Who Bears the Ultimate Risk? *General Growth*, Substantive Consolidation, Intercompany Claims and the Use of Cash Collateral

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IF IT WALKS LIKE A DUCK: HYBRID AND COMPLEX SUBSTANTIVE CONSOLIDATION STRUCTURES AFTER *NEW CENTURY*

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Introduction

The substantive consolidation opinion (or more specifically, the no substantive consolidation opinion) has, of course, become a fixture in most complex financing deals, particularly real estate financings. The often lengthy opinions, assuming without change a long list of facts, assure that the various entities involved in the deal as obligors of one sort or another will not be substantively consolidated in the event of a bankruptcy filing by one or more of the entities, assuming (again) no change in the current law. Accordingly, any development in the law of substantive consolidation has an impact on such opinions and, indirectly, on the deals relying upon such opinions. While other decisions—see General Growth—have given pause to the architects of bankruptcy-remote deal structures, the recent opinion of the United States District Court for the District of Delaware in In re New Century TRS Holdings, Inc., 407 B.R. 576 (D. Del. 2009) (hereinafter, "New Century II") should allow the opinion writers a bit of extra sleep.

Substantive Consolidation Generally

Substantive consolidation can generally be described as the "pooling [of] the assets of, and claims against, [multiple entities]; satisfying liabilities from the resultant common fund; eliminating inter-company claims; and combining the creditors of the two companies for purposes of voting on reorganization plans," and for purpose of distribution. See, e.g., Union Savings Bank v. Augie/Restivo Baking Company, LTD (In re Augie/Restivo Baking Company),

[1] The author represented the Ad Hoc Committee of Beneficiaries of the New Century Financial Corporation Deferred Compensation and SERP.

860 F.2d 515, 518 (2d Cir. 1988). Courts have articulated a number of different tests to determine when substantive consolidation is appropriate and will be ordered, most of which are variations on the three most widely accepted tests:

(1) **The Auto-Train Test.** This test balances the benefits of the proposed consolidation against the harm inflicted on objecting parties. Drabkin v. Midland-Ross Corporation (In re Auto-Train Corporation, Inc.), 810 F.2d 270, 276 (D.C. Cir. 1987). Under this analysis, "[t]he proponent must show not only a substantial identity between the entities to be consolidated, but also that consolidation is necessary to avoid some harm or realize some benefit." Id. If a creditor shows that it relied on the separate credit of one of the entities and that it will be prejudiced, "the court may order consolidation only if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm." Id.

(2) **The Augie/Restivo Test.** The Augie/Restivo test requires courts to consider two separate factors: "(i) whether creditors dealt with the entities as a single economic unit and 'did not rely on their separate identity in extending credit' . . . or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors." Augie/Restivo, 860 F.2d at 518. [Internal citations omitted.]

(3) **The Owens Corning Test.** This test states that substantive consolidation is only appropriate if all classes of creditors consent or where, with respect to the debtors, it can be shown that "(i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." In re Owens Corning, 419 F.3d 195, 211 (3rd Cir. 2005).

Of these tests, the Owens Corning test appeared the most restrictive. First, in addition to articulating the tough, two-option test noted above—which applied absent the consent of all affected classes of creditors—the Third Circuit made it clear that convenience of administration of the chapter 11 case was never an adequate basis for substantive consolidation, and also outlawed "deemed" or "for the purposes of the plan" substantive consolidation, absent the consent of all affected classes of creditors. Id. at 210-212. The precise scope and meaning of the Owens Corning opinion was precisely at issue in the New Century case.

<u>The Case in the Bankruptcy Court: Confirmation of the *New Century* Plan</u>

Prior to the date of the bankruptcy filings, the various New Century Debtors (the "<u>Debtors</u>") were engaged in the business of originating, servicing and purchasing mortgage loans and selling mortgage loans through whole loan sales and securitizations. Founded in 1995, one of the Debtors, New Century Financial Corporation ("<u>New Century</u>" or "<u>NCFC</u>"), grew to employ over 7,200 individuals and the loan origination part of the business funded more than $200 million in loans almost every business day from April of 2005 through December of 2006. In short, from its beginnings in 1995 through the date of the bankruptcy filings, New Century had grown to become the second largest originator of subprime residential mortgage loans in the country.

In order to retain employees, on or about January 1, 1999, New Century executed and made available to certain employees the Deferred Compensation Plans. In general terms, the purpose of non-qualified deferred compensation plans, such as the Plans at issue in the case (often referred to as "top hat" plans), is to allow a select group of individuals in management or who are highly compensated (and who meet the other requirements imposed by the Employee Retirement Income Security Act of 1974 (as amended, hereinafter, "<u>ERISA</u>")) to defer certain tax liabilities on compensation in addition to the amounts which can be deferred in other types of qualified retirement plans. Although "top hat" plans offer considerable tax benefits, there are certain risks associated with them. One of the statutory requirements for "top hat" plans to qualify as such is that the plan must remain subject to the claims of general unsecured creditors of the company in the event of the company's insolvency. The ad hoc committee that would object to the New Century plan of liquidation and that litigated issues related to the Deferred

Compensation Plans and the class they represented (the "Plaintiffs") were individuals who contributed to the Deferred Compensation Plans during the course of their employment. As of December 31, 2006, the Deferred Compensation Plans contained in excess of $43 million (the "Plan Assets").

After approximately ten years of the exceptional growth described above, cracks in the Debtors' armor began to appear. On February 7, 2007, New Century announced that it needed to restate its 2006 interim financial statements. On March 8, 2007, New Century reported that it was unable to satisfy approximately $70 million in margin calls. On March 13, 2007, New Century's securities were delisted by the New York Stock Exchange. These events and others sent the Debtors into a downward spiral that eventually led to their Chapter 11 filings on April 2, 2007.

The bankruptcy filing of New Century triggered certain issues concerning rights to the $43 million in the Deferred Compensation Plans being held in a segregated trust account by Wells Fargo Bank, N.A., as Trustee of the Plan trust ("Wells Fargo"). Premised on these disputes, on June 20, 2007, Plaintiffs, again the individuals who participated in the Plans, initiated an adversary proceeding against the Debtors, Wells Fargo, the Compensation Committee of the Board of Directors of New Century as the Plan Administrator, and the Official Committee of Unsecured Creditors (the "Committee"), by filing a complaint seeking declaratory and equitable relief to redress violations of ERISA with regard to the Plan Assets (the "Adversary Proceeding").

