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Treading Murky Waters: The Third Circuit's Search for When a Claim Arises in *In re Grossman's, Inc.*

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TREADING MURKY WATERS: THE THIRD CIRCUIT'S SEARCH FOR WHEN A CLAIM ARISES IN *IN RE GROSSMAN'S, INC.*

Abstract: On June 2, 2010, the U.S. Court of Appeals for the Third Circuit in *In re Grossman's, Inc.* held that despite a post-petition manifestation of injury, the tort claims of a woman allegedly exposed to a Chapter Eleven debtor's asbestos-containing products arose pre-petition. In so holding, the court reasoned that a claim arises when an individual is exposed pre-petition to a debtor's product giving rise to an injury, thus overruling its 1984 decision in *In re M. Frenville Co.* This Comment argues that although the court examined two tests before determining when a claim arises under the Bankruptcy Code, it left the state of claim accrual law in the contingent tort claims context unclear.

Introduction

In bankruptcy, there is a tension between the rights of a debtor to a "fresh start" and a creditor to due process.[1] This tension is most common in cases where the creditor is a tort claimant who has been exposed to a debtor's tortious product or conduct prior to the debtor's filing of a bankruptcy petition, but has yet to manifest any injury.[2] For these future claimants as well as the debtor, much hinges upon when a "claim" arises under the Bankruptcy Code ("Code") because if the claim arises pre-petition, it can be discharged by the Chapter Eleven debtor's Plan of Reorganization.[3] This issue is at the heart of *In re Grossman's, Inc.*, where, in 2010, the U.S. Court of Appeals for the Third Circuit overruled its 1984 decision in *In re M. Frenville Co* to hold that a claim arises when an individual has pre-petition exposure to a product

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[1] *See In re* Chateaugay Corp., 944 F.2d 997, 1002 (2d Cir. 1991); Dale Ellen Azaria, *When Is a Claim a Claim? A Bankruptcy Code Riddle*, 62 Tenn. L. Rev. 205, 205 (1995) (describing the difficulty in determining when a claim arises under the Bankruptcy Code).

[2] *See* Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. Rev. 745, 759 (1993) (describing the constitutional complications of discharging future claims of those who have either yet to develop an asbestos-related disease or have no knowledge of their pre-bankruptcy exposure).

[3] *See* 11 U.S.C. § 1141(d)(1)(A) (2006) (stating that the confirmation of a plan discharges the debtor from debt arising before the date of plan confirmation); Barbara J. Houser, *Symposium on Mass Torts: Chapter 11 as a Mass Tort Solution*, 31 Loy. L.A. L. Rev. 451, 461–62 (1998).

or other conduct giving rise to an injury, which underlies a right to payment under the Code.[4]

Courts have struggled to interpret the Code's definition of "claim" in the context of future tort claimants seeking relief from a Chapter Eleven debtor.[5] The Code defines a claim 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."[6] The breadth of this definition implies that Congress intended that a debtor would be able to address all legal obligations during the bankruptcy proceeding.[7]

Interpreting the definition of a claim under the Code, the Third Circuit in *Frenville* and *Grossman's* took opposing views of when a claim arises.[8] In *Frenville*, the Third Circuit narrowly interpreted the definition of a claim despite its expansive treatment in the Code.[9] It focused on the "right to payment" language in the definition and concluded that a right to payment does not exist until there is a cause of action under applicable state law.[10] In *Grossman's*, however, the Third Circuit rejected the narrow *Frenville* approach and took a broader stance on when a claim arises under the Code.[11] It held that an individual's prepetition exposure to a debtor's product or conduct constitutes a claim, even if the resulting injury manifests after the reorganization.[12] To reach this conclusion, the court examined two tests circuit courts have used to determine when future tort claims constitute "claims" under

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[4] *See In re* Grossman's, Inc., 607 F.3d 114, 121 (3d Cir. 2010), *overruling In re* M. Frenville Co., 744 F.2d 332, 338 (3d Cir. 1984).

[5] *See* Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. Pa. L. Rev. 2045, 2069–70 (2000) (discussing the inconsistency among courts in determining when a claim arises for bankruptcy purposes when tortious conduct occurred before plan confirmation but injuries resulted after).

[6] 11 U.S.C. § 101(5)(A) (2006).

[7] *See Grossman's*, 607 F.3d at 121 (citing H.R. Rep. No. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266)); *In re* Remington Rand, 836 F.2d 825, 826 (3d Cir. 1988). Congress's intent in providing a broad definition of "claim" in the Code is made explicit in the House Report. *See* H.R. Rep. No. 95-595, at 309 (stating that by using the "broadest possible definition," the law was intended to allow a debtor to deal with all legal obligations, no matter how contingent, in the bankruptcy case and to provide the broadest possible relief in the bankruptcy court).

[8] *Compare Grossman's*, 607 F.3d at 125, *with Frenville*, 744 F.2d at 337. The two cases deal with the subject of claims in two different contexts: *Frenville*, in an indemnification context, and *Grossman's*, in a context of tort liability for exposure to asbestos. *See generally Grossman's*, 607 F.3d 114; *Frenville*, 744 F.2d 332.

