LIFTING THE VEIL AND FINDING THE POT OF GOLD:

PIERCING THE CORPORATE VEIL AND SUBSTANTIVE CONSOLIDATION IN THE UNITED STATES

Judith Elkin*

You are sitting at your desk eating lunch when the phone rings. It is a friend of yours who is a corporate partner at another law firm. She has been representing a large real estate developer for years. Her main client contact has always been the flamboyant majority owner of the enterprise, Joe Castle. His empire is crumbling. The real estate market has softened significantly, and his bondholder creditors have just discovered that there is significantly more debt owed than had allegedly been disclosed to them. She wants your help in defending against potential litigation.

Over time, the enterprise has been structured such that there is a public holding company, Castle Development, Inc. ("CDI"), with several separate subsidiaries set up for specific development projects. Mr. Castle is chairman of the board and chief executive officer of CDI, and a majority of CDI's stock is owned by Mr. Castle and his family members. A related privately held company, Golden Land, Inc., is also owned by Mr. Castle and his family. Golden Land also is in the real estate development business and has several operating subsidiaries, some of which operate separate development projects, and some of which provide services and amenities, like golf courses, to CDI projects.

In order to facilitate operations, a centralized cash management account has been established at Senior Bank, the bank which is also the agent on CDI and Golden Land's senior secured credit facility. CDI and Golden Land are co-borrowers under the credit facility, which is guaranteed by certain of the public company subsidiaries and certain of the private company subsidiaries. Senior Bank has a lien on the stock of all these entities. Various other lenders have liens on the real estate owned by subsidiaries. In addition, both CDI and certain of its operating subsidiaries have separately issued unsecured public bond debt.

Mr. Castle and his family members sit on the board of each entity, and while there are a few outside directors at CDI, they are, for the most part, friends of the family. Mr. Castle and his family have always enjoyed the finer things in life. They have acquired some vineyards in France and a small independent movie production company, which is run by one of Mr. Castle's granddaughters. Mr. Castle's son, Joe Jr., is the chief financial officer ("CFO") of both CDI and Golden Land, and has had unfettered control of the books and records, as well as

---

* Partner: Bankruptcy and Business Restructuring Section. Over 30 years' experience representing various constituencies in reorganization and Chapter 15 proceedings, financial restructurings and related litigation, including in some of the largest most complex U.S. and multi-national insolvencies. Currently: Co-Chair IBA—Insolvency, Restructuring and Creditors' Rights Section; Chair—International Women's Insolvency & Restructuring Confederation (IWIRC).This article was first published in DISPUTE RESOLUTION INTERNATIONAL, Vol. 6 No. 2, October 2012, and is reproduced by kind permission of the International Bar Association, London, UK.

of the cash management account. All cash received by any operating subsidiary is swept daily into the cash management account, and that account has been used for the operations of both the publicly and privately held companies. Joe Jr. must approve every financial transaction, every intercompany payable and receivable, and every ledger entry. It is also clear that some of Mr. Castle and his family's personal projects have also been funded through the centralized cash management system used by both the public and private companies.

The public bondholders of CDI and the public bondholders of certain operating subsidiaries allege they have just learned that the entities that owe them money are also liable for certain other significant debts incurred by CDI and Golden Land and its subsidiaries, allegedly making their obligors insolvent. The bondholders are threatening litigation or bankruptcy, or both, against CDI and its subsidiaries, and are seeking to bring into the pot all the assets and subsidiaries of Golden Land, claiming that the entities really are one single enterprise and that all the assets of the consolidated entities should be available to pay their claims. Will the bondholders be successful?

I. PIERCING THE CORPORATE VEIL

A. Generally

In general, corporations are treated as legal persons, and each corporate entity, regardless of whether it is a parent, subsidiary, or affiliate is viewed as having separate assets and liabilities, distinct from those of its shareholders and related entities.[1] The concept of limited liability for corporate shareholders has been an underpinning of U.S. corporate law for over a century, and is contained in most state corporate law statutes.[2] In most circumstances, a creditor who does business with Corporation A will not be able to seek payment from Corporation A's parent corporation or shareholder. A creditor "is presumed to have voluntarily and knowingly entered into an agreement with a corporate entity and is expected to suffer the consequences of the limited liability associated with the business form."[3]

Veil-piercing is an equitable doctrine through which a court holds a shareholder liable for the obligations of its corporation. A related theory, alter ego, enables a court to treat separate corporations as one legal entity, hold each liable for the debts of the other, and consolidate the assets of both. As a technical matter, alter ego is one part of the test for veil-piercing, though courts sometimes use them interchangeably and sometimes refer to them as separate theories. These theories, through which a court may disregard the separateness of the corporate entity, are attractive remedies for creditors of insolvent entities, and a significant amount of litigation is generated by attempts to seek such relief. The actual standards for piercing the corporate veil and alter ego have been developed over time by state case and sometimes, statutory, law, as applicable to the jurisdictions of the corporations involved in the dispute.[4] While the standards

---

1 Alexander & Alexander of N.Y. Inc. v. Fritzen, 495 N.Y.S.2d 386, 388 (N.Y. App. Div. 1985); *see also* Meshel v. Resorts Int'l of N.Y., Inc., 553 N.Y.S.2d 342, 342 (N.Y. App. Div. 1990).

2 KAREN VANDEKERCKHOVE, PIERCING THE CORPORATE VEIL, § 1.1.2, at 4 (2007).

3 I. WILLIAM MEAD FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41.85 (perm. ed., rev. vol. 1999).

4 For purposes of this article, most references are to veil-piercing case law from the states of New York and

and application may differ slightly from state to state, a list of criteria has developed which most courts use to analyze a given fact pattern.

B. The Factors

The factors courts look at in varying degrees include:

- A disregard of corporate formalities, such as not keeping separate books and records or holding separate board of director meetings;
- Overlapping ownership, officers, and directors;
- Inadequate capitalization;
- Lack of separate employees;
- Intermingling or comingling of funds;
- Shared bank accounts;
- Shared office space;
- Consolidated financial statements;
- The degree of discretion a subsidiary has over its operations or its assets;
- Whether dealings between the entities were conducted at arm's length;
- Whether the corporations are treated as independent profit centers;
- Have the subsidiary entities been required to guarantee the dominant corporation's debts or pledge their assets to secure the dominant corporation's debts;
- Has the subsidiary paid the debts of the parent in the past;
- Are the assets or operations of the entities separate or intermingled;
- Has the corporate fiction been used to perpetrate a fraud;
- Are the corporations operated or organized such that one is a mere conduit of the other;

Delaware, as these are primary jurisdictions for corporate law analyses.

