PREVALENCE OF SUBSTANTIVE CONSOLIDATION IN LARGE BANKRUPTCIES FROM 2000 TO 2004: PRELIMINARY RESULTS

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I. MOTIVATION FOR STUDY

This study highlights the importance of substantive consolidation doctrine to large public company bankruptcies. In substantive consolidation, the inter-company liabilities of the subject companies are eliminated, the assets of these subject companies are pooled and the third party liabilities of the subject companies are satisfied from this single pool of assets. This pooling of assets changes the percentage recovery, for better or worse, that individual creditors would receive in the absence of a consolidation.[1] The doctrine's significance is difficult to gauge merely by examination of published court opinions.[2] Indeed, in the two cases that provide the most widely accepted statements of the conditions for application of the rule, the court does not approve substantive consolidation as a remedy.[3] This study attempts to measure the extent to which large public company bankruptcy reorganization negotiations take place in the shadow of the doctrine of substantive consolidation, despite the judicial rhetoric of rarity.[4]

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[1] For an exhaustive examination of the case law development of this doctrine, see Mary E. Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U. PITT. L. REV. 381 (1998). Substantive consolidation differs from procedural consolidation in which multiple bankruptcy cases are subject to joint administration by a single judge. *Id*. at 381 n.1.

[2] Courts often suggest that use of substantive consolidation should be rare. *See, e.g.*, *In re* Gandy, 299 F.3d 489, 499 (5th Cir. 2002) (stating that substantive consolidation is "an extreme and unusual remedy"); Eastgroup Props. v. S. Motel Ass'n, Ltd., 935 F.2d 245, 248 (11th Cir. 1991) (noting that substantive consolidation should be used "sparingly"). This study shows that use of substantive consolidation to craft reorganization plans and settlements is not rare in large public company bankruptcies.

[3] *See* Union Sav. Bank v. Augie/Restivo Baking Co. (*In re* Augie/Restivo Baking Co.), 860 F.2d 515 (2d Cir. 1988); Drabkin v. Midland-Ross Corp. (*In re* Auto-Train Corp.), 810 F.2d 270, 276 (D.C. Cir. 1987). The Third Circuit acknowledged these two cases as forming the two strands of substantive consolidation doctrine. *See In re* Owens Corning, 419 F.3d 195, 207 (3d Cir. 2005) (identifying *Augie/Restivo* as supporting alter-ego analysis of substantive consolidation and *In re Auto-Train* as supporting the balancing of the equities approach).

[4] The "bargaining in the shadow" theme that motivates this study is not new. Various studies have considered bargaining in the shadow of different laws. *See, e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (positing primary function of divorce law is to provide a structure within which divorcing couples can determine their own post-dissolution rights); Robert Cooter & Stephen Marks (with Robert Mnookin), *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621 (2003) (examining whether those

Two sources for business bankruptcy data—WebBRD[5] and BankrupcyData.com[6]—do not maintain separate data specifically tracking substantive consolidation.[7] I am not aware of other data sources that might track this information.[8] BankruptcyData.com often reports on substantive consolidation as part of its summary of reorganization plans; however, that source can offer no assurance that this feature is always reported upon when present or that its review, particularly of older matters, is comprehensive. Research to date confirms that BankrutpcyData.com does not identify all cases that constitute Substantive Consolidation Bankruptcies as defined in this study. Thus, this study supplements a gap in existing data sources by beginning a study of the phenomenon of substantive consolidation in large public company bankruptcy cases, challenging the notion that the circumstances for use of the remedy are rare.[9]

On a broader level, the prevalence of substantive consolidation in our largest bankruptcies may teach us something about corporate form in practice that will adjust the focus of recent corporate law scholarship. The signature book guiding current corporate law debates—*The Anatomy of Corporate Law*[10]—does not explore either the impact of insolvency law on corporate form or the special problems raised

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takeover defenses endorsed by Delaware courts truly increase the bargaining power of takeover targets).

[5] WebBRD is a database maintained by Professor Lynn M. Lopucki at the UCLA School of Law. *See* WebBRD, http://lopucki.law.ucla.edu/index.htm (last visited May 10, 2006).

[6] BankruptcyData.com, a division of New Generation Research, Inc., is a commercial service. *See* BankruptcyData.com, http://www.bankruptcydata.com/default.asp (last visited Mar. 25, 2006).

[7] The scope of coverage for WebBRD was confirmed by email correspondence between the author and Professor LoPucki. The scope of coverage for BankrupctyData.com was confirmed by telephone conversations between the library staff at University of Miami School of Law and representatives of New Generation Research, Inc.

[8] Studies exist that attempt to measure the significance of the doctrine of "piercing the corporate veil"—a doctrine related to substantive consolidation. *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991).

[9] For purposes of this study, "large public company bankruptcy" follows the WebBRD protocols. *See* WebBRD, Contents, http://lopucki.law.ucla.edu/contents_of_the_webbrd.htm (last visited May 10, 2006):

> A case is "large" if debtor reported assets or more than $100 million (measured in 1980 dollars) on the last form 10-K that the debtor filed with the Securities Exchange Commission before filing the bankruptcy case.
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> A company is "public" if the company filed a form 10-K with the Securities Exchange Commission in the three years prior to bankruptcy and the company did not afterward file a form 15 (going private) more than one year prior to bankruptcy.
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> A "case" includes all cases filed by or against members of the 10-K filing company's corporate group provided that those cases are consolidated by the bankruptcy court for the purpose of administration. Thus, a single "case" for the purpose of the WebBRD may be reported by the Administrative Office of the U.S. Courts as dozens or hundreds of cases.

Id.

[10] REINIER H. KRAAKMAN ET AL.., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (2004).

by corporate groups.[11] Professors Hansmann and Kraakman, two of the seven authors of *The Anatomy of Corporate Law*, stress the idea that the concept of separate corporate personality holds the key to understanding corporate form, proposing that separate corporate personality should be understood in terms of "affirmative asset partitioning."[12] Though I believe this paradigm has value, to the extent data show that affirmative asset partitioning breaks down within corporate groups under the stress of insolvency, one might consider the implications of its context sensitivity.[13] In my critique of substantive consolidation doctrine, *Corporate Form and Substantive Consolidation*,[14] I argue that economic theory predicts that firms will create the circumstances that justify use of substantive consolidation as they pursue cost cutting strategies within a corporate group. This study supplements that work by providing an empirical basis indicating that the conditions for use of substantive consolidation are fairly common, just as economic theory predicts those conditions should be common.