[9] *See* 744 F.2d at 337.

[10] *See id.* at 336–37.

[11] *See* 607 F.3d at 121.

[12] *See id.* at 125.

the Code: the Conduct Test, which requires a debtor's pre-petition tortious conduct, and Pre-Petition Relationship Test, which requires both a debtor's pre-petition tortious conduct and some pre-petition relationship between the debtor and the claimant.[13] The *Grossman's* court ultimately applied a test most resembling the latter.[14]

This Comment argues that *Grossman's* analysis of the Conduct and Pre-Petition Relationship Tests and its ultimate application of the latter not only demonstrate how similar the two tests are, but also add to the confusion over when future tort claims constitute "claims" under the Code.[15] Part I introduces *Frenville* and its state law accrual test.[16] Part II focuses on *Grossman's*, highlighting the case's facts and procedure and discussing the demise of *Frenville*.[17] It then describes the court's analysis of the Conduct Test and Pre-Petition Relationship Test, and its application of a test similar to the latter.[18] Part III analyzes the similarity between these two tests, recognizes issues that *Grossman's* fails to resolve, and explains how the decision ultimately brings more confusion to this area of law.[19]

I. The *Frenville* Accrual Test

In 1984, in *In re M. Frenville Co.*, a Chapter Seven debtor's former accounting firm, "A&B," sought relief from an automatic stay to implead the debtor-company, "Frenville," as a third-party defendant to obtain indemnification under New York Law.[20] A&B, an independent auditor and accountant for Frenville, sought this relief because several banks had filed suit against it for negligently and recklessly preparing

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[13] *See id.* at 122–23; *see also, e.g.*, *In re* Piper Aircraft Corp., 58 F.3d 1573, 1577 (11th Cir. 1995) (applying the Pre-Petition Relationship Test); Grady v. A.H. Robins Co., Inc., 839 F.2d 198, 202–03 (4th Cir. 1988) (applying the Conduct Test).

[14] *See Grossman's*, 744 F.2d at 125.

[15] *See infra* notes 101–124 and accompanying text; *see also In re Chateaugay Corp.*, 944 F.2d at 1004 (noting that the court did not need to decide the difficult case of pre-petition conduct that has not resulted in a detectable injury); Azaria, *supra* note 1, at 205; Laura Bartell, *Due Process for the Unknown Future Claim in Bankruptcy: Is This Notice Really Necessary?*, 78 Am. Bankr. L.J. 339, 342–43 (2004) (discussing the difficulty courts have had in applying different claim-accrual tests to individuals who have not been exposed to the debtor's pre-petition conduct until after the bankruptcy filing or are unaware of the harm that may result in the future as a result of their pre-petition contact with the debtor's product).

[16] *See infra* notes 20–33 and accompanying text.

[17] *See infra* notes 34–70 and accompanying text.

[18] *See infra* notes 71–100 and accompanying text

[19] *See infra* notes 101–124 and accompanying text.

[20] *See* 744 F.2d 332, 333–34 (3d Cir. 1984).

Frenville's financial statements.[21] Although no indemnification clause existed in the agreement, A&B prepared financial statements for Frenville in the years prior to the petition for bankruptcy filed against Frenville.[22] Finding that Frenville's liability resulted from its pre-petition acts, the bankruptcy court held that the automatic stay applied, barring A&B's action.[23] The district court affirmed.[24]

On appeal, the Third Circuit reversed and held that the automatic stay did not bar the indemnification claim.[25] Although the conduct giving rise to the suit occurred before the filing of the bankruptcy petition, the court concluded that the claim arose post-petition because the cause of action stemming from that conduct arose after filing.[26] Because claims arising post-petition are not subject to the automatic stay, A&B's claim was not barred.[27]

In concluding that the claim arose post-petition, the Third Circuit narrowly construed the definition of "claim" under the Code.[28] Focusing on the right to payment language within the definition of "claim," the court found that a right to payment for a claim does not exist until there is a cause of action under the applicable state law.[29] Under New York law, an indemnity claim does not arise until the "prime obligation" to pay has been established.[30] In *Frenville*, the prime obligation had not been established until the post-petition period, when the banks brought suit against A&B, spurring it to seek indemnification from Frenville.[31] As such, the court held that the claim arose post-petition, thereby rendering the automatic stay inapplicable to A&B's claim.[32] Thus, under

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[21] *See id.* at 333. The complaint also alleged that the statements were false, and that because of reliance on them, the banks suffered losses of over five million dollars. *See id.*

[22] *See id.*

[23] *Id.* at 334. The Code states that a "petition . . . operates as a stay . . . of the commencement or continuation . . . of an action or proceeding against the debtor that was or could have been commenced before the commencement of the case . . . or to recover a *claim that arose before the commencement of the case* under this title." 11 U.S.C. § 362(a)(1) (2006) (emphasis added).

[24] *Frenville*, 744 F.2d at 334.

[25] *Id.* at 338.

[26] *Id.* at 337.

[27] *Id.* at 335, 337–38.

[28] *Id.* at 336.

