anytime? Or only when an estate professional is using one?

What about plaintiffs' lawyers in connection with mass tort bankruptcy cases? What if the litigation financier is a private equity or hedge fund that also cross-holder positions—i.e., holds bonds or equity in the target defendant/debtor or its parent? Or perhaps just generally has different motives than the plaintiff/tort claimants?

Courts and even legislatures are starting to consider this.

Case of Interest: In the second PG&E bankruptcy case (commenced in 2019), which was largely driven by massive tort claims of wildfire victims, some of these issues came to the forefront and no doubt will again. There, a very vigilant tort claimant moved to designate allegedly improperly solicited votes pursuant to sections 1125(b) and 1126e, arguing as a reason failure to comply with Bankruptcy Rule 2019. Reminder: Bankruptcy Rule 2019 requires disclosures of certain groups, committees and entities. "Disclosable Economic Interests" are defined therein to include not just claims or interests but such things as participations, options, rights, or derivative rights granting the holder thereof an economic interest that is affected by the value, acquisition, or disposition of a claim or interest.

PG&E Facts:

Plaintiffs' lawyer, Mikal Watts, and his law firm, Watts Guerra LLP, represented 16,000 fire victims. Months into the PG&E case, there were two competing plans, both of which offered significant compensation to victims (and, accordingly, also to Watts Guerra). A vigilant tort claimant named Will B. Abrams had learned that Watts Guerra was able to pursue protracted litigation because it had drawn down on a $100 million line of credit funded by a syndicate of investors that included private-equity firm Centerbridge Partners. The fund Apollo also funded some of the mass-tort litigation for plaintiffs. Watts had not disclosed his relationship with Centerbridge to the court or his clients. Centerbridge meanwhile had accumulated 1.6% of PG&E stock and Apollo more than $500M of PG&E debt. Both entities also had other claims in the case. Centerbridge was a participant in a DIP facility. ***Importantly, Centerbridge was also part of a group that had proposed one of the competing settlement plans in the case***. Watts had enthusiastically recommended that his clients support the Centerbridge plan, which proposed paying victims $13.5 billion. But half of this value came in the form of PG&E stock, a fact that some tort claimants found distasteful because it tethered victim compensation to PG&E's post-bankruptcy performance. Meanwhile, though, a competing plan proposed by a bondholder did not involve plan consideration in the form of stock, so many claimants believed that it was superior.

Will Abrams filed a motion asking the bankruptcy court to disregard votes cast by Watts's clients because of Watts' apparent conflict. The court was troubled by the possibility that Watts had undisclosed financial incentives for supporting the Centerbridge plan. The only defense Watts offered was his own assertion that the funding agreements did not authorize Centerbridge to control his litigation strategy, decision-making, or client representation. Based on this representation, the court concluded that the prepetition funding arrangement was not relevant to plan voting and denied the motion. The court reached this conclusion even though Watts never answered any specific questions about the funding relationship, and the underlying agreement between Centerbridge and Watts's firm was never provided to the court or opposing counsel. The court did not believe it was required.

PG&E emerged from bankruptcy and its stock price languished in the years that followed, and claimants have openly questioned whether they voted for the right plan—some asking: What if a third party had in fact controlled the outcome of the case and that possibility was ignored?

Ethical Question: Could a litigation financier, who is offering significant capital, via litigation funding to a plaintiff's law firm, essentially create and control a multibillion-dollar mass-tort case, cradle to grave—e.g. funding aggressive advertising on TV and social media and emails to amass a large group of claimants (maybe frivolous claims, maybe genuine); funding the litigation effort that will then evolve into a massive MDL stage; meanwhile buy up stock or bonds in the defendant—shorting it, long playing it, or whatever makes sense at a particular point in time; and eventually force a settlement (i.e., exerting control on both sides of the litigation)?

IV. SANCTIONS BY BANKRUPTCY COURTS

Dondero v. Highland Capital Management LP (*In re Highland Capital Management LP*), 22-10889 (5th Cir. July 1, 2024)