- Has the corporate fiction been used to avoid or evade an existing legal obligation;

- Has the corporate fiction been used to create a monopoly; and

- Has the corporate fiction been used to circumvent a statute (either civil or criminal).[5]

In assessing these factors, courts look at the totality of the circumstances, and no one factor will be determinative.[6]

The court will disregard the corporate form only in "exceptional case[s]."[7] Several states have now emphasized the fraud element, especially in contract cases where the plaintiff entered into the agreement voluntarily and presumably did due diligence on the entity with which it was doing business.[8] A decision to pierce the veil requires consideration of any fraudulent action committed under the guise of the corporate form.[9]

---

5 *See, e.g.*, Winner Acceptance Corp. v. Return on Capital Corp., No. 3088–VCP, 2008 WL 5352063, at *5 (Del. Ch. Dec. 23, 2008) (listing several factors and emphasizing the necessity for finding the element of fraud); Phoenix Cos. v. Abrahamsen, No. 05 Civ. 4894, 2005 U.S. Dist. LEXIS 43615, at *17–18 (S.D.N.Y. Sept. 28, 2006) (citing MAG Portfolio Consultant, GMBH v. Merlin Biomed Grp., LLC, 268 F.3d 58, 63 (2d Cir. 2001)); Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986) (listing numerous factors); *see also* AHA Sales, Inc. v. Creative Bath Prods., Inc., 867 N.Y.S.2d 169, 183 (N.Y. App. Div. 2008) (same); Associated Vendors, Inc. v. Oakland Meat Co., 26 Cal. Rptr. 806, 813–15 (Cal. App. 1962) (listing 20 factors).

6 *See, e.g.*, Carte Blanche (Sing.) Pte., Ltd. v. Diners Club Int'l, Inc., 2 F.3d 24 (2d Cir. 1993) (piercing the corporate veil where the parent and subsidiary failed to observe corporate formalities, the subsidiary did not keep corporate records, had no assets, had no separate offices or letterhead, had no paid employees or board of directors, all revenues were put directly into the parent's bank account, had no separate personnel or payroll, and revenues and marketing reports were not recorded independently); Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 140 (2d Cir. 1991) (piercing corporate veil where parent and subsidiary shared office space and officers, intermingled funds, and were not treated as separate profit centers). For cases where some factors were present but deemed insufficient to pierce the corporate veil because others were not present, see, for example, Time Square Constr., Inc. v. Mason Tenders Dist. Council, No. 07 Civ. 7250, 2008 U.S. Dist. LEXIS 206, at *13 (S.D.N.Y. Jan. 2, 2008) (declining to pierce the corporate veil where the subsidiary had a formal corporate existence, sufficient capitalization, its own office space, freedom to act independent of the parent, no intermingling of property and employees left the parent company when they went to work for the subsidiary); *Phoenix Cos.,* No. 05 Civ. 4894, 2005 U.S. Dist. LEXIS 43615, at *18–19 (declining to pierce the corporate veil where there was no evidence of a disregard of corporate formalities or any evidence that the subsidiary's commercial interests were subordinated to those of the parent, the parent and subsidiary maintained separate officers, had different business models, did not commingle property or funds, and employees received separate payments from the parent and subsidiary under their respective contracts with those entities); Stiftung v. V.E.B. Carl Zeiss, Jena, 298 F. Supp. 1309, 1317–18 (S.D.N.Y. 1969), *modified*, 433 F.2d 686 (2d Cir. 1970) (declining to pierce the corporate veil where employees were hired and paid only by the subsidiary and not the parent; the subsidiary and parent kept their records separate, prepared their own financials, paid their own operating expenses, and maintained their own health insurance plans and bank accounts).

7 Sprint Nextel Corp. v. iPCS, Inc., No. 3746-VCP, 2008 WL 2737409, at *11 (Del. Ch. July 14, 2008) (quoting Sears, Roebuck & Co. v. Sears plc, 744 F.Supp. 1297, 1305 (D. Del. 1990).

8 *See, e.g.*, Mancorp Inc. v. Culpepper Props., Inc., 836 S.W.2d 844, 847–48 (Tex. App.—Houston [1st Dist.] 1992, no writ).

9 Midland Interiors, Inc. v. Burleigh, No. 18544, 2006 Del. Ch. LEXIS 220, at *7–11 (Del. Ch. Dec. 19, 2006)

Courts will pierce the corporate veil and hold two corporations to constitute a single legal entity where "complete domination was exercised over a corporation with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury."[10] "Additionally, 'the corporate veil will be pierced to achieve equity, even absent fraud, [w]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego.'"[11]

In sum, veil-piercing in the United States is a fact specific, holistic inquiry based on the factors addressed above. Because the ultimate determination on veil-piercing is based on the totality of the circumstances,[12] it is difficult to predict how a court will assess any particular relevant factor on its own. Thus, in order to best avoid veil-piercing, a company should, at the minimum, maintain corporate formalities, sufficiently capitalize the subsidiary, and treat the parent and subsidiary companies as independent profit centers. In addition, corporations and their shareholders should pay heed to as many of the additional factors as possible: maintain separate funds and property for the parent and the subsidiary companies; keep overlap in ownership, officers, directors and personnel to a minimum; maintain distinct office space for each corporate entity; and keep all dealings between the parent and subsidiary at arms-length. In analyzing the situation of poor Mr. Castle and his empire, many of these precautions were overlooked and ignored. However, whether the facts can give rise to a finding of actual fraud against the bondholders is unclear, and in a jurisdiction where the fraud finding is paramount, Mr. Castle may still be protected from attempts by the companies' bondholders to pierce the corporate veil.

(piercing allowed where corporate formalities ignored, company was insolvent, and individual shareholder had not only committed fraud when he negotiated contract with plaintiff knowing corporation had become inactive but then again on the small claims court in the original lawsuit when he consented to entry of a judgment he knew the corporation could not pay); *see also* Harper v. Del. Valley Broadcasters, Inc., 743 F.Supp. 1076, 1085 (D. Del. 1990), *aff'd*, 932 F.2d 959 (3d Cir. 1991).

[10] Williams v. Lovell Safety Mgmt. Co., 896 N.Y.S.2d 150, 151 ('N.Y. App. Div. 2010) (citing Matter of Morris v. N.Y. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 141 (1993) (internal quotations omitted); *see also Castleberry,* 721 S.W.2d at 272.

