Bankruptcy Remoteness: A Summary Analysis

By Committee on Securitization and Structured Finance, ABA Business Law Section

The Committee on Securitization and Structured Finance of the Business Law Section of the American Bar Association has prepared this white paper to provide a summary analysis of certain fundamental legal concepts underlying "bankruptcy remoteness," namely: special purpose vehicles, substantive consolidation, and true sale, including the impact of certain recent judicial decisions, in order to provide a framework for assessing the extent to which an entity can be structured to be "bankruptcy remote" without running afoul of federal bankruptcy law. The comments presented in this paper represent the views of the draftspersons[1] and the Committee's Bankruptcy Remoteness Task Force (the "Task Force")[2] only and have not been approved by the ABA's House of Delegates or Board of Governors and, therefore, do not represent the official position of the ABA. Moreover, this white paper does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee or their respective employers.

Introduction

"Bankruptcy remoteness" is a term used to describe the combination of rights, duties, and covenants found in the organizational documents or loan documents of a legal entity intended to minimize the risk that the entity will enter into bankruptcy, either voluntarily or involuntarily.[3] "Special purpose entities," "special

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3. Provisions addressing voluntary bankruptcy target the authority of an SPE to file for bankruptcy protection; provisions addressing an involuntary bankruptcy filing focus on preventing an SPE from either being subject to an involuntary bankruptcy filed by a third-party creditor or being substantively

purpose vehicles," "SPEs," or "SPVs" are all terms used to describe legal entities with bankruptcy remote characteristics.[4] Participants in securitizations of receivables[5] and in single-asset financings, particularly commercial real property finance, use SPEs to hold the assets being securitized or financed.[6] The SPE may be organized as a domestic (frequently Delaware) corporation, partnership, or limited liability company or as a similar entity under the laws of a foreign jurisdiction.

Utilizing bankruptcy remote SPEs provides a number of advantages to the parties to a transaction, including (i) the ability to segregate the assets to be financed such that they are held solely for the benefit of specific creditors and (ii) avoiding bankruptcy risks, costs, and delays including cram-down risk, the suspension of payments to creditors, and the limitations on enforcement actions against the SPE for nonpayment due to the automatic stay taking effect upon the filing of a bankruptcy case.[7] Another significant advantage is that a bankruptcy remote SPE should not become part of its parent's or an affiliate's bankruptcy case as a result of an order of substantive consolidation by a bankruptcy court.[8]

Unfortunately, there is no assurance that the bankruptcy remote terms of an SPE's organizational and transactional documents will be upheld by a bankruptcy court. There are a number of situations in which bankruptcy judges have exercised their statutory and equitable powers to override certain bankruptcy remote terms and structures. While a variety of contractual provisions supporting bankruptcy remoteness have been upheld in bankruptcy over the years, including the requirement that the independent directors or managers of an SPE vote affirmatively to file a voluntary bankruptcy petition,[9] contractual

consolidated in the bankruptcy of its parent or an affiliate. See discussion of Substantive Consolidation at *infra* Part B.

4. We use the term "SPE" in this white paper. For a general glossary of securitization terms, see ABA Bus. Law Section, Securitization & Structured Fin. Comm., Frequently Used Terms in Securitization Structured Finance Transactions: The Jargon, Lingo and Lore (Vicki Tucker & Craig Wolson eds., 2016).

5. The discussion of the securitization of receivables also applies to other financial assets such as accounts, loans, chattel paper, and mortgage loans. See definition of "asset-backed security" in 17 C.F.R. § 229.1101(c) (2022) (specifying that an asset-backed security is "a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets").

6. A typical asset-backed securitization could be structured as a transfer of receivables or other financial assets from entity A (the "Sponsor") to its wholly owned SPE subsidiary followed by the SPE entering into a financing transaction using the assets as collateral for the financing. On the other hand, a financing of commercial real estate or real estate mortgage loans could be structured as the Sponsor establishing an SPE and the SPE acquiring the assets directly or indirectly from a third party.

7. *See* David W. Forti & Allison Whip, "Bankruptcy Remote" Special Purpose Entities in Commercial Mortgage Lending: Characteristics, Enforcement and Limitations 3 (2020).

8. A substantively consolidated SPE's assets would become assets of the parent debtor's estate, thereby benefitting the parent's creditors and in all likelihood leaving the SPE's creditors with less-favorable repayment terms.

9. It appears to be settled law that the authority of a party to file bankruptcy on the entity's behalf for all commonly used forms of entities, including partnerships, corporations, and limited liability companies, is governed by the law of the state under which the entity is organized, and not federal bankruptcy law. For further discussion of the authority to file bankruptcy see *Special Purpose Entities and Authority to File*, Am. Bankr. Inst. J. (Mar. 2004), https://www.abi.org/abi-journal/special-purpose-entities-and-authority-to-file-bankruptcy.

provisions[10] that are seen by bankruptcy courts as being overly restrictive of a party's right to access bankruptcy relief are considered to be void as against public policy under federal bankruptcy law[11] or otherwise in conflict with the Bankruptcy Code.

In addition to making the SPE bankruptcy remote, the SPE's acquisition of the assets to be securitized will be structured as a true sale of the assets such that the assets are no longer assets of the seller's (originator's[12]) estate in the event of its bankruptcy. Assets sold in a true sale are considered to be legally isolated from the originator.[13] An important advantage of legal isolation of assets is that it allows creditors financing the assets to focus on the credit quality of the assets rather than the credit quality of the originator, resulting in better financing terms for the issuer/borrower.[14]

A. Reducing the Likelihood of Voluntary or Involuntary Bankruptcy Filings and Special Purpose Entities

(i) Bankruptcy Remote Characteristics

Over the course of the last forty-plus years, (i) attorneys working with the stakeholders in securitizations and commercial real estate transactions and (ii) the rating agencies have identified a number of bankruptcy remote characteristics required to be incorporated into the organizational documents of a bankruptcy remote SPE. For example, in order to have the entity's separateness recognized in the rating of obligations of the SPE, S&P Global Ratings ("S&P") has identified the following characteristics as supporting the overall concept of bankruptcy remoteness:[15] restrictions on objects and powers, debt limitations,

10. There are those who advocate never permitting limitations on an entity's ability to file for bankruptcy relief by contract or restrictions in the entity's organizational documents. *See* Daniel J. Bussel, *Corporate Governance, Bankruptcy Waivers, and Consolidation in Bankruptcy*, 36 Emory Bankr. Dev. J. 99 (2020).

11. *See In re* Lexington Hosp. Grp., LLC, 577 B.R. 676, 683 (Bankr. E.D. Ky. 2017); *In re* Intervention Energy Holdings, LLC, 553 B.R. 258 (Bankr. D. Del. 2016); *In re* Lake Mich. Beach Pottawattamie Resort LLC, 547 B.R. 899, 912 (Bankr. N.D. Ill. 2016); discussion of Unanimity Requirements for Bankruptcy Filings at *infra* Section A.iv.

12. "Originator" is defined in section 15G(a)(4) of the Securities Exchange Act as the person who, through the extension of credit or otherwise, creates a financial asset that collateralizes an asset-backed security, and sells an asset directly or indirectly to a securitizer. 15 U.S.C. § 78*o*-11 (2018).

13. The term "true sale" most often is used in analyzing whether the transfer of assets effectively has removed the assets from the originator for bankruptcy purposes. *See* Steven L. Schwarcz, Structured Finance: A Guide to the Principles of Asset Securitization 16 (3d ed. 2002).

14. A two-tier structure may be required in order to have a true sale in the structure and therefore achieve bankruptcy remoteness in a state in which the amount of additional cash or assets ("overcollateralization") required by the investors to be held by the SPE issuing the securities ("SPE2") would result in excessive recourse to the originator of the assets. In a two-tier structure, the originator transfers the assets to a wholly owned SPE ("SPE1") through a combination of sale and capital contribution which should constitute a true sale and survive any fraudulent conveyance attack. SPE1 then transfers the assets to SPE2 in a manner structured as a sale but is most likely a secured loan. For further discussion of the two-tier structure, see 1 Jason H.P. Kravitt, Securitization of Financial Assets § 4.04, at 4-55 (3d ed. 2012).

15. *See* S&P Global Ratings, Legal Criteria: Structured Finance: Asset Isolation and Special-Purpose Entity Criteria 23 (May 15, 2019) [hereinafter *S&P Legal Criteria*].

independent directors or managers,[16] restrictions on mergers and reorganization, limitations on amendments to organizational documents, separateness, and security interests over assets.

(ii) Reducing the Likelihood of Voluntary Bankruptcy Filings

A number of the bankruptcy remote characteristics identified by S&P are designed to limit the likelihood of a voluntary bankruptcy filing by the SPE. For example, an SPE's organizational documents typically limit an SPE's purposes and powers to activities necessary to effect the specific transaction and also place limits on the SPE's indebtedness in order to reduce the likelihood of the SPE being forced into bankruptcy.[17] Furthermore, SPEs are usually required to have at least one independent manager or director whose consent is required with respect to any action seeking bankruptcy protection for the SPE,[18] in order to reduce the likelihood that the SPE would file a "strategic" bankruptcy merely for the convenience or benefit of its parent.[19] Conversely, an independent director's or manager's affirmative vote requirement with respect to any action seeking bankruptcy protection is not a bankruptcy "blocking" right. As a matter of law, an independent director or manager owes certain fiduciary duties to the SPE for which it serves and its equity holders. In the context of a potential bankruptcy, an independent director or manager must consider the consequences to the SPE of both an affirmative vote to filing bankruptcy as well as a vote against a bankruptcy filing.