[29] *Id.* at 337.

[30] *Frenville*, 744 F.2d at 337 (quoting Burgundy Basin Inn v. Watkins Glen Grand Prix Corp., 379 N.Y.S.2d 873, 880 (App. Div. 1976)).

[31] *Id.*

[32] *Id.* at 337, 338.

Frenville's accrual test, a valid claim exists under the Code at the time the claimant's right to payment arises under state law.[33]

II. *In re Grossman's, Inc.*: Overruling Twenty-Six Years of Precedent

On June 2, 2010, the Third Circuit in *Grossman's* rejected *In re M. Frenville Co.*'s state law accrual test.[34] This rejection, however, left a gap in the Third Circuit's jurisprudence as to when a claim arises.[35] To fill the void, the *Grossman's* court analyzed two tests courts have generally used to determine when a claim arises under the Code: the Conduct Test and Pre-Petition Relationship Test.[36] In place of the accrual test, the court ultimately held that a claim arises when an individual is exposed pre-petition to the debtor's product or conduct giving rise to an injury, even if that injury manifests post-petition.[37]

A. *Facts and Procedure*

The conflict at the heart of *Grossman's* was between a tort claimant and a reorganized Chapter Eleven debtor.[38] In 1977, Mary Van Brunt purchased products allegedly containing asbestos from Grossman's, a home improvement and lumber retailer.[39] Twenty years later, in 1997, Grossman's filed petitions under Chapter Eleven.[40] Under its Chapter Eleven Plan of Reorganization, Grossman's merged with Jeld-Wen, which then served as its successor-in-interest.[41] In addition to the merger, the Plan purported to discharge all claims arising before the date of Plan confirmation.[42]

When it filed its Plan, Grossman's knew it had sold asbestos-containing products and knew of the associated health risks.[43] It also

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[33] *See id.* at 337; *see also In re* Grossman's, Inc., 607 F.3d 114, 119 (3d Cir. 2010).

[34] *See In re* Grossman's, Inc., 607 F.3d 114, 121 (3d Cir. 2010), *overruling In re* M. Frenville Co., 744 F.2d 332, 338 (3d Cir. 1984).

[35] *See id.*

[36] *See id.* at 122.

[37] *See id.* at 125. *Compare id.* (focusing on the *act* giving rise to injury), *with Frenville*, 744 F.2d at 335 (stating that Congress has focused on the *harm*, rather than the act).

[38] *See* 607 F.3d at 117.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 117 n.1.

[42] *See id.* at 117. Under Chapter Eleven of the U.S. Bankruptcy Code, a debtor can obtain a discharge of debts arising before the date of confirmation of the Plan of Reorganization, with debt defined as liability on a claim. *See* 11 U.S.C. §§ 1141(d)(1)(a), 101(12) (2006).

[43] *Grossman's*, 607 F.3d at 117.

knew that personal injury claimants were suing asbestos manufacturers.[44] But Grossman's was not aware of any product liability lawsuits based upon asbestos exposure filed against it.[45] Grossman's filed notice by publication of the deadline for filing proofs of claim but did not specifically suggest in the notice that it might have future asbestos liability.[46] Mary Van Brunt did not file a proof of claim at that time because she was unaware she had a claim:[47] she did not manifest any asbestos exposure-related symptoms until about ten years after Grossman's filing, when she developed symptoms of mesothelioma, a disease linked to asbestos exposure.[48] Soon thereafter, the Van Brunts filed suit against Jeld-Wen.[49]

Jeld-Wen moved to reopen the Chapter Eleven case to obtain a court determination that the Plan discharged the Van Brunts' claim.[50] Relying on the Third Circuit's decision in *Frenville*, the bankruptcy court entered judgment for the Van Brunts, holding that the Plan of Reorganization did not discharge their asbestos-related claims because they arose post-petition, when Ms. Van Brunt's injuries manifested.[51] The district court affirmed.[52] Sitting en banc, the Third Circuit reversed and overruled *Frenville*, holding that the tort claim arose pre-petition despite the post-petition manifestation of Ms. Van Brunt's injuries.[53]

B. *Overruling* Frenville

By overruling *Frenville*, the Third Circuit in *Grossman's* interpreted the Code to reflect Congress's intent that "claim" be understood broad-

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Grossman's*, 607 F.3d at 117. Mary Van Brunt died in 2008 while the case was pending; her husband Gordon represented her estate in litigation. *Id.* at 118.

[50] *Id.*

[51] *See In re* Grossman's, Inc., 389 B.R. 384, 390 (Bankr. D. Del. 2008), *aff'd in part, rev'd in part*, 400 B.R. 429, 433 (D. Del. 2009), *rev'd in part*, 607 F.3d 114, 121 (3d Cir. 2010). The bankruptcy court stated that under New York law, the cause of action for an asbestos related injury does not accrue until manifestation of the injury, which in this case did not occur until 2006. *See id.* at 388.