[11] *Williams*, 896 N.Y.S.2d at 151 (quoting Matter of Island Seafood Co. v. Golub Corp., 759 N.Y.S.2d 768, 769 (N.Y. App. Div. 2003); *see also* Pebble Cove Homeowners' Ass'n v. Fid. N.Y. FSB, 545 N.Y.S.2d 362, 363 ('N.Y. App. Div. 1989); Trs. of Vill. of Arden v. Unity Constr. Co., No. 15025, 2000 WL 130627 (Del. Ch. Jan. 26, 2000) ("A court can pierce the corporate veil of an entity where there is fraud or where a subsidiary is in fact a mere instrumentality or alter ego of its owner."); Mabon, Nugent & Co. v. Tex. Am. Energy Corp., No. 8578, 1990 WL 44267, at *838 (Del. Ch. Apr. 12, 1990) ("[C]orporate veil may be pierced where there is fraud . . .[but] the Delaware courts have also stated. . .the corporate veil may be pierced where a subsidiary is in fact a mere instrumentality or alter ego of its parent. . .[and] where equitable considerations require it."); Humana, Inc. v. Kissun, 471 S.E.2d 514, 515 (Ga. Ct. App. 1996), *rev'd*, 479 S.E.2d 751 (Ga. 1997) (to pierce corporate veil it must be shown that parent's disregard of corporate entity made subsidiary mere instrumentality for transaction of parent's affairs, that there was such unity of interest in ownership that separate personalities of subsidiary and parent no longer exist, and that to adhere to doctrine of corporate entity would promote injustice or protect fraud).

[12] Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 140 (2d Cir. 1991).

II. SUBSTANTIVE CONSOLIDATION

A. Generally

Substantive consolidation is an equitable doctrine that permits a bankruptcy court, in appropriate circumstances, to disregard the legal separateness of a debtor and a related but distinct legal entity, which may or may not itself be a debtor in bankruptcy, and to merge their respective assets and liabilities for bankruptcy purposes. Substantive consolidation typically results in the pooling of liabilities and assets of the entities being consolidated, the satisfaction of liabilities from the resultant common fund of assets, and the elimination of all duplicate and inter-entity claims.[13] Because substantive consolidation is an equitable remedy, however, the exact consequences of substantive consolidation vary from case to case.[14]

Because the entities being consolidated frequently will have different debt-to-asset ratios, substantive consolidation invariably redistributes wealth among the entities' respective creditors.[15] Thus, as courts have emphasized repeatedly, consolidation vitally affects parties' substantive rights and should be used sparingly after careful scrutiny of the evidence.[16] Some court decisions, however, have noted a "modern" or "liberal" trend toward allowing substantive consolidation.[17] The Third Circuit in *In re Owens Corning* rejected this trend.[18]

Substantive consolidation is analogous to the non-bankruptcy law remedy of piercing the corporate veil. In fact, courts hearing early substantive consolidation cases applied a test for substantive consolidation that was virtually identical to the test used for piercing the corporate veil.[19] Substantive consolidation was accomplished in early cases by finding that the entity with which consolidation was sought was the "alter ego" or an "instrumentality" of the debtor, which was used by the debtor to hinder, delay, or otherwise defraud creditors.[20]

Although courts in early substantive consolidation cases looked to state corporate veil-piercing law for guidance, modern courts have increasingly looked to a growing body of

---

[13] *In re* Augie/Restivo Baking Co., 860 F.2d 515, 518 (2d Cir. 1988) (citing 5 L. King, COLLIER ON BANKRUPTCY ¶ 1100.06, at 1100–32, n.1 (15th ed. 1988)); *In re* Ltd. Gaming of Am., Inc., 228 B.R. 275, 286 (Bankr. N.D. Okla. 1998); *In re* Standard Brands Paint Co., 154 B.R. 563, 569 (Bankr. C.D. Cal. 1993).

[14] *See In re* Deltacorp, Inc., 179 B.R. 773, 777 (Bankr. S.D.N.Y. 1995) (noting that the court is afforded a great deal of discretion in constructing a consolidation order and retains the power to order less than complete consolidation); *see also* 2 Alan N. Resnick & Henry J. Sommers, COLLIER ON BANKRUPTCY ¶ 105.09[2] (16th ed., 2011) (stating that substantive consolidation cases are fact specific and must be decided on a case-by-case basis).

[15] *See* Eastgroup Props. v. S. Motel Ass'n, 935 F.2d 245, 248 (11th Cir. 1991) (quoting *In re* Auto-Train Corp., 810 F.2d 270, 276 (D.C. Cir. 1987)); *In re Ltd. Gaming*, 228 B.R. at 286–87.

[16] *See* Fed. Deposit Ins. Corp. v. Colonial Realty Co., 966 F.2d 57, 61 (2d Cir. 1992) (quoting Chem. Bank N.Y. Trust Co. v. Kheel, 369 F.2d 845, 847 (2d Cir. 1966)); *In re Ltd. Gaming*, 228 B.R. at 287.

[17] *E.g.*, *Eastgroup Props.*, 935 F.2d at 248–49, n.10 (citing cases); *In re* Walnut Equip. Leasing Co., No. 97-19699DWS, 1999 WL 288651, at *3 n.9 (Bankr. E.D. Pa. May 4, 1999); *In re* Bonham, 226 B.R. 56, 83 (Bankr. D. Alaska 1998), *aff'd*, 229 F.3d 750 (9th Cir. 2000).

[18] *In re* Owens Corning, 419 F.3d 195, 209 n.15 (3d Cir. 2005).

[19] *See In re* Standard Brands Paint Co., 154 B.R. 563, 567 (Bankr. C.D. Cal. 1993) (citing cases).

[20] *E.g.*, Maule Indus., Inc. v. Gerstel, 232 F.2d 294, 297 (5th Cir. 1956) (citing Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940)).

federal common law opinions decided under federal bankruptcy law.[21] Consequently, federal courts rely almost uniformly on the federal common law instead of on state corporate law in deciding whether or not to substantively consolidate.

