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Financial Recovery Law

Bankruptcy Claims Time Machine

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So Maybe We Now Know When A Claim Arises, But Can A Debtor Discharge The Claim?

Although not admitting that it succumb to acknowledged "universal disapproval" of its 1984 decision in *Avellino & Bienes v. M. Frenville Co. (Matter of M. Frenville Co)* 744 F3d 332 (3rd Cir. 1984), the Third Circuit Court of Appeals did, in fact, reverse *Frenville* on June 2, 2010, with its en banc decision *In re: Grossman's Inc. et al., Debtors JELD-WEN f/k/a Grossman's Inc. Appellant, v. Gordon Van Brunt, Individually and in his capacity as Personal Representative of the Estate of Mary Van Brunt.* However, the Court left open the question of whether a claim is discharged in bankruptcy.

The facts of the JELD-WEN case were as follows:

- In 1977, the claimant purchased products containing asbestos from Grossman's Inc. when remodeling her home. In April 1997, Grossman's filed a Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for District of Delaware and the plan of reorganization was confirmed in December 1997. The claimant did not file a proof of claim before confirmation of the plan because, at the time, she was unaware of any claim she had because she was not diagnosed with mesothelioma until March 2007, and had manifested no symptoms related to asbestos exposure until 2006.
- Shortly after her diagnosis, claimant sued JELD-WEN, the successor-in-interest to Grossman's, in a New York state court. JELD-WEN moved the Bankruptcy Court to reopen the chapter 11 case, seeking a determination that the claims were discharged by the plan. Claimant died in 2008, and the spouse was substituted as the representative of her estate.

Significantly, the Court noted that in the Grossman's bankruptcy case "[a]t the time of the [bankruptcy], Grossman's had actual knowledge that it had previously sold asbestos-containing products such as gypsum board and joint compound"; "Grossman's knew of the adverse health risks associated with exposure to asbestos"; it "was aware that asbestos manufacturers had been or were being sued by asbestos personal-injury claimants"; it "was aware that producers of both gypsum board and joint compound were being sued for asbestos-related injuries" and it "was not aware of any product liability lawsuits based upon alleged exposure to asbestos-containing product had been filed against [it]…."

In first overruling its *Frenville* decision, the Court concluded that the *Frenville* "accrual" test was too narrow an interpretation of a "claim" under the Bankruptcy Code. The accrual test of *Frenville* established that the existence of a claim depended upon whether the claimant possessed a right to payment, and when that right "arose" as determined by the relevant non-bankruptcy law. If the right to payment, per state law, arose post-petition, it is a post-petition claim, even though (for example) the exposure to toxic materials happened pre-petition.

Now, the Third Circuit is "persuaded that the widespread criticism of Frenville's accrual test is justified." In its place, the Third Circuit now says "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. *See* 11 U.S.C. Section 101(5)".

But then, the Court stated that their new definition of when a claim arises did not, necessarily, mean that the plaintiff's claim was discharged. For that, the case had to be remanded to the District Court. The Court did give some guidance in this regard — raising the issue of due process. The Court noted that notice is "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality…." Also, inadequate notice can "preclude discharge of a claim." In this regard, one wonders if the plaintiff was accorded proper due process. Recall, Grossman knew it had sold asbestos-containing products and that asbestos caused health problems, and knew that the manufacturers of asbestos and products that use it had pending personal injury claims litigation.

For claimants seeking to not have their claims discharged, it appears a due process argument is an avenue of attack. For debtor companies filing bankruptcy and seeking to discharge potential future claims — perhaps the notice of claims bar date should have language regarding potential tort liability.

So what do you think? Should Frenville have been overturned? Has the Court pointed to a due process attack?