[52] *See Grossman's*, 400 B.R. at 433. Although the district court affirmed the bankruptcy court's decision that the Van Brunts' tort claim arose post-petition, it reversed the breach of warranty claim. *See id.*

[53] *See Grossman's*, 607 F.3d at 121. The Third Circuit then remanded the case to the district court to determine whether a discharge of the claim would comport with due process. *See id.* at 128.

ly.[54] The court found this intent in three different areas.[55] Looking first to the text of the Code itself, the court reasoned that *Frenville* construed the term "claim" too narrowly.[56] The *Frenville* court had decided that a right to payment—the threshold requirement of a claim— must exist before a claim could arise under the Code.[57] In *Grossman's*, however, the Third Circuit decided that the Code's use of adjectives like "contingent" and "unmatured" in its definition of "claim" indicated that Congress intended to allow that a claim can exist before a right to payment.[58]

The Third Circuit next looked to federal bankruptcy reform, noting that *Frenville* was out of sync with the Bankruptcy Reform Act of 1978, which defined "claim" for the first time for Code purposes.[59] Although the *Grossman's* court did not explicitly refer to the Bankruptcy Act of 1898, *Frenville*'s logic hewed closer to this late nineteenth century act than to the modern law.[60] Rather than broadly defining "claim," the Bankruptcy Act of 1898 defined a "debt" as "any debt, demand, or *claim* provable in bankruptcy."[61] To be a valid "debt" under the 1898 Act, a tort claim had to be provable.[62] As such, contingent tort claims could not be considered debts payable in bankruptcy.[63] *Frenville*'s holding that

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[54] S*ee id.* at 121; *see also In re* Remington Rand Corp., 836 F.2d 825, 826, 829 (1988) (noting the Code's broad definition of "claim"); H.R. Rep. No. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266.

[55] *See Grossman's*, 607 F.3d at 121.

[56] *See id.*

[57] *See id.*; *Frenville*, 744 F.2d at 336 ("'[A]lthough the code definition of claim has been drafted in extremely broad terms, such definition may not confer the status of a claimant upon a petitioning creditor who has no right to payment.'" (quoting *In re* First Energy Leasing Corp., 38 B.R. 577, 581 (Bankr. E.D.N.Y. 1984))); *see also* Ralph R. Mabey & Annette W. Jarvis, In re Frenville*: A Critique by the National Bankruptcy Conference's Committee on Claims and Distributions*, 42 Bus. Law. 697, 705 (1987) (critiquing *Frenville*'s narrow focus on the right to payment language in the Code).

[58] *See Grossman's*, 607 F.3d at 121 (discussing 11 U.S.C. § 101(5)(a) (2006)). Section 502(c)(1) of the Code provides further support of the broad definition of a claim. *See* 11 U.S.C. § 502(c)(1) (2006) ("There shall be estimated for purpose of allowance under this section any contingent or unliquidated claim, the fixing or liquidation of which . . . would unduly delay the administration of the case . . . .").

[59] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101(4), 92 Stat. 2549, 2550 (codified at 11 U.S.C. § 101(5)); *Grossman's*, 607 F.3d at 121.

[60] *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; *Grossman's*, 607 F.3d at 121; *Frenville*, 744 F.2d at 335–37; Leonard J. Long, *Bankruptcy Lesson of Future Mass Tort Claims: Potential Mass Tort Victims Should Have Catastrophic Injury Insurance*, 16 Quinnipiac L. Rev. 357, 384–85 (1997) (discussing the nature of proving a claim in bankruptcy under the Bankruptcy Act of 1898).

[61] *See* § 1(11), 30 Stat. at 544 (emphasis added); Long, *supra* note 60, at 384–85.

[62] Long, *supra* note 60, at 384–85.

[63] *See id.* at 385.

a claim did not arise until a right to payment existed under state law essentially conformed to the provability standard in the 1898 Act.[64] Congress, however, revised that standard in the Bankruptcy Reform Act of 1978 by broadly defining "claim" to include contingent and unmatured claims.[65] If the *Grossman's* court adhered to the narrow *Frenville* reasoning, it would have effectively reinstituted the provability theory, defeating congressional intent.[66]

Finally, the Third Circuit noted that *Frenville* conflicted with the principle that bankruptcy courts must administer and enforce the Bankruptcy Act and not the law of the state in which they sit.[67] Congress granted authority to the bankruptcy courts to enforce the Act and to determine when a claim arises.[68] *Frenville*, however, relied on state law to determine when a claim arose—a reliance which other courts consider incorrect in light of Congress's power under the Constitution to establish bankruptcy law.[69] Thus, in overruling *Frenville*, the Third Circuit in *Grossman's* brought the law in line with congressional intent.[70]

C. *Filling the* Frenville *Void: The Dueling Tests*

Having overruled *Frenville* and detached claim accrual from state law requirements, the Third Circuit in *Grossman's* had to determine when a future tort claim arises under the Code.[71] This determination was critical to the court's assessment of whether the scope of Gross-

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[64] *See Frenville*, 744 F.2d at 336–37; *In re* Johns-Manville Corp., 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986) (noting *Frenville*'s adherence to a definition of claim that resembled the 1898 definition).