Substantive consolidation is an equitable remedy. Its sole purpose is to ensure the equitable treatment of all creditors, not just a particular plaintiff.[22] As a result, substantive consolidation does not require a finding of fraud or intent to hinder or delay creditors, but merely a finding that consolidation would be more equitable to all parties under the circumstances.[23] While later cases have relaxed the requirement of fraud in favor of other factors warranting substantive consolidation, courts will still pierce the corporate veil to effect a substantive consolidation if fraud or similar activity is present.[24] In addition, courts may disregard an entity when it is not operated independently of another entity.[25] In sum, however, substantive consolidation is different from piercing the corporate veil.[26]

While the issue of substantive consolidation typically arises in the context of an affiliated group of corporations, one or more of which is in bankruptcy, the doctrine is equally applicable to cases involving non-corporate entities, such as partnerships and their individual partners.[27]

---

[21] *See Eastgroup Props.*, 935 F.2d at 248–49; *In re* Augie/Restivo Baking Co., 860 F.2d 515, 518–19 (2d Cir. 1988); *In re* Auto-Train Corp., 810 F.2d 270, 276 (D.C. Cir. 1987); *In re* Cont'l Vending Mach. Corp., 517 F.2d 997, 1000–01 (2d Cir. 1975); *In re* Flora Mir Candy Corp., 432 F.2d 1060, 1062 (2d Cir. 1970); Chem. Bank N.Y. Trust Co. v. Kheel, 369 F.2d 845, 847 (2d Cir. 1966); Soviero v. Franklin Nat'l Bank, 328 F.2d 446, 448 (2d Cir. 1964); *In re* Tip Top Tailors, Inc., 127 F.2d 284, 288–89 (4th Cir. 1942). *But see In re* Alico Mining, Inc., 278 B.R. 586, 588–89 (Bankr. M.D. Fla. 2002) (basing substantive consolidation on alter ego theory); *In re* Moran Pipe & Supply Co., 130 B.R. 588, 591–92 (Bankr. E.D. Okla. 1991) (same).

[22] Fed. Deposit Ins. Corp. v. Colonial Realty Co., 966 F.2d 57, 61 (2d Cir. 1992); *In re Augie/Restivo Baking Co.*, 860 F.2d at 518; *In re* Cooper, 147 B.R. 678, 683–84 (Bankr. D.N.J. 1992).

[23] *In re* Munford, Inc., 115 B.R. 390, 394 (Bankr. N.D. Ga. 1990); *see In re* Tureaud, 45 B.R. 658, 661–62 (Bankr. N.D. Okla. 1985), *aff'd*, 59 B.R. 973 (N.D. Okla. 1986).

[24] *See In re* Daily, 107 B.R. 996, 1007 (D. Haw. 1989), *rev'd on other grounds*, 940 F.2d 1306 (9th Cir. 1991); *In re* Stop & Go of Am., Inc., 49 B.R. 743, 747–48 (Bankr. D. Mass. 1985); *In re Tureaud*, 45 B.R. at 662–63.

[25] Paloian v. LaSalle Bank, N.A., 619 F.3d 688, 695 (7th Cir. 2010).

[26] *E.g.*, *Colonial Realty Co.*, 966 F.2d at 61; *In re* Bonham, 226 B.R. 56, 76–77 (Bankr. D. Alaska 1998), *aff'd*, 229 F.3d 750 (9th Cir. 2000); *In re* Circle Land & Cattle Corp., 213 B.R. 870, 874–76 (Bankr. D. Kan. 1997).

[27] *See, e.g.*, *Colonial Realty Co.*, 966 F.2d at 60–61 (consolidating estates of general partnership and two of its general partners) (citing cases); Eastgroup Props. v. S. Motel Ass'n, 935 F.2d 245, 252 (11th Cir. 1991) (consolidating limited partnership with related management corporation); *In re* Parkway Calabasas Ltd., 89 B.R. 832, 834–35 (Bankr. C.D. Cal. 1988) (consolidating estates of four limited partnerships and one of their principals), *aff'd,* 949 F.2d 1058 (9th Cir. 1991); *In re* Hedged-Invs. Assocs., Inc., 163 B.R. 841, 844, 849–50 (Bankr. D. Colo. 1994) (finding "no logical reason" why in the estate of a corporate entity, the general partner of at least two of three related limited partnerships could not be substantively consolidated with the consolidated partnership estates), *aff'd*, 84 F.3d 1286 (10th Cir. 1996); *In re* Palumbo Family Ltd. P'ship, 182 B.R. 447, 471 (Bankr. E.D. Va. 1995) (consolidating estates of limited partnership and individual general partner); *In re* Edwards Theatres Circuit, Inc., 281 B.R. 675, 677 n.1, 678 (Bankr. C.D. Cal. 2002) (bankruptcy estates of five California corporations and two Delaware limited liability companies, and their affiliates, substantively consolidated in confirmed chapter 11 plan); *In re* Ltd. Gaming of Am., Inc., 228 B.R. 275, 278–79, 287–89 (Bankr. N.D. Okla. 1998) (confirming liquidating plan which consolidated estates of limited partnership and its corporate partner).

Bankruptcy courts have also sanctioned the substantive consolidation of two or more entities *nunc pro tunc* in order to allow an agent or creditor to attack fraudulent transfers or avoidable preferences made by the debtor or consolidated entities as of the date of filing of the initial bankruptcy petition.[28]

B. Court's Authority to Grant Substantive Consolidation

The authority of a bankruptcy court to substantively consolidate two or more debtors is well established. That authority stems both from Section 105 of the Bankruptcy Code, which expressly empowers bankruptcy courts to issue any order necessary or appropriate to carry out the provisions of the Bankruptcy Code, and more generally, from the bankruptcy court's status as a court of equity.[29] See, for example, *Colonial Realty Co.*, 966 F.2d at 60 (citing Pepper v. Litton, 308 U.S. 295, 304 (1939)); *In re Bonham*, 226 B.R. at 75; and *In re* Standard Brands Paint Co., 154 B.R. 563, 567 (Bankr. C.D. Cal. 1993) (citing cases).

Additionally, many courts have held that bankruptcy courts also have the power under Section 105 to consolidate a bankruptcy debtor with an entity not in bankruptcy.[30] Some courts

---

[28] *See, e.g.*, *In re* Baker & Getty Fin. Servs., Inc., 974 F.2d 712, 720 (6th Cir. 1992); *In re* Auto-Train Corp., 810 F.2d 270, 275–77 (D.C. Cir. 1987); *In re* Kroh Bros. Dev. Co., 117 B.R. 499, 502 (W.D. Mo. 1989).