Among other relief, Plaintiffs sought a declaration in the Adversary Proceeding that the Deferred Compensation Plans were not "top hat" plans as defined by ERISA. In the event it was determined that the Plans were not "top hat" plans, the Plan Assets would be deemed to be the property of the Beneficiaries and not property of the Debtors' bankruptcy estates. In other words, if the Plans failed to satisfy the ERISA requirements relating to "top hat" plans, the Plan Assets would not be subject to the claims of the general creditors of New Century and would be trust property held exclusively for the benefit of the men and women who earned the money which went into the Plans. Alternatively, in the event it was determined that the Deferred Compensation Plans did in fact constitute "top hat" plans under ERISA, Plaintiffs sought a determination that the Plan Assets are available to ***only*** the general unsecured creditors of New Century and ***not*** to secured or undersecured creditors, nor to the creditors of any of the remaining Debtors, under the language of the governing trust and Plan documents.

With the Adversary Proceedings still in its relative infancy, on April 23, 2008, the Debtors and the Creditors Committee (the "Plan Proponents") filed a plan of liquidation ("the Chapter 11 Plan"). The Chapter 11 Plan included the following provisions:

(a) Under the Chapter 11 Plan, the 16 separate Debtors were grouped into only three debtor groups, the Operating Company Debtors, the Holding Company Debtors, and a third, single-Debtor "group" (each a "Debtor Group"). Under the terms of the Chapter 11 Plan, the claims of Plaintiffs (assuming claims existed after resolution of the Adversary Proceeding) were deemed to be against the Holding Company Debtors, as opposed to the Plaintiffs holding claims only against New Century.

(b) Under the Chapter 11 Plan, the assets of each Debtor Group, as opposed to each individual debtor, were pooled together and liquidated, and the net proceeds resulting from the deposition of the assets (after payment of certain priority and secured claims) used to satisfy the claims of holders of allowed unsecured claims against any Debtor that is a member of the Debtor Group at issue.

The Chapter 11 Plan also incorporated certain devices, or "protocols", allegedly designed to mitigate against the effects of grouping the Debtors. The Chapter 11 Plan provided for distribution of the net cash available from the assets of the Debtors in each Debtor Group to the holders of allowed unsecured claims against the Debtors in that Debtor Group. Generally, the cash available to distribute to the holders of allowed unsecured claims in each Debtor Group was calculated based on the gross proceeds obtained from the disposition of that Debtor Group's assets, less (i) the amount of allowed administrative, priority and secured claims, (ii) expenses of administering the Debtors' estates during the chapter 11 cases, and (iii) expenses of the liquidating trust established by the Chapter 11 Plan, which, in each case, would be allocated among the Debtor Groups pursuant to the negotiated allocation as set forth in the Chapter 11 Plan. The amount of an allowed unsecured claim was determined according to a formula set forth in the Chapter 11 Plan for each class, which established the claim's “Determined Distribution Amount.” The calculations used to arrive at the Determined Distribution Amounts were also subject to certain “protocols” established in the Chapter 11 Plan, including the following:

(a) *The Multi-Debtor Claim Protocol.* The Multi-Debtor Claim Protocol adjusted the Determined Distribution Amount of creditors holding allowed unsecured claims for which more than one Debtor was jointly and/or severally liable. The Multi-Debtor Claim Protocol was designed to reduce the expense of administering claims resolution and to take into account the legal rights of creditors holding guarantees, or other valid joint and several contractual arrangements with the Debtors. Under the Multi-Debtor Claim Protocol, a creditor with allowed unsecured claims for which Holding Company Debtors NCFC and NC Credit are jointly and/or severally liable would be assigned a Determined Distribution Amount of 130% of the amount of its allowed unsecured claim against NCFC, and a Determined Distribution Amount of 0% with respect to its claim against NC Credit. Unsecured creditors holding allowed unsecured claims against Operating Debtors were treated similarly. Therefore, if a creditor held allowed unsecured claims against NCMC, NC Capital and Home 123, for which those Debtors are jointly and/or severally liable, those creditors would receive a Determined Distribution Amount of 130% against NCMC and a Determined Distribution Amount of 0% on account of its other unsecured claims against Operating Debtors.

(b) *The Intercompany Claim Protocol.* The Intercompany Claim Protocol was a protocol designed to address claims held by one Debtor against another Debtor. The claims appeared on the Debtors' books and records, but there were no promissory notes or instruments evidencing the debt between the companies. Intercompany claims were dealt with in the Chapter 11 Plan partly through Determined Distribution Amounts. Claims by one holding company against another within the Holding Company Debtor Group were assigned a Determined Distribution Amount of 0%. Similarly, claims of one operating company against another in the Operating Debtor Group are assigned a Determined Distribution Amount of 0%. The settlement of intercompany claims took into account factors such as joint and several claims against multiple Debtors, and the intercompany claims that might result therefrom, by adjusting a creditor's Determined Distribution Amounts. This approach zeroed out the intercompany claims, but dealt with the potential merits of intercompany claims by increasing or decreasing the distributions to affected creditors. The Intercompany Claim Protocol also was developed, in part, because various members of the Committee questioned whether the intercompany claims of the Debtors should be treated as debt or equity. Under the settlement embodied in the Intercompany Claim Protocol, NCFC (as a member of Holding Company Debtor Group) would receive 50% of its intercompany claims against NCMC (one of the Operating Company Group), despite the argument that the intercompany claims should be recharacterized as equity.