A 3-judge panel of Fifth Circuit (Judges Leslie H. Southwick, Jerry E. Smith and Stephen Higginson) issued a decision upholding bankruptcy court's $450,000 compensatory sanction against Debtor's former president and CEO James Dondero. Relevant context: to fend off the possible appointment of a chapter 11 trustee early in the case, Highland's CEO resigned his positions as an officer and director and stayed on at Debtor for a few months as an unpaid portfolio manager. In his place, 3 independent directors took over along with a CRO. These independent directors later terminated the former CEO from any role w/ the Debtor. The bankruptcy court eventually issued a 55-page memorandum opinion and order granting, in part, the Debtor's contempt motion against the former CEO, for violations of a TRO of the court that had prohibited his business interference and communications with the Debtor's employees except for limited purposes. The bankruptcy court found that the former CEO violated the TRO by clear and convincing evidence, by doing such things as directing the Debtor's employees not to execute trades in contravention of instructions given to them by the current CRO and making email threats to the current CRO. Sanction award consisted of $400,000, plus an additional $50,000 to offset costs of local counsel, UCC counsel, and depositions and transcripts required. The overall award included fees not simply related to the underlying contempt motion but also fees for work “done to protect the reorganization” from the former CEO’s interference. Fifth Circuit wrote that the bankruptcy court did not err in issuing the sanctions award, including in using estimates for calculating the awarded amounts. According to the opinion, “the goal of [sanctions] awards everywhere” is “‘to do rough justice.’” Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. 101, 110 (2017). As a result, “complete accuracy is neither required nor expected” in terms of calculating the compensatory amount and the bankruptcy court’s judgments are entitled to “our ‘substantial deference.’” Court stated that “a court may use estimates or decide that an entire category of expenses was incurred solely because of the misconduct at issue.” Court held that the bankruptcy court “did not err in granting all fees for work done to protect the reorganization plan from [the former CEO’s] interference,” adding that the court “was permitted to use estimates given its ‘superior understanding of the litigation.” To be clear, the bankruptcy court awarded substantially less than Debtor requested (for example, Debtor had requested “a penalty of three times” the Debtor’s actual expenses).

***Charitable DAF Fund LP v. Highland Capital Management LP* (*In re Highland Capital Management LP*), 98 F.4th 170 (5th Cir. April 4, 2024)**

Meanwhile, 3 months earlier, a different 3-judge panel of the Fifth Circuit split 2-1 (Judges Andrew Oldham and Kurt Engelhardt, in the majority, and Judge James Dennis, dissenting), and issued a decision vacating and remanding the bankruptcy court’s $240,000 compensatory sanction against the same individual in the same case of Highland Capital Management. The bankruptcy court, in this wholly separate contested matter, found the former CEO to be in civil contempt post-confirmation/pre-effective date for violating the bankruptcy court’s gatekeeping order (an order that was appealed and affirmed by the Fifth Circuit) by instigating a lawsuit in the D. Ct against Highland and filing a motion therein to add the Debtor’s CRO, James Seery to that suit. The majority started by noting that bankruptcy courts are not Article III courts and lack inherent power to punish violations of their orders with criminal contempt. They “have only civil contempt powers because that is all Congress has given them.” The majority emphasized that “civil contempt power is limited” and may not have a “primary purpose” of punishing or vindicating the authority of the court. Instead, use of the civil contempt power must be “remedial” by coercing compliance or compensating the injured party for its actual loss.

It appears that the majority believed the bankruptcy court and D. Ct both “reasoned that the award was compensatory because it shifted expenses [that the Debtor] reasonably and necessarily incurred in responding to the [alleged contemnor’s actions]” but the majority noted that the bankruptcy court permitted “extensive discovery” and conducted a “marathon evidentiary hearing” to unearth the former CEO’s role—which the majority stated was “irrelevant to civil contempt.” [Note: the bankruptcy court had limited each side to one deposition and to four hours total hearing. Extensive discovery? Marathon evidentiary hearing? It was all about determining if the former CEO should be regarded as the contemnor since the entity who had actually taken the actions was a Cayman Island entity that had one director only who had been in place for about 3 weeks at the time of the contemptuous act. The Debtor had wanted to try and establish that the former CEO was “pulling the strings.”]

Majority vacated the sanctions and remanded w/ instructions to limit any sanctions to damages the Debtor suffered because of the former CEO filing (through his affiliate) a gatekeeper motion in the wrong court—i.e., the D. Ct. Since the D. Ct had denied the gatekeeping motion pretty promptly for a procedural problem, majority didn't think Debtor had suffered all that much harm.

Bottom line: the majority implied bankruptcy court over-compensated the Debtor for the civil contempt, and this fact, along with bankruptcy court's discussion of former CEO's intent, suggested that contempt award was criminal in nature.

Guidelines for Imposing Sanctions:

> A bankruptcy court can issue civil contempt sanctions but not criminal contempt.
>
> Civil sanctions are aimed at either coercing compliance w/ a court order or compensating a person who was injured by the contempt of a court order. Criminal contempt is aimed at punishment of a person who violated a court order. Jail can be civil contempt, if it is aimed at coercion not punishment.
>
> There must be "clear and convincing evidence" that an order was in effect, that the order proscribed "certain conduct," and that the contemnor "failed to comply."
>
> Contempt citations are reviewed for abuse of discretion.
>
> Reimbursement of legal fees "is a permissible sanction."
>
> A trial court should consider probable effectiveness of a sanction, alleged contemnor's financial resources and the burden of the sanction, and contemnor's willfulness in disregarding the order.
>
> Offended party "may recover only the portion of his fees that he would not have paid but for the misconduct."

