NOT SO FRIENDLY TO *FRENVILLE*: THE SPLIT AMONG COURTS REGARDING ACCRUAL OF CLAIMS IN BANKRUPTCY

Theresa J. Pulley Radwan*

INTRODUCTION

The Bankruptcy Code seeks to provide a debtor with a "fresh start" by handling claims through the bankruptcy case and discharging unpaid debts

*Professor of Law, Stetson University College of Law. Thanks to research assistants Jonathan Kinsella (J.D. 2012) and Teodora Siderova (J.D. 2016) for their help in researching this paper, and to Stetson's 2016 Duberstein Bankruptcy Moot Court team, Tiffany Fanelli (J.D. 2016), Correy Karbeiner (J.D. 2016), and Lara McGuire (J.D. 2016), who, in preparing for competition, unintentionally helped cement several aspects of this paper.

at the conclusion of that case.[1] However, this purpose often conflicts with other statutes or common law designed to ensure full recovery to the victim of a defendant's wrongful conduct.[2] These contrary purposes become even more pronounced when a potential plaintiff uncovers the wrongful conduct after the debtor files a bankruptcy petition, and sometimes even after closure of the bankruptcy case. Claims against the debtor that existed—or "accrued"—before the filing of the bankruptcy petition fall within the bankruptcy case. The Bankruptcy Code imposes upon creditors holding those claims an automatic stay, preventing them from taking action on the claim outside of the bankruptcy process.[3] And, at the conclusion of the bankruptcy case, most unpaid claims will be discharged, preventing those creditors from ever taking action to recover the unpaid debt. For those claims that arise *after* the bankruptcy petition date, neither the automatic stay nor the discharge apply—allowing creditors holding those claims to seek recovery outside of the bankruptcy process, at least until the statute of limitations on that claim expires.

---

[1] S. REP. NO. 95-989, at 54 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5840 ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors.").

[2] As the court noted in *Chateaugay Corp.*, this breathing spell is not unlimited:

> Here, we encounter a bankruptcy statute that is intended to override many provisions of law that would apply in the absence of bankruptcy-especially laws otherwise providing creditors suing promptly with full payment of their claims. Of course, the comprehensive nature of the bankruptcy statute does not relieve us of the obligation to construe its terms, nor may we resolve all issues of statutory construction in favor of the "fresh start" objective, regardless of the terms Congress has chosen to express its will.

United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1002 (2d Cir. 1991); *see also, e.g.*, Cal. Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925, 927–28 (9th Cir. 1993) (noting CERCLA's purpose of ensuring "cleanup of environmental contamination and imposing costs on the parties responsible" versus the Bankruptcy Code's goal of providing a "fresh start" to debtors). The court in *Wright* articulated the competing interests of debtors and creditors:

> Consideration of the treatment of unknown future claims involves two competing concerns: the Bankruptcy Code's goal of providing a debtor with a fresh start by resolving all claims arising from the debtor's conduct prior to its emergence from bankruptcy; and the rights of individuals who may be damaged by that conduct but are unaware of the potential harm at the time of the debtor's bankruptcy.

Wright v. Owens Corning, 679 F.3d 101, 105 (3d Cir. 2012).

[3] *See* 11 U.S.C. § 362(a)(3) (2009).

When harm occurs before the bankruptcy case filing but the plaintiff does not discover that harm until some time during the bankruptcy case (or even after the case concludes), whether the claim falls within the case or not might be the difference between receiving nothing on the claim or being paid in full. Most cases involving a gap between the defendant's wrongful conduct and the victim's discovery of the wrong post-petition involve a potential claimant arguing that his or her claim falls within the bankruptcy case and, thus, is not discharged at the conclusion of the case.[4] In some cases, however, the potential plaintiff seeks inclusion in the bankruptcy case—even if that subjects the claimant to the automatic stay imposed upon creditors and discharge of unpaid debts.[5] This occurs in reorganization cases when the putative claimant seeks a right to participate in voting on acceptance of the plan[6] or in liquidation cases where, if a claimant receives no payment in the bankruptcy case, no party remains to recover from after the case concludes.[7]

[4] Most of the circuit courts have considered the issue of claim accrual in such a context. *E.g.*, Bos. & Me. Corp. v. Mass. Bay Transp. Auth., 587 F.3d 89, 100–01 (1st Cir. 2009); Woburn Assocs. v. Kahn (*In re* Hemingway Transp. Inc.), 954 F.2d 1, 8 (1st Cir. 1992); *In re* Ruitenberg III, 745 F.3d 647, 651–52 (3d Cir. 2014); Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 119–21 (3d Cir. 2010); Schweitzer v. Consol. Rail Corp., 758 F.2d 936, 941–42 (3d Cir. 1985); Avellino & Bienes v. M. Frenville Co. (*In re* M. Frenville Co.), 744 F.2d 332, 337 (3d Cir. 1984); River Place E. Hous. Corp. v. Rosenfeld (*In re* Rosenfeld), 23 F.3d 833, 836–37 (4th Cir. 1994); Grady v. A.H. Robins Co., 839 F.2d 198, 201 (4th Cir. 1988); Lemelle v. Universal MFG. Corp., 18 F.3d 1268, 1275 (5th Cir. 1994); Mooney Aircraft Corp. v. Foster (*In re* Mooney Aircraft, Inc.), 730 F.2d 367, 375 (5th Cir. 1984); CPT Holdings, Inc. v. Indus. & Allied Emps. Union Pension Plan, Local 73, 162 F.3d 405, 406–07 (6th Cir. 1998); Fogel v. Zell, 221 F.3d 955, 961 (7th Cir. 2000); AM Int'l, Inc. v. Datacard Corp., DBS, 106 F.3d 1342, 1347–48 (7th Cir. 1997); *In re* Chi., Milwaukee, St. Paul & Pac. R.R. Co., 974 F.2d 775, 785 (7th Cir. 1992); Zilog, Inc. v. Corning (*In re* Zilog, Inc.), 450 F.3d 996, 1000–02 (9th Cir. 2006); Cal. Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925, 928–31 (9th Cir. 1993); Epstein v. Official Comm. of Unsecured Creditors, of the Estate of Piper Aircraft Corp. (*In re* Piper Aircraft, Corp.), 58 F.3d 1573, 1576 (11th Cir. 1995).

[5] *See, e.g.*, *In re* Quigley Co., 383 B.R. 19, 24 (Bankr. S.D.N.Y. 2008) (involving ability of future asbestos-related injury claimants to vote on the debtor's proposed reorganization plan and specifically asking whether "a person whose right to payment is not enforceable under state law nevertheless hold[s] a bankruptcy 'claim' and [is] entitled to vote").

[6] Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2068–69 (2000).

[7] *See, e.g.*, *Chateaugay*, 944 F.2d at 1005 (citing Ohio v. Kovacs, 469 U.S. 274, 285–86 (1985) (O'Connor, J., concurring)). *See also In re Ruitenberg III*, 745 F.3d at 653 (wife of debtor sought claim in bankruptcy case to obtain marital assets even though family court had not yet issued distribution order for marital estate and court granted her claim in bankruptcy case).

Competing interests exist any time the harm caused by wrongful action takes significant time to manifest, such as cancer following exposure to asbestos, injury from a defectively manufactured product, or environmental damage following exposure. On the one hand, potential plaintiffs need notice in order to protect their rights in a bankruptcy case, and providing such notice presents a challenge when neither the potential plaintiffs nor the debtor-defendant knows of a future cause of action. On the other hand, the bankruptcy system depends upon finality and closure, but such finality will suffer if the case cannot conclude until identification of all possible claimants. The Bankruptcy Code provides some guidance by defining a claim broadly, including "contingent" claims. But how far to take a contingency in order to bring a claim into a bankruptcy case remains a decision for the courts.