II. SCOPE OF STUDY

This study provides a preliminary indication of the extent to which the doctrine of substantive consolidation played a role in large public company bankruptcies for bankruptcy filings made in the five year period from 2000 to 2004. Court filings for the 21 largest public company bankruptcies, measured by pre-filing assets, have been analyzed.[15] Secondary data sources have been examined for other large public company bankruptcies during this period. Lastly, secondary data sources have been examined for large public company bankruptcies filed from 1990 to 1999. The goal of each review is to identify Substantive Consolidation Bankruptcies.

For purposes of this study, a "Substantive Consolidation Bankruptcy" is a large

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[11] *See* David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1522 (2004) (reviewing THE ANATOMY OF CORPORATE LAW).

[12] *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 394 (2000) (asserting asset partitioning has two facets: insulating shareholders from claims of corporate creditors and preventing liquidation of assets by individual shareholders). Professors Hansmann and Kraakman have continued research into asset partitioning, refining the concept into "entity shielding" and "owner shielding." *See* Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1337 (2006). They note that use of the "unsettled" doctrine of substantive consolidation provides one response to various increased costs associated with complex bankruptcy proceedings. *Id.* at 1401-02.

[13] There has been significant academic debate over eliminating limited liability for members of corporate groups with respect to tort claimants. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565 (1991); Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1 (1986). The prevalence of voluntary substantive consolidation in corporate reorganizations may be relevant to that debate.

[14] William H. Widen, *Corporate Form and Substantive Consolidation*, 75 GEO. WASH. L. REV. __ (forthcoming 2007) [hereinafter *Corporate Form and Substantive Consolidation*].

[15] The ranking of bankruptcy cases based on pre-filing asset size comes from WebBRD which adjusts asset size to current dollars. WebBRD reported numbers fluctuate based on the Consumer Price Index. The Owens Corning bankruptcy is the twenty-first largest bankruptcy filed during the 2000–2004 time period.

public company federal bankruptcy case in which either (a) settlement of substantive consolidation litigation preceded approval of a reorganization plan or liquidation or (b) a plan of reorganization proposed substantive consolidation of two or more entities involved in related bankruptcy proceedings. For purposes of this classification, substantive consolidation is considered part of a bankruptcy plan or liquidation if the plan or liquidation provides (i) for the actual combination of two or more legal entities, (ii) for voting on the plan as if two or more entities were a single entity (whether or not the plan combines the entities) or (iii) for distributions as if two or more entities were combined (whether or not the plan combines the entities). If a debtor proposed that two or more entities be consolidated prior to implementation of a plan, substantive consolidation is considered part of a subsequent plan. A plan proposing substantive consolidation does not need to have been approved for the case to count as a Substantive Consolidation Bankruptcy.

The scope of the definition includes a so-called "deemed" substantive consolidation as a Substantive Consolidation Bankruptcy. In a "deemed" substantive consolidation distinct legal entities are not combined. Instead, either votes on a plan, plan distributions, or both, are computed "as if" the legal entities had been combined. The earliest reported decision of which I am aware that considers and approves a deemed consolidation is *In re Standard Brands Paint Co*.[16] Since that case, use of substantive consolidation doctrine to justify consolidated distributions and voting without actual combination of legal entities has become known as a "deemed" consolidation.[17] Courts disagree over whether deemed consolidations should be considered substantive consolidations at all.[18] In my view, this disagreement amounts to an uninteresting dispute over labels that is relevant only if one wants to restrict the ability of bankruptcy courts to use equitable principles. I find no support in the Bankruptcy Code to limit a bankruptcy court's ability to craft resolutions custom tailored to particular facts. This custom tailoring occurs when a court orders something less than a full substantive consolidation to reach a fair and equitable result.[19]

My study of the prevalence of substantive consolidation in large public

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[16] 154 B.R. 563, 566–67 (Bankr. C.D. Cal. 1993) (indicating that a plan which made distributions as if the entities were combined without actually combining the legal entities was "unusual, maybe unique"). As far as the parties and the court could determine, the plan proposed in *In re Standard Brands Paint Co.* was the first deemed consolidation, though the procedure was not then referred to as a "deemed" consolidation. *Id.* at 573.

[17] *See* Genesis Health Ventures, Inc. v. Stapleton (*In re* Genesis Health Ventures, Inc.), 402 F.3d 416 (3rd Cir. 2005) (containing a description of a deemed consolidation by the author of the Third Circuit's *Owens Corning* decision).

[18] *See id.* at 423 (distinguishing substantive consolidation from deemed consolidation).

[19] As an equitable doctrine, some courts have expressly recognized that they may modify or adjust the effects of substantive consolidation to fit the circumstances of the case. *See In re Standard Brands*, 154 B.R. at 570; *In re* Parkway Calabasas, 89 B.R. 832, 837 (Bankr. C.D. Cal. 1988) (indicating that a bankruptcy court's equitable powers permit it to order less than complete substantive consolidation). Under the flexible approach, a court need not actually combine entities in order to take advantage of the benefits that asset pooling or voting combinations might offer in a particular case.

bankruptcies includes a "deemed" substantive consolidation as a "Substantive Consolidation Bankruptcy" for several reasons. First, the study attempts to measure the extent to which reorganization negotiations take place in the shadow of substantive consolidation doctrine as articulated by various courts. Factors that justify full substantive consolidation appear in cases that opt to use deemed consolidation as part of a plan or to settle substantive consolidation litigation. Second, courts have expressly referred to substantive consolidation doctrine, as developed by case law, in supporting their decisions to approve a settlement or a plan that uses the deemed consolidation technique. Third, the same cost savings and equitable motivations that justify full substantive consolidation motivate use of deemed consolidation. Indeed, a deemed consolidation may save costs compared to a full consolidation, including eliminating the need to re-title property and obtain new business qualifications, leaving more value for creditors in a reorganized company.[20] Fourth, aggrieved creditors arguing for full substantive consolidation may well accept distributions on a deemed consolidated basis to settle their grievances; their central concern remains the final distribution and not the corporate structure of the reorganized company going forward. In liquidating plans under chapter 11, and in chapter 7 liquidations, there may be little or no need to worry about the corporate structure going forward in any event.

III. USE OF THE DOCTRINE IN SUBSTANTIVE CONSOLIDATION BANKRUPTCIES

Courts use substantive consolidation doctrine both (a) in consideration of settlement of actual or potential litigation involving substantive consolidation and (b) in approving liquidations and reorganizations that impose substantive consolidation in some form.