[65] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, § 101(4), 92 Stat. 2549, 2550 (codified at 11 U.S.C. § 101(5)(A) (2006)); H.R. Rep. No. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266; Long, *supra* note 60, at 384.

[66] *See In re Johns-Manville Corp.*, 57 B.R. at 690; Mabey & Jarvis, *supra* note 57, at 705.

[67] *See Grossman's*, 607 F.3d at 121 ("The Supreme Court has stated that 'a bankruptcy court does not apply the law of the state where it sits. . . . [B]ankruptcy courts must administer and enforce the Bankruptcy Act . . . .'" (quoting Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 162–63 (1946))).

[68] *See id.* (citing *Vanston*, 329 U.S. at 162–63).

[69] *See, e.g.*, Grady v. A.H. Robins Co., Inc., 839 F.2d 198, 201–02 (4th Cir. 1988) (reasoning that claim accrual under the bankruptcy code should be determined under bankruptcy law rather than state law and in accordance with the Constitution); *see also* U.S. Const. art. I, § 8 cl. 4 ("The Congress shall have the power to . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").

[70] *See Grossman's*, 607 F.3d at 121; H.R. Rep. No. 95-595, at 309.

[71] *See Grossman's*, 607 F.3d at 121.

man's discharge would extend to the Van Brunts' claims.[72] Although the broad definition of "claim" included "unmanifested" or "contingent" tort claims, how far could the definition of a claim be stretched?[73] Could a debtor's pre-petition actions constitute a claim even though the potential claimant did not manifest an injury before the bankruptcy petition was filed?[74] To answer these questions, the Third Circuit looked at several other circuit courts' analyses of two tests—the Conduct Test and the Pre-Petition Relationship Test—before applying a test most similar to the latter to conclude that a claimant's pre-petition exposure to the debtor's product gives rise to a "claim."[75]

The Third Circuit first considered the Conduct Test, under which a debtor's pre-petition conduct giving rise to liability constitutes a claim for Code purposes.[76] Because the Conduct Test focuses on when the debtor's conduct occurred and not when the claimant's injury accrued, "claims" arise and are subject to discharge in bankruptcy proceedings if the debtor's conduct occurred pre-petition.[77] This is so even if the resulting injuries have not yet manifested.[78] In 1988, for example, the U.S. Court of Appeals for the Fourth Circuit applied the Conduct Test in *Grady v. A.H. Robins Co., Inc.*, and held that a woman fitted with a contraceptive device prior to the debtor-manufacturer's filing for bankruptcy had a pre-petition claim, despite her post-petition manifestation of injuries.[79] The Fourth Circuit reasoned that because the device was

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[72] *See id.* at 122; Resnick, *supra* note 5, at 2067 ("[T]he effect of the debtor's discharge . . . depends on the court's construction of the definition of 'claim' and its determination as to when such a claim arises.").

[73] *See Grossman's*, 607 F.3d at 123.

[74] *See id.* at 122 (stating that a broad discharge could disadvantage tort claimants whose injuries were caused by the debtor but have not manifested, and who therefore would not notify claimants of debtor's liability); Houser, *supra* note 3, at 463.

[75] *See Grossman's*, 607 F.3d at 123, 125; *see also, e.g.*, Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1277 (5th Cir. 1994) (applying the Pre-Petition Relationship Test to hold that plaintiffs' claim did not arise pre-petition because there was no evidence of any pre-petition relationship between plaintiffs and debtor); *Grady*, 839 F.2d at 202–03 (applying the Conduct Test to hold that plaintiff's claim arose pre-petition because the debtor's injurious conduct occurred before the filing of the bankruptcy petition).

[76] *See Grady*, 839 F.3d at 199; *In re Johns-Manville*, 57 B.R. at 690.

[77] *See* Houser, *supra* note 3, at 464.

[78] *See* Bartell, *supra* note 15, at 343; Resnick, *supra* note 5, at 2070.

[79] *See* 839 F.3d at 203. In *Grady*, a pharmaceutical company manufactured and marketed a contraceptive device which Mrs. Grady, the plaintiff, inserted before the company filed a petition for reorganization; the device caused severe injuries after the petition date. *Id.* at 199. Mrs. Grady sued the company two months after the petition and sought a decision in the bankruptcy court that her claim arose post-petition when her injuries became apparent. *Id.* Such a finding would mean that her claim would not be stayed by the automatic stay provision of the Code. *See id.*

used before the company filed for bankruptcy, the debtor's conduct occurred pre-petition, giving rise to a pre-petition claim.[80]

Although the Conduct Test reflects Congress's intent to afford broad relief to debtors,[81] the *Grossman's* court noted that the Conduct Test has been criticized for stretching the Code too far.[82] For example, the Third Circuit stated that the Conduct Test's focus on the debtor ignores claimants and their relationship to the debtor's acts.[83] Most notably, a court applying the Conduct Test need not ask whether the plaintiff was exposed to the debtor's tortious conduct or product pre-petition.[84] As a consequence, under the Conduct Test, a pre-petition claim may exist solely based on the debtor's tortious conduct, leaving claimants who develop injuries as a result of *post-petition exposure* to the debtor's product subject to the debtor's discharge.[85]