The Third Circuit was the first to consider when a claim accrues for the purpose of determining whether it falls within a bankruptcy case. In *Avellino & Bienes v. M. Frenville Co.*, the Third Circuit deferred to state law to determine when a claim accrued.[8] The *Frenville* decision delayed the onset of the claim until the plaintiff's injury manifested itself—typically post-bankruptcy. As a result, the plaintiff did not hold a claim that could be paid—or discharged—in the bankruptcy case. Not only have *all* other circuits considering the issue rejected the *Frenville* approach, but the Third Circuit changed its own mind twenty-six years later in *Jeld-Wen, Inc. v. Van Brunt* (*In re Grossman's Inc.*).[9] Following the rejection of *Frenville*, a variety of possible standards remain regarding when a claim accrues for the purpose of including it within a bankruptcy case. Each considers when the debtor engaged in wrongful or tortious conduct, the date of exposure to the debtor's conduct, and when the plaintiff became aware of that exposure.

This article argues that following *Frenville*, the development of different standards regarding claim accrual occurred because the cases initially promulgating these standards faced different factual situations for which prior tests seemed inappropriate. However, each test seeks a similar goal—to balance fairness to the injured party with a need to provide the debtor with bankruptcy's fresh start. It concludes that the proper test in any factual scenario considers when the claimant could reasonably anticipate the existence of a claim—known as the "fair contemplation" test—because only that standard provides for a balance between the need for a debtor to

[8] 744 F.2d at 337.

[9] 607 F.3d at 121.

start fresh with the need for a creditor to receive due process before being denied recovery. Further, only fair contemplation applies neatly to a variety of factual contexts, including torts, environmental clean-up, and contract-based claims.

I. THE CIRCUIT SPLIT

A. The State-Law Accrual[10] Standard

The Third Circuit's decision in *Frenville* serves as the starting point for any discussion of claim accrual. The appellant, Avellino & Bienes ("A&B") performed accounting services for M. Frenville Co. during the late 1970's.[11] In 1980, Frenville's creditors filed it into an involuntary chapter 7 case.[12] Several of those creditors also sued A&B because A&B prepared false financial statements on Frenville's behalf.[13] A&B then sought relief from the automatic stay to join Frenville in the litigation between the creditors and A&B, seeking indemnification from Frenville.[14] When A&B's indemnification action accrued became central to the determination of whether the claim against Frenville belonged in the bankruptcy case.[15] Specifically, if the claim arose prior to the bankruptcy filing, the automatic stay applied and prevented A&B from pursuing the indemnification claim outside of the bankruptcy case.[16] But if the claim arose after the bankruptcy filing, A&B could pursue its action against Frenville in state court.[17]

[10] The state-law accrual standard, as discussed in this section, provides that a claim accrues when state law would recognize a cause of action on the claim. Courts and commentators sometimes refer to this as the "accrual test." *E.g.*, *Grossman's*, 607 F.3d at 119; Graham Stieglitz, *Stuck in the Middle Again! How to Treat Straddle-Year Income Taxes in a Corporate Chapter 11 Reorganization*, 9 AM. BANKR. INST. L. REV. 467, 476 (2001). But as used in this article, accrual of claims refers to the broad concept of when to recognize a claim for bankruptcy purposes, and the "state-law accrual" standard refers to the standard set forth in *Frenville*.

[11] *Frenville*, 744 F.2d at 333.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 333–34.

[15] *Id.* at 334.

[16] *Id.* at 335.

[17] *See id.* Of course, other provisions of the automatic stay would prevent recovering on that claim from assets of the estate. 11 U.S.C. § 362(a)(3) (2009). Additionally, since *Frenville* was in chapter 7 and likely liquidating, no debtor would exist to pay a post-bankruptcy claim. 11 U.S.C. § 721 (2010) (trustee may operate debtor business for short time in order to liquidate the estate).

The actions that Frenville took that led to potential liability—including Frenville's part in creating and distributing false financial statements—all occurred pre-petition. However, A&B lacked either the need or the ability to join Frenville into the creditors' lawsuit until that lawsuit had actually been filed post-petition. In making its decision, the Third Circuit noted that section 362's automatic stay prevents *claims* that accrue pre-petition.[18] The Third Circuit then distinguished the situation in *Frenville*, in which the right to indemnification arose solely under state law, from situations in which the indemnification claim arises from a pre-petition contract.[19] For a contractual right to indemnification, a claim exists at the moment of signing the contract, even if uncollectable until some future event occurs (and even if that event occurs post-petition).[20] But for the indemnification provided *by law*, as in the *Frenville* case, such a right arises only when the party has made the payment for which it seeks indemnification.[21] Thus, because A&B lacked contractual indemnification rights, it also lacked a right to indemnification—even a contingent one—pre-petition. As a result, the court held that A&B's claim accrued post-petition and was not subject to the automatic stay or payable in the bankruptcy case.[22] The *Frenville* result became known as the state-law accrual theory because it looks to state law to determine when a claim accrues and uses that date to determine its treatment in the bankruptcy case.[23] However, the court's dicta regarding accrual of a claim in the case of contractual indemnification hinted at a broader interpretation of claim accrual—one that considers the foreseeability of the claim at the time of the bankruptcy filing, even if not yet matured. Though *Frenville* seemed to limit its use of the state-law accrual approach to a specific set of facts, courts expanded the test to other factual situations.

One year after issuing the *Frenville* decision, the Third Circuit again considered the issue of accrual of a tort claim, this time in the context of exposure to asbestos pre-petition that resulted in post-petition injuries.[24] In *Schweitzer*, the court noted that tort principles suggest that a claim arises only when the plaintiff suffers a cognizable harm resulting from the injury:

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

[19] *Id.* at 336.

[20] *Id.* at 337.

[21] *Id.*

[22] *Id.* at 338.

[23] Watson v. Parker (*In re* Parker), 313 F.3d 1267, 1269 (10th Cir. 2002).

[24] Schweitzer v. Consol. Rail Corp., 758 F.2d 936, 940 (3d Cir. 1985).

> [T]here is generally no cause of action in tort until a plaintiff has suffered identifiable, compensable injury. A leading treatise on tort law explains:
>
> > Actual loss or damage resulting to the interests of another [is a necessary element of a negligence cause of action]. . . . The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.[25]

However, the same decision then considered the competing interests balanced in the bankruptcy courts.[26] The court began by considering whether exposure to asbestos constitutes a cognizable injury, determining that it does not and that allowing claims for mere exposure would potentially shift payment for injuries from those who develop significant illnesses to those who might not develop such illnesses.[27] But the court then used language suggesting that, in appropriate circumstances, a claim may accrue *before* state law would recognize a right to receive payment:

> Still, it has been held that, under certain circumstances, a person may hold a "contingent" claim and thereby be a "creditor" within the meaning of the Bankruptcy Act, even though he presently has no cause of action against the debtor. . . . This proposition follows from the broad language of section 77(b) which provides that "claims" include "interests of whatever character". . . . *In our view, before one can have an "interest" which is cognizable as a contingent claim under section 77, one must have a legal*

[25] *Id.* at 942 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 165 (5th ed. 1984) (footnotes omitted)).

[26] *See id.* at 942–43.

[27] *Id.* at 942; Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 LOY. L.A. L. REV. 451, 462 (1988) ("If the debtor's plan of reorganization provides for distributions to individuals with future claims for inchoate injuries, the dividend paid to creditors with manifest injuries will be diluted."). *But see* Resnick, *supra* note 6, at 2056 ("An important goal in resolving mass tort liability that affects future claimants is assuring that present tort claimants with manifested injuries and causes of action do not exhaust the defendant's assets before future claimants manifest injuries.").

> *relationship relevant to the purported interest from which that interest may flow.*[28]

As it had in the *Frenville* case, the Third Circuit in *Schweitzer* distinguished between contract-based cases, from which the legal relationship might suffice to establish a claim, and tort cases in which the claim does not accrue until the injury manifests itself.[29] Thus, the Third Circuit twice utilized the state-law accrual test while recognizing that such a test might apply differently in the context of a contract-based claim to allow accrual of the claim even before the plaintiff maintains a state-law right to sue under that claim. The critical factor identified in *Schweitzer*—the legal relationship between the parties—was adopted as a key factor in determining claim accrual by later courts.[30]

In the temporal context in which the Third Circuit decided *Frenville* and *Schweitzer*, the accrual approach did not represent such a departure as it does today. Several bankruptcy and district courts had determined that a claim did not arise until the plaintiff recognized that he or she held a cause of action.[31] The *Frenville* and *Schweitzer* cases both focused on when a claimant's right to payment existed under state law. The Third Circuit also foreshadowed the argument that would prevail in other circuits—that the

[28] *Schweitzer*, 758 F.2d at 942–43 (emphasis added).