[29] Some have argued that the cases that rely on the bankruptcy courts' general equitable powers as the source of authority for substantive consolidation are no longer good law after the decision of the U.S. Supreme Court in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 572 U.S. 308 (1999) ("*Grupo Mexicano*"). In *Grupo Mexicano,* the Supreme Court held that a federal district court did not have judicial power to issue a preliminary injunction preventing a Mexican toll road operator from disposing of its assets pending adjudication of the plaintiff creditor's contract claim for money damages because such a remedy was historically unavailable from a court of equity. The Court noted that the equitable jurisdiction of the federal courts was derived from the Judiciary Act of 1789 (§ 11, 1 Stat. 78), and that a long line of U.S. Supreme Court cases had limited equitable jurisdiction to only that exercised by the English High Court of Chancery at the time of the adoption of the U.S. Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73). Consequently, the argument is that the equitable remedy of substantive consolidation is not a valid exercise of judicial power since it did not exist in the English Court of Chancery in 1789. Douglas A. Baird, *Substantive Consolidation Today*, 47 B.C. L. REV. 5, 20 (Dec. 2005); *see also* Simon Bowmer, *To Pierce or Not to Pierce the Corporate Veil: Why Substantive Consolidation is Not an Issue Under English Law*; 15 J. INT'L BANKING L. 193 (Issue 8, August 2000) (noting that English courts have not followed the lead of American courts in developing substantive consolidation doctrine). This argument was rejected in *In re Stone & Webster, Inc.*, 286 B.R. 532, 537–38 (Bankr. D. Del. 2002), *In re NM Holding Co., LLC, et al.*, 407 B.R. 232, 273–74 (Bankr. E.D. Mich. 2009), and *In re American Homepatient, Inc.,* 298 B.R. 152, 165 (Bankr. M.D. Tenn. 2003), determined to be inapplicable by the holding of the Supreme Court in *Sampsell*, *supra*, in *In re* Owens Corning*,* 419 F.3d 195 (3d Cir. 2005) and discussed, but not ruled upon, in *In re Amco Ins.,* 444 F.3d 690 (5th Cir. 2006).

[30] *See In re Bonham*, 226 B.R. at 75 ("[I]n what appears to be a slight majority of the cases which have decided the issue, courts have held that the estate of a non-debtor can be consolidated into that of a debtor under appropriate circumstances."); *In re* Creditors Serv. Corp., 195 B.R. 680, 689 (Bankr. S.D. Ohio 1996); *In re* New Ctr. Hosp., 187 B.R. 560, 566–67 (E.D. Mich. 1995); *In re* United Stairs Corp., 176 B.R. 359, 368 (Bankr. D.N.J. 1995); *In re* Gucci, 174 B.R. 401, 413 (Bankr. S.D.N.Y. 1994) ("[I]t is not a requirement that all the entities be debtors."); *In re* Munford, Inc., 115 B.R. 390, 396–97 (Bankr. N.D. Ga. 1990) (citing Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941)). *But see In re* Circle Land & Cattle Corp., 213 B.R. 870, 877 (Bankr. D. Kan. 1997) (determining that because bankruptcy court lacks subject-matter jurisdiction over non-debtor, it cannot consolidate debtor with non-debtor); *In re* Julien Co., 120 B.R. 930, 934 (Bankr. W.D. Tenn. 1990) (questioning bankruptcy court's power under section 105 of the Bankruptcy Code to consolidate a non-debtor); *In re* Alpha & Omega Realty, Inc., 36 B.R. 416, 417 (Bankr. D. Idaho 1984) (concluding that non-debtor status of entity precluded consolidation); *In re* Fesco Plastics Corp., 996 F.2d

have argued that the consolidation of a debtor with a non-debtor essentially circumvents the requirements in Section 303 of the Bankruptcy Code for filing an involuntary bankruptcy petition against the non-debtor.[31] Other courts, however, have rejected this argument.[32]

Of course, a court may also permit substantive consolidation if the applicable parties agree. Thus, if the requisite vote is obtained, and a reorganization plan is confirmed, merger or consolidation can occur pursuant to Section 1123(a)(5)(C) of the Bankruptcy Code. In such instances, the assets of the consolidated entities will be used to pay the claims of the consolidated entities, either in accordance with the absolute priority rule set out in the Bankruptcy Code or as otherwise agreed by all parties.[33]

C. Standards for Substantive Consolidation

The standards for substantive consolidation have evolved exclusively through case law, not by statute. Although Sections 302 and 1123(a)(5)(C) of the Bankruptcy Code refer to "consolidation," they do not articulate a legal standard for substantive consolidation. Additionally, Rule 1015(b) of the Federal Rules of Bankruptcy Procedure expressly permits the "joint administration" of separate debtors' estates, but the Official Advisory Committee Note to Rule 1015(b) makes it clear that Rule 1015(b) has nothing to do with substantive consolidation.[34]

In determining whether substantive consolidation is appropriate, courts have analyzed a multitude of factors in lieu of applying a rigid, bright-line test. These factors include:

1. Common Ownership or Control.

Common ownership or control of the debtor and the sought to be consolidated entities increases the likelihood of consolidation, but will not by itself result in consolidation.[35]

---

152 (7th Cir. 1993); *In re* Colfor, Inc., No. 96-60306, 1997 WL 605100, at *2 (Bankr. N.D. Ohio Sept. 4, 1997); *In re* Schwinn Bicycle, 210 B.R. 747 (Bankr. N.D. Ill. 1997); *In re* Deltacorp, Inc., 111 B.R. 419, 420–21 (Bankr. S.D.N.Y. 1990).

[31] *See In re Circle Land & Cattle Corp.*, 213 B.R. at 877; *In re* Lease-A-Fleet, Inc., 141 B.R. 869, 875 (Bankr. E.D. Pa. 1992); *In re* R.H.N. Realty Corp., 84 B.R. 356, 358 (Bankr. S.D.N.Y. 1988).

[32] *E.g.*, *In re* Alico Mining, Inc., 278 B.R. 586, 588–89 (Bankr. M.D. Fla. 2002) (rejecting involuntary-bankruptcy limitation, but requiring the party seeking substantive consolidation of debtor with non-debtor to establish that debtor is nothing more than alter ego of non-debtor); *In re Munford*, 115 B.R. at 397–98.

[33] *See In re* Stone & Webster, Inc., 286 B.R. 532, 542, 545 n.8, 546 (Bankr. D. Del. 2002) (reserving the examination of facts of a Chapter 11 case bearing upon numerous substantive consolidation factors and concomitant determination of whether substantive consolidation is warranted).

[34] *In re Bonham*, 226 B.R. at 76.