Recognizing these problems, the Third Circuit in *Grossman's* turned to the Pre-Petition Relationship Test,[86] under which some *pre-petition* relationship must exist between the claimant and the debtor's tortious conduct for a "claim" to arise pre-petition under the Code.[87] The relationship can stem from the purchase, use, operation of, or exposure to the debtor's product.[88] The theory driving this test is that potential claimants who have some relationship with the debtor will have a greater awareness of any claims they may have against the debtor.[89] For example, in *Lemelle v. Universal Manufacturing Corp.* the U.S. Court of Appeals for the Fifth Circuit in 1994 found that without any pre-petition

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[80] *See id.* at 199, 203 (noting that the court was not deciding whether the plaintiff held a pre-petition claim for purposes of discharge, but rather whether the claim was subject to the automatic stay provision of 11. U.S.C. § 362(1)(a) (2006)).

[81] *See* Long, *supra* note 60, at 396.

[82] *See* 607 F.3d at 123 (citing *In re* Piper Aircraft Corp., 58 F.3d 1573, 1577 (11th Cir. 1995)).

[83] *See Grossman's*, 607 F.3d at 123 (citing *In re Piper*, 58 F.3d at 1577).

[84] *See* Resnick, *supra* note 5, at 2071.

[85] *See Grossman's*, 607 F.3d at 123 (citing Resnick, *supra* note 5, at 2071); Houser, *supra* note 3, at 464. In these situations, however, issues of notice may arise which could preclude discharge. *See Grossman's*, 607 F.3d at 123; Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3d Cir. 1995). In addition to the test's unfair inclusion of claimants who did not come into contact with the product until post-petition, the Conduct Test could also enable anyone to hold a claim against a debtor solely by virtue of potential future exposure to the debtor's conduct or product. *See In re Piper*, 58 F.3d at 1577.

[86] *See* 607 F.3d at 123.

[87] *See id.*; *In re Piper*, 58 F.3d at 1577.

[88] *See Grossman's*, 607 F.3d at 123; *In re Piper*, 58 F.3d at 1577.

[89] *See Lemelle*, 18 F.3d at 1277 ("[T]here must be evidence that would permit the debtor to identify, during the course of the bankruptcy proceedings, potential victims and thereby permit notice to these potential victims of the pendency of the proceedings.").

contact, privity or other relationship with the debtor, plaintiffs whose rights relied on a future occurrence did not have pre-petition claims.[90] In *Lemelle*, the plaintiff alleged that the decedent's death in a mobile home fire was caused by defendant's defective mobile home design.[91] The design and manufacture of the home, however, did not result in any tortious consequence until a fire started years after the debtor's bankruptcy Plan had been confirmed.[92] The Fifth Circuit reasoned that without a pre-petition relationship, the debtor would not have been able to identify the claimant during the bankruptcy proceedings to afford the decedents proper notice.[93] Thus, the plaintiff's claims could not have arisen pre-petition to be subject to discharge under the Plan.[94]

D. *Choosing a Standard for When a Claim Arises*

Following an extensive discussion of the two tests, the Third Circuit in *Grossman's* oddly failed to identify explicitly the test it used to decide that the Van Brunts' claim arose pre-petition.[95] The court's language stressing pre-petition exposure to a product, however, reveals that it essentially adopted the Pre-Petition Relationship Test.[96] Under the *Grossman's* court's test, a "claim" arises when an individual is exposed pre-petition to the debtor's tortious conduct.[97] The similarity between this test and Pre-Petition Relationship Test is the requirement that an individual have pre-petition exposure to the debtor's product.[98] Applying this test, the Third Circuit held that the Van Brunts' pre-petition exposure to the asbestos products gave rise to a claim.[99] The

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[90] *See id.*

[91] *See id.* at 1271.

[92] *See id.* at 1277.

[93] *See id.*; *see also In re Piper*, 58 F.3d at 1577 (modifying test slightly to include pre-*confirmation* relationship between debtor and claimant); *In re* Pettibone Corp., 90 B.R. 918, 920, 931–32 (N.D. Ill. 1988) (holding that there was no pre-petition claim where claimant sustained injuries operating company's forklift *after* company filed for bankruptcy because there was no pre-bankruptcy contact or hidden harm that affected the claimant).

[94] *See Lemelle*, 18 F.3d at 1277–78.

[95] *See* 607 F.3d at 125 ("Irrespective of the title used, there seems to be something approaching a consensus among the courts that a prerequisite for recognizing a 'claim' is that the claimant's exposure to a product giving rise to the 'claim' occurred pre-petition . . . .").

[96] *See id.* at 123 (stating that pre-petition exposure gives rise to a pre-petition relationship); *id.* at 125 (holding that a claim arises with pre-petition exposure).

