



## **The Third Circuit Extends *Grossman's* Test for when a "Claim" Arises but Declines Discharge of Claims on Due Process Grounds**

Mark E. Felger • 302.295.2087 • [mfelger@cozen.com](mailto:mfelger@cozen.com)

Keith L. Kleinman • 302.295.2077 • [kkleinman@cozen.com](mailto:kkleinman@cozen.com)

Confirmation of a plan of reorganization generally discharges all pre-confirmation "claims."<sup>1</sup> However, in some instances, a plaintiff's claim against a debtor does not manifest itself until after a plan has already been confirmed. Until 2010, the 3rd Circuit applied what was known as the *Frenville* "accrual test" to determine when a plaintiff's claim arose.<sup>2</sup> Under the *Frenville* test, a claim arose when a cause of action accrued under applicable nonbankruptcy law.<sup>3</sup> However, after much criticism, the 3rd Circuit overruled *Frenville* and announced a new test in *Grossman's*.<sup>4</sup> Under the *Grossman's* test, "a claim arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a right to payment under the Bankruptcy Code."<sup>5</sup>

One of the issues left open by the *Grossman's* decision was how the new test should be applied to existing bankruptcies and previously confirmed plans. In *Wright v. Owens Corning*,<sup>6</sup> the 3rd Circuit answered this question. Initially, the court extended the reach of the *Grossman's* test to include all pre-confirmation exposure to a debtor's product or conduct. However, because of due process concerns, the court declined to discharge the plaintiffs' pre-confirmation claims.

### **FACTUAL BACKGROUND**

Owens Corning and certain of its affiliates (collectively, the debtors) filed Chapter 11 bankruptcy petitions in 2000 (the petition date). The claims bar date was set at April 15, 2002 and the debtors provided publication notice of the bar date. In 2006, the debtors' plan of reorganization was filed (the plan). The debtors provided publication notice of the confirmation hearing, the disclosure statement, and the plan confirmation date. Both the plan and the plan's confirmation order (the confirmation order) discharged claims relating to the debtors that arose prior to the plan's confirmation date.

In 2009, Patricia Wright (Wright) and Kevin West (West and collectively with Wright, the plaintiffs) filed claims against the debtors, claiming that a product defect in roof shingles manufactured by the debtors caused the plaintiffs' roofs to leak (collectively, the claims). Wright's claim was based on shingles that had been installed prior to the petition date in late 1998 to early 1999. West's claim was based on shingles that were installed in 2005, after the debtors' petition date but prior to confirmation of the plan. The plaintiffs waited until 2009 to file their claims because it was not until 2009 that the alleged product defect manifested itself by causing their respective roofs to leak.

After the plaintiffs filed their claims, the debtors moved for summary judgment, arguing that the claims were discharged by the plan and confirmation order. Agreeing with the debtors, the district court determined that the plaintiffs held claims under the Bankruptcy Code and publication notice afforded the plaintiffs their due process rights. Subsequently, the plaintiffs appealed to the 3rd Circuit.

### **GROSSMAN'S TEST GETS EXTENDED TO POST-PETITION/ PRE-CONFIRMATION EXPOSURE BUT DUE PROCESS REQUIRES CONTINUED APPLICATION OF FRENVILLE**

Initially, the court applied the *Grossman's* test to determine whether the plaintiffs held claims under the Bankruptcy Code. The court found that Wright clearly held a claim because she purchased her shingles and was exposed to its defect pre-petition. West, on the other hand, presented a tougher call. The *Grossman's* test, as currently articulated, only accounts for pre-petition exposure to a debtor's product or conduct. West purchased his shingles post-petition. As such, the *Grossman's* test did not expressly cover West's exposure to the debtors' shingles.

Judge Ambro, writing for the court, stated that excluding post-petition/pre-confirmation exposure from the *Grossman's* test would unnecessarily and artificially restrict the Bankruptcy Code's expansive treatment of claims that was recognized in *Grossman's*. Thus, the *Grossman's* test must be restated to include such post-petition/pre-confirmation exposure to a debtor's conduct or product. Under this restated definition of the *Grossman's* test, West also held a claim under the Bankruptcy Code.

Finding that both plaintiffs held claims under the Bankruptcy Code, the court went on to analyze whether the plaintiffs, as unknown future claimants, received sufficient notice under the Due Process Clause to permit the discharge of their claims. Although publication notice is generally sufficient to provide unknown claimants with due process, the circumstances of this case created unique problems. When the debtors sent their notices, *Frenville* was still good law. Under *Frenville*, the plaintiffs did not hold a claim under the Bankruptcy Code. Therefore, when the plaintiffs received their notices, they did not believe that their rights could be affected by the proceedings and correctly took no action.

Under such circumstances, "[d]ue process affords a re-do ... to be sure all claimants have equal rights."<sup>7</sup> As such, the court held that *Frenville* must be used to determine whether pre-petition claims may be discharged for reorganization plans proposed and confirmed prior to the *Grossman's* decision (June 2, 2010). Furthermore, because the *Grossman's* decision was limited to pre-petition exposure and the court now expands its application to all pre-confirmation exposure, *Frenville* will continue to apply to post-petition/pre-confirmation claims for plans proposed and confirmed prior to the *Wright* decision (May 18, 2012). In the present case, neither *Wright* nor *West* held claims under *Frenville*. Thus, their claims could not be discharged. The 3rd Circuit concluded by noting that "[t]he shadow of *Frenville* fades, but more slowly than we would like."<sup>9</sup>

## VIEWPOINT

*Wright* should serve as a warning to potential claimants that they will need to diligently research any pre-confirmation exposure to a debtor's product or conduct that may result in a future injury and consider filing a proof of claim to prevent discharge of such a claim.

From a debtor's perspective, this case shows the reluctance of some courts to discharge unknown future claims because of due process concerns. Notably, however, the *Wright* decision was limited to the specific problems created by the retroactive application of the *Grossman's* test. The court expressly left open the "broader issue of whether discharging unknown future claims comports with due process"<sup>8</sup> (e.g., even where there is a future claims representative). In any event, for better or worse, the spectre of *Frenville* likely will be felt for years to come.

- 
- 1 See 11 U.S.C. § 1141(d)(1)(A).
  - 2 *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984).
  - 3 *Wright v. Owens Corning*, --- F.3d ---, 2012 WL 1759992, at \*2 (3d Cir. May 18, 2012). For example, in a products liability case, a right to payment may not accrue until a product defect becomes evident and an individual suffers actual damage. Therefore, a claim would arise when the product defect actually manifests and causes damage to the claimant.
  - 4 *JELD-WEN, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114 (3d Cir. 2010).
  - 5 *Id.* at 125 (internal quotations omitted). In *Grossman's*, the court determined that an asbestos claim arose when the claimant was exposed to the company's product pre-petition even though the claimant's injury did not manifest until after the debtor's plan of reorganization was confirmed. *Id.*
  - 6 *Wright*, 2012 WL 1759992.
  - 7 *Id.* at \*6.
  - 8 *Id.* at \*6 n.7.
  - 9 *Id.* at \*7.

---

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:

Mark E. Felger at 302.295.2087 or [mfelger@cozen.com](mailto:mfelger@cozen.com)

Keith L. Kleinman at 302.295.2077 or [kkleinman@cozen.com](mailto:kkleinman@cozen.com)