[35] *E.g., In re* Orfa Corp. of Phila., 129 B.R. 404, 415 (Bankr. E.D. Pa. 1991) (citing cases); *In re* DRW Prop. Co., 54 B.R. 489, 495–96 (Bankr. N.D. Tex. 1985).

2. *Identical or Overlapping Officers or Directors.*

When the debtor and the entities sought to be consolidated have identical or overlapping officers or directors, this increases the likelihood of consolidation, but is not controlling.[36]

3. *Consolidated Tax Returns or Financial Reporting.*

When the debtor and its affiliates file consolidated tax returns, or report their assets and liabilities on a consolidated basis in financial statements or Securities and Exchange Commission documents, consolidation becomes more likely.[37] Consolidated tax returns and financial statements, standing alone, normally do not warrant substantive consolidation.[38]

4. *Inter-Affiliate Debts or Guarantees.*

The presence of numerous inter-affiliate debts or guarantees among the affiliates being consolidated typically weighs in favor of consolidation, particularly if such debts or guarantees would be difficult or costly to untangle.[39] A court can also rely on a creditor's acceptance of an inter-corporate guarantee as evidence that the creditor knew of the consolidated nature of the debtor's businesses and did not rely on the separate credit of any entity being consolidated in extending credit.[40] By contrast, some courts have interpreted the existence of an inter-affiliate guarantee as evidence that creditors dealt with the entity being consolidated as economically separate and distinct.[41]

5. *Undercapitalization.*

When the affiliates being consolidated are grossly undercapitalized for their business

---

36 *See, e.g.*, *In re* Ltd. Gaming of Am., Inc., 228 B.R. 275, 288 (Bankr. N.D. Okla. 1998); *In re Lease-A-Fleet*, 141 B.R. at 871, 877; *In re* Buckhead Am. Corp., 1992 U.S. Bankr. LEXIS 2506 (Bankr. D. Del. Aug. 13, 1992); *In re* Drexel Burnham Lambert Grp. Inc., 138 B.R. 723, 766 (Bankr. S.D.N.Y. 1992).

37 *See, e.g.*, *In re* Food Fair, Inc., 10 B.R. 123, 126 (Bankr. S.D.N.Y. 1981). *Compare In re* Mars Stores, Inc., 150 B.R. 869, 880 (Bankr. D. Mass. 1993) (consolidated financials in 10-Q weighed in favor of consolidation), *with In re* Auto-Train Corp., 810 F.2d 270, 278 (D.C. Cir. 1987) (S-1 registration statement supported creditor's claim of reliance on separate credit of entity sought to be consolidated).

38 *In re* KRSM Props., Inc., 318 B.R. 712, 719–20 (B.A.P. 9th Cir. 2004); *In re* World Access, Inc., 301 B.R. 217, 276 (Bankr. N.D. Ill. 2003); *In re* Snider Bros., Inc., 18 B.R. 230, 233–34 (Bankr. D. Mass. 1982).

39 *See, e.g.*, *In re* Standard Brands Paint Co., 154 B.R. 563, 568, 572 (Bankr. C.D. Cal. 1993); *In re Buckhead Am. Corp.*, 1992 U.S. Bankr. LEXIS 2506; *see also In re Drexel Burnham*, 138 B.R. at 766; *In re* GC Cos., 274 B.R. 663, 674–75 (Bankr. D. Del. 2002); *In re Food Fair, Inc.*, 10 B.R. 123, 126.

40 *E.g.*, *In re* Snider Bros., Inc., 18 B.R. at 238 n.5.

41 *See, e.g.*, *In re* Donut Queen, Ltd., 41 B.R. 706, 711 (Bankr. E.D.N.Y. 1984) (noting that a creditor "required the additional assurances of two distinct economic entities and required formal guarantees in recognition that they were indeed distinct"); *In re* Augie/Restivo Baking Co., 860 F.2d 515, 518 (2d Cir. 1988).

undertakings, the likelihood of consolidation increases.[42]

6. *Commingling of Assets or Business Functions.*

The debtor's commingling of assets or business functions with its affiliates weighs in favor of consolidation, but generally is not dispositive, unless the commingling is so extensive as to make the separation of the entities' assets impossible or not cost-effective.[43] Consolidation may also be appropriate where the debtor and its affiliates are functionally integrated, if other factors favoring consolidation are present.[44] Functional integration factors may include financing of a subsidiary, payment by the parent of salaries, expenses and losses of the subsidiary, the lack of business and assets of the subsidiary, except for those provided by the parent, and when the parent refers to the subsidiary as a department or division.

7. *Failure to Maintain Corporate and Other Formalities.*

The failure of the debtor to maintain corporate formalities, particularly in dealings with its affiliates, weighs in favor of substantive consolidation; but without more, this may not warrant consolidation except in the most egregious cases.[45]

8. *Fraudulent or Preferential Transfers.*

When significant fraudulent or preferential transfers exist between the debtor and the entity being consolidated, courts sometimes will grant consolidation to obviate the cost of avoiding or recovering such transfers.[46] Other courts, however, have held that the traditional statutory methods for avoiding and recovering such transfers expressly provided in the Bankruptcy Code are always preferable to the more radical remedy of substantive consolidation.[47]

9. *Fraudulent or Inequitable Use of an Affiliate.*

When the debtor uses an affiliate to hide or perpetrate fraud, to hinder creditors, or otherwise to advance an inequitable result, consolidation is likely.[48]

---

[42] *See, e.g.*, *In re* 1438 Meridian Place, N.W., Inc., 15 B.R. 89, 96 (Bankr. D. D.C. 1981).

[43] *See, e.g.*, Soviero v. Franklin Nat'l Bank, 328 F.2d 446, 448 (2d Cir. 1964).

[44] *E.g.*, *In re Standard Brands*, 154 B.R. at 572.

[45] *See, e.g.*, *In re Snider Bros.*, 18 B.R. at 234; *In re* Buckhead Am. Corp., 1992 U.S. Bankr. LEXIS 2506 (Bankr. D. Del. Aug. 13, 1992); *see also Soviero*, 328 F.2d at 448 (featuring flagrant disregard of corporate forms); *In re* Tureaud, 45 B.R. 658, 660–61 (Bankr. N.D. Okla. 1985) (featuring egregious disregard of corporate formalities).

[46] *See, e.g.*, *In re Tureaud*, 59 B.R. at 977; *In re Standard Brands*, 154 B.R. at 571.