[29] *Id.* at 943 (discussing *In re* Radio-Keith-Orpheum Corp., 106 F.2d 22, 26 (2d Cir. 1939) (allowing a claim by landlords before the debtor incurred obligations under a guaranty of its subsidiary's leasehold requirements)).

[30] *See infra* section I.C.

[31] *See, e.g.*, Mooney Aircraft Corp. v. Foster (*In re* Mooney Aircraft, Inc.), 730 F.2d 367, 375 (5th Cir. 1984) (wrongful death claims due to aircraft accident that occurred post-petition not discharged by bankruptcy even though manufacture of aircraft occurred pre-petition because claim did not arise until accident occurred); *see also* Gladding Corp. v. Forrer (*In re* Gladding Corp.), 20 B.R. 566, 567–68 (Bankr. D. Mass. 1982) (plaintiff's claim against debtor corporation for defective automobile not discharged by bankruptcy case; though company manufactured and sold car before petition date, debtors did not purchase car from original buyer until after petition date and did not bring claim until after confirmation of plan). However, some of the cases were decided at a time when the statute expressly *required* consideration of when state law recognized a claim, while others were decided after Congress removed that provision from the Code. Removal of the provision suggests that Congress intended a change in the standard. Kevin J. Saville, Note, *Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?*, 76 MINN. L. REV. 327, 345 (1991) ("Abolition of the provability requirement strongly suggests that nonbankruptcy law should no longer be dispositive of when a bankruptcy claim arises.").

broad definition of a "claim" in the Bankruptcy Code includes contingent claims, particularly in the contractual setting.[32]

B. The Conduct Test Develops in the Context of Tort Claims

The conduct test presents the opposite extreme of the accrual test—the potential plaintiff's claim arises at the moment that the debtor takes whatever action might lead to liability, even though the plaintiff suffered no harm yet and may lack any contact with the potential defendant at that moment. This interpretation of claim accrual relies upon the Bankruptcy Code definition of the term "claim" and, more specifically, of a "contingent claim."[33]

The circuit court split on claim accrual arose just a few years after the *Frenville* case. In 1987, the Fourth Circuit weighed in on the accrual issue in the *Grady* case.[34] As in the *Frenville* case, the question at issue involved whether the automatic stay barred a creditor from pursuing a claim outside of the bankruptcy case. The debtor, A.H. Robins, filed for chapter 11 bankruptcy protection on August 21, 1985, the same day that Mrs. Grady was admitted to the hospital due to complications from a defective Dalkon Shield manufactured by the debtor.[35] Mrs. Grady filed a lawsuit against the debtor two months later and sought a determination from the bankruptcy court that the automatic stay did not prevent her lawsuit.[36] As in the *Frenville* case, the decision rested on when Mrs. Grady's claim against the debtor arose—at the time of exposure to the defective Dalkon Shield, or at the time that her injuries manifested themselves.[37] Mrs. Grady argued that, under the analysis accepted by the *Frenville* Court, she did not hold a right to sue until the injury manifested itself post-petition, and, thus, the claim

[32] *Schweitzer*, 758 F.2d at 942 (citing *In re* Radio-Keith-Orpheum Corp., 106 F.2d 22, 26–27 (2d Cir. 1939)).

[33] *Id.* at 943 ("A number of factors lend support to this analysis. First, defendants have not cited a single opinion, other than those of the district courts in these cases, holding that a tort cause of action as yet nonexistent under applicable tort law is a contingent claim within the meaning of any section of the Bankruptcy Act or Bankruptcy Code.").

[34] Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir. 1988).

[35] *Id.* at 199.

[36] *Id.*

[37] *Id.*

arose post-petition and the automatic stay did not apply to the claim.[38] The court disagreed, holding that Mrs. Grady's claim arose pre-petition.[39]

In rendering its decision, the *Grady* Court focused on the divide between federal and state law. The *Frenville* Court's decision rested on New York law dictating when a claim arose.[40] But the *Grady* Court held that the existence of a claim typically arises under state law, while the ability of that claim to fall within the bankruptcy case falls within federal bankruptcy law.[41] Further, the Bankruptcy Code provides a broad definition for claim, including any "right to payment"—even contingent rights to payment.[42] A contingency, then, is "conditioned upon the occurrence of some future event which is itself uncertain, or questionable."[43] Thus, Mrs. Grady held a right to payment, contingent upon her defective Dalkon Shield manifesting into an injury, and that right to payment arose at the time of exposure to the defective Dalkon Shield—pre-petition.[44] The *Grady* decision is frequently known as the "conduct" theory because it dictates that a claim arises when the conduct giving rise to the claim occurs or upon a victim's exposure to the defective product.[45]

More recently, the Tenth Circuit considered how claim accrual impacts the discharge of debt.[46] The debtor sought to reopen his bankruptcy case after receiving a discharge of debt to include a malpractice claim against him.[47] The discharge applies only to claims arising pre-petition and, thus, the accrual of the malpractice claim dictated dischargeability.[48] The court agreed with the *Grady* conduct standard, holding that the malpractice claim arose when the malpractice itself occurred, not when the harm from that malpractice manifested itself.[49] As a result, the claim fell within the

[38] *Id.* at 201.

[39] *Id.* at 203.

[40] Avellino & Bienes v. M. Frenville Co. (*In re* M. Frenville Co.), 744 F.2d 332, 335 (3d Cir. 1984).

[41] *Grady*, 839 F.2d at 202.

[42] 11 U.S.C. § 101(5)(A) (2014)).

[43] *Grady*, 829 F.2d at 202 (citing *Contingent*, BLACK'S LAW DICTIONARY (5th ed. 1979)).

[44] *Id.* at 202–03.

[45] Watson v. Parker (*In re* Parker), 313 F.3d 1267, 1269 (10th Cir. 2002).

[46] *Id.*

[47] *Id.* at 1268.

[48] *Id.* at 1269.

[49] *Id.* at 1269–70.

bankruptcy case and could be discharged absent another basis for nondischargeability.

C. The Relationship Test Develops in the Tort Context

The 11th Circuit's decision in *In re Piper Aircraft, Corp.* created another split among the circuit courts.[50] *Piper* involved claims against Piper Aircraft Corporation for the defective manufacture of planes.[51] The potential class of claimants included those harmed in post-petition accidents involving planes manufactured defectively pre-petition. The trustee asserted a claim on behalf of these potential claimants in the amount of $100 million.[52] This created an issue regarding whether these potential claimants held a claim in the bankruptcy case or held a post-petition claim that would arise upon manifestation of the injury outside of the bankruptcy case. As in the prior cases, the court started with the broad definition of a "claim." It referred to three possible tests: *Frenville*'s "accrued state law claim test," under which the claim would not arise until the accident occurred; *Grady*'s "conduct test," under which the claim arises at the time of defective manufacture of the claim; and the "pre-petition relationship test," a new standard used by the *Piper* bankruptcy and district courts.[53] Differentiating between the conduct and pre-petition relationship tests, the court explained that the conduct test relies solely on the date of the defendant's conduct that led to the potential claim, while the pre-petition relationship test requires that the defendant engage in the wrongful conduct *and* have a relationship with the potential plaintiff.[54] For victims of a defective manufacture of a product, such as an airplane, the conduct test would cause all potential claims based on defects in a product manufactured pre-petition to be claims in the bankruptcy case. The pre-petition relationship test would exclude those claims based on pre-petition defective manufacture but for which the claimant is not yet foreseeable because the claimant did not actually engage with the manufacturer of the defective product before the bankruptcy case

[50] *See* Epstein v. Official Comm. of Unsecured Creditors, of the Estate of Piper Aircraft Corp. (*In re* Piper Aircraft, Corp.), 58 F.3d 1573 (11th Cir. 1995).

[51] *Id.* at 1575.

[52] *Id.*

[53] *Id.* at 1576.