The extent to which an "independent" director's or manager's fiduciary duties include the interest of the parent company or indirect equity holders such as affiliates of the parent company, or whether such fiduciary duties may be enforced derivatively by creditors, has been considered by the bankruptcy courts.[20]

16. The *S&P Legal Criteria* also specify the factors that constitute "independence" of a director or manager. A truly independent director or manager makes it more likely that a court will find that an SPE maintained a separate existence from its parent, which is an important factor in a substantive consolidation analysis.

17. An SPE's organizational documents often contain additional "protective provisions" not discussed in this white paper. For example, in Delaware, in order to avoid possible dissolution of the SPE for failure to have any members, an SPE's organizational documents will have provisions addressing the admission of one or more "Special Members" (typically the independent directors or managers whose admission to the SPE as a Special Member occurs simultaneously with the sole Member ceasing to be a member of the SPE). See the discussion of the Model Agreement, *infra* note 31, for an example of such a "Special Member" provision and further explanation regarding the role of "Special Members."

18. There may also be an independent equity holder whose consent is required to file a bankruptcy case. *See infra* Section A.iv.

19. A "strategic" bankruptcy filing occurs "when an otherwise solvent and financially sound borrower entity nevertheless files for bankruptcy as part of its (likely less stable) corporate parent's legitimate insolvency proceeding." *See* Forti & Whip, *supra* note 7, at 3 (quoting *CMBS–US: Sector Update–Q3 2019: Slight Improvements in Credit Metrics Amid Falling Interest Rates*, Moodys (Dec. 5, 2019)).

20. *See, e.g.*, *In re* Kingston Square Assocs., 214 B.R. 713, 735 (Bankr. S.D.N.Y. 1997) ("Nonetheless, it is universally agreed that when a corporation approaches insolvency or actually becomes insolvent, directors' fiduciary duties expand to include general creditors. Nearly all states' law is in accord, including those states in which the Debtors or their corporate general partners are incorporated."). *See also In re* Gen. Growth Props. Inc., 409 B.R. 43 (Bankr. S.D.N.Y. 2009); N. Am. Cath.

Although the formation documents of an SPE may attempt to modify an independent director's or manager's fiduciary duties by providing, for example, that such fiduciary duties include only a consideration of the interests of the SPE, including the SPE's creditors,[21] a bankruptcy court may not agree that certain fiduciary duty standards are enforceable, despite precedent to the contrary, if the court believes that the drafters of the formation documents "may have attempted to create impediments to a bankruptcy filing."[22]

The limits of an independent director's or manager's fiduciary duties was considered by *General Growth Properties*. General Growth Properties, Inc. was a publicly traded REIT with more than 700 subsidiaries and affiliates (collectively, "GGP"), many of which were SPEs owning and operating individual commercial real estate projects. In April 2009, more than 300 GGP subsidiaries structured to be bankruptcy remote filed voluntary bankruptcy proceedings under Chapter 11 of the Bankruptcy Code even though some of the SPEs were still generating a profit. Furthermore, a number of the independent managers of the SPEs were replaced, under questionable circumstances on the eve of the related SPEs' bankruptcy filings, with independent managers who were friendly to the parent and willing to vote for a voluntary bankruptcy filing.

It was readily apparent that the reason the profitable SPEs filed voluntary bankruptcy was to provide the entire GGP bankruptcy estate with access to the cash flow from the profitable SPEs if all bankruptcy proceedings were consolidated. The bankruptcy filings were challenged by several creditors of the profitable SPEs on grounds that the filings were (i) in bad faith because, at the time of the filing, the SPEs were not yet in financial distress and (ii) not in good faith, given the removal of the independent managers in order to replace them with bankruptcy-filing-friendly managers.

Regarding removal of the independent managers, the court held that management could replace the directors under the terms of the related operating agreements. When considering the bad-faith filing challenge, the court held that such an inquiry should consider the financial distress of the debtors as a group and not just individually as SPEs. The court took exception to the language in each SPE's limited liability company agreement directing the independent managers to consider "only the interests of the Company, including its respective creditors, in acting or otherwise voting on the matters" relating to the filing of a voluntary bankruptcy proceeding, characterizing such a concept as an attempt to create an impediment to bankruptcy filing. Instead, the court applied "a fiduciary duty of loyalty and care similar to that of a director of a business corporation organized under the General Corporation Law of the State of Delaware,"[23] a

Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007); Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., Civ. A. No. 12150, 1991 WL 277613 (Del. Ch. Dec. 30, 1991).

21. The Delaware LLC Act permits the expansion, restriction, or elimination of most duties (including fiduciary duties) of members and managers of the limited liability company by authorized provisions in the LLC agreement. Del. Code Ann. tit. 6, § 18-1101(c) (2021).

22. *See Gen. Growth Props.*, 409 B.R. at 63.

23. *Id.*

provision that was also included in each of the operating agreements.[24] The court held that Delaware law requires that the directors of a solvent corporation consider the interests of the shareholders in exercising their fiduciary duties. Furthermore, citing *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*,[25] the court in *General Growth Properties* rejected the proposition that directors of a Delaware solvent company have duties to creditors when operating in the "zone of insolvency."[26]

The court in *General Growth Properties* explicitly rejected certain holdings in other Delaware "zone of insolvency cases"[27] in which courts had recognized that fiduciary duties may extend to the companies' creditors.[28] For example, in the case of *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*,[29] Chancellor William Allen, one of the nation's most respected judges on corporation law, held that the fiduciary duties of a director of a Delaware corporation that is in the vicinity of insolvency may extend to the company's creditors as well as its shareholders.[30]

Not only did the *General Growth Properties* decision send shock waves throughout the securitization market, the decision also resulted in several important changes to a typical SPE's organizational documents.[31] One such change imposed by the rating agencies and many investors was the requirement to use professional independent directors or managers who understand that their role is not to "block" or vote against a bankruptcy. Another change to address concerns expressed by the court in *General Growth Properties* was to update the language regarding an independent director's or manager's fiduciary duties to provide as follows:

> To the fullest extent permitted by law, the independent manager shall consider only the interests of the Company, including its respective creditors, in acting or otherwise voting on the matters for which its vote is required. Except for duties to the Company as set forth in the immediately preceding sentence (including duties to the Member and the Company's creditors solely to the extent of their respective economic interests in the Company but excluding (i) all other interests of the Member,

24. For further discussion on fiduciary duty rules, see *infra* Section A.iv.

25. *See Gen. Growth Props.*, 409 B.R. at 63 ("In *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007), the Delaware Supreme Court held for the first time that the directors of an insolvent corporation have duties to creditors that may be enforceable in a derivative action on behalf of the corporation.").

26. For an in-depth discussion of the *General Growth Properties* decision, see Jason Lynch, *Reevaluating Bankruptcy Remoteness: Transfers of Risk, Implications of the GGP Reorganization*, AM. BANKR. INST. J., July–Aug. 2010, at 58.

27. The court rejected certain holdings in the following: Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772 (Del. Ch. 2004); Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., Civ. A. No. 12150, 1991 WL 277613 (Del. Ch. 1991).

28. *See, e.g.*, Katz v. Oak Indus., Inc., 508 A.2d 873 (Del. Ch. 1986).

29. *Credit Lyonnais*, 1991 WL 277613, at *34.

30. *See* SCHWARCZ, *supra* note 13, at 20.

31. The Task Force has prepared a model form of Delaware Limited Liability Company Agreement (the "Model Agreement"), which reflects the changes to operating agreements resulting from the *General Growth Properties* decision described herein, amongst others.

> (ii) the interests of other Affiliates of the Company, and (iii) the interests of any group of Affiliates of which the Company is a part), the independent manager shall not have any fiduciary duties to the Member, any Manager or any other Person bound by this Agreement; provided, however, the foregoing shall not eliminate the implied contractual covenant of good faith and fair dealing.[32]

Other changes to a typical SPE's organizational documents stemming from the *General Growth Properties* decision include a limitation that (i) the independent director or manager may only be removed or expelled for "Cause," which is defined as "acting in bad faith or grossly negligent with respect to its duties, being convicted of fraud or other acts constituting a crime under any law applicable to such independent director or manager and the like" and (ii) before termination becomes effective, the independent director or manager has to be notified of such termination.

Despite the possibility that a court, such as in the *General Growth Properties* decision, might limit the scope of an independent director's or manager's authority, it is very advisable in a securitization that the documents include the terms described in this subsection, not only because desired ratings may not be issued in their absence, but also because analysts for potential investors will expect to see these terms.