[47] *See, e.g.*, *In re* Lease-A-Fleet, Inc., 141 B.R. 869, 875–76 (Bankr. E.D. Pa. 1992); *In re* Owens Corning, 419 F.3d 195, 210 (3d Cir. 2005).

[48] *See, e.g.*, Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 216 (1941); Maule Indus., Inc. v. Gerstel, 232 F.2d 294, 297 (5th Cir. 1956); *In re Tureaud*, 45 B.R. at 660.

10. Economic Benefits of Consolidation.

A factor frequently considered by courts is the potential profitability of consolidating the debtor and its related entities.[49] Consolidation has been granted where it improved the debtor's chances for a successful financial reorganization.[50]

11. Degree of Difficulty in Segregating Assets and Liabilities.

An extremely probative and sometimes decisive factor in consolidation decisions is the degree of difficulty in segregating the various entities' respective assets and liabilities. Consolidation may be granted if the entities' assets and liabilities are so entangled that their segregation is impossible or can be achieved only at great expense.[51]

12. Reliance on Separate Credit of Entities to be Consolidated.

In honoring settled commercial expectations, courts frequently deny consolidation where objecting creditors have reasonably relied on the separate credit of one of the entities being consolidated.[52] However, a creditor may be estopped from asserting such reliance where the creditor knew or should have known of the close association of the debtor and the entities sought to be consolidated.[53] Alternatively, if creditors have dealt with the debtor and its related entities as a single integrated entity, that fact weighs in favor of consolidation.[54]

13. Prejudice or Benefit to Creditors.

Inequitable prejudice to creditors of one entity may preclude consolidation.[55] However, the fact that some creditors will be adversely affected by consolidation is

---

[49] *See, e.g.*, *In re* Vecco Constr. Indus., Inc., 4 B.R. 407, 410 (Bankr. E.D. Va. 1980).

[50] *See, e.g.*, *In re* Orfa Corp., 129 B.R. 404, 414–15 (Bankr. W.D. Pa. 1991) (citing *In re* F.A. Potts & Co., 23 B.R. 569, 572 (Bankr. E.D. Pa. 1982)).

[51] *See In re* Augie/Restivo Baking Co., 860 F.2d 515, 519 (2d Cir. 1988); *In re* Drexel Burnham Lambert Grp. Inc., 138 B.R. 723, 766 (Bankr. S.D.N.Y. 1992). *But see In re* DRW Prop. Co., 54 B.R. 489, 496–97 (Bankr. N.D. Tex. 1985) (refusing to grant consolidation even though it would cost over two million dollars to disentangle the various entities).

[52] *See, e.g.*, *In re Augie/Restivo Baking Co.*, 860 F.2d at 515; *In re* Auto-Train Corp., 810 F.2d 270, 277–78 (D.C. Cir. 1987).

[53] Eastgroup Props. v. S. Motel Ass'n, 935 F.2d 245, 249 n.11 (11th Cir. 1991) (*citing In re* Snider Bros., Inc., 18 B.R. 230, 235, 237, 233 (Bankr. D. Mass. 1982)).

[54] *Compare In re* Leslie Fay Cos., Inc., 207 B.R. 764, 780 (Bankr. S.D.N.Y. 1997) (granting consolidation), *and In re* Munford, Inc., 115 B.R. 390, 395–96 (Bankr. N.D. Ga. 1990) (granting consolidation), *with In re* Crown Mach. & Welding, Inc., 100 B.R. 25, 28 (Bankr. D. Mont. 1989) (refusing to consolidate even though creditors believed they were dealing with one entity).

[55] *See, e.g.*, *In re Augie/Restivo Baking Co.*, 860 F.2d at 517–19 (refusing to consolidate where secured lender's unsecured deficiency claim would have been subordinated as a result).

not always controlling.[56] Thus, if consolidation would directly benefit certain creditors, it may be granted over the objections of other creditors.[57] The court will balance the equities of the situation.

14. Individual or Non-Debtor Status of Entities to be Consolidated.

As discussed above, a number of courts have expressed reluctance to consolidate a debtor with individuals or with entities that are not themselves bankruptcy debtors. Accordingly, in such cases, a higher standard for consolidation may be imposed.[58]

D. Methodologies for Applying Substantive Consolidation Factors

As the overriding concern guiding the application of the above factors is the equitable treatment of creditors, the central inquiry in evaluating a motion for substantive consolidation is whether the economic prejudice resulting from continued recognition of the entities' separateness outweighs the economic prejudice that would be caused by the entities' consolidation.[59] The bankruptcy court presiding over a consolidation hearing will conduct a factually intensive inquiry and carefully balance the competing interests of all constituencies. Generally, the burden of proof is on the party seeking consolidation, presenting evidence using the factual criteria set forth above. The federal courts have implemented different approaches for analyzing the numerous factors discussed above. Three basic methodologies have emerged.[60] They are as follows:

1. First Methodology.

The first methodology relies on the factors listed above, or some subset thereof, as a means for measuring the equities, benefits, and detriments of consolidation.[61] According to this view, no one factor is decisive, and not all of the factors favoring consolidation need to be present in order for consolidation to be justified.[62] In situations where some factors favoring consolidation are present to a significant degree, but other critical factors are absent or are in conflict, a court nonetheless may

---

[56] *In re* Murray Indus., Inc., 119 B.R. 820, 828 (Bankr. M.D. Fla. 1990).

[57] *E.g.*, *Eastgroup Props.*, 935 F.2d at 251 (permitting consolidation in part because it would increase the pro rata distribution to priority creditors).

[58] *See, e.g.*, *In re* Lease-A-Fleet, Inc., 141 B.R. 869, 874–76 (Bankr. E.D. Pa. 1992) (noting that consolidation of a non-debtor "should be reserved for unusual circumstances"); *In re* Julien Co., 120 B.R. 930, 935 (Bankr. W.D. Tenn. 1990) (noting that the bankruptcy trustee's attempt to consolidate assets of an individual contemplated "a "broader and much more invasive result").

[59] *E.g.*, *Eastgroup Props.*, 935 F.2d at 249 (quoting *In re* Snider Bros., Inc., 18 B.R. 230, 234 (Bankr. D. Mass. 1982)).

[60] *See generally In re* Bonham, 226 B.R. 56, 81–83 (Bankr. D. Alaska 1998), *aff'd*, 229 F.3d 750 (9th Cir. 2000).