Premised on the Chapter 11 Plan’s proposed consolidation of the 16 Debtors into three debtor groups, pooling of the assets of the debtor groups, and the pooling of claims against the debtor groups (among other factors), Plaintiffs filed an objection to the confirmation of the Chapter 11 Plan (the "Plan Objection"). In the Plan Objection, Plaintiffs argued that the pooling of the Debtors' assets and liabilities constituted substantive consolidation of the Debtors' assets and liabilities in contravention of Owens Corning.[2]

After a two-day hearing, the Bankruptcy Court confirmed the Plan. Specifically, the Bankruptcy Court held, among other things, that the Chapter 11 Plan did not effectuate a substantive consolidation of the Debtors, either in form or effect. The Bankruptcy Court, in dealing with Owens Corning, held that:

> Typically, substantive consolidation takes a form in which separate entities are merged into a single survivor, which is then left with the assets and liabilities of all. In contrast, the Plan here does not propose to combine the assets and liabilities of all sixteen Debtors, but fashions three Debtor Groups, based upon each entity's function and in an attempt to resolve intercompany claims and issues regarding ownership of certain assets. The Plan framework recognizes the separate business functions and creditor bodies of the respective entities. The Holding Company Debtors consist of entities which generally operated as real estate investment entities, frequently holding residual interests in securitization trusts realized by the Debtors from the securitization of pools of mortgage loans. The Operating Company Debtors consist of entities that conducted the Debtors' business operations, including originating, purchasing and selling loans and servicing loans for third parties. Access Lending stands by itself because it operated largely autonomously from the other Debtors by providing warehouse financing to other loan originators. The procedures approved

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[2] Plaintiffs also argued in the Plan Objection that the Chapter 11 Plan could not be confirmed because similarly situated claimants in the same class were being treated differently, in violation of sections 1123(a)(4) and 1129(a)(1) of the Bankruptcy Code. This objection arose from the fact that the Chapter 11 Plan established a "Multi-Debtor Claim Protocol." In general terms, under this protocol, claims of creditors holding allowed unsecured claims against more than one debtor in a debtor group were granted a claim against one debtor in an amount equal to 130% of the creditor's claim in exchange for reducing the claim against another debtor to 0%. In the Plan Objection, Plaintiffs argued that the Multi-Debtor Claim Protocol violated section 1123(a)(4) of the Bankruptcy Code because claimants in the same class were being paid at 130% of a Determined Distribution Amount while other claimants in the same class but holding claims against a particular debtor, like Plaintiffs, were being paid only 100% of the Determined Distribution Amount.

Plaintiffs additionally argued that the Chapter 11 Plan could not be confirmed because the Plan Proponents failed to satisfy all of the requirements of section 1129(a) of the Bankruptcy Code. Under section 1129(a)(7), before a plan of reorganization can be confirmed it has to be demonstrated with respect to each class of impaired claims that the holder of an impaired claim will receive or retain on account of such claim an amount not less than the amount such claimant would receive in the event the debtor's assets were liquidated under Chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(7).

> by the Court also required creditors to file claims against specific Debtors, which allowed creditors with claims against more than one Debtor to file claims against each of those entities. I conclude that the Plan does not propose substantive consolidation *in form.*
>
> Neither does the Plan, *in effect,* result in substantive consolidation. Usually, creditors who rely upon the corporate separateness of subsidiaries are harmed by consolidation, which eliminates the benefit of obtaining satisfaction of a claim from more than one entity. This Plan, however, avoids that harm by creating the Multi-Debtor Claim Protocol. The Multi-Debtor Claim Protocol is applicable when a creditor has valid claims against more than one Debtor and, therefore, has claims in multiple classes. The Multi-Debtor Claim Protocol adjusts the Determined Distribution Amount of the multiple claims to a single claim that is less than 100% of each claim against the Debtors, but more than 100% of a single claim against the combined Debtor Group. Furthermore, substantive consolidation usually cancels any inter-entity liabilities. The Plan before me includes a compromise on this issue by providing for the Intercompany Claim Protocol, which resolves many disputes over intercompany claims but does not cancel them entirely. Here, but for consent of the Deferred Compensation Beneficiaries, the Debtors have achieved a global agreement, settling all key intercreditor and inter-estate disputes through the use of numerous, tailored, interrelated protocols. This effect is far from the imprecise, "rough justice" of substantive consolidation against which Owens Corning warns; neither is there any evidence that the purpose of the Plan is to disadvantage tactically any group of creditors. Instead, as demonstrated by the record before me, the Plan embodies thoughtful compromises that carefully preserve creditors' rights, rather than diminish or eliminate them.
>
> Upon analysis of the Plan's framework, viewed in light of the principles articulated by the Court of Appeals, I conclude that the Plan does not provide for substantive consolidation of the Debtors, "deemed" or otherwise.

In re New Century TRS Holdings, Inc., 390 B.R. 140, 161-62 (Bankr. D. Del. 2008)(footnote omitted)(hereinafter "New Century I").[3]

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[3] The Bankruptcy Court also held that the Chapter 11 Plan did not violate section 1123(a)(4) because, although certain claimants in the same class were receiving 130% of the Determined Distribution Amount in circumstances where others were receiving only 100% of the Determined Distribution Amount, those receiving 130% were actually agreeing on an overall basis to less favorable treatment in relation to payment of their claims (by waiving claims against other debtors) and, therefore, the Chapter 11 Plan did not violate section 1123(a)(4); and the Chapter 11 Plan did not violate section 1129(a)(7) because, despite the fact that the Bankruptcy Court excluded much of the evidence offered by the Plan Proponents at the confirmation hearing, according to the Bankruptcy Court, the Plan

The Plaintiffs promptly appealed to the District Court. The Plaintiffs also filed a Motion to Stay Order Confirming Plan of Reorganization Pending Appeal Pursuant to Federal Rule of Bankruptcy Procedure 8005 (the "Stay Motion") seeking to stay the confirmation of the Chapter 11 Plan pending appeal. In an effort to expedite the appeal process, Plaintiffs filed a Request for Certification of Direct Appeal to the United States Court of Appeals for the Third Circuit seeking to have the appeal heard directly by the Third Circuit (the "Motion for Direct Appeal"). After hearing, the Bankruptcy Court denied the Motion for Direct Appeal and denied the Stay Motion. In denying the Stay Motion, however, the Bankruptcy Court, in order to protect the interests of Plaintiffs, ordered the Debtors to provide Plaintiffs with notice prior to making certain types of distributions under the Chapter 11 Plan in order to allow Plaintiffs time to seek a stay of the distribution.

The Issues and Arguments on Appeal

The Plaintiffs' Arguments. Among others[4], the Plaintiffs raised the following issue on appeal: whether the Bankruptcy Court erred in holding that the Chapter 11 Plan did not provide for the substantive consolidation of the Debtors in either form or effect and thus was not prohibited by the Third Circuit's Owens Corning holding? The Plaintiffs argued that a straightforward reading of Owens Corning simply did not permit the creative substantive consolidation structure used in the Chapter 11 Plan.