[54] *Id.* at 1576–77.

arose.[55] Affirming the district court, the 11th Circuit used the pre-petition relationship test because it allowed for the identification of potential claimants:

> We therefore modify the test used by the district court and adopt what we will call the "Piper test" in determining the scope of the term claim under § 101(5): an individual has a § 101(5) claim against a debtor manufacturer if (i) events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor's product; and (ii) the basis for liability is the debtor's prepetition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. The debtor's prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established before confirmation between an

[55] *Id.* at 1577. In its analysis, the *Piper* and *Grady* courts referred to the defective bridge manufacture hypothetical from the *Chateaugay* case. *See infra* note 96. One commentator rejects *Piper*'s reference to the bridge hypothetical, arguing that *Piper* should have used a conduct test rather than requiring a connection between the debtor and the potential claimant:

> Unlike the *Chateaugay* hypothetical, in *Piper*, several products liability suits existed prepetition. Furthermore, the court appointed a legal representative to represent the interests of individuals likely to be injured postpetition by prepetition conduct similar to that asserted in the pending products liability suits. These future tort claimants are not the victims of "sheer fortuity" as if the planes were simply predicted to crash due to normal wear and tear on the product, as in the bridge hypothetical. Rather, Piper's tortious prepetition conduct is predicted to cause the future injuries. Thus, Piper is held liable for the defective design and manufacturing of its product, and the wrongful conduct giving rise to the contingent claim for products liability should be viewed as prepetition activity.

Michelle M. Morgan, *The Denial of Future Tort Claims in* In re Piper Aircraft*: Will the Court's Quick-Fix Solution Keep the Debtor Flying High or Bring It Crashing Down?*, 27 LOY. U. CHI. L.J. 27, 35 (1995) (footnotes omitted) (arguing that *Piper* wrongfully relied on *Chateaugay* bridge hypothetical because *Piper* engaged in pre-petition wrongful conduct and unknown creditors had representation). However, even if you add a fact to the *Chateaugay* hypothetical—defective manufacture of the bridge pre-petition—due process might present a concern if the defective manufacture has not yet been discovered or—as in *Piper*—there is no way to predict who will be harmed by that defective manufacture post-petition. Representation of future claimants in a situation where the wrong has been discovered pre-petition *may* solve the due process concerns, but only to the extent that such representation also provides a remedy for those represented, such as the trust funds allowed for asbestos manufacturer cases. *See infra* section II.C; 11 U.S.C. § 524(g) (2004).

> identifiable claimant or group of claimants and that prepetition conduct.[56]

Though *Piper* espoused a new test that required a relationship between the parties, in *Grady*, the victim had actually been exposed to the product, creating a pre-petition relationship between her and the debtor company. The court in *Piper* did not define what level of relationship must exist for a claim to accrue pre-petition.

Courts have since completely rejected the *Frenville* approach,[57] and the Third Circuit abandoned it in the 2010 *Grossman's* decision.[58] In *Grossman's*, the plaintiff's exposure to asbestos sold by the debtor-defendant to the plaintiff occurred twenty years before the debtor filed for bankruptcy protection.[59] On the petition date, the debtor knew that it had sold products containing asbestos, and knew of the dangers associated with asbestos, but did not know of a potential claim from this particular plaintiff.[60] In fact, the plaintiff's cancer resulting from her exposure to asbestos did not manifest for almost ten years after the petition date.[61] The court recognized the precedent set by *Frenville*, as well as the failure of most courts to use the state-law accrual standard.[62] It also noted that *Frenville* relied on the "right to payment" inherent in a claim, rather than the broad construction of the term "claim" used by other courts, and rejected the state-law accrual standard as "too narrow an interpretation" of the term.[63] The court in *Grossman's* espoused a new standard for the Third Circuit: "a 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code."[64] This standard appears to match the conduct test adopted by other circuits[65] because it focuses on exposure as

[56] *Piper*, 58 F.3d at 1577 (footnotes omitted).

[57] *E.g.*, Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 120 (3d Cir. 2010) (citing Cadleway Props., Inc. v. Andrews (*In re* Andrews), 239 F.3d 708, 710 n.7 (5th Cir. 2001)).

[58] *See id.* at 121.

[59] *See id.* at 117.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 119–20.

[63] *Id.* at 121 (quoting Epstein v. Official Comm. of Unsecured Creditors, of the Estate of Piper Aircraft Corp. (*In re* Piper Aircraft, Corp.), 58 F.3d 1573, 1576 n.2 (11th Cir. 1995)).

[64] *Id.* at 125.

[65] *See supra* section I.B.

the measurement of claim accrual, but the requirement of exposure also suggests adoption of the relationship test espoused in *Piper*.[66]

Shortly after the *Grossman's* decision, the Third Circuit extended its holding to a non-asbestos-related case. In *Wright v. Owens Corning*, two plaintiffs sued the debtor after discovering alleged defects in roof tiles manufactured by the debtor.[67] The debtor manufactured the defective tiles before its 2000 bankruptcy filing, and they were installed in one of the plaintiffs' houses before that time.[68] But neither plaintiff discovered the defect until several years post-petition.[69] The Third Circuit began by reciting the *Grossman's* standard, creating a claim upon *exposure* to a defective product that gives rise to a damage claim.[70] Given that standard, the plaintiff who installed defective tiles pre-petition clearly held a claim. As to the plaintiff who did not install the defectives tiles until after the bankruptcy filing (but who purchased tiles manufactured before the filing date), the court recognized that the *Grossman's* decision did not fully address the issue.[71] Instead, the court looked to the *Piper* standard, adopted by the 11th Circuit, and to section 1141(d) of the Code, which provides for discharge of claims arising before *confirmation* of the plan.[72] Because the second plaintiff installed the tiles prior to plan confirmation, he held a dischargeable claim even though unaware of the injury at the time of confirmation.[73]

D. Confusion in Applying the State-Law Accrual, Conduct, and Relationship Standards

The variety of claim accrual tests developed in part because different tests seem to apply better in various factual contexts, such as latent tort

[66] *Grossman's*, 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 . . . ."); *See* C.R. "Chip" Bowles, Jr., *Is It All About Time? The End of Frenville and Its Impact on Environmental Claims*, 30 AM. BANKR. INST. J. 34, 35 (2011) (arguing the Third Circuit failed to create clear standard for accrual in environmental context when it overruled *Frenville*).

[67] 679 F.3d 101, 102 (3d Cir. 2012).

[68] *Id.* at 103.

[69] *See id.*

[70] *Id.* at 106.

[71] *Id.*

[72] *Id.* at 106-07. *See supra* section I.C.

[73] *Wright*, 679 F.3d at 106–07.

injuries versus environmental clean-up claims or contractual guaranties. As noted in *Conseco, Inc. v. Schwartz* (*In re* Conseco, *Inc*), even in the same circuit, tests can differ.[74] Specifically, the *Conseco* Court, located in the Seventh Circuit, cited to cases within that circuit using different tests—a tort case holding that "no claim exists . . . . until the injury occurs" versus two environmental cases considering "whether the claimant could have fairly contemplated a claim".[75] Similarly, the Fourth Circuit utilizes different standards in different factual contexts. Less than a decade after adopting the conduct test in *Grady*, the court declined to use the conduct test in breach of contract actions.[76] In *Rosenfeld*, the court considered whether the debtor's bankruptcy discharge extended to dues accrued post-petition on a pre-petition contract.[77] While recognizing the split in authority,[78] the court specifically declined to apply *Grady* to a contract-based scenario[79] without providing an appropriate test for such a scenario.[80]

In some cases, determining exactly which standard the court adopted presents a challenge. The Fifth Circuit weighed in on accrual of claims in *Lemelle v. Universal MFG. Corp*.[81] *Lemelle* involved a wrongful death action based on allegedly faulty manufacture of a mobile home that caught fire.[82] Though Winston Mobile Homes[83] manufactured the home before it

[74] 330 B.R. 673, 685 (Bankr. N.D. Ill. 2005).

[75] *Id.* at 685–86 (citing Fogel v. Zell, 221 F.3d 955, 960 (7th Cir. 2000)). *See also* AM Int'l, Inc. v. Datacard Corp., DBS, 106 F.3d 1342, 1348 (7th Cir. 1997); *In re* Chi., Milwaukee, St. Paul & Pac. R.R. Co., 974 F.2d 775, 787 (7th Cir. 1992).