Settlement of potential substantive consolidation litigation takes place in the shadow of substantive consolidation doctrine because bankruptcy courts must make an independent assessment of the appropriateness of the settlement. This independent assessment does not require the court to decide whether it would have imposed substantive consolidation in the particular case. Rather, the court reviews the settlement to determine whether, in light of the doctrine, a reasonable basis exists for the settlement.[21]

> The fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and

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[20] In *In re Standard Brands*, for example, tax considerations strongly favored a deemed consolidation without the actual combination of legal entities. 154 B.R. at 565. An actual combination would have triggered cancellation of indebtedness income for state tax purposes. *Id*.

[21] *In re* W.T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983) (finding that a bankruptcy court may approve a fair and equitable settlement that is not "below the lowest point in the range of reasonableness").

> equitable. There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.[22]

Many reported decisions reflect court approval of settlement of potential substantive consolidation litigation.[23]

Courts consider substantive consolidation doctrine in detail when approving plans that provide for substantive consolidation.[24] This consideration often occurs in the context of opposition to a plan.[25] However, in *In re Standard Brands Paint Co.*, the court considered the appropriateness of a deemed consolidation in a reorganization plan even though no party opposed the plan.[26] Further, the

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[22] Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424–25 (1968) (citation omitted).

[23] *See, e.g.*, *In re* Stoecker, 125 B.R. 767, 774 (Bankr. N.D. Ill. 1991) (noting settlement of a substantive consolidation motion benefited the debtor's estate); *In re* Resorts Int'l, Inc., 145 B.R. 412, 418, 459 (Bankr. D. N.J. 1990) (confirming a chapter 11 plan that provided for settlement of all substantive consolidation litigation, finding such settlement fair and equitable considering the delays, costs and potential damage to the debtor); *In re* Apex Oil Co., 118 B.R. 683, 688 (Bankr. E.D. Mo. 1990) (finding settlement of substantive consolidation claim stabilized debtor's operations); *see also* Findings of Fact and Conclusions of Law Confirming Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, and Related Relief, *In re* Enron, No. 01-16034 (Bankr. S.D.N.Y. July 15, 2004). In *In re Enron*, the court spent significant time and effort in concluding that the terms of the settlement of substantive consolidation issues was supported by an assessment of the likelihood of successful litigation in light of the doctrine.

[24] *See, e.g.*, Lisanti v. Lubetkin (*In re* Lisanti Foods, Inc.), 329 B.R. 491, 497–99 (D. N.J. 2005); *see also In re* Worldcom Inc., No. 02-13533, 2003 WL 23861928, at *6–16 (Bankr. S.D.N.Y. Oct. 31, 2003).

[25] The plan proponent, typically the debtor or debtors-in-possession, must prove by a preponderance of the evidence that the plan meets the requirements of section 1129 of the Bankruptcy Code. *See, e.g.*, *In re* Cellular Info. Sys., Inc., 171 B.R. 926, 937 (Bankr. S.D.N.Y. 1994) ("[A] plan proponent must demonstrate that its plan satisfies section 1129(b) by a preponderance of evidence."). These requirements include that the plan not "discriminate unfairly" and be "fair and equitable" to creditors impaired under the plan who have not voted to accept it. 11 U.S.C. A. § 1129(b) (2005). Thus, in a plan subject to this so-called "cramdown" provision, the court would need to consider the appropriateness of imposing substantive consolidation as part of considering the plan as a whole. In the absence of a plan cramdown, the need for an express review of the appropriateness of substantive consolidation is less clear, though courts have considered the applicability of the doctrine even in the absence of objections. *See infra* text accompanying note 26. There may be individual creditor objections within an impaired class even if the class itself votes to accept a plan. This may provide a further reason for a court to separately consider the appropriateness of imposing substantive consolidation.

[26] 154 B.R. 563 (Bankr. C.D. Cal. 1993).

Bankruptcy Code itself, in section 1123(a), contemplates that a debtor may merge or consolidate with another person as part of implementing a plan of reorganization.[27]

IV. SUMMARY OF FINDINGS

A review of the 21 largest bankrupcies, measured by asset value prior to filing, for petitions filed in the years 2000 to 2004, shows that 11 of these bankruptcies are Substantive Consolidation Bankruptcies (as defined); an additional 3 plans expressly reserved the right to use substantive consolidation at a later stage in their insolvency proceedings. These data come from a review of confirmation orders, disclosure statements and reorganization plans retrieved from the PACER system. The twenty-first largest case by asset value is *Owens Corning*, with an asset value in current dollars of $7.345 billion.[28] *Owens Corning* presented the Third Circuit with the chance to conduct a significant review of substantive consolidation law. These figures include one bankruptcy case that was dismissed and then refiled. To avoid a double counting of this case, I believe the better frequency number is to find 11 Substantive Consolidation Bankruptcies out of the largest 20 cases filed from 2000 through 2004.[29]

WebBRD identifies 344 large public company bankruptcies filed in the years 2000 to 2004. A preliminary review of secondary sources[30] shows (i) an additional 18 Substantive Consolidation Bankruptcies among cases with asset value of $1 billion or more and (ii) an additional 11 Substantive Consolidation Bankruptcies among cases with an asset value of $100 million or more, but less than $1 billion. Thus, the preliminary study has identified 40 Substantive Consolidation Bankruptcies out of 344 large public company bankruptcy filings during the period. Based on a review of original documents for the 21 largest public company bankruptcies, the secondary sources under-report Substantive Consolidation Bankruptcies (as defined). While the data suggest that application of substantive consolidation is less prevalent in the smaller cases that constitute large public company bankruptcies, any significant positive frequency claims are premature absent further review. Nevertheless, the data do suggest that it would be a mistake to project an approximate 50% frequency of substantive consolidation across all large public company bankruptcies. The final version of this study aims to review

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[27] Section 1123(a) of the Bankruptcy Code contemplates that a debtor may merge or consolidate with another person as part of implementing a plan of reorganization, though no specific authorization for substantive consolidation or deemed consolidation expressly appears in the Code. 11 U.S.C. A. § 1123(a)(5)(C) (2005). The references to merger and consolidation likely refer to state law corporate procedures implemented by filing with the applicable secretary of state. *See id.*

[28] Lynn M. LoPucki: WebBRD, at http://lopucki.law.ucla.edu/companyinfo.asp?name=Owens+Corning (last visited May 10, 2006).