The Plaintiffs argued that substantive consolidation is an equitable remedy which allows a debtor to merge the assets and liabilities of various legal entities into one surviving entity. Owens Corning, 419 F.3d at 205. In Owens Corning, the doctrine was described as follows:

Proponents offered sufficient evidence to demonstrate that the distributions under the Chapter 11 Plan would result in greater distributions than creditors would receive under a Chapter 7 liquidation.

[4] On appeal, the Plaintiffs pressed all issues in the Plan Objection.

> Substantive consolidation, a construct of federal common law, emanates from equity. It treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor. Consolidation restructures (and thus revalues) rights of creditors and for certain creditors this may result in significantly less recovery.

419 F.2d at 205 (internal citations omitted). In relation to substantive consolidation, "[t]he bad news for certain creditors is that, instead of looking to assets of the subsidiary with whom they dealt, they must now share those assets with all creditors of the consolidated entities, raising the specter for some of a significant distribution diminution." Id. at 206. Because of the potential of this adverse impact, the Third Circuit Court held that substantive consolidation cannot be called into play absent "compelling circumstances," and that it is a remedy of "last resort" which should be considered only after "considering and rejecting" all other remedies. Id. at 211.

The Plaintiffs contended that the Bankruptcy Court concluded that the Chapter 11 Plan did not result in substantive consolidation even though it clearly consolidated the assets and liabilities of the 16 Debtors into only three "debtor groups," and achieved full substantive consolidation within each group of companies. Indeed, the Plaintiff's contended that the Plan Proponents admitted that the consolidation of the Debtors into the Debtor groups had all of the characteristics of substantive consolidation, but merely argued that the harms created by this substantive consolidation were mitigated (but not eliminated) by the "protocols." The Plan Proponents did not seriously contend that the Debtor groups were not substantively consolidated in form.

The Bankruptcy Court provided essentially two reasons why the Chapter 11 Plan did not effectuate substantive consolidation in either ***form*** or ***effect***. First, in determining that the Chapter 11 Plan did not effectuate substantive consolidation in ***form***, the Bankruptcy Court held that the breaking of the 16 Debtors into three debtor groups, principally a group of holding companies and a group of operating companies, prevented the consolidation of assets and liabilities from being deemed a substantive consolidation because not **all** of the Debtors were consolidated into a single entity. In the words of the Bankruptcy Court:

> Typically, substantive consolidation takes a form in which separate entities are merged into a ***single survivor***, which is then left with the assets and liabilities of all. ***In contrast, the Plan here does not propose to combine the assets and liabilities of all sixteen Debtors, but fashions three Debtor Groups, based upon each entity's function and in an attempt to resolve inter-company claims and issues regarding the ownership of certain assets***.

New Century I, 390 B.R. at 161(emphasis added). The problem with the Bankruptcy Court's analysis, the Plaintiffs argued, is that there is nothing in the Owens Corning decision or elsewhere that permits the pooling of the assets and liabilities of ***some*** but not ***all*** of the debtors in order to avoid having to satisfy the requirements for substantive consolidation. The Bankruptcy Court's approach would have Owens Corning ban a combination of two debtors (if there are only two) but not the combination of ten debtors (if there were more than ten). The Plaintiffs argued that Owens Corning cannot be so easily avoided and disregarded.

In fact, cases addressing exactly the same of type of pooling of debtors into various groups had recognized that the pooling of debtors into different debtor groups was still substantively consolidating the assets and liabilities of the various debtors and have required debtors to demonstrate, through meeting detailed evidentiary and factual standards, that substantive consolidation is factually warranted. E.g., In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 763 (Bankr. S.D.N.Y. 1992).

In Drexel, the debtors proposed a plan of reorganization that involved the same type of consolidation of certain of the debtors into groups as the Chapter 11 Plan at issue in the New

Century case. The debtors in Drexel proposed a plan of reorganization that substantively consolidated the debtors into two debtor groups and left one independent debtor premised on the various debtors' "separate historical presentation to creditors," among other reasons. Drexel, 138 B.R. at 763. The Drexel Court described the consolidation of debtors in this way:

> The Plan *provides for the substantive consolidation of the DBL Group Consolidating Subsidiaries into DBL Group, and the DBL Inc. Consolidating Subsidiaries into DBL Inc.,* but does not provide for the consolidation of DBL Group, DBL Inc., and DBL Trading because of their separate historical presentation to creditors and their independent regulatory requirements.

Id. at 763 (emphasis added). The Court in Drexel went on to analyze whether the debtors satisfied the requirements of substantive consolidation and held, in the context of the case, that the requirements of substantive consolidation had been satisfied on the facts. Id. at 773. In other words, unlike in the New Century case, the Drexel Court did not find that the breaking of the debtors into various debtor groups allowed the debtors to sidestep the factual predicates for substantive consolidation. Rather, the consolidation of even some, but not all, of the debtors into separate debtor groups still constituted substantive consolidation which had to be factually justified and supported. Owens Corning, which provides a much higher bar to substantive consolidation than the Second Circuit test employed by the Court in Drexel, provided no allowance for consolidation, of some, but not all, debtors.

The Plaintiffs contended that the Plan Proponents' witnesses themselves testified at the confirmation hearing that the Chapter 11 Plan effectuated a substantive consolidation of the Debtors into the various debtor groups. The Plan Proponents' own witnesses admitted the following:

- One of the Committee's financial advisors, testified that the "debtor group" model used by the Plan Proponents involved the substantive consolidation of all of the holding companies as a group and the separate substantive consolidation of the operating company debtors as a group.

- That same advisor testified further that the debtor group model incorporated into the Chapter 11 Plan included the substantive consolidation of each group of companies because the assets of each group were combined, the claims again each group were combined, and the inter-company claims within each group were allowed at zero.

- The Chief Restructuring Officer and Chief Executive Officer of the Debtors, admitted on cross-examination that under the Chapter 11 Plan the assets of the Debtors in each debtor group are merged and combined and pooled for distribution, the claims against the holding companies share in the pool of assets, and the inter-company liabilities as between the group are valued at zero.

