

The End of *Frenville*: Relief or More Confusion?

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Paul M. Green

As part of the overhaul of bankruptcy laws in 1978, Congress for the first time included the definition of “claim” as part of the Bankruptcy Code. A few years later, in *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, the Third Circuit became the first court of appeals to examine the scope of this new definition in the context of the automatic stay. In interpreting the definition of “claim,” the Third Circuit focused on the “right to payment” language in that definition and ultimately held that a claim arises when a claimant’s right to payment accrues under applicable nonbankruptcy law. Subsequent to the decision in *Frenville*, courts in other jurisdictions almost unanimously criticized the Third Circuit’s adoption of the “accrual” test because it appeared to contradict the broad definition of “claim” envisioned by Congress and the Bankruptcy Code.

On June 2, 2010, the Third Circuit issued an en banc decision in *Jeld-Wen, Inc. v. Van Brunt (In re Grossman’s Inc.)* specifically overruling *Frenville* and 26 intervening years of precedent. In *Grossman’s*, the court rejected the widely criticized accrual test initially adopted in *Frenville* and instead opted for a version of the “conduct” test used by other courts to determine when a claim arises for purposes of the Bankruptcy Code. With this ruling, the Third Circuit fundamentally altered how courts in the Third Circuit will determine whether an entity has a claim in bankruptcy.

Background

In 1977, Mary Van Brunt purchased products that allegedly contained asbestos from Grossman's, Inc., a home-improvement retail store. The retailer and its affiliates (collectively, "Grossman's") filed for chapter 11 relief in April 1997 in Delaware and confirmed a chapter 11 plan in December 1997. At the time of its bankruptcy filing, Grossman's had not been the subject of any asbestos claims, nor were any such claims filed during its bankruptcy case. Grossman's was aware, however, that it had previously sold asbestos-containing products. Nonetheless, Grossman's did not seek a channeling injunction pursuant to Bankruptcy Code section 524(g), nor did it seek the appointment of an individual to represent the interests of future asbestos claimants. Additionally, the bar date notice did not reference asbestos liability or an intent to cover future claims.

Van Brunt began to develop symptoms of mesothelioma in 2006, and she was diagnosed with the disease in 2007. Soon after her diagnosis, Van Brunt filed an action against Jeld-Wen, the successor in interest to Grossman's. Jeld-Wen in turn sought to reopen the Grossman's bankruptcy case and obtain a ruling that Van Brunt's claim had been discharged pursuant to the 1997 chapter 11 plan. Both the bankruptcy and district courts concluded, pursuant to *Frenville*, that Van Brunt's claim had not been discharged pursuant to the 1997 bankruptcy because her claim accrued in 2006, when Van Brunt first manifested symptoms of mesothelioma.

After noting that the lower courts had correctly applied the accrual test set forth in *Frenville* in determining that Van Brunt's claim had not been discharged, the Third Circuit questioned whether that result was appropriate in light of the significant criticism of *Frenville*. The court noted that other courts "have declined to follow *Frenville* because of its apparent conflict with

the Bankruptcy Code's expansive treatment of the term claim." Explaining that "claim" is specifically defined in section 101(5) as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured," the Third Circuit acknowledged that, as these courts have concluded, the accrual test fails to account for the fact that unliquidated, contingent, and unmatured claims can exist under the Bankruptcy Code before a right to payment accrues under state or applicable law. Reexamining the ruling in *Frenville*, the Third Circuit, sitting en banc, unanimously determined it was appropriate to overrule the accrual test.

Determining When a Claim Arises

After expressly overruling *Frenville* and the accrual test, the Third Circuit had to decide what test it should adopt to determine when a claim arises. The court first examined the policy implications related to the definition of "claim." On the one hand, a broad definition allows a greater number of potential liabilities to be discharged, consistent with congressional intent to provide debtors a fresh start. On the other hand, a definition that is too broad may disproportionately disadvantage involuntary creditors, such as tort victims whose injuries have not manifested. The court noted that these competing considerations must be weighed and that other courts have failed to reach a definitive resolution of this issue.

Consistent with a broad interpretation of "claim," some courts have adopted the "conduct" test, finding that a claim arises when the debtor engages in the conduct that ultimately causes harm, even if no harm was discovered prior to plan confirmation. This test was adopted by the Fourth Circuit in its 1988 ruling in *Grady v. A.H. Robins Co.*, which dealt with a claimant who used an intrauterine contraceptive device the debtor manufactured prior to its bankruptcy. The *A.H.*

Robins court ultimately held that the plaintiff's claim arose "when the acts giving rise to [the defendant's] liability were performed, not when the harm caused by those acts was manifested."