[61] *See, e.g.*, *In re* Creditors Serv. Corp., 195 B.R. 680, 690 (Bankr. S.D. Ohio 1996) ("The factors merely provide the framework to assist the Court's inquiry whether harm will result in the absence of consolidation."); *In re* Vecco Constr. Indus., Inc., 4 B.R. 407, 410 (Bankr. E.D. Va. 1980).

[62] *E.g.*, *In re* Orfa Corp. of Phila., 129 B.R. 404, 415 (Bankr. E.D. Pa. 1991).

conclude that Substantive Consolidation is sufficiently beneficial to be appropriate.[63] Courts following this approach, however, generally place the burden on the proponent of consolidation of proving that the benefits from consolidation outweigh any resulting prejudice.[64]

2. Second Methodology.

The United States Court of Appeals for the Second Circuit has articulated a similar, but not identical, methodology that has gained acceptance in a number of courts. This standard treats the relevant factors outlined above as mere variants of two critical criteria: (i) whether creditors dealt with the entities being consolidated as a single economic unit and did not rely on their separate identity in extending credit; and (ii) whether the affairs of the sought to be consolidated entities are so entangled that consolidation will benefit all creditors because segregating the entities' respective affairs is impossible or so costly as to threaten the realization of any net assets for creditors.[65] If the proponent of consolidation establishes that either of these criteria is satisfied, consolidation may be granted.[66]

3. Third Methodology.

The third methodology has been adopted in the Eleventh and District of Columbia Circuits.[67] This standard allows the proponent of consolidation to establish a prima facie case for consolidation by demonstrating (i) a substantial identity between the entities sought to be consolidated, and (ii) that consolidation is necessary to avoid some harm or to realize some benefit.[68] The proponent of consolidation may rely upon the usual factors relied on in substantive consolidation cases, or some subset thereof, to prove either or both elements of the prima facie case.[69] Upon establishing a prima facie case, the burden shifts to objecting creditors to prove that they reasonably relied on the separate credit of one of the entities sought to be consolidated in extending credit and that they would be prejudiced by consolidation.[70] If a creditor proves reasonable reliance and prejudice, consolidation may be granted only if its

---

[63] *Id.*

[64] *E.g.*, *In re* Crown Mach. & Welding, Inc., 100 B.R. 25, 27 (Bankr. D. Mont. 1989) (citing *In re* Steury, 94 B.R. 553, 554 (Bankr. N.D. Ind. 1988)); *In re Snider Bros.*, 18 B.R. at 238.

[65] *See In re* Augie/Restivo Baking Co., 860 F.2d 515, 518–19 (2d Cir. 1988); *see also* Fed. Deposit Ins. Corp. v. Colonial Realty Co., 966 F.2d 57, 61 (2d Cir. 1992) (affirming the *Augie/Restivo* standard); *In re Bonham*, 226 B.R. at 76.

[66] *In re* Standard Brands Paint Co., 154 B.R. 563, 569 (Bankr. C.D. Cal. 1993).

[67] *See* Eastgroup Props. v. S. Motel Ass'n, 935 F.2d 245 (11th Cir. 1991); *see In re* Auto-Train Corp., 810 F.2d 270 (D.C. Cir. 1987).

[68] *Eastgroup Props.*, 935 F.2d at 249; *In re Auto-Train Corp.*, 810 F.2d at 276.

[69] *Eastgroup Props.*, 935 F.2d at 249; *In re Auto-Train Corp.*, 810 F.2d at 276.

[70] *Eastgroup Props.*, 935 F.2d at 249.

> benefits "heavily outweigh" its detriments.[71] If such a creditor fails to prove either reasonable reliance or prejudice, however, consolidation may be granted regardless of whether the benefits of consolidation "heavily outweigh" its detriments.[72]

The courts for the District of Delaware have, in the past, relied upon both the second and third methodologies in making substantive consolidation determinations without declaring a preference for one methodology over the other, and without enouncing a new legal standard.[73] However, the Third Circuit in *In re Owens Corning,*[74] expressly rejected the "checklist" approach of the first methodology and the "balance of benefit and harm" approach of the third methodology, and stated, "if presented with a choice of analytical avenues, we favor essentially that of *Augie/Restivo*."[75] The Third Circuit determined that substantive consolidation is warranted if "(i) prepetition. . .[the entities] disregarded separateness so significantly [that] their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition [sic] their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors."[76]

Substantive consolidation is a powerful tool for a bankruptcy court presiding over the cases of related entities whose financial affairs are hopelessly entangled or whose corporate separateness has been ignored by either its shareholders or creditors. "[S]ubstantive consolidation should be used only after it has been determined that all creditors will benefit because untangling is either impossible or so costly as to consume the assets."[77] So what will happen to Mr. Castle and his empire? Assuming the bondholders are successful in filing bankruptcy petitions against several of the Castle entities, based on the facts, Mr. Castle may have a hard time preventing the consolidation of his holdings, both public and private.

---

71 *Eastgroup Props.*, 935 F.2d at 249; *In re Auto-Train Corp.*, 810 F.2d at 276.

72 *E.g.*, *In re* New Ctr. Hosp., 187 B.R. 560, 569 (E.D. Mich. 1995) ("Since reliance and prejudice have not been shown, the Court need not reach the issue of whether the benefits of consolidation 'heavily outweigh' the harm."); *see also Eastgroup Props.*, 935 F.2d at 249; *In re Auto-Train Corp.*, 810 F.2d at 276; *In re* Ltd. Gaming of Am., Inc., 228 B.R. 275, 287 (Bankr. N.D. Okla. 1998); *In re Standard Brands*, 154 B.R. at 568–69; *In re* Lewellyn, 26 B.R. 246, 251–52 (Bankr. S.D. Iowa 1982).

73 *See In re* GC Cos., Inc., 298 B.R. 226, 231 (D. Del. 2003); *In re* Genesis Health Ventures, Inc., 266 B.R. 591, 618–19 (Bankr. D. Del. 2001); *In re* Stone & Webster, Inc., 286 B.R. 532, 539 (Bankr. D. Del. 2002) (bankruptcy court has great flexibility to tailor its relief to ensure equitable treatment of all creditors).

74 *In re* Owens Corning*,* 419 F.3d 195, 211–12 (3d Cir. 2005).

75 *Id.* at 210.

76 *Id.* at 211 (footnote omitted).

77 *In re* Augie/Restivo Baking Co., 860 F.2d 515, 519 (2d Cir. 1988); *In re Owens Corning,* 419 F.3d at 210.