The Plaintiffs argued that there was a consensus amongst the Plan Proponents' own witnesses on at least one issue, and that is that the Chapter 11 Plan resulted in the pooling of the assets and liabilities of the various debtors within each of the debtor groups and the elimination of inter-company liabilities. This characterization of the Chapter 11 Plan appeared to mirror the definition of substantive consolidation enunciated by the Third Circuit. Owens Corning, 419 F.3d at 205. Accordingly, the Plaintiffs argued that the holding of the Bankruptcy Court that the Chapter 11 Plan did not result in substantive consolidation in *form* should be reversed by the District Court.

The Bankruptcy Court also held that the Chapter 11 Plan did not result in substantive consolidation because *in effect* the Chapter 11 Plan stemmed from a global settlement of claims, excepting only the claims of Plaintiffs from the terms of the global settlement. The Bankruptcy Court stated: "Here, but for the consent of the Deferred Compensation Beneficiaries, the Debtors achieved a global agreement, settling all of the intercreditor and inter-estate disputes through use of numerous, tailored, interrelated protocols." New Century I, 390 B.R. at 161. In other words, the Bankruptcy Court found that the Chapter 11 Plan did not, *in effect*, result in substantive consolidation because through use of certain protocols, the settlement agreements reached by all of the creditors other than Plaintiffs, had the effect of avoiding the "rough justice" against which Owens Corning warns. Id. The Plaintiffs argued that proposing a plan of reorganization premised on a series of compromises that settle most, *but not all* claims, did not allow a debtor to escape the requirements of Owens Corning. In this respect, the Chapter 11 Plan is nearly identical to the failed Owens Corning plan.

In Owens Corning, certain banks made an unsecured loan to Owens Corning of approximately $2 billion. 419 F. 3d. at 201. As part of the transaction, the obligations of Owens Corning were guaranteed by a number of Owen Corning's subsidiaries. Id. Several years after the closing of the loan transaction, Owens Corning and 17 of its subsidiaries filed for relief under Chapter 11 and ultimately proposed a plan of reorganization. Id. at 201-02. The plan provided for the substantive consolidation of the debtors' assets and liabilities. Id. at 202. The banks objected to the proposed substantive consolidation contemplated by the debtors' proposed plan. Id. The District Court, in holding that substantive consolidation was warranted, concluded that, due to the difficulties involved in attempting to "untangle the financial affairs of the various entities," not only did substantive consolidation have "obvious advantages" but it was a "virtual necessity." Id. at 203.

The Third Circuit reversed the District Court and held that Owens Corning had not demonstrated that substantive consolidation was warranted under the circumstances of the case. After outlining the principles that should be used to guide a court in determining substantive consolidation issues, the Third Circuit stated that, *absent consent*, substantive consolidation could only occur under two sets of circumstances:

> In our Court what must be proven (*absent consent*) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they

> disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.

Id. at 211 (emphasis added).

Similar to the facts at issue in Owens Corning, the Plan Proponents settled with every group of creditors *but* Plaintiffs. Characterizing either the Owens Corning plan or the Chapter 11 Plan as a series of "compromises" is a semantic exercise which attempts to place form over substance. If the Chapter 11 Plan was a series of compromises – and in some sense every plan of reorganization or liquidation is a series of "compromises" (otherwise known as negotiating the plan) – its effect was substantive consolidation and, therefore, it had to be approved, and could only be approved, under the two-part standard established by the Third Circuit in Owens Corning. The Plaintiffs argued that the Bankruptcy Court allowed precisely what the Third Circuit disallowed in Owens Corning – an attempt to "settle" on substantive consolidation, by partial agreement of the parties, over the objection of a dissenting group of creditors. Consolidation can only be achieved by *unanimous* consent or by meeting the Owens Corning test. Accordingly, because they fell short of obtaining unanimous consent, the Debtors were required to meet the test set forth in Owens Corning because Owens Corning itself precludes "compromising-around" a standard they could otherwise meet. For these reasons, the Plaintiffs contended that the Bankruptcy Court's ruling that the Chapter 11 Plan did not result in substantive consolidation in *effect* should also be reversed by the District Court.

The Plan Proponents' Arguments. The Plan Proponents argued that the Chapter 11 Plan did not provide for substantive consolidation because it did not simply lump the assets and liabilities of the Debtors together in different groups and ignore the distinctions among Debtors and the relative rights of their creditors. Rather, even though the Chapter 11 Plan pools the assets and liabilities of certain groups of Debtors for purposes of making distributions, in reality the Chapter 11 Plan was a complicated web of settlements that addresses the host of issues that affect different Debtors and the creditors of different Debtors in variable ways. For example, the Chapter 11 Plan provides for classes specific to individual Debtors and Determined Distribution Amounts specific to those classes. These Determined Distribution Amounts set forth classes of claims against various Debtors and were weighted to reflect the legal rights of creditors in those classes, taking into account such matters as what Debtor entities have the stronger ownership claims to various key assets and causes of action where ownership is inherently unclear, intercompany claims between various Debtors, and whether creditors have joint and several claims against multiple Debtors (and if so, the nature of the assets held by and claims against those multiple Debtor obligors). This, the Plan Proponents argued, was not substantive consolidation, whether phrased as "in form" or "in effect". It was an integrated and interrelated series of compromises, one feature of which is the grouping of Debtors as an administrative convenience to cut down the costs associated with distributions to creditors and allow for all creditors, including the Plaintiffs, to receive a larger distribution.

The Plan Proponents contended that the Plaintiffs' argument that the Plan violated the standards articulated in Owens Corning was premised on a mischaracterization of the Bankruptcy Court's opinion. According to the Plan Proponents, the Bankruptcy Court recognized that the three debtors groups were formed for the very purpose of avoiding the substantive consolidation that Owens Corning prohibits, despite the fact that simply substantively consolidating the Debtors into three groups would have made it far easier for the Debtors to consummate their Plan. The Bankruptcy Court reviewed all aspects of the Plan and saw the Plan for what it is, which is why it properly concluded, after a two-day trial, that the Plan was a "global agreement, settling all of the intercreditor and inter-estate disputes through the use of numerous, tailored, interrelated protocols. This effect was far from the imprecise, "rough justice" of substantive consolidation [against] which Owens Corning warns." New Century I, 390 B.R. at 161-62.