(iii) Reducing the Likelihood of Involuntary Bankruptcy Filings

Another step to reducing the likelihood of an SPE entering bankruptcy is to limit the circumstances under which creditors can force the SPE into involuntary bankruptcy. Unlike the case in voluntary bankruptcy, with respect to which there are no criteria specified in the Code for filing, a creditor may not force an SPE into involuntary bankruptcy unless the SPE meets the criteria required for filing.[33] These criteria are that the SPE is either generally not paying its debts as they become due, or that a custodian (other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the SPE for the purpose of enforcing a lien against such property) has been appointed or has taken possession of the SPE's assets.[34] Several of the bankruptcy remote characteristics identified in A.1 above are designed to protect against an involuntary bankruptcy filing by creditors of the SPE, including limiting both the debt that the SPE can incur and the business in which the SPE is permitted to engage. Furthermore, any third parties that deal with the SPE

32. Under Delaware law, such a modification of fiduciary duties is permissible for limited liability companies pursuant to title 6, section 18-1101(c), of the Delaware Code and for limited partnerships pursuant to section 17-1101(d). However, such a modification is not generally permissible for corporations.

33. Section 303(b) of the Bankruptcy Code also has requirements for the number of creditors and the types of claims necessary for filing an involuntary petition. 11 U.S.C. § 303(b) (2018).

34. *See id.* § 303(h).

contractually should be required to waive their rights to file an involuntary bankruptcy petition against the SPE.[35]

Another method of limiting the possibility of an involuntary bankruptcy filing is to require the SPE to adhere to the separateness covenants that minimize the likelihood that the SPE would be integrated into the parent's or an affiliate's bankruptcy as a result of substantive consolidation.[36] Separateness covenants are typically included in an SPE's organizational documents. Although required separateness covenants may vary among lenders, or among rating agencies in the case of rated securitizations, the following is a typical list of separateness covenants:[37]

- Maintain books and records separate from any other person or entity;
- Maintain its accounts separate from those of any other person or entity;
- Not commingle assets with those of any other entity;
- Conduct its own business in its own name;
- Maintain separate financial statements;
- Pay its own liabilities out of its own funds;
- Observe all corporate, partnership, limited liability company, or trust formalities and other formalities required by its organizational documents;
- Maintain an arm's length relationship with its affiliates;
- Pay the salaries of its own employees and maintain a sufficient number of employees in light of its contemplated business operations;
- Not guarantee or become obligated for the debts of any other entity or hold out its credit as being available to satisfy the obligations of others;
- Not acquire obligations or securities of its partners, members, or shareholders;
- Allocate fairly and reasonably any overhead for shared office space;
- Use separate stationery, invoices, and checks;
- Not pledge its assets for the benefit of any other entity or make any loans or advances to any entity (except as provided in the transaction documents);

35. *See* Schwarcz, *supra* note 13, at 31. Waivers of a third-party creditor's right to petition an SPE into bankruptcy are common in securitization transactions with a number of such waivers being limited in duration to one year and one day following repayment of the SPE's obligations. Many practitioners are of the view that such provisions are enforceable. We have not found any cases directly on point regarding the enforceability of a creditor's waiver of the right to file an involuntary bankruptcy petition against an SPE debtor.

36. It is important to recognize that the mere presence of separateness covenants in an SPE's organizational documents is not going to satisfy a bankruptcy court's inquiries regarding substantive consolidation. The SPE must comply with the separateness covenants in order to benefit from them.

37. *See S&P Legal Criteria*, *supra* note 15, at 33.

- Hold itself out as a separate entity;
- Correct any known misunderstanding regarding its separate identity; and
- Maintain adequate capital in light of its contemplated business operations.

These types of separateness covenants were developed with a view to managing some of the problematic operational issues, such as commingling of assets or deficient recordkeeping, which a majority of courts have identified as important factors in the substantive consolidation analysis.[38]

(iv) Unanimity Requirements for Bankruptcy Filings: Golden Shares

The term "unanimity requirements" in the context of a bankruptcy filing refers to the right of a party that is not a director or manager to veto or block a voluntary bankruptcy filing.[39] The veto or blocking right is typically an equity interest and is commonly referred to as a "golden share." The holder of such a golden share could vary from one of the company's lenders, which holds no other ownership interest or other governance rights, to a more traditional private equity investor, which may not be a creditor but holds only an equity interest in the entity.

Courts typically analyze questions of golden share enforceability by considering these three questions:

(1) Does state statutory law permit the company to allocate bankruptcy decision-making to creditors and outside investors?

(2) Is the holder of the bankruptcy–consent right subject to fiduciary duties under local law and, if so, did it act in accordance with its fiduciary duties?

(3) Is the bankruptcy–consent right valid as a matter of federal public policy?

Question (1) requires the bankruptcy court to analyze the entity's jurisdiction of organization because entity governance formalities under state law must be satisfied to commence a bankruptcy proceeding on behalf of an entity. For example, Delaware generally has relaxed business-law statutes and local courts are not prone to invalidating organizational document provisions that merely limit the "traditional power" of the board, such as allocating bankruptcy decision-making to a preferred equity holder.[40]

38. *See* discussion of Substantive Consolidation at *infra* Part B.

39. The holder of a bankruptcy consent right establishes bankruptcy remoteness through its control of the SPE's right to file a voluntary bankruptcy.

40. *See In re* Franchise Servs. of N. Am., Inc. v. U.S. Trustee (*In re* Franchise Servs. of N. Am., Inc.), 891 F.3d 198, 210 (5th Cir. 2018) ("A provision is not contrary to Delaware law just because it withdraws traditional power from the board.").

Question (2) requires the bankruptcy court to review the fiduciary duty rules of the entity's jurisdiction of organization.[41] In Delaware, absent provisions to the contrary, an equity holder may act in its own self-interest unless it is subject to a fiduciary duty to the company because it is found to be (a) a majority equity holder or (b) a minority equity holder with actual control. In order to be considered such a minority equity holder, the equity holder must possess "formidable" decision-making authority, and a single source of control will not give rise to actual control sufficient to impose a fiduciary obligation.[42] Furthermore, even if a court holds that a golden shareholder was subject to a fiduciary duty to the company but breached such fiduciary duty, a golden shareholder's consent right might still be recognized. For example, in *Franchise Services*, interpreting Delaware law, the court noted that, even if the "golden shareholder" was a controlling shareholder and violated its fiduciary duty to the entity, the proper remedy would be for the entity itself to bring an action against the equity holder, rather than for the court to ignore the golden share. However, as discussed below, a breach of such fiduciary duty might also lead a bankruptcy court to invalidate a golden shareholder's consent right.

Question (3) requires the bankruptcy court to balance public policy that favors access to the bankruptcy process with public policy that recognizes sophisticated parties' freedom to contract.[43] The golden shareholder's relationship with the entity is a particularly important consideration in question (3) because courts appear to be more hesitant to enforce bankruptcy vetoes in favor of lenders than vetoes in favor of bona fide equity holders.

If the answer to any of the golden share enforceability questions listed above is "no," then a court will be more likely to refuse to enforce the consent right. However, a recent bankruptcy court decision, *In re Pace Industries, LLC*, disrupted what appeared to be a spectrum of developing case law on golden-share enforceability.[44] The typical fact pattern on one end of the spectrum was a lender that

41. Many of the "golden share" decisions involve corporate entities. Like the "authority to file" issue discussed at *supra* note 8, the principles applied by the courts to "shareholders" should apply equally to an equity holder in a limited liability company or a limited partnership (subject to the terms of the partnership agreement or limited liability company agreement which, as a matter of Delaware law, may expand, restrict, or eliminate the fiduciary duties of a member or partner).

42. *See Franchise Servs. of N. Am.*, 891 F.3d at 211 ("A minority shareholder exercises 'actual control' only when it has 'such formidable voting and managerial power that [it], as a practical matter, [is] no differently situated than if [it] had majority voting control.'" (alterations in original)); Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC, C.A. No. 11802-VCL, 2018 WL 3326693, at *63 (Del. Ch. July 6, 2018) ("Rarely (if ever) will any one source of influence or indication of control, standing alone, be sufficient to make the necessary showing. A finding of control after trial, like a reasonable inference of control at the pleading stage, typically results when a confluence of multiple sources combines in a fact-specific manner to produce a particular result.").

43. Patrick J. Archambault & Marie A. MacCune, *Coal Instead of Golden Shares: The Enforceability of Bankruptcy Filing Consent Rights*, 95 Am. Bankr. L.J. 1, 29 (2021). *See also In re* 3P Hightstown, LLC, 631 B.R. 205, 211–14 (Bankr. D.N.J. 2021) (discussing public policy implications of golden shares).

44. *See* Order Denying Macquarie Septa (US) I, LLC's Motion for an Order Dismissing the Chapter 11 Cases of KPI Intermediate Holdings, Inc. and Its Direct and Indirect Subsidiaries at 1, *In re* Pace Indus., LLC, No. 20-10927, 2020 WL 5015839 (Bankr. D. Del. May 11, 2020), ECF No. 173 [hereinafter Order Denying Motion for Dismissal]. Because *Pace Industries* was issued by the United States

was issued a single unit of equity that granted the lender the right to approve the decision to file a petition in bankruptcy. Because the shareholder's true relationship to the company was that of a creditor, a court would refuse to enforce the golden share.[45] On the other end of the spectrum, the golden shareholder was a bona fide equity investor that had received the bankruptcy consent right as partial consideration for its capital investment. In that case, a court was more likely to enforce the golden shareholder's consent right.[46] *Pace Industries* contradicted the latter side of the spectrum—including the Fifth Circuit's decision in *Franchise Services*—by holding that, under the particular facts of that case, a bankruptcy–consent right held by a bona fide equity holder was invalid.