[29] An involuntary chapter 11 petition filed in 2002 against NRG Energy, Inc. was dismissed from the District of Minnesota. *In re* NRG Energy, Inc., 294 B.R. 71 (Bankr. D. Minn. 2003). Two days later the company filed a voluntary chapter 11 petition in the Southern District of New York.

[30] *See infra* pp. 56–57 (discussing research of secondary sources).

original court filings for the largest public company bankruptcies, but not beyond the $1 billion limit, to permit more solidly grounded frequency claims. The secondary data do show that the doctrine of substantive consolidation remains important for large public company bankruptcies of varying sizes. The Substantive Consolidation Bankruptcy phenomenon is not limited only to our very largest reorganization proceedings.

Further, a preliminary review of secondary sources for filings in large public company bankruptcies from 1990 to 1999 reveals 27 Substantive Consolidation Bankruptcies in the period out of a total 265 large public company bankruptcy filings. Thus, the secondary data suggest prior use of substantive consolidation doctrine at levels similar to the frequency of use revealed from 2000 to 2004 (approximately 11.6% during 2000 to 2004 versus approximately 10.2% during 1990 to 1999). However, given the limitations of the secondary sources (as discussed below), the data do not permit any precise positive frequency claims. One can conclude from this review of secondary sources that the Substantive Consolidation Bankruptcy is not a new phenomenon. Use of substantive consolidation to craft reorganization plans has been significant part of the bankruptcy lawyers' toolbox for at least a decade prior to the period of the primary study.

Lastly, in preparing this preliminary study, the secondary sources identified many other bankruptcy cases that do not satisfy the WebBRD reporting criteria, both small and large, public and private, in which substantive consolidation was imposed. The Substantive Consolidation Bankrutpcy phenomenon is not confined simply to large public company bankruptcies as defined by WebBRD. Further, the doctrine of substantive consolidation remains important for other areas of law and finance, including for the crafting of structured finance and securitization transactions.[31] The focus of this study should not lead one to forget the importance of the doctrine in other areas.

Three aspects of this study surprised me. First, I was not aware of the extent to which substantive consolidation doctrine informed negotiations of our largest restructurings. Over time it will be interesting to see whether anything like a 50% frequency rate is maintained in our largest bankruptcy cases and whether, overall, a frequency rate in excess of 10% is maintained. Second, I was not aware of the extent to which the use of the "deemed" substantive consolidation technique had proliferated. It seems that lawyers, acting as transaction cost engineers in reorganization proceedings,[32] have detached the benefits of substantive consolidation doctrine from its potential burdens. Third, as part of this transaction engineering, the study reveals the practice of "springing" consolidations in which plan proponents reserve the right to impose substantive consolidation at a later

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[31] *See, e.g.,* Peter J. Lahny IV, *Securitization: A Discussion of Traditional Bankruptcy Attacks and an Analysis of the Next Potential Attack, Substantive Consolidation*, 9 AM. BANKR. INST. L. REV. 815 (2001).

[32] *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L. J. 239, 253–55 (1984) (proposing that we analyze the role of lawyer as that of a transaction cost engineer).

date.[33]

Tables and case summaries detailing these results appear at the end of this study.

V. METHODOLOGICAL REMARKS

The WebBRD database was used to identify the universe of large public company bankruptcies to consider for this study. A study was performed using online search tools supplied by WebBRD to identify all large public bankruptcies for two time periods: filings made in 2000 through 2004 (344 total filings); and, filings made in 1990 through 1999 (265 total filings). Bankruptcies were rank ordered based on reported pre-filing assets, as adjusted to current dollars, in accordance with the WebBRD protocols.

Based on the first WebBRD study, the top 21 bankruptcies from 2000 to 2004 were identified and PACER was used to locate confirmation orders, disclosure statements and reorganization plans for these bankruptcies. Additionally, headings in the PACER system were reviewed to identify other filings indexed with the phrase "substantive consolidation" in the heading. The characterization of each of these top 21 bankruptcy filings as a Substantive Consolidation Bankruptcy (or not) was made based on a review of these original sources as compared to my definition of Substantive Consolidation Bankruptcy. Because of the breadth of the definition, a summary of the reasons for each categorization appear following the table presenting results for these top 21 filings. The final version of this study aims to review original documents for large public company bankruptcy filings involving assets of $1 billion or more from 2000 through 2004.

Given the small sample size and limited date range for the study of original sources, a review of secondary sources was conducted to determine whether the Substantive Consolidation Bankruptcy phenomenon was limited to the time frame of the study (and, thus, a relatively new phenomenon) and whether the phenomenon was limited to only the largest cases (on the notion that larger cases might be a proxy for greater complexity in which substantive consolidation tools might prove most useful). Lastly, it was hoped that a review of secondary sources might convey some sense of whether anything in the range of a 50% frequency for Substantive Consolidation Bankruptcies might be expected from a broader study.

WebBRD does not track for substantive consolidation. BankruptcyData.com does not specifically track for substantive consolidation; however, BankruptcyData.com mentions substantive consolidation in its reorganization plan summaries when application of the doctrine appears as part of the plan (though no assurances are given that this feature of plans has been consistently reported). To make matters more complex, one cannot directly perform a search of BankruptcyData.com's reorganization plan summaries for "substantive

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[33] At this point, the benefits of a springing consolidation remain unclear to me.

consolidation." Such a search only can be performed on LexisNexis and Westlaw to the extent that those services have input information received from BankruptcyData.com. It appears that both LexisNexis and Westlaw have input such data, but neither has done so on a consistent basis.

Accepting the significant limitations of the secondary data sources, to make a preliminary identification of "Substantive Consolidation Bankruptcies" beyond the review of original sources, the following search procedures were followed.

For LexisNexis a search for the term "substantive consolidation" was performed on May 10, 2006, without date restriction, in each of Bankruptcy DataSource – Company Profiles, News and Reorganization Plans (generating 226 documents); Bankruptcy DataSource – Data Pages (generating no documents); Bankruptcy DataSource – Reorganization Plans (generating 145 documents) and Bankruptcy DataSource – News Notes (generating 81 documents).

For Westlaw a search for the term "substantive consolidation" was performed on May 10,2006, without date restriction, in the "bkrdata" database, which is identified as containing materials from The Bankruptcy DataSource Plans of Reorganization database (generating 162 documents). Further, a search for the term "substantive consolidation" was performed on May 10, 2006, in the "allfeds" database, date restricted to after December 31, 1989 (generating 338 documents).

The documents produced in each of the LexisNexis and Westlaw searches were reviewed and compared to the listing of companies produced by the WebBRD searches to identify bankruptcies within the universe of companies identified by WebBRD that also appeared to fit the definition of Substantive Consolidation Bankruptcy given by this study.