The Plan Proponents denied that their own witnesses admitted that the Plan provided for substantive consolidation. When the Creditors Committee's advisor testified and used the term "substantive consolidation", he did not use the term in the legal context; his use of such term simply meant that the assets of the Debtors were groups for distribution. Furthermore, when the CEO and Chief Restructuring Officer of the Debtors testified that assets of the Debtors in each debtor group are merged and pooled for distribution and inter-company claims are valued at zero, that was not an admission that the Plan substantively consolidated any Debtors.

The Plan Proponents relied heavily on the decision in In re Winn-Dixie Stores, Inc., 365 B.R. 239 (Bankr. M.D. Fla. 2006). According to the Plan Proponents, Winn-Dixie Stores, Inc. and its subsidiaries filed a plan of reorganization that is similar to the plan at issue in New Century in that differing rights of creditors against various debtors were dealt with in the plan through weighing factors. As the debtors attempted to formulate a consensual plan of reorganization, the decision of whether or not to substantially consolidate became a pivotal issue, one that materially divided the creditors. Id. The debtors and creditors settled the issues related to the substantive consolidation by coming up with a "Substantive Consolidation Compromise." Id. Certain landlords objected to the compromise because landlords without guarantees were to receive the same pro rata share that the landlords with guarantees were to receive. Id. at 245-46. The objecting landlords had two primary claims: disparate treatment and "deemed" consolidation. Id. at 245, 251. The bankruptcy court rejected both arguments. First, it considered important the fact that the debtors had not sought deemed consolidation or even substantive consolidation, but had presented the court with a settlement that touches on events consistent with consolidation. Id. at 252. For example, like the Chapter 11 Plan, the Winn-Dixie plan pooled assets and weighted distributions to reflect legal rights. Next, the court emphasized the fact that the substantive consolidation compromise was an agreement reached between the parties; it "was a compromise that entailed bargaining for specific benefits while giving away certain rights." Id. Specifically, most of the landlords with guarantees thought it was fair to give up their guarantee claims in exchange for 70.6% of their unsecured claims while most of the landlords without guarantees thought it was fair to forego seeking substantive consolidation in exchange for 70.6% of their unsecured claims. Id. Finally, the Winn-Dixie court noted that the paramount interest of the creditors, even in the face of opposition from a group of creditors, "is that the Substantive Consolidation Compromise is a better alternative than forcing the impending litigation" where such litigation "could wipe out the estate." Id. at 250 (emphasis added). The court noted the complexity of the case, the expense, the inconvenience and the delay to the estate and to the creditors, in the event the court was forced to decide on the issues of substantive consolidation, and held that the "Substantive Consolidation Compromise" was a much better alternative. Id.

The Plan Proponents argued that the Chapter 11 Plan, like the plan in Winn-Dixie, considered the relative rights of creditors against different Debtors, and the distributions took this into account. For example, the Chapter 11 Plan provided for a Determined Distribution Amount of 130 percent (130%) where a creditor has a joint and several claim against both NCFC and NC Credit, two of the Holding Company Debtors. Similar distinctions are made in the Chapter 11 Plan in setting distributions for creditors who had multiple claims against Operating Debtors, who had better rights to Litigation Proceeds, who had claims against Debtors that had substantial intercompany claims against other Debtors, and so on.

In that respect, the Plan Proponents argued, the Chapter 11 Plan was markedly different than the plan the Third Circuit rejected in Owens Corning. There, the plan treated all creditors and all debtors as though they were deemed to be merged into a single entity. In so doing, the Owens Corning plan ignored that certain banks that had loaned the debtors $2 billion legitimately enhanced the credit of these loans by obtaining subsidiary guarantees. This provided the banks with structural seniority and was a loan structure that occurs every business day. 419 F. 3d at 212. It was improper to strip these rights from the banks by treating their joint and several claims against several entities as single claims against a single entity that was "deemed" to have merged for purposes of the plan and then reverted to a group of separate entities upon confirmation. Id. Unlike substantive consolidation, the Chapter 11 Plan addressed, rather than ignored, matters such as the enhanced recoveries afforded to creditors with claims against multiple Debtors, the weighting of the strength and amount of various intercompany claims, the relative rights of creditors with claims against Debtors with comparatively more assets and fewer creditors compared to claims of creditors against more insolvent estates, and the host of other factors built into the Plan compromises.

The Plaintiffs' Reply Arguments. In response, the Plaintiffs contended that there is nothing in Owens Corning that supported the theory that a "complex" plan woven together by settlements allows a debtor to sidestep the requirements for substantive consolidation. Although the Plan Proponents openly acknowledged that the Chapter 11 Plan contemplated the pooling of assets and liabilities of various debtors - the very definition of substantive consolidation - they attempted to muddy the waters by arguing that a determination of whether substantive consolidation has occurred cannot simply be based on whether debtors are grouped together for certain purposes under a plan. Rather, the entire plan must be analyzed, the facts specific to each case must be reviewed, and the manner in which debtor groups are utilized must be examined in order to determine whether substantive consolidation has occurred. The Plaintiffs argued that this attempt to end-run the Third Circuit's dictates simply has no support in the law. The Third Circuit had clearly defined substantive consolidation and had not defined it the same way as the Plan Proponents: As set forth in Plaintiffs' Opening Brief, the Owens Corning Court defined the doctrine this way:

> Substantive consolidation, a construct of federal common law, emanates from equity. It treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor. Consolidation restructures (and thus revalues) rights of creditors and for certain creditors this may result in significantly less recovery.

Owens Corning, 419 F.3d at 195(internal citations omitted); see also In re WorldCom, Inc., 2003 WL 23861928, *35 (Bankr. S.D.N.Y., October 31, 2003) ("Substantive consolidation has the effect of consolidating the assets and liabilities of multiple debtors and treating them as if the liabilities were owned by, and the assets held by, a single legal entity."). Premised on the legal definition of substantive consolidation, since the Plan Proponents admitted that "the Plan pools the assets and liabilities of certain groups of Debtors for purposes of making distributions . . . [,]" they were required to satisfy the Owens Corning standard for substantive consolidation. [Appellees' Brief, p. 17].