[76] River Place E. Hous. Corp. v. Rosenfeld (*In re* Rosenfeld), 23 F.3d 833, 837 (4th Cir. 1994).

[77] *Id.* at 836.

[78] *See id.* at 836–37.

[79] *Id.* at 837.

[80] *See id.* at 838.

[81] 18 F.3d 1268 (5th Cir. 1994).

[82] *Id.* at 1271.

[83] The debtor, Winston Mobile Homes, Inc., filed for bankruptcy in 1982. *Id.* at 1270. Ultimately, through a series of sales and mergers, the debtor merged into Universal Manufacturing Corporation. *Id.* at 1270–71. In addition to considering accrual of the claim, the court considered whether Universal Manufacturing Corporation met the requirements of a successor corporation, liable for non-discharged debts of Winston Mobile Homes, Inc. *Id.* at 1272–74. The court found Universal to be a successor corporation and, thus, to the extent that the plaintiff's claim was not discharged by the bankruptcy case, Universal faced liability for any damages assessed against Winston. *Id.* at 1274.

filed for bankruptcy protection, the fire occurred three years post-petition.[84] The plaintiff alleged that under state law, the claim against Winston accrued at the time of the fire—post-petition—and, thus could not be discharged.[85] The court considered each of the *Frenville*, *Grady*, and *Piper* approaches.[86] Though the court appeared to follow the *Piper* rationale, providing that "at a minimum, there 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,"[87] the result resembled a *Frenville* analysis.[88] Ultimately, the court deemed the claim to accrue when the harm to the plaintiff actually occurred, not at the time of manufacture of the allegedly defective product, or even at the time that the plaintiff purchased the defective home and entered into a relationship with the debtor.[89] As another example, one court within the Third Circuit used *Frenville*'s state-law accrual standard outside of the context of asbestos claims, but used language that suggested a *Piper*-like analysis.[90]

Such confusion has appeared in the context of environmental claims in bankruptcy cases. A debtor may choose to file for bankruptcy protection before the government realizes or assesses the extent of contamination, and requiring filing a claim may cause the government's focus to shift from the clean-up to the bankruptcy case.[91] But allowing the claim to continue post-bankruptcy may prevent the debtor from being able to discharge its biggest liabilities and enjoy the fresh start that the bankruptcy system promises. The

[84] *Id.* at 1271.

[85] *Id.* at 1274–75.

[86] *Id.* at 1275–77.

[87] *Id.* at 1277.

[88] The *Lemelle* result mirrors a prior case from the Fifth Circuit, decided under the Bankruptcy Act. *Compare Lemelle*, 18 F.3d at 1277, *with* Mooney Aircraft Corp. v. Foster (*In re* Mooney Aircraft, Inc.), 730 F.2d 367, 375 (5th Cir. 1984) (wrongful death claims due to aircraft accident that occurred post-petition not discharged by bankruptcy even though manufacture of aircraft occurred pre-petition because claim did not arise until accident occurred).

[89] *Lemelle*, 18 F.3d at 1277 ("The design and manufacture of the mobile home in question thus resulted in *no* tortious consequence until a fire started in that mobile home in December 1985.").

[90] *In re* Penn Cent. Transp. Co., 71 F.3d 1113, 1116–17 (3d Cir. 1995) (applying *Frenville* state-law accrual test to antitrust claim against debtor, but also noting that "there was no legal relationship from which a prepetition interest . . . could flow"—suggesting possibility of *Piper* test).

[91] *See* Saville, s*upra* note 31, at 351–52.

Second Circuit considered the issue of claim accrual in clean-up cases in *Chateaugay*.[92] The release of dangerous substances on debtor LTV Corporation's property occurred pre-petition, but much of the actual clean-up of the property occurred post-petition, with the potential for discovering more need for remediation in the future.[93] LTV sought to discharge the government's claims for reimbursement of clean-up expenses, and the government responded that the claim for post-petition clean-up expenses fell outside of the bankruptcy court's jurisdiction and the Bankruptcy Code's discharge of debt.[94] In considering the conduct test espoused by *Grady*, the Second Circuit recognized the problem of foreseeability:

> Defining claims to include any ultimate right to payment arising from pre-petition conduct by the debtor comports with the theoretical model of assuring that all assets of the debtor are available to those seeking recovery for pre-petition conduct. But such an interpretation of "claim" yields questionable results. Consider, for example, a company that builds bridges around the world. It can estimate that of 10,000 bridges it builds, one will fail, causing 10 deaths. Having built 10,000 bridges, it becomes insolvent and files a petition in bankruptcy. Is there a "claim" on behalf of the 10 people who will be killed when they drive across the one bridge that will fail someday in the future? If the only test is whether the ultimate right to payment will arise out of the debtor's pre-petition conduct, the future victims have a "claim." Yet it must be obvious that enormous practical and perhaps constitutional problems would arise from recognition of such a claim. The potential victims are not only unidentified, but there is no way to identify them. Sheer fortuity will determine who will be on that one bridge when it crashes. What notice is to be given to these potential "claimants"? Or would it suffice to designate a representative for future victims and

[92] United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997 (2d Cir. 1991).

[93] *Id.* at 999.

[94] *Id.* at 1000 ("[i]n the Government's view, it does not have a 'claim' within the meaning of the Bankruptcy Code").

> authorize the representative to negotiate terms of a binding reorganization plan?[95]

Ultimately, the Second Circuit held that the EPA's claims were foreseeable, even if the potential clean-up sites had not been fully discovered, because the location of potential environmental waste sites could be determined.[96] Thus, *in that particular factual situation*, the debtor's pre-petition conduct sufficed to create a claim subject to the automatic stay and discharge in bankruptcy.

Noting the broad definition of a "claim," the *Chateaugay* Court also considered the definition of a "creditor," which specifically references one with a claim that "arose" pre-petition.[97] But ultimately, the court declined to limit the broad scope of claims by the somewhat-narrow language in the term "creditor."[98] It also declined to use the very broad terms of "contingent" and "unmatured" in the definition of a "claim" to include every potential tort victim, noting that those terms generally refer to contractual claims in which the parties negotiate for a future payment or event to trigger payment.[99] Such a consideration harkens back to the *Frenville* Court's determination that a *contractual right* to indemnification might arise at the moment of contract—even before indemnification comes due—while a state-law based right to indemnification could not arise until the party to be indemnified faces a lawsuit. While the Second Circuit seemed to reject both the *Frenville* state-accrual test and the *Grady* conduct test, it did not explicitly provide for a new test,[100] and courts within the

[95] *Id.* at 1003.

[96] *Id.* at 1005.

[97] *Id.* at 1004 (citing 11 U.S.C. § 101(9)(A) (1988)).

[98] *Id.*

[99] *Id.* at 1004–05.

[100] Other courts have suggested that *Chateaugay*, while not so naming its test, used the pre-petition relationship test. *E.g.*, Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 123 (3d Cir. 2010) (noting discussion in *Chateaugay* case of relationship between government and potential pollutants that provides notice of potential claims). *See In re Chateaugay*, 944 F.2d at 1003 (noting breadth of claim definition and that "a 'claim' should be deemed to exist whenever, in the absence of bankruptcy, a particular claimant has the right to reach the debtor's assets," but noting that "[d]efining claims to include any ultimate right to payment arising from pre-petition conduct . . . yields questionable results").