VI. FUTURE RESEARCH BASED UPON THIS STUDY AND PARTING THOUGHTS

One premise of my critique of substantive consolidation doctrine in *Corporate Form and Substantive Consolidation* is that bankruptcy reorganizations involve bargaining in the shadow of the doctrine of substantive consolidation. For this reason, changes in the contours of the doctrine matter far beyond the impact that appears in reported decisions. Thus, when courts, such as the Third Circuit, make changes in statement of doctrine, and application of that doctrine to facts, as I believe occurred in *In re Owens Corning*,[34] these developments may affect the structure of future bankruptcy reorganization negotiations.[35] Because the United

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[34] 419 F.3d 195 (3d Cir. 2005), *cert. denied sub noms.* McMonagle v. Credit Suisse First Boston, 74 USLW 3395 (U.S. May 1, 2006) *and* Official Reps. Bondholders v. Credit Suisse First Boston, 74 USLW 3443 (U.S. May 1, 2006).

[35] I do not mean to suggest by this remark that *Owens Corning* was wrongly decided as a matter of pure result. I have no idea what the correct result for this case might be because, on my formulation of the doctrine, the court should have articulated a different standard and looked at somewhat different facts to decide the matter. Because the circuit court failed to appreciate the nature of reliance on guarantees in syndicated loan transactions, on its own articulated test, the Third Circuit should have upheld the lower court's imposition of substantive consolidation. Based on my seventeen years of practice experience with

States Supreme Court denied *certiorari*, the Third Circuit's decision in *Owens Corning*, will now serve as a benchmark for further study to test whether that decision influenced the structure of bankruptcy reorganizations completed in its wake. A subsequent study would involve review of bankruptcy reorganizations for filings occuring in 2005 and beyond. These results would be compared to the existing study (perhaps supplemented by additional measurements) in an attempt to determine whether, in fact, *Owens Corning* articulated a tighter standard for substantive consolidation as reflected in subsequent negotiation practices. Another effect that might be studied while *Owens Corning* remains precedent in the Third Circuit would be forum shopping. One might measure whether parties hoping to use substantive consolidation in crafting reorganization plans avoided the Third Circuit following the decision.[36]

Given the rise of the "deemed" substantive consolidation as a tool for reorganizing large public companies, several practices bear particular mention. First, courts have considered and approved the payment of interim fees from the consolidated cash flow of a corporate group as a matter of necessity when fees must be paid prior to disentangling the financial affairs of various group members.[37] Though parties objected to the practice as effecting a substantive consolidation, the interim order was found not appealable. Nevertheless, the practice should be seen as a limited form of substantive consolidation in which corporate form gives way to the practical realities that confront creditors and debtors when a corporate group has been operated as a single economic enterprise. Should the need to pay interim expenses on a consolidated cash flow basis provide evidence supporting substantive consolidation in the larger case?

Second, courts often approve debtor-in-possession ("DIP") financing in which the DIP lender receives either a priority payment or a security interest in the consolidated assets of a corporate group (typical asset classes being accounts receivable and inventory).[38] In effect, this practice recognizes the corporate group as a single entity post-petition for the purposes of obtaining financing. Should the structure of post-petition financing tell us anything about the proper treatment of the

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syndicated lending, I believe the Third Circuit simply was wrong, as a factual matter, about the nature of reliance on these types of guarantees. *See id*. at 212–15. However, the test articulated by the Third Circuit is also wrong, in my view. To apply a properly formulated test, additional fact finding would be required to decide the issue of reliance. These matters are discussed in *Corporate Form and Substantive Consolidation*, *see supra* note 14.

[36] The motivation to conduct a forum shopping study to assess the behavior of "case placers" follows directly from investigations by Professor LoPucki. *See generally* LYNN M. LOPUCKI, COURTING FAILURE (2005). I am grateful for Professor LoPucki's suggestion that future research might include an analysis of *Owens Corning*'s impact on forum shopping.

[37] *In re* Geiger Enterprises, Inc., 17 B.R. 432 (W.D.N.Y. 1982) (noting that payment of interim fees from consolidated earnings of group did not result in de facto consolidation because the court was still trying to sort out the separate corporate entities and their finances, and was not a final order that was appealable).

[38] *See, e.g.*, *In re* Babcock & Wilcox Co., 250 F. 3d 955 (5th Cir. 2001) (allowing group wide DIP financing using group assets as collateral even though certain entities in the group did not require financing); White Rose Food v. General Trading Co. (*In re* Clinton Street Food Corp.), 170 B.R. 216 (S.D.N.Y. 1994) (acknowledging DIP lenders could rely on the financing order even though the order worked the equivalent of substantive consolidation for the benefit of DIP lenders).

corporate group as of the time of the bankruptcy filing? In effect, the DIP financing order, whether priority or secured, creates the equivalent of an intercompany family of guarantees to protect the DIP lender. If financing at the time of bankruptcy is only available on a consolidated group basis, should this provide evidence that the members of the corporate group should not be respected as separate legal entities as of the time of filing? Certainly the capital market may be telling us that such a consolidated group is not independently financeable on an entity by entity basis.

Third, we need to be cautious about the use of a deemed consolidation and its effect on certain creditor classes. The particular case I have in mind is the potential contrasting effect of a substantive consolidation and a deemed consolidation on rights of set-off.[39] Under a "deemed" consolidation, as opposed to an actual consolidation, legal entities are not combined. The actual combining of entities might create, post-petition, the degree of mutuality needed to permit the exercise of a right of set-off—a form of priority available to some creditors. The practice of a deemed consolidation, however, eliminates any possible argument that mutuality necessary for set-off has been created, while at the same time providing cost saving benefits of consolidation. Though one might argue that even a post-petition actual consolidation should not enhance rights of set-off because those rights should have been fixed at the time of filing the petition (and not at the later time of the substantive consolidation order), the example of set-off warns us to be vigilant for the opportunities and pitfalls that might exist for parties as they analyze whether to use an actual or a deemed consolidation.

What I think we find with the rise of the "deemed" consolidation, as suggested by the above three examples, is the bankruptcy law equivalent of a derivative instrument. Lawyers and courts are decoupling a particular desired functional outcome from the legal form previously needed to achieve that particular outcome. Courts can effect a temporary substantive consolidation to pay fees without the need for a merger. Courts can approve a consolidated financing without the need for intercompany guarantees or a merger. Courts can order a deemed consolidation to achieve benefits of consolidation decoupled from any downside that an actual merger might create through the creation of mutuality and the attendant activation of rights of set-off. In each case, the desired result is simply decreed without the need to wrap that result in a known corporate form or practice, such as a merger or consolidation. This study provides a glimpse of this process in action by revealing the rise of the deemed substantive consolidation.