The Plaintiffs admitted that the Owens Corning standard is a tough one to meet; the Third Circuit clearly intended that the standard would be rarely met. The Owens Corning Court stated that, *absent consent*, substantive consolidation can occur under two, and only two, sets of circumstances. There are two and only two ways to justify substantive consolidation and the Plan Proponents' idea of "complexity" and a lack of "rough justice" was not one of them.

The Plaintiffs argued that once a plan attempts to substantively consolidate debtors (as defined by the Third Circuit – not as defined by the Plan Proponents), the first question which needs to be answered is whether the plan satisfies the Owens Corning standard. This is the threshold question, period. The Plan Proponents argued that the threshold question can be ignored in order to allow the "the entire plan to be analyzed" to determine whether substantive consolidation has occurred. Such is not the case. A plan either combines assets and liabilities of various debtors or it does not. If it does, it substantively consolidates the debtors and the Owens Corning standards have to be met before addressing any other allegedly mitigating aspects of the plan.

The Plaintiffs also argued that the reliance on Winn-Dixie was misplaced; that case simply did not involve substantive consolidation (although the Court uses the defined term "Substantive Consolidation Compromise"). In fact, the case involved a settlement whereby creditors in the case specifically *traded away* the right to *seek* substantive consolidation in return for the terms of the settlement entered into by the parties. 365 B.R. at 253 ("The landlords without guarantees thought it was fair to forego seeking substantive consolidation, as did the vendors and suppliers, in exchange for 70.6% of their unsecured claims."). In other words, the case simply has nothing to do with when substantive consolidation does or does not occur under the Third Circuit standard.

The Decision of the District Court

On appeal, the District Court reversed, finding that the Chapter 11 Plan did, in fact, utilize substantive consolidation without meeting the Owens Corning test. The court found that the structure employed by the Debtors did, in fact, result in the "rough justice" against which the Third Circuit has cautioned, and that the Chapter 11 Plan was not saved by either the various protocols that were used to mitigate the effects of substantive consolidation, or the fact that the plan was the product of an alleged amalgamation of interrelated and complex settlements. As the court succinctly stated:

> The question raised on appeal is whether the plan, by aggregating multiple debtors into debtor groups to resolve claims, effects a substantive consolidation. As the bankruptcy court points out, the plan here does not call for the typical case of substantive consolidation where multiple separate entities are merged into a single entity and inter-entity liabilities are erased; instead of many-into-one, the plan calls for many-into-three, and the inter-entity liabilities are not erased. Typical or not, however, the many-into-three framework still presents the same potential inequities for creditors as would be presented in the many-into-one frame-work, namely that creditors face increased competition for a consolidated pool of assets and a re-valued claim that is less precise than if the creditors were dealing with debtors individually. This is the "rough justice" against which *Owens Corning* warns and, because it is effected by aggregating multiple debtors into one or more debtor groups, it falls within the definition of substantive consolidation.
>
> It is true that the aggregation in this case was not accompanied by erasure of inter-entity liabilities and was achieved by compromise settlement. These facts, however, are not meaningful ground for differentiating the instant case from the typical substantive consolidation scenario because they do not eliminate the aggregation's potentially deleterious effects on creditors, which is the main concern expressed in *Owens Corning* with respect to substantive consolidation and the reason why *Owens Corning* limits the use of substantive consolidation to only a few scenarios. Thus, these differences are not sufficient to place the aggregation in this case outside the definition of substantive consolidation. The bankruptcy court erred, then, in concluding that the plan did not effect a substantive consolidation and, as the record does not show that substantive consolidation is warranted in this case consistent with *Owens Corning*, the plan confirmation must be reversed.

New Century II, 407 B.R. at 591-92.[5]

Conclusion

Thus, the District Court's opinion endorses a "plain-meaning" approach to the Third Circuit's holding in Owens Corning and answers those who argue that the holding is largely limited to the facts of that case or to instances of "deemed" substantive consolidation. The District Court decision makes it clear that, in the Third Circuit, substantive consolidation may be achieved only with the express consent of all affected classes of creditors, or by meeting one of the two stringent factual tests set forth by the Third Circuit. The fact that the substantive consolidation is the product of settlements with some, but not all, creditors does not allow an end-run around the Owens Corning factors. Moreover, mitigating agreements, designed to soften the effect of consolidation, will not rescue the plan. At least with respect to cases that might find their way to Delaware, the opinion provides some comfort to dealmakers and opinion writers alike.

[5] The District Court also reversed on the basis of intra-class discrimination, but did not reach the other issues. The Plan Proponents, now succeeded by the liquidating trustee, appealed. The District Court stayed its decision pending an appeal to the Third Circuit. In re New Century TRS Holdings, Inc., 2007 WL 1833875 (D. Del.). Following a settlement between the Plaintiffs and the liquidating trustee appointed under the Chapter 11 Plan, the appeal to the Third Circuit was dismissed, leaving New Century II as precedent. An amended liquidating plan was later confirmed, with the Plaintiffs voting in favor of the plan and supporting confirmation.

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Restructurings, Reorganizations and Distressed Sales: Valuation Strategies and Opportunities

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VALCON 2010
Restructurings, Reorganizations and Distressed Sales: Valuation Strategies and Opportunities

Who Bears the Ultimate Risk?: General Growth, Substantive Consolidation, InterCompany Claims and the Use of Cash Collateral

Recent chapter 11 developments reflect that lenders and other vendors/creditors of integrated corporate enterprises assume the risk of extending credit to one entity in the enterprise in a subsequent chapter 11 proceeding.

1. **<u>Risk of Reinstatement</u>**

The current trend of reinstatement strategies is a legal, loan market and economic phenomenon attributable to the change in availability, legal terms, and cost of bank financing in the current loan market.

The period prior to the Lehman bankruptcy filing on September 15, 2008 is a "high water" mark, from the borrower's point of view, for economic terms and availability of bank financing. Prior to Lehman, loans were available at interest rates, in principal amounts, and with covenant restrictions (or absence thereof) that are not currently available. At the time of making these loans, lenders had no expectation or foresight of the potential for being crammed up, or reinstated, in a borrower's subsequent chapter 11 case. As a result, significant financings that are now on the balance sheets of leveraged companies are an "asset" to such companies in the sense that, under current market conditions, neither the amounts nor the economic nor legal terms of these financings can be duplicated.