Second Circuit do not see the *Chateaugay* case as having set a clear standard regarding accrual of claims in bankruptcy cases.[101]

The First Circuit then joined the debate in the context of environmental clean-up actions.[102] *Hemingway* involved indemnification pursuant to the terms of a lease agreement.[103] The debtor agreed to indemnify Woburn Associates should it incur attorneys' fees resulting from the debtor's possession of real property.[104] The parties entered into the lease agreement pre-petition, and between the time of the lease agreement and the bankruptcy filing date, the debtor allegedly polluted the property.[105] After the bankruptcy filing date, the EPA brought forth claims requiring clean-up of the property, and Woburn Associates sought indemnification of its attorneys' fees incurred in the EPA litigation.[106] Woburn Associates sought a post-petition claim for administrative expenses,[107] while the bankruptcy trustee believed Woburn Associates' claim qualified as a pre-petition, non-priority claim.[108] The court agreed with the trustee, focusing on a broad interpretation of the term "claim" without espousing a test for when a claim accrues (but clearly rejecting *Frenville*, upon which Woburn Associates relied).[109] At the time of the case, *Frenville* and *Grady* predominated, suggesting that if the court dictated a standard, that standard would have been the conduct test.[110] The First Circuit again visited the issue in the

[101] *See, e.g.*, *In re* Quigley Co., 383 B.R. 19, 26–27 (Bankr. S.D.N.Y. 2008) (discussing overwhelming rejection of *Frenville* conduct test, but citing *In re Chateaugay*, 102 B.R. at 352 and dicta in Erti v. Paine Webber Jackson & Curtis, Inc. (*In re* Baldwin-United Corp. Litig.), 765 F.2d 343, 348 n.4 (2d Cir. 1985), and relying primarily on Grady v. A.H. Robins Co., Inc. 839 F.2d 198 (4th Cir. 1988) in its analysis).

[102] Woburn Assocs. v. Kahn (*In re* Hemingway Transp. Inc.), 954 F.2d 1 (1st Cir. 1992).

[103] *Id.* at 3.

[104] *Id.*

[105] *See id.*

[106] *Id.* at 3–4.

[107] Administrative expenses include expenses that the debtor incurs during the pendency of the bankruptcy case. 11 U.S.C. § 503(b) (2012). In exchange for the creditor's willingness to work with a debtor in bankruptcy, the creditor's claim receives administrative expense priority, and is paid before the claims of general unsecured creditors. 11 U.S.C. § 507(a)(2) (2012).

[108] *See Hemingway*, 954 F.2d at 4.

[109] *Id.* at 8–9 n.9. Though the First Circuit has not chosen a test, at least some courts within the circuit have rejected a standard by which a claim accrues upon the defective manufacture.

[110] *See* Wis. Barge Lines, Inc. v. United States (*In re* Wis. Barge Lines, Inc.), 91 B.R. 65, 67–68 (Bankr. E.D. Mo. 1988) (discussing conduct standard and state-law accrual standard and applying conduct standard to environmental clean-up claim, given the broad definition of claim in Bankruptcy Code).

context of an environmental clean-up claim seventeen years later in *Boston and Maine Corporation*.[111] However, the court did not need to espouse a standard for claim accrual because the putative claimant *knew* of the contamination before consummation of the sale of the debtor free and clear of claims, which essentially served to discharge those claims.[112]

E. Fair Contemplation Develops in the Environmental Context

The Ninth Circuit also considered accrual of claims in the context of cleaning environmental waste.[113] *Jensen* arose because the State of California engaged in environmental clean-up of property owned and used by the debtor's business.[114] As in the other cases, hazardous waste was brought onto the property prior to the bankruptcy filing date, but the clean-up occurred after that date.[115] The court considered the variety of tests, but recognized potential problems with each of them.[116] The accrual test fails to recognize the very broad and all-encompassing definition of a claim.[117] But the conduct test fails to provide potential creditors with appropriate notice of their potential claims.[118] And the relationship test that the *Jensen* court believed the *Chateaugay* court used suffered from the potential of essentially becoming the conduct test.[119] Instead, the *Jensen* court adopted a modified version of the relationship test dubbed the "fair contemplation" test, which required a combination of "pre-petition conduct" and the ability of the parties to "fairly contemplate" the possibility of damages resulting from that conduct.[120]

---

[111] Bos. & Me. Corp. v. Mass. Bay Transp. Auth., 587 F.3d 89 (1st Cir. 2009).

[112] *Id.* at 101.

[113] Cal. Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925 (9th Cir. 1993).

[114] *Id.* at 926–27.

[115] *See id.*

[116] *Id.* at 928–31.

[117] *Id.* at 929–30.

[118] *Id.* at 930.

[119] *Cf. In re* Chi., Milwaukee, St. Paul & Pac. R.R. Co., 974 F.2d 775, 784 (7th Cir. 1992) (noting that, while *Chateaugay* has been characterized as applying the conduct test, it "involved claimants who had some knowledge about the release or threatened release of a hazardous substance and who had some idea that the bankruptcy debtor was a potentially responsible party").

[120] *In re Jensen*, 995 F.2d at 930. *See also* Signature Combs, Inc. v. United States, 253 F. Supp. 2d 1028 (W.D. Tenn. 2003), which involved the claim of a potentially responsible party in a CERCLA clean-up action. The debtor contaminated two sites before the bankruptcy filing, but they were remediated pursuant to an order of the Environmental Protection Agency more than a

The Sixth Circuit expanded the fair contemplation test to a collective bargaining agreement in *CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan, Local 73*.[121] *CPT Holdings* involved an agreement between Hupp—CPT Holdings' subsidiary—and the labor union.[122] The parties entered into the agreement pre-bankruptcy and Hupp assumed[123] it in bankruptcy. However, Hupp withdrew from the agreement a few years later.[124] Hupp and CPT Holdings were potentially responsible for damages resulting from the withdrawal, and CPT Holdings sought a claim against the debtor for any damages assessed.[125] The court considered whether CPT's claim arose when it became Hupp's majority shareholder or when Hupp withdrew from the agreement.[126] The court held that a contingent liability requires something external to create the claim, and that the debtor and claimant could foresee the external event for the claim to accrue.[127] In the fact situation presented, the external event that foreseeably created damages was withdrawal from the agreement, not simply becoming

decade after the bankruptcy discharge. *Id.* at 1029–31. The court focused on the need for a claimant to know of its rights in order to discharge its claim in bankruptcy. *Id.* at 1035. After considering the relationship test, the court determined that the relationship only suffices to establish a claim *if* that relationship would give the potential claimant cause to understand that it held a claim. *See id.* at 1037.

[121] 162 F.3d 405 (6th Cir. 1998).

[122] *Id.* at 406.

[123] Accrual cases are closely connected to the question of assumption of executory contracts in bankruptcy under 11 U.S.C. § 365. In *Texaco Inc. v. Board of Commissioners for the LaFourche Basin Levee District* (*In re* Texaco Inc.), the debtor, Texaco, sought to assume its oil and gas agreements as executory contracts. 254 B.R. 536, 545 (Bankr. S.D.N.Y. 2000). But ultimately, it did not seek to assume some of the agreements, and claimed that they did not qualify as executory contracts at all or, alternatively, debtor had rejected the contracts. *Id.* at 547. In dicta, the court discussed whether, absent an assumed executory contract, a claim existed when the debtor constructed the pits at issue pre-petition but the pits caused damage post-petition. *Id.* at 553–54. The court indicated that a claim would only arise when the debtor breached its duty to responsibly operate the pits, even if the possibility of such a breach could be predicted upon construction of the pits. *Id.* at 554–55, 558–59. As a result, a "future claim[] for possible future breaches of contract" would not be cognizable in a bankruptcy case or discharged by the case. *Id.* at 559. The court suggested a fair contemplation standard. *See id.* at 564.

[124] *CPT Holdings, Inc.*, 162 F.3d at 406.

[125] *See id.*

[126] *Id.* at 406–07.

[127] *Id.* at 408. *See also* Saville, *supra* note 31, at 347 n.100 (citing *In re* All Media Props., Inc., 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd*, All Media Props., Inc. v. Best (*In re* All Media Props., Inc.), 646 F.2d 193 (5th Cir. 1981)).

the majority shareholder. Thus, the claim accrued post-petition, not subject to the bankruptcy discharge.[128]

While most of the accrual issues arise in the context of exposure to defective products or environmental waste, accrual issues can arise in any context in which injury occurs before the damage from that injury appears.[129] Take, for example, the situation faced by the Ninth Circuit in *Zilog*.[130] The case involved claims by female employees of sexual discrimination in the workplace.[131] The alleged discrimination occurred in December of 2001, the debtor-employer filed for bankruptcy protection in February of 2002, and the plaintiffs indicated that they learned of the discrimination between April and June of 2002.[132] None of the plaintiffs filed a proof of claim in the bankruptcy case,[133] and they later sought to bring late proofs of claim under the doctrine of "excusable neglect."[134] The case involved whether the claims accrued before or after the claims bar date, rather than pre- or post-petition.[135] Adopting the "fair contemplation"

[128] *See CPT Holdings, Inc.*, 162 F.3d at 409.