VII. DATA TABLES AND SUMMARIES

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[39] *See In re* Garden Ridge Corp., 338 B.R. 627, 640–41 (Bankr. D. Del. 2006) (noting deemed substantive consolidation did not necessarily create mutuality required for parties to exercise set-off).

21 Largest Bankruptcies, 2000–2004 (status as of May 10, 2006)				
Company	Assets PreFiling[40] (in millions)	Filing Year	Disposition	Substantive Consolidation Bankruptcy?
Worldcom, Inc.	113,550	2002	Confirmed	Yes
Enron Corp.	72,954	2001	Confirmed	Yes
Conseco, Inc.	66,788	2002	Confirmed	Yes
Global Crossing Ltd.	33,543	2002	Confirmed	Yes
UAL Corp. (United Airlines)	27,412	2002	Confirmed	Yes
Pacific Gas and Electric Co.	24,461	2001	Confirmed	No
Adelphia Communications	23,519	2002	Pending	Yes
Mirant Corporation	20,777	2003	Confirmed	Yes
NTL, Inc.	18,426	2002	Confirmed	No
Kmart Corp.	16,482	2002	Confirmed	Yes
Reliance Group Holdings, Inc.	16,160	2001	Confirmed	No
NRG Energy, Inc. (2002)	13,997	2002	Dismissed	No
FINOVA Group, Inc. (The)	13,502	2001	Confirmed	No
NRG Energy, Inc. (2003)	11,673	2003	Confirmed	No
Federal-Mogul Corp.	11,357	2001	Pending	No
Comdisco, Inc.	9,706	2001	Confirmed	Yes
US Airways, Inc (2002)	8,740	2002	Confirmed	No
XO Communications, Inc.	8,675	2002	Confirmed	No
US Airways Group, Inc (2004)	8,652	2004	Confirmed	No
PG&E National Energy Group	8,502	2003	Confirmed	Yes
Owens Corning	7,345	2000	Pending	Yes

Synopsis of Reasons and Support for Chart Characterization Presented on a Company by Company Basis

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[40] The asset figures presented have been adjusted to current dollars (as of May 10, 2006) by WebBRD.

Worldcom, Inc.: The confirmed plan both imposes substantive consolidation to combine multiple entities into two groups and settles substantive consolidation litigation. In settling litigation, certain MCI creditors agreed to accept an estimated 44% percent recovery. This recovery was less than the estimated full recovery of 113% (representing principal and post-petition interest) in the absence of substantive consolidation and greater than the estimated 35% recovery with substantive consolidation.[41]

Enron Corp.: The confirmed plan incorporates settlement of substantive consolidation litigation.[42] In general, 30% of a creditor's claim is treated as if substantive consolidation had been imposed and 70% of a creditor's claim is treated as if substantive consolidation had not been imposed. The plan does not combine legal entities.[43]

Conseco, Inc.: The confirmed plan substantively consolidated all the so-called "Finance Company Debtors."[44]

Global Crossing Ltd.: The confirmed plan imposed a "deemed" consolidation for the limited purpose of voting and distribution with respect to certain creditor classes.[45]

Pacific Gas and Electric Co.: The confirmed plan reorganizes a single debtor.[46]

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[41] *See* Findings of Fact and Conclusions of Law (1) Approving (i) Substantive Consolidation and (ii) the Settlements Under Debtors' Modified Second Amended Joint Plan of Reorganization, dated October 21, 2003, and (2) Confirming Debtors' Modified Second Amended Joint Plan of Reorganization, *In re* Worldcom, Inc., No. 02-13533, 2003 WL 23861928 (Bankr. S.D.N.Y. Oct. 31, 2003).

[42] It had been rumored that the Enron Corp. bankruptcy plan would effect a substantive consolidation combining legal entities. *See* Midland Cogeneration Venture L.P. v. Enron Corp. (*In re* Enron Corp.), 419 F.3d 115, 127 (2d Cir. 2005). In fact, the court approved a settlement of the substantive consolidation issues after extensive fact finding and negotiation.

[43] *See* Findings of Fact and Conclusions of Law Confirming Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, and Related Relief, *In re* Enron Corp., No. 01-16034 (Bankr. S.D.N.Y. July 15, 2004).

[44] *See* Order Confirming Finance Company Debtors' Sixth Amended Joint Liquidating Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code at 24, *In re* Conseco Inc, No. 02 B 49672 (Bankr. N.D. Ill. Sept. 9, 2003).

[45] *See* Order Pursuant to section 1129(a) of the Bankruptcy Code and Rule 3020 of the Federal Rules of Bankruptcy Procedure Confirming Debtors' Joint Plan of Reorganization at 9, *In re* Global Crossing Ltd., No. 02-40188 (Bankr. S.D.N.Y. Dec. 26, 2002).

[46] *See* Order Confirming Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company Proposed by Pacific Gas and Electric Company, PG&E Corporation and the Official Committee of Unsecured Creditors, *In re* Pacific Gas and Electric Co., No. 01-30923DM (Bankr. N.D. Cal. July 31, 2003, as modified Dec. 22, 2003). Though not a Substantive Consolidation Bankruptcy (as defined), one should not get the impression that the scope of the doctrine of substantive consolidation is irrelevant to such cases. In my experience, creditor representatives always consider the existence of potential deep pockets and evaluate the chance of success in bringing more assets to the table to pay claims by use of doctrines such as substantive consolidation. I would be surprised if discussions on the topic did not occur in

UAL Corp. (United Airlines): The proposed plan effects a deemed consolidation for voting and distribution purposes. It specifically states that it does not affect the legal structure of the entities.[47]

Adelphia Communications Corp.: The proposed plan substantively consolidates various debtor entities into separate groups. The plan settles substantive consolidation claims under the so-called "Global Compromise." For some purposes it combines entities and for other purposes it effects a "deemed" consolidation for voting and distribution purposes.[48]

Mirant Corp.: The confirmed plan effects, in substance, a deemed consolidation to settle various intercompany disputes by combining entities solely for purposes of voting, confirmation and distributions into a single estate (though the plan does not describe the process as involving substantive consolidation). The plan specifically states that the combination of various debtors into a single estate for these purposes does not result in a combination of legal entities.[49] The bankruptcy court recognized that the Mirant Plan was, in substance, a substantive consolidation plan and so characterized it in a recent decision on the case.[50]

NTL Inc.: This confirmed plan does not provide for substantive consolidation, though the plan does effect a corporate restructuring into two corporate groups. Further, the plan nominally recognizes intercompany claims (Class 11) which, in a consolidation, should be ignored.[51]

Kmart Corp.: The plan provides for the substantive consolidation of various estates for purposes of effectuating a settlement and making distributions, but not for voting. Generally, the substantive consolidation under the plan does not affect the legal or corporate structure of the debtors, though the plan does contemplate a restructuring of the debtors in which assets of the debtors are transferred to new entities.[52]

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the Pacific Gas & Electric Co. and XO Communications cases even though each matter involved a single company.