Under the *Pace Industries* approach, an investor seeking to enforce its bankruptcy consent right will have to satisfy its fiduciary duty and consider "the best interests of all."[47] That may mean, as was held in *Pace Industries*, that the investor has the added burden of proving that the entity has a viable alternative solution to bankruptcy.[48] Depending on the entity's circumstances, sometimes the only alternative would be to procure additional capital for the company, which would appear to compel the objecting investor to provide, or arrange for, additional debt or equity for the failing enterprise. This could be a viable option for an equity investor, which might be able to provide senior debt as a lifeline to the company and to prevent filing of a chapter petition. If a court following the *Pace Industries* approach determines that the investor has not met its burden of offering a viable alternative to bankruptcy, the investor could see its investment wiped out in the bankruptcy proceeding.[49]

More recently, the December 13, 2021, bench ruling in *In re PWM Property Management, LLC*[50] considered challenges to an October 31, 2021, voluntary bankruptcy petition filed by a newly formed holding company for a Midtown Manhattan office building, on behalf of itself and affiliates having ownership interests in the building, 245 Park Avenue. HNA Group North America LLC, the original building owner, had approached SL Green ("SLG") to invest in a joint venture for building ownership. The joint venture agreement provided for joint decision-making (HNA and SLG) for "Major Decisions," which included filing for bankruptcy protection. SLG also extracted provisions that triggered

Bankruptcy Court for the District of Delaware, a trial court, the case's authority is merely persuasive and other courts will not be required to follow its ruling.

45. *See In re* Intervention Energy Holdings, LLC, 553 B.R. 258, 260–61 (Bankr. D. Del. 2016).

46. *See Franchise Servs.*, 891 F.3d at 211.

47. The *Pace Industries* court found that "on the circumstances of this case, the additional facts do support that such a blocking right does create a fiduciary duty" on the part of the holder of the golden share, thus obligating the holder to consider "the best interest of all." The court found that the holder of the golden share in *Pace Industries* did not appear to fulfill its fiduciary duties by considering the interests of the company or others. *See* Transcript of Oral Argument at 41–42, *In re* Pace Indus., LLC, No. 20-10927 (Bankr. D. Del. May 5, 2020).

48. *Id.* at 41 ("It is hard to contemplate an alternative to the bankruptcy proceeding, and Macquarie has not suggested any; any viable one, anyway.").

49. Archambault & MacCune, *supra* note 43, at 19.

50. 245 Park Member LLC v. PWM Prop. Mgmt. LLC (*In re* PWM Prop. Mgmt. LLC), No. 21-11445 (Bankr. D. Del. Dec. 13, 2021).

(1) mandatory acceleration of SLG's equity if space previously occupied by Major League Baseball was not relet to another tenant by November 1, 2021, and (2) foreclosure sale of the building if the accelerated payment was not made. By filing the bankruptcy petition on October 31, 2021, the building owner prevented SLG from enforcing either of those rights.

Because the petition was filed without obtaining SLG's consent, SLG (joined by several mezzanine lenders that argued that the reorganization proceedings were unnecessary and siphoned cash, to the detriment of all creditors) filed its motion to dismiss the reorganization proceedings, citing the failure to honor SLG's consent rights. Following an eight-hour hearing on December 13, 2021, Judge Mary Walrath (the same judge who presided in *Pace Industries*) concluded (after deliberating for seventeen minutes) that SLG's equity investment was structured "more akin to debt than equity" because of several factors: the mandatory redemption provision and the aforementioned right to foreclose; the fixed rate of return, with no right to participate in profits or any excess liquidation proceeds; and that, shortly after SLG made its equity investment (in addition to its pre-existing Mezzanine C debt investment), it was "hired as a property manager . . . creating a creditor relationship with the debtor."[51]

Given that the *Pace Industries* and *PWM Property Management* decisions do not bind other courts, it is likely that golden shares will remain in use and be held enforceable in various jurisdictions, albeit subject to further litigation. In the meantime, creditors and investors should understand what approach various courts have adopted. As the *Pace Industries* and *PWM Property Management* decisions show, courts asked to rule on the validity of golden shares and consent rights held by true equity holders will look closely at whether the equity is true equity (rather than disguised debt)[52] and whether there are viable alternatives to the bankruptcy process. By contrast, advocates of bankruptcy–consent rights will likely argue for the approach adopted by the Fifth Circuit in *Franchise Services*.[53]

In the context of securitizations, debtholders are likely to be better served adhering to the independent manager–bankruptcy remoteness structure rather than relying on golden shares. Furthermore, in light of questionable enforceability of golden shares even in the hands of true equity holders, without any subsequent cases or changes to federal or state law, even adding golden shares as additional support for bankruptcy remoteness appears to be of little-to-no value. In fact, it could possibly attract the ire of a bankruptcy judge considering the enforceability of a company's overall bankruptcy remoteness structure.

51. Transcript of Oral Argument at 154, *In re* PWM Prop. Mgmt. LLC, No. 21-11445 (Bankr. D. Del. Dec. 13, 2021).

52. *Id.* at 155.

53. *See* discussion at *supra* note 42.

(v) Bad-Faith Bankruptcy Filings[54]

As noted in section (iii) above, bad faith would likely be alleged as the basis of the filing in a creditor's motion to dismiss a voluntary bankruptcy filing.[55] After all, it is fundamental policy that bankruptcy relief is generally limited to the "honest but unfortunate debtor."[56] Although not expressly stated in the Bankruptcy Code, good faith has been a long-standing requirement to the filing of a voluntary bankruptcy petition.[57] The phrase is often used interchangeably with the "for cause" requirement enumerated in section 1112(b).[58] Section 1112(b)(1) states:

> Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of the creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

The good-faith requirement focuses on the proper use of the bankruptcy system as a general system of equity, and it is designed to prevent abuse of the bankruptcy process.[59] A determination of good faith consists of a fact-intensive inquiry that turns on the totality of the circumstances.[60]

The movant party seeking dismissal bears the burden of proof by a preponderance of the evidence.[61] If the movant satisfies the initial burden of making a *prima facie* showing of bad faith in filing, the burden then shifts to the debtor to demonstrate good faith.[62]

To determine whether factors indicative of a debtor's good or bad faith are present, courts look at each bankruptcy filing on a case-by-case basis.[63] A

54. A number of bankruptcy courts apply the factors outlined herein in performing a bad-faith analysis in connection with a motion for relief from the automatic stay. However, such automatic stay cases are not referenced herein, inasmuch as the focus of this white paper is about preventing an SPE from becoming subject to a bankruptcy proceeding.

55. *See* discussion of *General Growth Properties* at *supra* Section A.ii.

56. 7 William Miller Collier, Collier on Bankruptcy ¶ 1112.07[3] (16th ed. 2020).

57. Some courts extend their analysis to include factors indicative of a showing of good faith. *See In re* Clinton Fields, Inc., 168 B.R. 265 (Bankr. M.D. Ga. 1994) (setting forth additional factors that may be indications of good faith); *In re* Lake Mich. Beach Pottawattamie Resort LLC, 547 B.R. 899 (Bankr. N.D. Ill. 2016) (analyzing both bad faith and blocking rights provisions as grounds for a motion to dismiss under 11 U.S.C. § 1112(b)).

58. Section 1112(b)(4) contains a non-exclusive list of what constitutes "cause" for purposes of dismissal, but the U.S. Court of Appeals for the Fifth Circuit has held that the term "cause" affords flexibility to the bankruptcy courts and can include a finding that the debtor's filing for relief is not in good faith. *In re* Little Creek Dev. Co., 779 F.2d 1068, 1072–73 (5th Cir. 1986); *In re* Humble Place Joint Venture, 936 F.2d 814, 816–17 (5th Cir. 1991).

59. *See In re* Victory Constr. Co., 9 B.R. 549, 559 (Bankr. C.D. Cal. 1981).

60. Marsch v. Marsch (*In re* Marsch), 36 F.3d 825, 828 (9th Cir. 1994) ("The existence of good faith depends on an amalgam of factors and not upon a specific fact." (internal quotation marks omitted)).

61. *In re* Woodbrook Assocs., 19 F.3d 312, 317 (7th Cir. 1994).

62. *In re* Nat'l Rifle Ass'n of Am., 628 B.R. 262, 271 (Bankr. N.D. Tex. 2021).

63. *See In re* Lake Mich. Beach Pottawattamie Resort LLC, 547 B.R. 899, 905 (Bankr. N.D. Ill. 2016).

lack of good faith has been found in many situations, including, but not limited to, those involving (i) filing of false or misleading information,[64] (ii) use of bankruptcy as a vehicle to defraud creditors,[65] (iii) the consistent failure to comply with applicable court orders, rules, and procedures,[66] and (iv) use of the bankruptcy system to avoid the consequences of prior misconduct.[67]

The bad-faith filing issue has been raised on numerous occasions to challenge bankruptcy petitions related to commercial real estate finance matters, many of which involve SPE borrowers. A bankruptcy court in Delaware recently issued an opinion dismissing the petition of the debtor on the basis of bad faith. In *In re GVS Portfolio I B, LLC*,[68] the debtor, one of a number of indirect subsidiaries of World Class Holding Company, LLC ("World Class"),[69] was an SPE[70] that owned 100 percent of the equity interest in non-debtor GVS Portfolio I, LLC (the "Mezz 1 Borrower"), which in turn owned 100 percent of the equity interests in twelve non-debtor limited liability companies (the "Mortgage Borrowers") that collectively owned a portfolio of self-storage facilities (the "Mortgaged Properties").[71]

In November 2018, the original lender[72] made loans to (i) the Mortgage Borrowers secured by first priority mortgages in the Mortgaged Properties, (ii) the Mezz 1 Borrower secured by a pledge of the equity interests in the Mortgage Borrowers (the "Mezz 1 Loan"), and (iii) the debtor secured by a pledge of the equity in the Mezz 1 Borrower (the "Mezz 2 Loan"). The Mezz 2 Loan was personally guaranteed by World Class's CEO.