[129] The unreported case of Covey v. Hackett (*In re* Roadrunner Delivery, Inc.), provides an unusual but interesting application of the claim accrual issue. 2007 WL 4553068 (Bankr. C.D. Ill. Dec. 19, 2007). Roadrunner's sole shareholder, Egolf Hackett, filed for bankruptcy protection thirty-one minutes before Roadrunner filed for bankruptcy protection. *Id.* at *1. The trustee for Roadrunner (who also served as the trustee in Hackett's individual case) sued Hackett to recover an allegedly fraudulent transfer made to Hackett. *Id.* Hackett claimed that the trustee's recovery action accrued pre-petition and faced discharge in Hackett's bankruptcy case. *Id.* The trustee responded that because Hackett filed for bankruptcy before Roadrunner filed for bankruptcy, the fraudulent transfer claim arose *after* Hackett's bankruptcy filing and, thus, could not be discharged in Hackett's case. *Id.* Applying the conduct theory, the court held that the alleged fraudulent transfer occurred before Hackett filed for bankruptcy protection, even if the ability to seek return of that transfer arose only as a result of Roadrunner's bankruptcy filing. *Id.* at *2–3. Thus, the fraudulent transfer claim was pre-petition and dischargeable in Hackett's bankruptcy case. *Id.*

[130] Zilog, Inc. v. Corning (*In re* Zilog, Inc.), 450 F.3d 996 (9th Cir. 2006).

[131] *See id.* at 998–99.

[132] *Id.* at 997–98.

[133] *Id.* at 998.

[134] *Id.* at 999. The excusable neglect standard arises out of the Federal Rules of Bankruptcy Procedure, Rules 3003(c)(3) and 9006(b)(1). Under the rules, the burden falls to the party failing to file a timely proof of claim to establish excusable neglect for the delay in filing. Courts have defined excusable neglect to include "late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 388 (1993). However, courts may not find excusable neglect if the claimant received sufficient notice enabling the claimant to file a timely claim. *E.g.*, *In re* Thomson McKinnon Sec. Inc., 130 B.R. 717, 719–20 (Bankr. S.D.N.Y. 1991).

[135] *Zilog*, 450 F.3d at 1001.

test already espoused in the Ninth Circuit, the court held that the sex discrimination claims accrued once the plaintiffs could fairly contemplate them, which in that particular case occurred only when the plaintiffs knew of the discrimination post-petition—a result reminiscent of a state-law claim accrual analysis.[136]

II. ANALYSIS

A. The Role of State Law in Claim Determination

The move away from *Frenville* makes sense, both as a matter of Code interpretation and as a matter of policy. Bankruptcy cases should provide for a fair and equitable distribution to creditors, and reorganization bankruptcies seek to ensure the successful reorganization of the business for the mutual benefit of the debtor and the creditors.[137] As noted in most of the cases in this area, Congress intentionally defined "claim" broadly.[138] One commentator has suggested, "a contractual obligation to pay a debt [six years after the petition date] is considered a 'claim' . . . even though the lender would not have the right to any remedy under state law before the due date of the loan."[139] Such a broad definition suggests that as many potential causes of action as possible should fall within the definition of a claim, and thus within the jurisdiction of the bankruptcy case. Focusing primarily upon the definition and the policy of inclusivity suggests use of the conduct test in determining the existence of a claim pre- or post-petition.[140]

[136] *Id.* at 1000–02.

[137] Resnick, *supra* note 6, at 2050.

[138] Grady v. A.H. Robins Co., 839 F.2d 198, 200 (4th Cir. 1988) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 21–22 (1978)); *see, e.g.*, Epstein v. Official Comm. of Unsecured Creditors, of the Estate of Piper Aircraft Corp. (*In re* Piper Aircraft, Corp.), 58 F.3d 1573, 1576 (11th Cir. 1995); Woburn Assocs. v. Kahn (*In re* Hemingway Transp., Inc.), 954 F.2d 1, 8 n.9 (1st Cir. 1992); United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1004 (2d Cir. 1991); *Grady*, 839 F.2d at 202; Schweitzer v. Consol. Rail Corp., 758 F.2d 936, 942–43 (3d Cir. 1985).

[139] Resnick, *supra* note 6, at 2057.

[140] For an article arguing in favor of use of the conduct test, *see* Morgan, *supra* note 55, at 36–37 (arguing against *Piper* and noting negative effects such as lowering sale value of debtor company due to successor liability for non-discharged claims, causing serial bankruptcy filings, and limiting compensation for future tort claimants).

Further, use of a standard based on state law may lead to inconsistent conclusions regarding the existence of a claim, a problem exacerbated by tort reform statutes. For example, in *In re Quigley Co.*, the court considered how tort reform impacted the ability of potential asbestos-related injury plaintiffs to participate in a bankruptcy case.[141] *Quigley* involved unmanifested injuries likely to occur as a result of asbestos exposure.[142] The debtor's plan of reorganization classified potential asbestos-related injury plaintiffs into one class, but the Ad Hoc Committee argued that tort reform enacted in several states limited potential claimants from pursuing claims and, thus, voting on the plan of reorganization.[143] Specifically, the tort reform would prevent tort plaintiffs with less significant injuries from bringing a cause of action under state law.[144] The court did not need to deal with the question of whether state law controlled because it found that the state laws did not exclude the claim altogether, but merely delayed the ability to enforce that claim until a more severe injury manifested itself and the appropriate medical documentation existed in support of the claim.[145] Similar issues arise in other contexts in which states seek to manage the challenges of latent diseases such as asbestosis through various procedural mechanisms.[146]

What, then, is the role of state law in determining the existence of bankruptcy claims? In a case under the Bankruptcy Act, the Supreme Court clarified the role of state law in determining claims in bankruptcy cases.[147] The case involved the ability to compound interest due on a bond.[148] The Court first considered which law applied—New York, where the bonds were written and payable; Kentucky, where the bankruptcy case was filed; or Delaware, as the state of incorporation.[149] The circuit court, after

[141] *See* 383 B.R. 19, 21 (Bankr. S.D.N.Y. 2008).

[142] *Id.* at 21.

[143] *Id.* at 22–23.

[144] *Id.* at 23.

[145] *See id.* at 28.

[146] *See, e.g.*, *In re* Lloyd E. Mitchell, Inc., 373 B.R. 416, 423–24 (Bankr. D. Md. 2007) (finding that county's use of "inactive docket" system for persons exposed to asbestos without manifested injuries merely served as a procedural mechanism for handling latent claims, but did not impact the substantive rights of the claimholder).

[147] *See* Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 162–63 (1946).

[148] *See id.* at 159.

[149] *Id.* at 161–62.

deciding to apply New York law, then reached conflicting resolutions regarding the ability to compound interest under New York's laws.[150] The Supreme Court started by recognizing that "[w]hat claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law."[151] Even so, the Court determined that state law does *not* apply in the context of claim allowance—that falls exclusively under federal bankruptcy law.[152] In the case at hand, because bankruptcy law terminated the accrual of claims as of the petition date, including interest on pre-petition claims, compounded interest did not accrue even if state law so permitted.[153]

B. Contingent Claims

The broad federal definition of a claim expressly includes the concept of contingent claims. As a result, the claim need not be one that the plaintiff can currently sue or collect upon—it can rely upon the occurrence of a

[150] *See id.* at 160–61.

