

(Almost) Everything You Ever Wanted to Know About Chapter 11 Plans

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Agenda

1. Substantive Consolidation
2. Artificial Impairment
3. Per Plan vs. Per Debtor

Substantive Consolidation

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Overview

- Substantive consolidation occurs when courts consolidate the assets and liabilities of different legal entities, providing different lenders with a common asset pool from which to recover.
 - This is different from joint administration under Bankruptcy Rule 1015(b).
- The Code does not expressly authorize substantive consolidation; rather, it is “a construct of federal common law, emanat[ing] from equity.” *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005).

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Impact

- Substantive consolidation can dramatically impact creditor recoveries – both positively and negatively – by altering the pool of assets from which claimants may recover.
- Courts generally seem to agree that substantive consolidation is an extraordinary remedy and ought to be used sparingly. As a creature of common law, however, the doctrine has evolved along various lines and, as a result, different jurisdictions apply different standards.

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Different Tests

D.C. Circuit	Second Circuit	Third Circuit	Bankr. N.D. Tex.
<ul style="list-style-type: none"> ▪ The <i>Auto-Train</i> three-part burden-shifting framework <ul style="list-style-type: none"> – Proponent must make prima facie case showing substantial identity and benefit of sub-con – Burden shifts to objector to show reliance and prejudice – If burden is met, court makes equitable decision 	<ul style="list-style-type: none"> ▪ The <i>Augie/Restivo</i> two-factor test <ul style="list-style-type: none"> – Economic unity/reliance – Entanglement 	<ul style="list-style-type: none"> ▪ The <i>In re Corning</i> multi-factor analysis <ul style="list-style-type: none"> – Blends two-part test with burden-shifting framework, creating higher bar than Second Circuit 	<ul style="list-style-type: none"> ▪ The <i>In re ADPT DFW</i> analysis <ul style="list-style-type: none"> – Sub-con in plan context is appropriate where section 1129 complied with, including: <ul style="list-style-type: none"> – impaired creditors accept, and best-interests test and absolute priority satisfied

While approaches vary slightly, equitable considerations dominate courts' analyses: (1) protecting creditors' reasonable reliance; (2) a prudential concern over administrability; and (3) a substance-versus-form inquiry into whether entities were, for all practical purposes, separate or unified.

In re Auto-Train Corp., Inc., 810 F.2d 270 (D.C. Cir. 1987); *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515 (2d Cir. 1988); *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005); *In re ADPT DFW Holdings, LLC*, 574 B.R. 87 (Bankr. N.D. Tex. 2017).

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