In December 2019, the debtor failed to make its monthly payment on the Mezz 2 Loan and, following failed negotiations surrounding treatment of the default in light of the debtor's subsequent cure, in July 2020 the debtor received a Notice of Disposition of the Collateral. At that point, the debtor commenced an action in New York state court to enjoin the foreclosure. The foreclosure sale was initially enjoined by way of preliminary injunction and thereafter, per court order, the parties stipulated to the terms of sale. In October 2020, the New York Supreme Court issued a Supplemental Decision and Order setting a sale date of March 10, 2021.[73] However, two days prior to that sale date, the creditor sold the loan for an undisclosed amount without further notice to the debtor.

64. *In re* Daniels, 362 B.R. 428, 436 (Bankr. S.D. Iowa 2007).

65. *See* Shapiro v. Wilgus, 287 U.S. 348, 354 (1932) (judicial remedy of federal receivership could not be employed to preserve fraudulent transfer).

66. *See* First Nat'l Bank of Sioux City v. Kerr (*In re* Kerr), 908 F.2d 400, 404 (8th Cir. 1990).

67. *See* Dvinsky v. Cook (*In re* Cook), 104 F.2d 981, 985 (7th Cir. 1939).

68. No. 21-10690 (CSS), 2021 Bankr. LEXIS 1513 (Bankr. Del. June 4, 2021).

69. World Class owned, operated, and developed properties throughout more than a dozen states.

70. The Debtor's board consisted of Natin Paul, the founder and CEO of the Debtor and its affiliates, and two independent directors. Each independent board member engaged separate counsel. Following a period of review, each independent director approved the Debtor's bankruptcy petition.

71. The vertical ownership structure of the Debtor, the Mezz 1 Borrower, and the Mortgage Borrowers was noted by the court as was the fact that the GVS affiliates with pending bankruptcy cases in Texas were not within the vertical ownership structure.

72. The loans were subsequently assigned to other lenders but such assignments were not in issue.

73. The court found that the process that the parties had followed in the UCC sale was presumptively reasonable. *See In re GVS*, 2021 Bankr. LEXIS 1513, at *11.

On April 12, 2021, the debtor filed for Chapter 11 protection. The debtor's stated grounds for filing the bankruptcy petition was that there was significant value in the GVS Portfolio that reached far beyond the Mezz 2 Loan.[74] The lender challenged the petition by motion to dismiss, arguing that the petition was not filed in good faith. Specifically, the lender claimed that the case was filed solely for the purpose of triggering the automatic stay and that the debtor's case had no legitimate Chapter 11 bankruptcy objective because the debtor's only asset was pledged to the lender.

The court considered (i) the validity of the debtor's stated purpose for filing bankruptcy and (ii) whether the case was filed "merely to obtain a tactical litigation advantage."[75] The court also considered the presence of the following factors in determining whether the filing was made in bad faith: "(a) single asset case; (b) few unsecured creditors; (c) no ongoing business or employees; (d) petition filed on eve of foreclosure; (e) two-party dispute that can be resolved in pending state court action; (f) no cash or income; (g) no pressure from non-moving creditors; (h) previous bankruptcy petitions; (i) prepetition conduct was improper; (j) no possibility of reorganization; (k) debtor formed immediately prepetition; (l) the debtor filed solely to create automatic stay; and (m) the subjective intent of the debtor (collectively referred to as the '*Primestone* factors')."[76]

The court considered the debtor's goals for reorganization, as stated in the debtor's petition,[77] as well as the circumstances surrounding the filing. Despite the court's acknowledgement that there were factors indicating the filing was not in bad faith,[78] the court was "troubled by the debtor's filing."[79] In dismissing the bankruptcy filing, the court pointed to the presence of a number of the "*Primestone* factors" and concluded that the debtor had not met the burden of establishing that the filing served a valid bankruptcy purpose. The court also considered whether the petition was merely a litigation tactic:[80]

> Here, the fact that this case was filed immediately before foreclosure in order to obtain the automatic stay coupled with the two-party nature of the dispute between the Debtor and RREF [the lender], supports the finding that this case was filed by the

74. *Id.*

75. The court referred to factors (i) and (ii) as "two essential elements for a 'good faith' bankruptcy filing," which have been identified by courts in the Third Circuit. *See id.* at *15.

76. *See id.* at *16 (citing *In re* JER/Jameson Mezz Borrower II, LLC, 461 B.R. 293, 298–99 (Bankr. D. Del. 2021) (quoting Primestone Inv. Partners v. Vornado PS, L.L.C. (*In re* Primestone Inv. Partners L.P.), 272 B.R. 554, 557 (D. Del. 2002))).

77. Although the Debtor asserted that its value was due to it being part of a larger enterprise, the court found the Debtor's filing was a "single-asset case."

78. The court noted that the Debtor only had one late payment, which triggered the default. Furthermore, there were no intercreditor disputes, no lower level enforcement actions, and no "unclean hands."

79. *See In re GVS*, 2021 Bankr. LEXIS 1513, at *19.

80. *See also In re* Nat'l Rifle Ass'n of Am., No. 21-30085 (HDH), 2021 WL 1970738, at *1 (Bankr. N.D. Tex. May 11, 2021) (dismissing the National Rifle Association's bankruptcy petition as a bad-faith filing because the petition was filed to gain an unfair advantage in litigation).

Debtor for a tactical advantage against RREF in the New York state court litigation that resulted in a foreclosure sale.[81]

Given that in these cases the relevant court dismissed the bankruptcy filing, the *GVS* decision and others like it support a secured creditor's claim that a filing is in bad faith when the debtor's assets are fully encumbered by an interest securing the claims of the secured creditors. In other words, courts are likely to find that there is no valid bankruptcy purpose in a situation in which there are no assets with which the bankrupt company might reorganize. Secured creditors in securitization transactions seeking to dismiss a bankruptcy petition should be in a similar position given that all assets of the SPE would be subject to a lien in favor of such creditors.

B. Substantive Consolidation

An equitable doctrine of bankruptcy law known as substantive consolidation enables a court, under appropriate circumstances, to consolidate the assets and liabilities of otherwise legally separate firms or other entities.[82] Entity liability, or the principle that a firm is legally separate from its shareholders, parents, and affiliates, is a fundamental tenet of U.S. corporate law.[83] Only in a few situations does American law allow enterprise liability—the attachment of liability to the whole of an economically integrated enterprise notwithstanding the formal legal separateness of the enterprise's component entities.[84] The best-known example is "piercing the corporate veil." Substantive consolidation has been analogized to corporate veil-piercing on steroids.[85]

Substantive consolidation, like other applications of enterprise liability, can dramatically affect creditor rights.[86] In a securitization context, for example, it could allow creditors of the originator to assert their claims directly against the SPE's assets.[87] Furthermore, by bringing the SPE's assets into the bankruptcy

81. *See In re GVS*, 2021 Bankr. LEXIS 1513, at *20.

82. A court also could jointly administer the bankruptcy cases of affiliated debtors. *See* Fed. R. Bankr. P. 1015(b). That would *not* affect the substantive rights of debtors or creditors but would be intended solely for administrative convenience at times when multiple affiliated debtors are in bankruptcy.

83. Dole Food Co. v. Patrickson, 538 U.S. 468 (2003).

84. Lynn LoPucki, *The Death of Liability*, 106 Yale L.J. 1, 67 (1996).

85. For a broad theoretical analysis of when enterprise liability should override entity liability, see Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 Bus. Law. 109 (2004). *Cf*. J. Maxwell Tucker, *Substantive Consolidation: The Cacophony Continues*, 18 Am. Bankr. Inst. L. Rev. 89 (2010) (arguing that deciding the correct rule for substantive consolidation ultimately requires making a policy choice between the "entity theory" of corporate group liability, under which one member of the group is presumed not liable—and the "enterprise theory" of corporate group liability, under which one member of the group is presumed liable—for the debts of the other members).