[47] *See* Debtor's Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code at 74, *In re* UAL Corp., No. 02 B 48191 (Bankr. N.D. Ill. Jan. 20, 2006).

[48] *See* Debtors' Third Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code at 88–89, *In re* Adelphia Communications Corp., No. 02-41729 (Bankr. S.D.N.Y. Sept. 28, 2005); *see also In re* Adelphia Communications Corp., 333 B.R. 649, 654 (S.D.N.Y. 2005) (describing plan).

[49] *See* Exhibit 1 to Amended and Restated Second Amended Joint Chapter 11 Plan of Reorganization for Mirant Corporation and its Affiliated Debtors at 2, *In re* Mirant Corp., No. 03-46590-DML-11 (Bankr. N.D. Tex. Dec. 9, 2005).

[50] *In re* Mirant Corp., 334 B.R. 800, 806 n.12 (Bankr. N.D. Tex. 2005).

[51] *See* Second Amended Joint Reorganization Plan of NTL Incorporated and Certain Subsidiaries at PLAN-27, *In re* NTL Inc., No. 02-41316 (Bankr. S.D.N.Y. July 15, 2002, as modified Sept. 5, 2002).

[52] *See* Findings of Fact, Conclusions of Law, and Order under 11 U.S.C. §§ 1129(a) and (b) and Fed. R. Bankr. P. 3020 Confirming the First Amended Joint Plan of Reorganization of Kmart Corporation and its Affiliated Debtors and Debtors-in-Possession, as modified, at 32, 82, *In re* Kmart Corp., No. 02 B 02474 (Bankr. N.D. Ill. Apr. 23, 2003).

Reliance Group Holdings, Inc.: The plan provides for the reorganization of an insurance holding company. The insurance company was subject to separate state insolvency proceedings. Though not classified as a Substantive Consolidation Bankruptcy, the parties entered into settlement agreements providing for treatment of various federal income tax matters, including treatment of net operating loss carryforwards and Section 847 refunds for the consolidated group.

NRG Energy, Inc. (2002): This case is reported as dismissed. It is treated as not constituting a Substantive Consolidation Bankruptcy.

The FINOVA Group, Inc.: The plan expressly states that it consists of nine separate plans of reorganization, one for each debtor in the jointly administered case.[53]

NRG Energy, Inc. (2003): This confirmed plan specifically states that it effects a procedural consolidation and not a substantive consolidation. The plan also provides for the possibility of the deemed substantive consolidation of certain debtors in the future—in my terminology, a "springing" substantive consolidation.[54]

Federal-Mogul Global Inc.: The proposed plan provides that each of the reorganized debtors will continue to exist as a separate corporate entity after the effective date of the plan.[55] However, under the proposed plan, the plan proponents reserve the right to substantively consolidate various US debtors and a UK debtor for plan classification, treatment, voting and confirmation purposes.[56]

Comdisco, Inc.: The plan provides a substantive consolidation of the debtors into two groups for purposes of voting, confirmation and distribution purposes. It is a "deemed" consolidation because it does not generally contemplate the merger or dissolution of any debtor or the transfer or commingling of any assets.[57]

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[53] *See* Third Amended and Restated Joint Plan of Reorganization of Debtors under Chapter 11 of the Bankruptcy Code dated June 13, 2001 at 35–36, *In re* The FINOVA Group, Inc., Nos. 01-0697 (PJW) through 01-0705 (PJW) (Bankr. D. Del. June 13, 2001) (NB: The PACER file copy bears later dates from a financial printer).

[54] *See* Debtors' Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code at 10, 16, *In re* NRG Energy, Inc., No. 03-13024, (Bankr. S.D.N.Y. July 2, 2003) (appearing as Exhibit A to the Third Amended Disclosure Statement).

[55] Third Amended Joint Plan of Reorganization at 104, *In re* Federal-Mogul Global Inc., No. 01-10578 (Bankr. D. Del. June 4, 2004). Though I have classified this case as not constituting a Substantive Consolidation Bankruptcy, it is an interesting example of a "springing" deemed consolidation.

[56] *Id.* at 27.

[57] *See* Findings of Fact, Conclusions of Law, and Order under 11 U.S.C. §§ 1129(a) and (b) and Fed. R. Bankr. P. 3020 Confirming the First Amended Joint Plan of Reorganization of Comdisco, Inc. and its Affiliated Debtors and Debtors-in-Possession at A-23, *In re* Comdisco, Inc., No. 01-24795 (Bankr. N.D. Ill. July 31, 2002).

US Airways Inc. (2002): The plan expressly states that it does not provide for substantive consolidation. However, the plan reserves the right to impose substantive consolidation solely for voting and distribution purposes.[58]

XO Communications, Inc.: Though the debtor owned, managed and controlled approximately 60 subsidiaries, the confirmed plan reorganized the parent company only.[59]

US Airways Group Inc. (2004): This plan was effected by a business combination with America West Airlines. The confirmation order leaves the existing debtor entities intact, revesting property in those entities, and specifically affirms Article V, Section 5.6, of the plan which reinstates intercompany claims (though it also states that no distributions will be made to any debtor in respect of such claims).[60]

PG&E National Energy Group: The confirmed plan does not provide for substantive consolidation. However, the bankruptcy court approved a settlement order resolving substantive consolidation claims in order to move forward with the plan of reorganization.[61] Given the relatively small amount paid to settle the claims, one might infer that substantive consolidation factors in this case were not particularly strong.