Some courts have expressed concern that the conduct test is too broad because it could require a claimant to be subject to a preexisting bankruptcy plan even though the claimant was not exposed to a product or hazardous substance until long after the bankruptcy case was concluded. Thus, those courts have sought to limit the definition of "claim" to situations where there is some prebankruptcy relationship between the debtor and the purported claimant. Pursuant to the "relationship" test, as adopted by the Eleventh Circuit in its 1995 ruling in *Epstein v. Official Committee of Unsecured Creditors (In re Piper Aircraft Corp.)*, "[t]he debtor's prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established before confirmation between an identifiable claimant or group of claimants and that prepetition conduct." Like the accrual test, however, the relationship test has been criticized by commentators for failing to fully encompass the broad definition of "claim" envisioned by Congress and the Bankruptcy Code.

Faced with what appear to be two imperfect tests for determining when a claim arises for purposes of the Bankruptcy Code, the Third Circuit looked to asbestos-specific cases and determined that a consensus emerged in those cases in which a claim arose upon a victim's exposure to asbestos, not upon the manifestation of injury. On the basis of this consensus, the Third Circuit held that:

a "claim" arises when an individual is exposed prepetition to a product or other conduct giving rise to an injury, which underlies a "right to payment" under the Bankruptcy Code. . . . Applied to the Van Brunts, it means that their claims arose

sometime in 1977, the date Mary Van Brunt alleged that Grossman's product exposed her to asbestos.

Implications of the Third Circuit's Decision

Unwilling to adopt outright either the conduct test or the relationship test, the Third Circuit appears to have developed a hybrid of both approaches, at least in the asbestos context. In a footnote, the court noted that it was defining the scope of a claim in the context of an asbestos case, so the determination of when a claim arises in other contexts, including environmental cases, will depend on the nature of the claim and the posture of the case. In reaching its decision, the court favorably cited decisions based on "a form of the conduct test"; however, by holding that a claim arises when an individual is exposed to the injury-causing product, the Third Circuit's test applicable to asbestos claims appears to be stricter than a pure conduct test, which focuses solely on the debtor actions that gave rise to the injury. By focusing on exposure, the Third Circuit also appears to embrace a test for asbestos claims at the very least that is broader than a relationship test, insofar as exposure does not necessarily create a prepetition relationship between an identifiable claimant and the debtor's prepetition conduct. Thus, it appears, at least in the asbestos context, that the Third Circuit sought to draw a line somewhere between the conduct and relationship tests.

Unfortunately, outside the asbestos context, the Third Circuit offered no real guidance. Indeed, the Third Circuit cited the Seventh Circuit's 1992 ruling in *Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.* that "the determination of when a party has a claim . . . seems to hinge on the nature of the claim and the posture of the case." This would seem to indicate a view by the

Third Circuit that “exposure” could have a significantly different meaning in other nonasbestos contexts.

In short, given the lack of clarity provided by the Third Circuit’s selection of the exposure test, it appears likely that the full effect of the court’s decision in *Grossman’s* will remain unknown until courts further refine the test’s application. Moreover, until such decisions are forthcoming, it is also unclear how the exposure test will apply outside the asbestos context and related areas.

Finally, while numerous questions regarding the ultimate effect of *Grossman’s* definition of “claim” remain unanswered, the Third Circuit made clear that regardless of the applicable definition of “claim,” due process remains an important component of a court’s determination of whether a claim has been discharged. In remanding the case on whether Van Brunt received adequate due process, the Third Circuit listed a number of factors the bankruptcy court should consider on remand, including:

the circumstances of the initial exposure to asbestos, whether and/or when the claimants were aware of their vulnerability to asbestos, whether the notice of the claims bar date came to their attention, whether the claimants were known or unknown creditors, whether the claimants had a colorable claim at the time of the bar date, and other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by § 524(g).

This list of factors appears to go beyond existing tests adopted by courts to assess whether potential creditors have been provided due process in connection with a bankruptcy. As a result, future court decisions, including the opinion of the bankruptcy court on remand, will be necessary to understand the full impact of *Grossman’s* on due process issues as well.

Jeld-Wen, Inc. v. Van Brunt (In re Grossman's Inc.), 607 F.3d 114 (3d Cir. 2010).

Epstein v. Off. Comm. of Unsecured Creditors (In re Piper Aircraft Corp.), 58 F.3d 1573 (11th Cir. 1995).

Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir. 1988).

Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.), 744 F.2d 332 (3d Cir. 1984).

Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co., 974 F.2d 775 (7th Cir. 1992).