86. Other consequences from a bankruptcy proceeding are discussed in the Introduction.

87. *See* Schwarcz, *supra* note 13, at 16, 32.

case, substantive consolidation could impose bankruptcy law's automatic stay on the right of the SPE's creditors to be repaid from those assets.[88]

As an equitable doctrine, substantive consolidation is not specifically authorized (or even referenced) in the text of the Bankruptcy Code. Nevertheless, it has a long history in bankruptcy courts and was at least once tacitly approved by the Douglas-era Supreme Court, applying the predecessor statute to the Bankruptcy Code.[89] Today, bankruptcy courts rely on section 105(a) of the Bankruptcy Code—a section believed to codify at least some of the body of equitable powers that bankruptcy courts have traditionally exercised[90]—as a statutory hook.[91]

Bankruptcy courts do not, however, order substantive consolidation lightly.[92] Because it can harm creditors of solvent entities that are consolidated with insolvent entities—creditors of the consolidated entities end up having claims against a single aggregated pool of assets[93]—substantive consolidation is assessed on a case-by-case basis, after consideration of the relevant facts of each case. Courts take into consideration both the nature of the relationship between the entities to be consolidated and the effect of the consolidation on the creditors of each entity. Doctrine is unsettled as to whether courts should substantively consolidate non-debtor entities with affiliated debtor entities.[94]

88. *Id.* at 31–32. Although substantive consolidation usually arises in the context of affiliated entities in bankruptcy, a court could order a substantive consolidation even if some of the entities are not in bankruptcy. *See, e.g.*, Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941) (consolidating the assets of corporation with those of its shareholders); 5 William Miller Collier, Collier on Bankruptcy ¶ 1100.06, at 1100-44 to -46 (15th ed. 1979).

89. *Sampsell*, 313 U.S. 215; Schwarcz, *supra* note 13, at 31.

90. Section 105 provides that "(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (2018).

91. Some courts additionally rely on section 1123(a)(5)(C), which provides that a plan of reorganization may "provide adequate means for the plan's implementation, such as— . . . merger or consolidation of the debtor with one or more persons." *In re* Stone & Webster, Inc., 286 B.R. 532, 541 (Bankr. D. Del. 2002).

92. The Third Circuit has observed that there is "nearly unanimous consensus" that substantive consolidation should be used "sparingly." *In re* Owens Corning, 419 F.3d 195, 209 (3d Cir. 2005).

93. "Courts generally hold that substantive consolidation is an 'extraordinary remedy' to be used sparingly because of the potential harm to creditors of a more solvent debtor if forced to share equally with creditors of a less solvent debtor." Buridi v. KMC Real Estate Invs., LLC (*In re* KMC Real Estate Invs., LLC), 531 B.R. 758, 768 (S.D. Ind. 2015). Indeed, "because every entity is likely to have a different debt-to-asset ratio, consolidation almost invariably redistributes wealth among the creditors of the various entities." Drabkin v. Midland-Ross Corp. (*In re* Auto-Train Corp., Inc.), 810 F.2d 270, 276 (D.C. Cir. 1987). In one recent case, the Delaware bankruptcy court was faced with a request for substantive consolidation of three different groups of entities: a debtor holding company that owned a chain of grocery stores ("Holdings"); a debtor operating company the subsidiaries of which owned the grocery stores' operating assets (the "OpCos"); and non-debtor subsidiaries that owned the real estate. *In re* HH Liquidation, LLC, No. 15-11874, 2017 WL 4457404, at *1–2 (Bankr. D. Del. Oct. 4, 2017). Holdings' creditors argued that substantive consolidation would reduce their recovery from 100 percent to 21 percent, while creditors of the OpCos would see their recoveries increase from zero to 20 percent, a "windfall." *Id.* at *3.

94. Kara Bruce, *Non-Debtor Substantive Consolidation—A Remedy Built on Rock or Sand?*, Bankr. L. Letter NL, Mar. 2017, at 1. *Compare* Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941) (consolidating the assets of a debtor with those of its non-debtor shareholders), *with* 2 Collier, *supra* note 56, ¶ 105.09(1)(c) (observing that some bankruptcy courts have refused to substantively consolidate non-debtors with debtors).

In considering the nature of the relationship between the entities to be consolidated, courts generally assess whether there is substantial identity between those entities. To that end, they normally consider and balance seven factors:[95]

(1) The presence or absence of consolidated financial statements.

(2) The unity of interests and ownership between various corporate entities.

(3) The existence of parent and intercorporate guarantees of liabilities.[96]

(4) The degree of difficulty in segregating and ascertaining individual assets and liabilities.

(5) The existence of transfers of assets without formal observance of corporate formalities.

(6) The commingling of assets and business functions.

(7) The profitability of consolidation of operations at a single physical location.

If, based on those factors, a court determines that there is substantial identity between the entities being considered for substantive consolidation, there are two schools of thought as to how the court should consider the effect of the consolidation on the creditors of those entities. One school of thought applies a balancing test, the other applies more of a "do-no-harm" test.

The balancing test currently is applied in the D.C. Circuit[97] as well as in the Eleventh and Ninth Circuits.[98] This test allows substantive consolidation if its benefits "heavily outweigh the harm."[99] The do-no-harm test currently is applied in the Second and Third Circuits.[100] That test, which recognizes that an equitable remedy should not be used to harm innocent parties, allows substantive consolidation only if, effectively, no creditors are harmed.[101]

95. These factors derive from *In re* Vecco Constr. Indus., Inc., 4 B.R. 407, 410 (Bankr. E.D. Va. 1980). *See* discussion in 5 COLLIER, *supra* note 88, ¶ 1100.06[3]; Chem. Bank N.Y. Trust Co. v. Kheel (*In re* Seatrade Corp.), 369 F.2d 845, 847 (2d Cir. 1966); *In re* Manzey Land & Cattle Co., 17 B.R. 332, 338 (Bankr. D.S.D. 1982).

96. An affiliate guarantee of an SPE's securities is problematic not only because it increases the likelihood of substantive consolidation of the entities but also because, where the affiliate guarantor conveyed assets to the SPE, it provides a level of recourse to the affiliate seller that is, to one degree or another, related to the credit quality of the conveyed assets which could impair a true sale of the conveyed assets. More limited guarantees might be acceptable, however. These could include a guarantee by the seller's parent of the seller's otherwise appropriate representations and warranties as to the quality of the assets being sold to the SPE, or a so-called "bad boy" guarantee by the parent that neither the seller nor its affiliate will take certain inappropriate acts that could undermine the securitization transaction, such as a voluntary bankruptcy filing.

97. *In re* Auto-Train Corp., 810 F.2d 270 (D.C. Cir. 1987).

98. Eastgroup Props. v. S. Motel Ass'n, 935 F.2d 245, 249 (11th Cir. 1991); Bonham v. Compton (*In re* Bonham), 229 F.3d 750, 766 n.11 (9th Cir. 2000).

99. *Eastgroup Props*., 935 F.2d at 249; *Bonham*, 229 F.3d at 766 n.11.

100. *In re* Augie/Restivo Baking Co., 860 F.2d 515 (2d Cir. 1988); *In re* Owens Corning, 419 F.3d 195 (3d Cir. 2005).

101. *Augie/Restivo,* 860 F.2d. at 519; *Owens Corning,* 419 F.3d at 215.

Interpreted literally, these tests would almost never allow substantive consolidation. The do-no-harm test could not be met, for example, unless creditors of the to-be-consolidated entities treated them as a single entity, without relying on their separate creditworthiness, or the assets of such entities are so hopelessly entangled that the cost to creditors of untangling them would be prohibitive and hurt all creditors.[102] In the latter case, the mere fact that substantive consolidation would greatly simplify and successfully expedite the bankruptcy case by avoiding the difficulty of untangling the assets would be inadequate as a basis to order consolidation.[103]

Ironically, although the benefits-heavily-outweigh-the-harm balancing test is intended more liberally to allow substantive consolidation,[104] a strictly literal application of the standard would likely be even more limited than the do-no-harm test. The reason is that—except perhaps for the hopeless entanglement scenario[105]—substantive consolidation would be a zero-sum game.[106] Any gain that substantive consolidation would give to creditors of the insolvent entity would come from the pockets of creditors and equity holders of the solvent entity. Positing for illustration an insolvent and a solvent entity, any gain that substantive consolidation would give to creditors of the former would come from the pockets of creditors and equity holders of the latter.[107] In practice, however, courts following that balancing test order substantive consolidation simply by stating, without attempting any mathematical analysis, that the benefits of such consolidation heavily outweigh the harm.[108] Under that balancing test, substantive consolidation therefore remains a real risk.

The risk of substantive consolidation can be controlled in securitization transactions by maintaining proper formalities between the originator and the SPE.[109] It

102. *Owens Corning*, 419 F.3d at 211. In order for "all creditors" to be hurt, "*every* creditor" must have its recovery reduced. *Id.* at 214.

103. *Id.* at 214 (further observing that the fact that substantive consolidation would benefit administration of the bankruptcy case is simply insufficient to order the consolidation).

104. *See, e.g.*, Douglas G. Baird, *Substantive Consolidation Today*, 47 B.C. L. Rev. 5, 8 & n.7, 13, 17 (2005).

105. *See supra* note 89 and accompanying text. The benefits-heavily-outweigh-the-harm balancing test may be "even more limited" than the do-no-harm test because the latter only requires the benefits to exceed—not necessarily heavily to exceed—the harm.