[97] *See id.*

[98] *See id.*

[99] *See id.*

Third Circuit then remanded the case to the district court to determine whether a discharge of the claim would comport with due process.[100]

III. The Similar Standards and Unresolved Issues

A. *The Similar Standards*

The Third Circuit in *Grossman's* applied its version of the Pre-Petition Relationship Test after concluding that courts seem to agree that pre-petition exposure to a product gives rise to a claim.[101] This conclusion reveals that the Conduct and Pre-Petition Relationship Tests are hardly mutually exclusive standards, as each assumes the existence of a pre-petition relationship in addition to a debtor's pre-petition tortious conduct.[102] First, the Pre-Petition Relationship Test assumes a debtor's pre-petition tortious conduct, and thus includes the Conduct Test within its definition of a claim; in fact, satisfying the Conduct Test is essentially the threshold requirement of the Pre-Petition Relationship Test because without a debtor's tortious conduct, there can be no injurious exposure to a product.[103] For the Third Circuit, for example, to have found that the Van Brunts had pre-petition exposure to Grossman's asbestos products, there had to have been some tortious conduct by Grossman's, such as the sale of the asbestos products, allowing for such exposure.[104]

Second, the Conduct Test often assumes the existence of a pre-petition relationship.[105] Although the Third Circuit noted the existence

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[100] *See id.* at 125, 127–28. The court's hesitation in discharging the Van Brunts' claim rested on due process grounds. *See id.* at 125; Bartell, *supra* note 15, at 346. At the heart of the due process concern is the issue of notice, which is especially complex when the claimant is unaware of the debtor's liability. *See Grossman's*, 607 F.3d at 125–26 ("Notice is '[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality . . . .'" (alterations in original) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950))); *see also Chemetron*, 72 F.3d at 345 ("Inadequate notice is a defect which precludes discharge of a claim in bankruptcy."). For a thorough discussion on the constitutional implications of discharging future claims in bankruptcy, see generally Mabey & Gavrin, *supra* note 2.

[101] *See* 607 F.3d 114, 125 (3d Cir. 2010).

[102] *See id.*; Long, *supra* note 60, at 404–05; *infra* notes 105–111.

[103] *See Grossman's*, 607 F.3d at 123; Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1277 (5th Cir. 1994).

[104] *See Grossman's*, 607 F.3d at 125.

[105] *See* Grady v. A.H. Robins Co., Inc., 839 F.2d 198, 203 (4th Cir. 1988); *In re* Quigley Co., 383 B.R. 19, 27 (Bankr. S.D.N.Y. 2008); Long, *supra* note 60, at 400 (discussing a case as one of the *few* cases which deals with an individual who had no exposure to the product pre-petition).

of a narrow conduct theory,[106] it nevertheless discussed the basic Conduct Test in a way that closely resembled the Pre-Petition Relationship Test.[107] It explained how the Fourth Circuit in *Grady v. A.H. Robins Co., Inc.* had applied the Conduct Test , but acknowledged that a pre-petition relationship existed from the plaintiff's exposure to the debtor's product.[108] The conduct giving rise to the claim *was* the plaintiff's pre-petition exposure to the product when she used the contraceptive device.[109] Therefore, although the Conduct Test does not require a pre-petition relationship, courts applying the test recognize the implications of finding a claim based solely on the debtor's pre-petition conduct and thus often assume the existence of a pre-petition relationship.[110] Moreover, in many cases, there is usually pre-petition contact between the claimant and debtor that would satisfy either test, making it unnecessary for courts to determine if there is a pre-petition claim based solely on actions of the debtor.[111]

B. *Unresolved Issues*

The similarities between the Conduct Test and Pre-Petition Relationship Test add confusion to an already clouded area of law.[112] Should courts continue to apply the Conduct Test and the Pre-Petition Relationship Test, or do the similarities between the tests render these labels meaningless?[113] Perhaps the answer is that one test alone is insufficient to cover cases addressing different types of claims.[114] For exam-

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[106] *See Grossman's*, 607 F.3d at 123 n.8. The narrow conduct theory is essentially the same as the pre-petition relationship test. *See In re* Parker, 313 F.3d 1267, 1269 n.1 (10th Cir. 2002).

[107] *See Grossman's*, 607 F.3d at 122–23.

[108] *See id.*; *Grady*, 839 F.2d at 199, 203; *supra* note 80 and accompanying text.

[109] *See Grady*, 839 F.2d at 203; *see also* Azaria, *supra* note 1, at 216–17 (noting that Grady's claim arose pre-petition due to her pre-petition exposure to the product).

[110] *See In re* Piper Aircraft Corp., 58 F.3d 1573, 1577 (11th Cir. 1995); Long, *supra* note 60, at 412 (stating that in the context of mass torts, courts have generally recognized the need for a pre-petition relationship even when applying the Conduct Test).

[111] *See, e.g.*, Butler v. Nationsbank, N.A., 58 F.3d 1022, 1029 (4th Cir. 1995); Concord W. of the Ashley Homeowners' Assoc. v. J.A. Jones Inc., No. 3:09-cv-00182-GCM, 2010 WL 148432, at *2 (W.D.N.C. 2010); Suntrust Bank v. Roberson, 393 B.R. 105, 110, 128 (Bankr. E.D. Va. 2008); *In re* U.S. Airways, 365 B.R. 624, 629–30 (Bankr. E.D. Va. 2007).