V. DISQUALIFICATION OF DEBTOR'S COUNSEL

Enviva:	World's largest producer of industrial wood pellets
Petition Date:	3/13/24
Proposed Counsel:	Vinson Elkins
Application(s):	3/27/24
Hearing:	May 9, 2024
Denied:	May 30, 2024
Rule 60/9024 Mtn.:	June 3, 2024 (Joinders filed later)
Hearing:	June 14, 2024
Denied:	July 02, 2024

V&E's Application: V&E represented the Debtors' Officers and Directors in shareholder and derivative litigation; and (b) V&E also represented the Riverstone entities, which owned 43% of the Debtors' common stock.

V&E argued:

… a wall of separation in unrelated matters is not required by the model rules, the Bankruptcy Code, the bankruptcy rules, or the local rules. And we do agree, as we must, that no confidential information of Enviva will be shared with Riverstone, and no confidential information of Riverstone will be shared with Enviva. But a wall of separation where none is required *would be incredibly harmful to Enviva* at this critical phase of its restructuring efforts. To be clear, this isn't a situation where the harm outweighs the need, but rather there's no need *and it would be harmful.*

[Court Denied Application]

Reconsideration Motion: proposed a complicated ethical wall, a separate Plan Evaluation Committee (with separate counsel if requested), allocation of Riverstone profit away from conflicted partners, among other things.

Riverstone approximated 1% of V&E revenue, about $14MM.

Court's holding:

1. "The Court finds that V&E's proposed ethical wall is insufficient."
2. "The Court finds that V&E's proposed compensation arrangement … do not render it disinterested under Section 327(a)."
3. "The Court finds that the establishment of the PEC does not solve the disinterestedness problem…."
4. "There may, however, be an important role for V&E under Section 327(e)…."

Bankruptcy Code Section 327(a) & (e)

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

…

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

Section 101:

(14) The term "disinterested person" means a person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

Bankruptcy Rule 2014 describes necessary disclosure of connections – V&E made full and complete disclosures.

State Bar Rules – It appears that, with appropriate, informed consent and waivers, and strict observance of client confidentiality, V&E would be permitted to represent the Debtors in their Chapter 11 case under the rules of professional conduct in Virginia, New York and Texas, all of which are based on the ABA Model Rules of Professional Conduct. ***See*** Rules 1.7 and 1.8.

Case to Watch: FTX – Examiner's Report on S&C's relationship with SBF due 70 days from date of order; Case 22-11068-JTD Doc 19061 Filed 06/26/24.

VI. PROTECTING CREDITOR CONFIDENTIALITY

Bankruptcy Code Section 107(b)(1) requires bankruptcy courts, on a request of a party in interest to:

> "protect an entity with respect to a trade secret or confidential research, development, or commercial information."

Bankruptcy Rule 9018 provides that:

> "the court may make any order which justice requires . . . to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information."

From docket entry 45, FTX case; 22-11068-JTD:

> The risk related to disclosure is not merely speculative. In at least one recent chapter 11 case, the abusive former partner of a debtor's employee used the publicly accessible creditor and employee information filed in the chapter 11 case to track the employee at her new address, which had not been publicly available until then, forcing the employee to change addresses again. See In re Charming Charlie Holdings, Inc., No. 19-11534

(CSS) (Jul. 11, 2019), D.I. 4 (describing incident which occurred during Charming Charlie's 2017 bankruptcy cases).

* These protections are also being extended to employees, officers and directors as noted above.

VII. Liability Management (aka "Creditor-on-Creditor" Violence)

The common denominators:

- Borrower needs liquidity;

- Loan Agreement or Trust Indenture have common place provisions for "permitted indebtedness", "permitted investments", "debt baskets", etc.

- One or more aggressive members of a loan syndicate or trust indenture, or occasionally a third party lender, identify "opportunities" to advance new funds and to improve their existing holdings, often by rolling up junior debt into new senior debt as part of the new money transaction, leaving co-lenders behind.

- Other common features are indemnification to participating holders pursuant to new docs; original docs had no such rights.

The Drop Down (getting "J. Crewed"; assets dropped through the "trap door")

- Loan agreement contained permitted investment in non-guarantor subsidiaries, and a general investment basket

- Baskets used to transfer IP assets to a restricted, non-guarantor subsidiary.