106. Steven L. Schwarcz & Lucy Chang, *The Custom-to-Failure Cycle*, 62 Duke L.J. 767, 780 n.66 (2012).

107. Consider a simple, stylized case in which a solvent SPE has assets of $2 million and liabilities of $1 million. An insolvent affiliated debtor also has assets of $2 million but faces liabilities of $4 million. Substantive consolidation of these entities would create a common pool of assets of $4 million and a common pool of claims totaling $5 million. The recovery of the insolvent debtor's creditors would be increased from 50 percent to 80 percent (or from $2 million to $3.2 million). But this is not because value is created. Rather, $200,000 would be transferred from the SPE's creditors, who would receive $800,000 rather than $1 million, and $1 million would be transferred from the SPE's owner, who would recover nothing. *Cf.* William H. Widen, *Corporate Form and Substantive Consolidation*, 75 Geo. Wash. L. Rev. 237, 280–91 (2007) (discussing the economics of different substantive consolidation scenarios).

108. *See, e.g.*, Alexander v. Compton (*In re* Bonham), 229 F.3d 750, 766 & n.12 (9th Cir. 2000); *cf. Auto-Train Corp.*, 810 F.2d at 277–78 (applying a balancing test to *nunc pro tunc* consolidation).

109. Ideally, there also should be ongoing monitoring to ensure that such formalities continue to be maintained during the life of the transaction.

also is customary in securitization transactions for the originator's counsel to opine that substantive consolidation should not occur.[110] Such an opinion not only will reflect good legal judgment of counsel but also might be a factor in showing reliance by the opinion recipients—the SPE's investors—on the SPE's legal separateness.[111]

The degree to which substantive consolidation will continue to pose a risk in the future is unclear. Although bankruptcy courts remain convinced of their equitable powers, the thrust of recent Supreme Court case law, cutting across ideological lines, has been to cut back on those powers.[112] A remedy like substantive consolidation, which radically alters state-law rights without any clear textual support from the Bankruptcy Code, is at the least out-of-sync with the Court's current instincts. In contrast, though, there are good arguments that, even if it did not say so expressly, Congress meant for well-established remedies like substantive consolidation to carry over from the Bankruptcy Act into the Bankruptcy Code.[113] Furthermore, the split in the federal circuits—with the D.C., Eleventh, and Ninth Circuits following a benefits-heavily-outweigh-the-harm balancing test and the Second and Third Circuits following a do-no-harm test[114]—makes it likely that the Supreme Court might one day hear an appeal of a substantive consolidation case in order to resolve that split. A resolution in favor of the do-no-harm test would substantially limit substantive–consolidation risk.[115] Meanwhile, parties should document securitization transactions to try to maintain all relevant formalities between the SPE and originators, taking into account the seven factors previously discussed.[116] If, based on these factors, a court determines that there is a lack of substantial identity between the entities being considered, the court should dismiss the motion for substantive consolidation without having to consider the balancing or do-no-harm tests.

C. True Sale

Investors in obligations issued by an SPE generally want assurance that, if the originator of the securitized assets later files for bankruptcy, the assets the orig-

110. Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 Tex. L. Rev. 1, 5–6 (2005).

111. *In re* Owens Corning, 419 F.3d 195, 213 n.24 (3d Cir. 2005).

112. This is most starkly expressed by Justice Scalia in *RadLAX*, noting that "the Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction." RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012).

113. *See, e.g.*, Cohen v. de la Cruz, 523 U.S. 213, 221 (1998) (explaining that courts "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure"). Indeed, the legislative history of the Bankruptcy Code includes the statement that section 105(a) should "cover any powers traditionally exercised by a bankruptcy court." H.R. Rep. No. 95-595, at 317 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6274.

114. *See supra* notes 98–100 and accompanying text.

115. Professor Baird observes, though, that when bankruptcy courts believe it is an important prerequisite to speedy confirmation of a plan and a reorganization, "there is a natural tendency to find that substantive consolidation is possible under whatever test is supposed to apply." Baird, *supra* note 104, at 13. The do-no-harm test likely serves more effectively to constrain the bankruptcy court's discretion in this respect. *See id.*

116. *See supra* note 93 and accompanying text.

inator had transferred to the SPE will be property of the SPE and not property of the originator's bankruptcy estate—i.e., that a "true sale" of assets from the originator to the SPE has occurred.[117] In other words, if such a "true sale" of assets has occurred, and the originator later files for bankruptcy, the SPE equity holders will have greater assurance that the collections from the assets will be applied to repayment of the indebtedness issued by the SPE.[118]

Conversely, if a bankruptcy court were to recharacterize the purported sale transaction between the originator and the SPE as a pledge of assets in return for a loan from the SPE,[119] the assets at issue would be deemed to be property of the originator's bankruptcy estate instead of property of the SPE.[120] If this were the case, the "automatic stay" contained in section 362(a) of the Bankruptcy Code would prevent the creditors of the SPE from foreclosing on the assets and related property that had been pledged to the creditors, unless (i) such a creditor establishes sufficient grounds to lift the automatic stay under section 362(d)[121] or (ii) one or more of the twenty-seven separate exceptions to the automatic stay applies.[122] Generally speaking, in the early stages of a Chapter 11 case, bankruptcy courts are reluctant to grant motions to lift the automatic stay. If the SPE's creditors are unsuccessful on such a motion, the originator's trustee in bankruptcy[123] may move the bankruptcy court for permission to use the proceeds of the assets, or the "cash collateral," as working capital of the originator during the pendency of the Chapter 11 case.[124] Moreover, in this scenario, the Bankruptcy Code may permit the originator's bankruptcy trustee to use the receivables or other financial assets the originator had purportedly sold to the SPE as collateral for a debtor-in-possession loan (a "DIP Loan") from a third-party lender (a "DIP Lender"), pursuant to which the DIP Lender could obtain a

117. Assets can also be transferred to an SPE by its parent entity by means of a capital contribution and be deemed to be property of the SPE and not of the parent's bankruptcy estate.

118. Those assets could, of course, turn out to be uncollectable based on reasons unassociated with the Originator's bankruptcy filing.

119. In this situation, the SPE would qualify as a secured creditor with respect to the transferred assets if it complied with provisions of applicable non-bankruptcy law, such as the provisions of Article 9 of the Uniform Commercial Code as in effect in the applicable state, required to achieve perfected secured creditor status, which include the filing of a UCC financing statement. *See* U.C.C. §§ 9-109(a)(3), 9-312(a), 9-102(a)(2) (2013).

120. *See* 11 U.S.C. § 541 (2018).

121. *See id.* § 362(a), (d).

122. *See id.* § 362(b).

123. As used herein, the term "Trustee" means either: (i) a duly appointed trustee under the Bankruptcy Code or (ii) a debtor in possession (which has the powers of a duly appointed trustee under the Bankruptcy Code). In certain situations, an official committee of unsecured creditors may have certain rights of a trustee. *See* Official Comm. of Unsecured Creditors v. Chinery (*In re* Cybergenics Corp.), 330 F.3d 548, 579–80 (3d Cir. 2003) (conferring derivative standing upon a creditors' committee).

124. 11 U.S.C. § 363 (2018). In order to use cash collateral in this manner, the Originator would have to give the SPE some form of "adequate protection." Although the making of periodic cash payments to the SPE could be a form of adequate protection, a bankruptcy court could permit the Originator to utilize other forms of adequate protection vis-à-vis the SPE, such as the granting of a lien on other unencumbered property of the Originator's estate. *See id.* § 361. A debtor's motion to use cash collateral may precede: (i) a creditor's objection thereto or (ii) a creditor's motion to lift the automatic stay.

super-priority lien, superior to the SPE creditors' lien, on the receivables or other financial assets.[125] The ability of the originator's Trustee to use the receivables or other financial assets as cash collateral or as collateral for a DIP Loan could adversely impact the SPE's cash flow and, consequently, would adversely impact the ability of the SPE investors to recover on their investments.

While courts ultimately look to the economic substance of a transaction to determine whether it qualifies as "true sale" or a secured loan, the judicial analysis has generally proceeded on a case-by-case basis. The cases have not established a precise formula that can be applied in a specified mechanical fashion. Instead, as the Third Circuit explained in a leading case, courts "have examined the parties' practices, objectives, business activities, and relationships and determined whether the transaction was a sale or secured loan only after the analysis of the evidence as to the true nature of the transaction."[126] The determination of the "true nature" of a transaction is thus usually based on an analysis of the totality of the facts and circumstances present in the particular transaction, rather than on an application of regularly applied or established legal doctrines.[127] Moreover, the published cases have not addressed the "true sale" issue in the context of a securitization.[128] The reported decisions indicate that no single factor or combination of factors is controlling and, due to the "totality of the facts and circumstances" nature of the analysis, do not provide a formula regarding the precise weight to be accorded to those factors.[129] Likewise, those cases are not uniform in their treatment of the factors considered.[130]

125. *Id.* § 364.

126. Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F.2d 538, 545 (3d Cir. 1979).

127. *In re* Golden Plan of Cal., Inc., 829 F.2d 705, 709 (9th Cir. 1987). *See also* Sarf v. Leff (*In re* Candy Lane Corp.), 38 B.R. 571, 576 (Bankr. S.D.N.Y. 1984) (true sale determination should be "based upon an examination of the substance of the documents in the context of the surrounding transaction").