Owens Corning: This bankruptcy has generated the most significant reported decisions on substantive consolidation during the period of study. The plan proposed a deemed consolidation which was approved by the bankruptcy court[62] but

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[58] *See* First Amended Joint Plan of Reorganization of US Airways Group, Inc. and its Affiliated Debtors and Debtors-in-Possession at A-39, *In re* U.S. Airways Group Inc., No. 02-83984-SSM (Bankr. E.D. Va. Jan. 17, 2003 as modified). Though I have classified this case as not constituting a Substantive Consolidation Bankruptcy, it is an interesting example of a "springing" deemed consolidation.

The text and charts in this article list cases by the name that appears on each company's Form 10-K, rather than the name of the debtor in its bankruptcy proceeding. *See* WebBRD, Glossary, http://lopucki.law.ucla.edu/glossary.htm (last visited Apr. 12, 2006). This company filed its 10-K for the year ended December 31, 2002 under the name US Airways, Inc. But the debtor's and its affiliate companies' bankruptcy case was jointly administered under the name US Airways Group, Inc. *See* Voluntary Petition, *In re* US Airways Group, Inc., No. 02-83984 (Bankr. E.D. Va. Aug. 11, 2002). When the company filed again in 2004 its case was administered under the name US Airways, Inc. *See* Voluntary Petition, *In re* US Airways, Inc., No. 04-13819 (Bankr. E.D. Va. Sept. 12, 2004). However, its Form 10-K for the year ended December 31, 2004 was filed under the name US Airways Group, Inc.

[59] *See* Third Amended Plan of Reorganization for XO Communications, Inc., *In re* XO Communications, Inc., No. 02-12947 (Bankr. S.D.N.Y. July 22, 2002); *see also supra* note 46.

[60] *See* Findings of Fact, Conclusions of Law and Order under 11 U.S.C. §§ 1129(a) and (b) and Fed. R. Bankr. P. 3020 Confirming the Joint Plan of Reorganization of US Airways, Inc. and its Affiliated Debtors and Debtors-in-Possession at 22–23, *In re* US Airways, Inc., No. 04-13819-SSM (Bankr. E.D. Va. Sept. 16, 2005).

[61] *See* Memorandum of Decision, *In re* PG&E National Energy Group, Inc., No.03-30459 (Bankr. D. Md. Apr. 16, 2004).

[62] *See In re* Owens Corning, 316 B.R. 168 (Bankr. D. Del. 2004).

rejected by the circuit court.[63]

Tables listing Identified Substantive Consolidation Bankruptcies for Large Public Companies during 2000-2004 and 1990-1999 follow.

[63] *See In re* Owens Corning, 419 F.3d 195 (3rd Cir. 2005), *cert. denied sub noms.* McMonagle v. Credit Suisse First Boston, 74 USLW 3395 (U.S. May 1, 2006) *and* Official Reps. Bondholders v. Credit Suisse First Boston, 74 USLW 3443 (U.S. May 1, 2006).

Substantive Consolidation Bankruptcies, 2000-2004		
Assets Pre-filing (in millions)[64]	**Company Name**	**Filing Year**
$113550	Worldcom, Inc.	2002
72954	Enron Corp.	2001
66788	Conseco Inc.	2002
33543	Global Crossing Ltd.	2002
27412	UAL Corporation (United Airlines)	2002
23519	Adelphia Communications Corporation	2002
20777	Mirant Corp.	2003
16482	Kmart Corp.	2002
9706	Comdisco, Inc.	2001
8502	PG&E National Energy Group	2003
7345	Owens Corning	2000
3916	Integrated Health Services, Inc.	2000
2854	PSINet Inc.	2001
2774	Genesis Health Ventures, Inc.	2000
2702	ContiFinancial Corp.	2000
2590	Warnaco Group Inc.	2001
2563	Arch Wireless Inc.	2001
2326	At Home Corp	2001
2263	Polaroid Corporation	2001
2135	Loews Cineplex Entertainment Corporation	2001
2019	Spiegel Inc.	2003
1826	ICG Communications	2000
1813	World Access, Inc.	2001
1486	Mariner Post-Acute Network, Inc.	2000
1339	Teligent Inc.	2001
1277	GST Telecommunications, Inc.	2000
1194	EOTT Energy Partners, LP	2002
1171	Rhythms NetConnections, Inc.	2001

[64] The asset figures presented have been adjusted to current dollars as reported May10, 2006 by WebBRD. Certain of these reported numbers for 2000-2004, and all the reported numbers for 1990-1999, vary slightly from numbers reported in prior online versions of this preliminary study. The variations result from recent recalculations of current dollars by WebBRD based on new Consumer Price Index information.

Substantive Consolidation Bankruptcies, 2000-2004		
Assets Pre-filing (in millions)[64]	**Company Name**	**Filing Year**
1065	Stone & Webster, Inc.	2000
914	Friede Goldman Halter, Inc.	2001
909	Footstar Inc.	2004
904	MicroAge, Inc.	2000
712	Intermet Corp.	2004
459	Coram Healthcare Corp.	2000
425	GC Companies, Inc.	2000
420	Fibermark, Inc.	2004
353	Big V Supermarkets, Inc.	2000
290	Kaiser Group International, Inc.	2000
283	Startec Global Communications Corporation	2001
253	Vista Eyecare, Inc.	2000

Substantive Consolidation Bankruptcies, 1990-1999		
Assets Pre-Filing (in millions)	**Company Name**	**Filing Year**
$11255	Continental Airlines, Inc.	1990
5982	Montgomery Ward Holding Corp. (1997)	1997
3467	Ames Department Stores	1990
3031	Pan Am Corp.	1991
2549	Zale Corporation	1992
1941	The Circle K Corporation	1990
1867	Hechinger Company	1999
1686	Lone Star Industries, Inc.	1990
1507	Anchor Glass Container Corporation	1996
955	Purina Mills, Inc.	1999
926	McCrory Corp	1992
855	Days Inns of America, Inc.	1991
760	Harvard Industries, Inc. (1997)	1997
614	The Leslie Fay Companies, Inc.	1993
605	Eagle-Picher Industries Inc.	1991
602[65]	AM International, Inc.	1993
592	APS Holding Corp.	1998
500	Edisto Resources Corporation	1992
455	Reliance Acceptance Group, Inc.	1998
407	Servam Corp.	1992
388	Jamesway Corporation	1993
377	Laclede Steel	1998
330	MMR Holding Corporation	1990
326	Telesphere Communications Inc.	1991
287	Standard Brands Paint Company	1992
278	Value Merchants, Inc.	1993
241	Carolco Pictures, Inc.	1995

[65] This number reflects restated financial results recently included in the WebBRD database, increasing the relative position of AM International, Inc. from prior online versions of this study.