In the recent cases of *Spectrum Jungle Brands* and *Charter Communications Inc.*, the borrowers commenced prepackaged or prenegotiated chapter 11 cases that aimed to restructure their balance sheets "around" their senior secured debt facilities by leaving those facilities unimpaired and reinstating them pursuant to a plan while deleveraging billions of dollars of bond debt.

In *Charter*, the debtors reinstated their $8 billion credit facility borrowed at an operating subsidiary level, which in turn was held through various pass-through entities by its ultimate holding company, Charter Communications Inc. In order to comply with the terms of the credit agreement and leave it unimpaired, the debtors had to maintain their existing corporate structure (i.e. keep the "boxes" in place).

Among the lenders' challenges to confirmation of the plan that proposed to reinstate their debt was the triggering of a cross-default provision.

- The credit agreement provided that it was an event of default if any affiliated, non-obligor Designated Holding Company ("DHC") either failed to pay installment on any indebtedness exceeding $200 million or failed to make interest payment that resulted in acceleration of indebtedness

- The DHCs were affiliated debtors in Charter's chapter 11 case. Each DHC had over $200 million in debt governed by indentures, which provided that a bankruptcy filing was an event of default upon which all outstanding notes would be accelerated

- The lenders contended that the acceleration of the DHC indentures constituted an event of default that was not an *ipso facto* default because the provision didn't speak to the *borrower's* financial condition or bankruptcy, but rather to the financial condition of the affiliated, non-obligor DHCs. Because the borrowing entity was solvent, the lenders contended that the court should enforce their rights according to their contract terms, including the cross-default provision.

- The bankruptcy court found that the cross-default provision was an *ipso facto* clause that did not preclude reinstatement. Specifically, the court found that the lender had specifically linked the financial health of the DHCs to that of the borrower by negotiating the events of default, and therefore the court concluded that an event of default based on the financial condition of a DHC was connected factually and contractually to the financial condition of the borrower to be an *ipso facto* default.

The potential for future reinstatement efforts remains economically significant. Over time, however, the economic value of this "legacy debt asset" will diminish because "legacy" term loans closed before September 2008 typically had 5-7 year maturities, and therefore only 3-5 years of such economic terms now remain available. Accordingly, the value of this "legacy debt asset" is eroding over time. That said, the reinstatement strategy can be expected to be utilized during this remaining window by leveraged borrowers seeking to implement balance sheet restructurings.

2. Section 1129(a)(10) Risk – Has the "statutory gate" of cramdown been left open?

In a jointly administered case, does section 1129(a)(10) require an impaired accepting class as to each debtor in the absence of substantive consolidation? Or is the vote of one impaired accepting class on a per-plan basis sufficient to cram-down dissenting classes?

Arguably, reading this section as a per-plan requirement and not a per-debtor requirement allows the election of creditors against one debtor to "veto" the rejecting vote of creditors against another debtor in an integrated enterprise.

- *In re SGPA, Inc., et al.*, Case No. 01-02609 (Bankr. M.D. Pa. filed Sept. 28, 2001). Eleven affiliated debtors filed a joint plan, but 10 of the 11 debtors' impaired classes received no distribution and thus were deemed to reject the plan. One of the debtors had an impaired bank class that voted to accept the plan, which would be crammed down on the objecting bondholders, who asserted that the deemed rejecting classes eliminated the possibility of an impaired accepting class on a per-debtor basis.

  The court confirmed the plan with a single accepting class on a per-plan basis:

  "I agree with Debtors' position that in a joint plan of reorganization it is not necessary to have an impaired class of creditors of each Debtor vote to accept the Plan. While I do not pretend to fully understand the corporate structure of these Debtors before or after reorganization, it is clear that the purpose of these filings was a financial restructuring of the Debtors. The Debtors were carrying too much debt on their balance sheets. It was necessary to convert debt to equity. All creditors were to be paid in full except the Bank Group and the Subordinated Bondholders. The Debtors made concerted efforts to conduct business as usual and the evidence indicated that the Chapter 11 filings did not have the adverse impact feared by Debtors. There is one plan of reorganization. While it is true that various corporations are affected by the Plan, the business of the Debtors remains the same. Whether these Debtors were substantively consolidated or jointly administered would have no adverse affect on the Subordinated Bondholders. The only truly substantive issue in this case is whether the Bank Group is getting more than 100%. For all the above-discussed reasons, I reject the Subordinated Bondholders' argument and conclude that the instant Plan complies with 1129(a)(10) because at least one class of impaired creditors – the Bank Group – has accepted the Plan."

- *In re Enron Corp., et al.*, 2004 Bankr. LEXIS 2549 (Bankr S.D.N.Y. 2004). The court confirmed a plan that contained a substantive consolidation settlement, but nonetheless ruled that, "though the Plan governs the treatment of claims against the 177 jointly administered Debtors, pursuant to applicable law, the affirmative vote of one impaired class under the Plan is sufficient to satisfy section 1129(a)(10) . . . . The plain language and inherent fundamental policy behind section 1129(a)(10) of the Bankruptcy Code provides that an affirmative vote of one impaired class under a plan is sufficient to satisfy section 1129(a)(10) of the Bankruptcy Code."

- *In re Charter Communications Inc., et al.* 2009 Bankr. LEXIS 3609 (Bankr. S.D.N.Y. 2009). The unsecured noteholders who were the most structurally subordinate creditor class challenged the voting outcome of the plan. The debtors contended (a) that there was an impaired accepting class at every debtor level because the solicitation procedures order provided that if a class didn't cast a ballot, it was deemed to accept the plan and (b) that *Enron* and *SGPA* stand for the proposition that section 1129(a)(10) is met on a per plan basis, and not a per debtor basis. The court ruled that, "[n]otably, given the Plan's structure, the requirement of section 1129(a)(10) would be satisfied even if Classes A-3 and C-3 were not deemed to be legitimately impaired. This is so because it is appropriate to test compliance with section 1129(a)(10) on a per-plan basis, not, as the CCI Noteholders argue, on a per-debtor basis. . . . Here, the evidence supports a finding that the business of Charter is managed by CCI on an integrated basis making it reasonable and administratively convenient to propose a joint plan. That joint Plan has been accepted by numerous impaired accepting classes, thereby satisfying the requirement of section 1129(a)(10)."