128. However, in 2001, the U.S. Bankruptcy Court for the Northern District of Ohio entered an order refusing to modify a previously entered cash collateral order that treated inventory and receivables sold by a Chapter 11 debtor to two SPEs that were not in bankruptcy proceedings as property of the debtor's bankruptcy estate. *See In re* LTV Steel Co., 274 B.R. 278 (Bankr. N.D. Ohio 2001) [hereinafter "*LTV*"]. Following *LTV*, the parties, however, settled their dispute, and agreed in a stipulation and order approved and entered by the bankruptcy court that the transfers at issue qualified as "true sales." *See* John F. Hilson, Asset-Based Lending: A Practical Guide to Secured Financing § 2:5.3 n.31 (2010).

129. For any sale of assets to be a true sale there has to be valid consideration. Cash or capital contribution of the assets by a parent company to its subsidiary, or a combination thereof, are forms of consideration frequently used in securitizations.

130. For example, six cases involving similar facts reached inconsistent conclusions. In two cases, the "true sale" status of the transaction was upheld, whereas four other cases recharacterized a purported sale as a financing. *Compare In re* Lemons & Assocs., Inc., 67 B.R. 198 (Bankr. D. Nev. 1986) (transfer of mortgage loan participations treated as a sale even though return to transferor was not related to return on transferred asset), *and* Cohen v. Army Moral Support Fund (*In re* Bevill, Bresler & Schulman Asset Mgmt. Corp.), 67 B.R. 557 (D.N.J. 1986) (sale treatment for repurchase agreement upheld even though purported sale of assets was not made at fair market value), *with In re* Coronet Capital Co., 142 B.R. 78 (Bankr. S.D.N.Y. 1992) (transfer of participation treated as financing agreement; return to transferors not related to return on transferred assets), *and* Fireman's Fund Ins. Co. v. Grover (*In re* The Woodson Co.), 813 F.2d 266 (9th Cir. 1987) (same), *and* Ables v. Major Funding Corp. (*In re* Major Funding Corp.), 82 B.R. 443 (Bankr. S.D. Tex. 1987) (same), *and In re* S.O.A.W. Enter., Inc., 32 B.R. 279 (Bankr. W.D. Tex. 1983) (same).

(i) Risk of Loss/Recourse

The most important factor in determining "true sale" status is the scope of the SPE's rights of recourse vis-à-vis the transferor of the assets.[131] In all securitizations there is going to be some level of recourse. Generally speaking, an SPE's rights of indemnification against the originator with respect to representations and warranties that the assets, at the time of the sale, comply with certain quality conditions will be deemed to be consistent with a true sale.[132] Conversely, if the SPE has very broad recourse rights against the originator regarding the assets, it is less likely that a bankruptcy court will construe the transaction as a "true sale."[133] The challenge in structuring a securitization transaction is assessing the amount of recourse that is likely to be upheld by the courts.[134]

(ii) Other Factors

Other factors that weigh in favor of a bankruptcy court concluding that a purported "sale" of assets constitutes a "secured loan" instead of a "true sale" include, without limitation: (i) the applicable transaction documents indicate that the parties intended the transaction to qualify as a "secured loan" instead of a "sale"; (ii) the originator has the right to redeem or repurchase the assets from the SPE; (iii) the originator has the right to any "surplus" collections of the assets—i.e., the right to collect any amounts that remain after the SPE Investors obtain their principal and agreed-upon interest payments; (iv) the purported purchaser has the right to receive level payments (regardless of the actual amounts collected from the assets); (v) the price of the assets was based on a fluctuating interest index, such as the prime rate; (vi) the SPE is unable to administer and control collections of the assets;[135] (vii) the SPE is a creditor of the originator on or before the purported sale date; (viii) the originator is obligated to pay the SPE's costs of collecting on the assets;[136] (ix) the purchaser has no right to sell or otherwise transfer the assets; and (x) there is no public notice of the transfer, such as by filing a financing statement or disclosure of the sale on the originator's financial statements. Although no single one of these elements would be dispositive, practitioners are advised to include

131. *See* Schwarcz, *supra* note 13, at 36–37.

132. *Id.*

133. *Id.*

134. *Id.* The amount of permissible recourse is frequently considered in true sale legal opinions. Similar to the consideration of whether limited guarantees might be acceptable in a substantive consolidation analysis, consideration is also given to limited recourse relating to the collectability of the assets.

135. The SPE should have the right to assume, or appoint another party to assume, collections if the servicer appointed at closing has been removed following a servicer termination event.

136. *See* Schwarcz, *supra* note 13, at 36–41 (providing detailed discussion of true sale factors). Indeed, in securitizations involving securities rated by rating agencies such as Moody's, Standard & Poor's, and/or Fitch, the rating agencies specify certain criteria regarding the "true sale" factors discussed herein that must be met for the applicable rating agency to issue its rating regarding the applicable securities. *See, e.g.*, Caroline Bradley, *Private International Law-Making for the Financial Markets,* 29 Fordham Int'l L.J. 127, 173 (2005) (discussing rating agency criteria).

clear language regarding the intent of the parties (item (i)) and to avoid every one of the other nine of the aforementioned elements.

(iii) Fraudulent Transfer Risk

Even if the transaction satisfies the "true sale" analysis, an asset transfer may still be vulnerable to attack if the originator (i) sold the assets to the SPE for "less than reasonably equivalent value" and (ii) (a) was insolvent when it made (or becomes insolvent as a result of) that sale or (b) was left with "unreasonably small capital" following that sale.[137] If the originator later files for bankruptcy, the Trustee of the originator could file a constructive fraudulent transfer action against the SPE seeking to "claw back" the value of the assets that the originator sold to the SPE.[138] Under the Bankruptcy Code, the trustee may avoid constructive fraudulent transfers made by the debtor within the longer of the following two periods: (i) two years before the debtor's bankruptcy filing[139] or (ii) the time provided by the applicable state law fraudulent (or voidable) transfer statute,[140] which is generally four years before the debtor's bankruptcy filing.[141] To mitigate fraudulent transfer risk, the sale agreement from the originator to the SPE will typically contain representations and warranties that the purchase price of the assets is not "less than their reasonably equivalent value" and that the originator will not be rendered insolvent as a result of selling the assets to the SPE.

Conclusion

Because the cluster of legal principles supporting bankruptcy remoteness are invariably going to conflict with access to bankruptcy, absent statutory intervention, the challenges to bankruptcy remoteness are going to continue. Careful consideration should be given to the assets to be securitized or financed and

137. *See* 11 U.S.C. § 548(a)(1)(B) (2018).

138. *See id.* § 548(a)(1)(B). An Originator's Trustee could also seek to recover the sale of the assets by bringing a fraudulent transfer action based on actual fraud. *See id.* § 548(a)(1)(A). Actual fraudulent transfers generally do not exist outside of egregious situations such as Ponzi schemes and similar fraudulent schemes. As a result, actual fraudulent transfers will not be discussed here.

139. *See id.* § 548(a)(1).

140. *See id.* § 544. Over the past six years, twenty-two states have enacted the Uniform Voidable Transactions Act (the "UVTA"). *See Uniform Voidable Transactions Act*, Unif. L. Commission, https://www.uni formlaws.org/committees/community-home?CommunityKey=64ee1ccc-a3ae-4a5e-a18f-a5ba8206 bf49 (last visited July 20, 2022) [https://perma.cc/8TDA-DKRW]. The Uniform Law Commission proposed the UVTA in 2014. *Id.* Under the UVTA, transfers that were formerly referred to as "constructively fraudulent" under the former Uniform Fraudulent Transfer Act are now simply referred to as "voidable." *Id.*

141. *See, e.g.*, Del. Code Ann. tit. 6, §§ 1304, 1309 (2021); N.Y. Debt. & Cred. L. § 278 (West 2021). In situations in which the Internal Revenue Service (the "IRS") holds an unsecured claim against the debtor, the Trustee may be able to: (i) "step into the shoes" of the IRS under section 544(b) of the Code and (ii) avoid fraudulent transfers made by the debtor within ten years before the date of the debtor's bankruptcy filing. 11 U.S.C. § 544(b) (2018). *See generally In re* Zagaroli, No. 18-50508, 2020 WL 6495156 (W.D.N.C. Nov. 3, 2020); Vieira v. Gaither (*In re* Gaither), 595 B.R. 201 (Bankr. D.S.C. 2018); Hillen v. City of Many Trees, LLC (*In re* CVAH, Inc.), 570 B.R. 816 (Bankr. D. Idaho 2017).

the organizational structure of the entities arranging the transaction in light of the legal issues and related court decisions analyzed in this white paper.[142] The transaction's structural foundation must be built to withstand attack. Furthermore, the risk of such an attack should be weighed. Practitioners are well-positioned to forestall unnecessary attacks against bankruptcy remoteness by ensuring that securitization or a similar bankruptcy remote financing structure is a good and viable option in the circumstances. The old adage that bad facts make bad law should not be forgotten.

142. Two significant cases illustrate the willingness of bankruptcy judges to disregard bankruptcy remoteness when non-financial corporate originators securitize core operating assets. *See In re* LTV Steel Co., 274 B.R. 278, 279–86 (Bankr. N.D. Ohio 2001); *In re* Gen. Growth Props. Inc., 409 B.R. 43, 55, 61–63 (Bankr. S.D.N.Y. 2009); *see also* Daniel J. Bussel, *Corporate Governance, Bankruptcy Waivers, and Consolidation in Bankruptcy*, 36 Emory Bankr. Dev. J. 99, 132–37 (2020).