- Another provision permitted investments between certain subsidiaries. This was the "trap door" used to get IP outside of the collateral or restricted packages.

- Assets pledged for new loan used to redeem expensive PIK loans.

- Coupled with litigation against lenders to create leverage.

The Double DIP

- Unrestricted subsidiary takes loan from "new" lenders and pledges assets (the first bite at the apple).

- New money is then loaned to restricted subsidiary. Unrestricted sub gives collateral assignment on new loan as additional collateral to new lender (second bite).

  See Exhibit.

Uptier Exchanges

- Limited “new debt” baskets used to raise new money from participating lenders;
  - The loan agreement or indenture may have small limits that were exceeded
  - Offer to fund new debt only made to the “cool kids”
- Lenders’ new debt, along with its existing debt, rolled up and “exchanged“ for a new super senior loan;
  - Relies on increased voting % of debt resulting from the new debt
  - Again, only offered to “cool kids”
- Non-participating lenders left unsecured, or undersecured
  - These were the “not cool kids”.

Common issues presented in uptiers are “permitted debt baskets”; redemption rights; “open market” exchanges; collateral release provisions; and “sacred rights”.

Well known cases: Boardriders; TPC; SertaSimmons; Robertshaw; Wesco Aviation.

Combinations

Just what the name implies – coupling two or more of the above LMT techniques.

Reactions

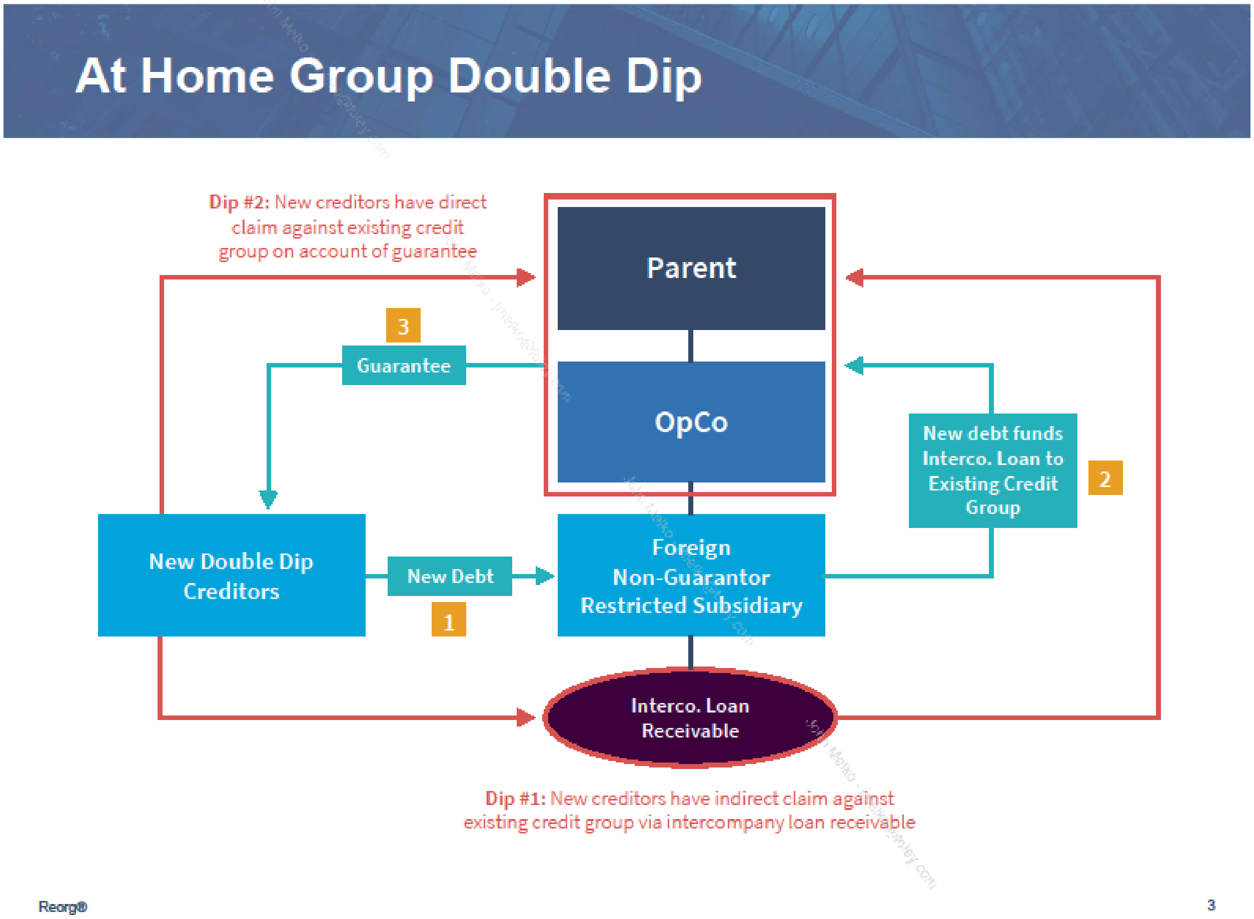
Finance lawyers have started writing loan agreements and indentures to protect against some of these issues. By way of example, restrictions on transfers by subsidiaries are referred to as “J.Crew blockers”.