[112] *See* Bartell, *supra* note 15, at 342–43 (explaining the years of struggle courts have had applying the Code to various types of holders of possible claims).

[113] *See In re Piper*, 58 F.3d at 1577 (recognizing that courts applying the Conduct Test also presume a pre-petition relationship); Howard J. Berlin & Kris Aungst, *The Fall of* Frenville, Norton Bankr. L. Adviser, Sept. 2010, at 1 (noting that the *Grossman's* decision did not resolve the many conflicting tests in the circuit courts); Long, *supra* note 60, at 405.

[114] *See* Azaria, *supra* note 1, at 205–06 (noting the different types of claims that exist).

ple, a case of tort liability for asbestos exposure, unlike an indemnification claim, may require a pre-petition relationship to address due process concerns.[115] The Third Circuit should have clarified, therefore, whether *Grossman's* test applies only in the context of contingent tort claims.[116] The court's failure to do so only makes the applicability of the *Grossman's* standard unclear and the state of claim accrual law more confused.[117]

Despite the Third Circuit's application of the Pre-Petition Relationship Test, the issue of notice remains unresolved.[118] Courts have applied the Pre-Petition Relationship Test to combat the problem of lack of notice to potential claimants inherent in the Conduct Test.[119] But the Third Circuit's application of its test reveals that this concern is not always addressed by the presence of a pre-petition relationship.[120] Although Mary Van Brunt and Grossman's had a pre-petition relationship due to her exposure to Grossman's products, both were unaware at that time of Grossman's potential liability.[121] Thus, the theory that a pre-petition relationship erases the notice problems associated with the Conduct Test is hardly bulletproof.[122] It certainly cannot address all cases involving contingent tort claims effectively.[123] The failure of the *Grossman's* standard to

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[115] *See Grossman's*, 607 F.3d at 122, 125–26; Schweitzer v. Consol. Rail Corp., 758 F.2d 936, 943 (3d Cir. 1985) (noting that contractual claimants, unlike tort claimants, are aware of their relationship with the debtor which lessons the risk of inadequate notice).

[116] *See* 607 F.3d at 125.

[117] *See* Bartell, *supra* note 15, at 343 (recognizing the many approaches courts have used in determining when a claim arises); Resnick, *supra* note 5, at 2069–70 (discussing the inconsistency among federal courts in applying the broad definition of "claim").

[118] *See Grossman's*, 607 F.3d at 125–28 (remanding case on the question of discharge).

[119] *See In re Piper*, 58 F.3d at 1577; *Lemelle*, 18 F.3d at 1277; *In re* Chateaugay Corp., 944 F.2d 997, 1003 (2d Cir. 1991).

[120] *See Grossman's*, 607 F.3d at 117 (noting that Grossman's was unaware of any product liability lawsuits based upon exposure to asbestos products filed against it, and that Ms. Van Brunt was unaware of any "claim").

[121] *See id.* Grossman's did not provide actual notice to Ms. Van Brunt, and its publication notice did not indicate any future asbestos liability. *See id. But see* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 317–18 (1950) (discussing publication as an adequate means of notice for due process purposes when dealing with future claimants).

[122] *In re* Kewanee Boiler Corp., 198 B.R. 519, 532 (Bankr. N.D. Ill. 1996); Azaria, *supra* note 1, at 220.

[123] *See* Azaria, *supra* note 1, at 220. The Third Circuit in *Grossman's* recognized that the "fair contemplation" test may be fairer to both claimants and debtors because of its focus on foreseeability. *See* 607 F.3d at 123 n.9; *see also* Azaria, *supra* note 1, at 227. This test, often employed by the Ninth Circuit, finds a claim when the claimant had a fair contemplation that a claim existed; although primarily used in environmental cases, the test has been applied to non-environmental claims. *See Grossman's*, 607 F.3d at 123 n.9 (citing *In re* Zilog, Inc., 450 F.3d 996, 1000 (9th Cir. 2006)).

ameliorate the Conduct Test's due process concerns raises questions as to its functional role in a contingent tort context.[124]

Conclusion

The Third Circuit in *Grossman's* faced the difficult task of trying to determine whether the Van Brunts' tort claim arose pre-petition under the Code. Courts have struggled with the many competing tests, trying to best reflect Congress's intent behind the broad definition of "claim" in the Code. It is especially difficult to interpret the Code's definition as it applies to future tort claims. This difficulty lies in the competing ideals of the Constitution and Bankruptcy Code: due process for all claimants on the one hand, and providing fair and efficient reorganization for debtors on the other. The contingent nature of asbestos claims makes it difficult to balance these two ideals. Although the Third Circuit decided when a future tort claim arises under the Code, a blurry line still remains between the Conduct and Pre-Petition Relationship Tests, and neither test resolves the fundamental issue of notice.

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[124] *See* Azaria, *supra* note 1, at 220. *Compare Grossman's*, 607 F.3d at 123 (citing Houser, *supra* note 3, at 465) (noting that the Pre-Petition Relationship Test can ameliorate the notice issue), *with id.* at 125 (noting that the issue of notice remains unresolved).