Substantive Consolidation and Nonconsolidation Opinions

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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”

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