Result on industry

Reorg’s Analysis of 11 Non-Pro-Rata Uptiers Shows Less Aggression Following Judge Isgur’s Feb. Commentary During Wesco Litigation; Future Transactions Could Become More Aggressive Following Wesco Decision Allowing Lien Stripping of 2024 Notes

Tue 07/16/2024 06:00 AM CDT from REORG RESEARCH

AlixPartners Survey of 700 participants: 97% say LMT is a temporary fix.



VIII. Modern Era Mass Tort Cases

What *was* a claim?

3d Cir. Frenville test: Claim arises when right to payment under state law accrues, 744 F.2d 332 (3rd Cir., 1984).

Other Circuits rejected *Frenville*, hewing to the broad Code definition.

3d Cir reversed in Jeld-Wen, focusing on conduct and prepetition relationship, 607F. 3d 114 (3rd Cir. , 2010).

What is a mass tort?

Generally, a single site/single incident event harming many people (e.g., a plane crash); or

A “dispersed” mass tort covering many people over a wide range of time and place (like *Johns-Manville* or *A.H Robbins*, below).

Pre-524(g) mass tort cases:

Johns-Manville

Early asbestos case, filed August 1982, SDNY Burton Lifland.

Plan confirmed 12/86. 2d Cir. Ct of Appeals upheld confirmation 10/28/88.

A.H. Robbins

Dalkon Shield case, over 325,000 claims

Filed Ch 11 August 1985

1994 Bankruptcy Code Amendments

Section 524(g) – limited to asbestos cases and modeled after Manville

Established National Bankruptcy Review Commission to study mass tort cases

Commission's Report (Oct. 20, 1997) recommended rewriting and expanding Code provisions of "mass torts";

5th Cir Judge Edith Jones (only Article III member of Commission) law review article criticizing

Report's "veneer of chirpy optimism" – focused on future claims and due process

76 Texas L. Rev. 1695 (1998). [Ed. Note: Edith Jones was right – still no amendments.]

Early mass tort cases made liberal use of section 105 injunctions coupled with section 362.

Other features, still used, are victims' trusts, future claims' representatives, ADR process for claims liquidation, global settlements with insurers.

Nonetheless:

Non-asbestos mass tort cases make use of 524(g) lite structures: broad definition of claims to include future claims; appoints future claims rep; approves channeling injunctions; either discharges non-consensual 3d party releases (**pre-Purdue**) or opt outs in circuits requiring them.

Parts of this structure have migrated to non-mass tort cases (channeling injunctions, broad releases of third parties, etc.)

Now, on to Purdue!!

But wait, There's More…!

Debtors, and bankruptcy courts, have already started nibbling at the edges of Purdue:

Can you enjoin 3d party litigation during the case?

Yes, but not on these facts: *In re Parlement Technologies, Inc*.; USBC, Del.; 24-10755; D/E 102 (Goldblatt, Craig), 7/15/24.

Yes: Coast to Coast Leasing, LLC; USBC, ND ILL. ; Eastern Div; D/E 3; (Cox, Jacqueline, CJ); 7/17/24. [No bond required because adequate protection payments being made.]

Texas Two-Step

- "Texas Two Step: a shorthand name given to a divisive merger followed by a bankruptcy of the entity allocated the mass tort liabilities.
- "Divisive Mergers": forms of state law governed corporate reorganizations.
  - Can be effected for a variety of purposes, including separation of assets for tax purposes;
  - Bankruptcy context focuses on separation of "bad business".
- Not exempt from fraudulent transfer laws.
- Texas and Delaware each have statutes permitting divisive mergers.
- Texas' Business Organizations Code; Chapter 10; Mergers, Interest Exchanges, Conversions and Sales of Assets; became effective 2006.
  - Applies to:
    - Corporations;
    - LLC's;
    - Limited Partnerships
- Delaware Limited Liability Company Act:
  - 2018 Amendment: Section 18-217
  - Only applies to LLC's