

# Substantive Consolidation and Nonconsolidation Opinions

September 12, 2019

Bruce J. Zabarauskas

ThompsonKnight

## What is “Substantive Consolidation”?

- Substantive consolidation is a bankruptcy concept where the assets and liabilities of two or more entities are combined and treated as if they were a single entity
  - Inter-company liabilities are eliminated
  - Duplicate claims are eliminated

# Potential Prejudicial Effects of Substantive Consolidation

- Potential lower recovery on claims by forcing creditors of one debtor to share on parity with creditors of a less solvent debtor
- May also increase bankruptcy cram down risks on secured lenders

# Basis for Substantive Consolidation

- No specific provision in bankruptcy permitting substantive consolidation
- Judge-made concept
- Bankruptcy Code § 105: “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

# Who May Be Substantive Consolidated?

---

- Two or more debtors in bankruptcy
- Debtor and non-debtor entities permitted by some courts

# How Common is Substantive Consolidation?

---

- “Rarely Granted”
- “Subject To Heightened Scrutiny”
- “Rough Justice”

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Substantive Consolidation and Nonconsolidation Opinions

Also available as part of the eCourse

[Commercial Real Estate Lending Hot Topics: Retail Tenant Bankruptcies, Unusual Collateral, Completion Guarantees, and Nonconsolidation Opinions](#)

First appeared as part of the conference materials for the  
53<sup>rd</sup> Annual William W. Gibson, Jr. Mortgage Lending and Servicing Institute session  
"Nonconsolidation Opinions"