[151] *Id.* at 161 (citing Bryant v. Swofford Bros. Dry Goods, 214 U.S. 279, 290–91 (1909); Sec. Mortg. Co. v. Powers (*In re* Fla. Furniture Co.), 278 U.S. 149, 153–54 (1928)). Justice Frankfurter's concurrence was particularly eloquent on this point:

> The business of bankruptcy administration is to determine how existing debts should be satisfied out of the bankrupt's estate so as to deal fairly with the various creditors. The existence of a debt between the parties to an alleged creditor-debtor relation is independent of bankruptcy and precedes it. Parties are in a bankruptcy court with their rights and duties already established, except insofar as they subsequently arise during the course of bankruptcy administration or as part of its conduct. Obligations to be satisfied out of the bankrupt's estate thus arise, if at all, out of tort or contract or other relationship created under applicable law. And the law that fixes legal consequences to transactions is the law of the several States. . . . But the threshold question for the allowance of a claim is whether a claim exists. And . . . except where federal law, wholly apart from bankruptcy, has created obligations by the exercise of power granted to the federal government, a claim implies the existence of an obligation created by State law.
>
> . . . [N]o obligation finds its way into a bankruptcy court unless, by the law of the State where the acts constituting a transaction occur, the legal consequence of such a transaction is an obligation to pay.

Id. at 169–70 (Frankfurter, J., concurring). The concurrence also rejected compound interest, but did so through an interpretation of New York law. *Id.* at 171.

[152] *Id.* at 162–63 (majority opinion).

[153] *Id.* at 162 (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).

future event in order to accrue and still constitute a "claim" in bankruptcy. Several courts rely upon the inclusion of contingencies in the definition of a claim to support use of the conduct test.[154] However, courts must avoid reading the definition of a contingency *too* broadly. Contingency cannot mean any future event that might create liability—otherwise, nearly everyone holds a contingent claim against anyone else because some event might occur in the future to create some liability. A contingency requires reasonable foreseeability. A contingency occurs based on the anticipated actions of the parties involved or based on actions that the parties agreed to be bound by. For example, if the parties agree, as they did in *Hemingway*, that one party will indemnify the other in the event of a lawsuit, the filing of a lawsuit by a third party serves as the contingency. The parties expressly agreed to allow that event to trigger liability. Likewise, parties who bet on a sports game hold a contingent obligation—one that depends on the outcome of the game. But the fact that a car accident that neither planned might occur does not create an obligation contingent on the occurrence of that accident at some point in the future. Thus, contingencies generally occur due to a relationship between the parties—often created by contract—that creates some reason for the parties to anticipate a possible claim between them.[155]

C. The Connection Between Accrual and Due Process

Every circuit appropriately rejects the state-law accrual standard, given the broad definition of a claim and the purposes of the Bankruptcy Code. Courts must now consider which of the remaining tests (or what other test) to use to determine claim accrual. As noted, the circuits split between the conduct test, the fair contemplation test, and the relationship test. The conduct test looks solely to the debtor's conduct that created potential liability, while the relationship test considers whether the debtor and potential plaintiff's relationship creates some notice between the parties as to the potential for a future claim, and the fair contemplation test considers whether the plaintiff could reasonably predict the existence of a future claim.

---

[154] *See supra* section I.B.

[155] *See, e.g.*, *In re* Chemtura Corp., 443 B.R. 601, 618–19 (Bankr. S.D.N.Y. 2011) (holding that potentially responsible party in environmental remediation action holds contingent claim until another party actually pays for the clean-up for which the potentially responsible party faces joint liability).

In rejecting the state-law accrual test, the court's analysis in *Grossman's* did not end with the determination that each plaintiff held a dischargeable claim under the chapter 11 bankruptcy plan. The court went on to consider whether the plaintiffs received due process.[156] The fact that a plaintiff holds a claim does not always lead to discharge of that claim in bankruptcy. The plaintiffs only face discharge of the claim in the event that they receive fair notice of the need to file a claim and fail to exercise the opportunity to put forward a claim.[157]

To some extent, the relationship and fair contemplation tests conflate the statutory definition of a "claim" with the concept of due process by ensuring that the potential plaintiff need not bring forward his or her claim until reason exists to know of that claim's existence. Due process concerns lie at the heart of claim accrual. A federal statute such as the Bankruptcy Code or a state law cannot undermine a constitutionally protected right such as an individual's right to due process.[158] Bankruptcy courts provide an efficient and effective means of handling mass tort cases because they ensure equality of distribution among similarly situated creditors and allow for efficiency in the discovery and litigation processes by collecting creditors together.[159] But they must provide that function in a manner that ensures proper notice to prospective claimants.

In the Supreme Court's prominent case on due process, *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court noted that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[160] *Mullane* involved a bank-established trust fund which needed to notify beneficiaries of the application for settlement of a trust account.[161] It provided notice to the beneficiaries via four weeks of notices placed in the local newspaper, though it provided personal notice to interested parties when the trust made its first investment.[162] Mullane objected, arguing that notice publication did

[156] Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 127 (3d Cir. 2010).

[157] *See* Wright v. Owens Corning, 679 F.3d 101, 107–08 (3d Cir. 2012).

[158] Flynn v. Bankowski (*In re* Flynn), 402 B.R. 437, 445 n.11 (B.A.P. 1st Cir. 2009) (citing United States v. One Star Class Sloop Sailboat, 458 F.3d 16, 22 (1st Cir. 2006)).

[159] *See* Resnick, *supra* note 6, at 2045.

[160] 339 U.S. 306, 314 (1950).

[161] *Id.* at 309.

[162] *See id.* at 310.

not meet the Fourteenth Amendment's due process requirements.[163] In its opinion, the Court recognized that, while personal service would always satisfy due process, an alternative suffices when personal service would be difficult or impossible.[164] The alternative must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [It must also] reasonably . . . convey the required information . . . and it must afford a reasonable time for those interested to make their appearance."[165] While recognizing that notice publication suffices in some circumstances,[166] and particularly noting cases in which "it is not reasonably possible or practicable to give more adequate warning,"[167] the Court also noted the challenges inherent in actually providing notice through mere publication.[168] As such, the Court limited its holding to unknown beneficiaries.[169]

But before a publication can put a potential plaintiff on notice, that plaintiff needs to realize that he or she might be a claimant.[170] A pure

[163] *Id.* at 311.

[164] *Id.* at 313–14.

[165] *Id.* at 314.

[166] *Id.* at 316 (discussing situations in which a party abandoned or otherwise stopped controlling property).

[167] *Id.* at 317 (discussing missing or unknown claimants).

[168] The *Mullane* Court noted challenges inherent in actually providing notice through publication:

> It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper . . . . The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.

Id. at 315.

[169] *Id.* at 318.

[170] *See* Williams v. Placid Oil Co. (*In re* Placid Oil Co.), 753 F.3d 151, 160 (5th Cir. 2014) (Dennis, J., dissenting) ("[A] majority of the [Supreme] Court has also strongly indicated that requiring only constructive notice to individuals exposed to asbestos but who do not know about either their exposure or the harm that may result would present grave problems." (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997))).

conduct standard leaves the potential for the putative plaintiff to receive notice of the debtor's bankruptcy filing, but not recognize the potential for a claim. Consider, for example, the asbestos-manufacturing cases. If the mere manufacture of the asbestos sufficed to create the claim, people who have not yet been exposed to the asbestos would have no reason to think to file a claim, but would indeed be claimants.[171] In fact, asking everyone who might ever be exposed to the asbestos in the future to file a claim would introduce inefficiencies to the bankruptcy case. By requiring an additional factor—a relationship between the debtor and the potential claimant or another reason why the claimant can "fairly contemplate" a potential claim—the courts (consciously or subconsciously) include due process in the analysis.[172] Absent the statutory remedy of a trust fund,[173] the conduct

[171] *See* Schweitzer v. Consol. Rail Corp., 758 F.2d 936, 944 (3d Cir. 1985) ("[T]he general rule is that all known creditors must receive personal notice. . . . This requirement has proven to be manageable where creditors have a present legal relationship with the debtor . . . . But if contingent claims were held to include possible future tort claims, then every hypothetical chain of future events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim.").

[172] *See* Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 125 (3d Cir. 2010) ("That does not necessarily mean that the Van Brunts' claims were discharged by the Plan of Reorganization. Any application of the test to be applied cannot be divorced from fundamental principles of due process.").

[173] In the context of an asbestos case, the Bankruptcy Code provides a statutory means of providing unknown future claimants with the ability to bring a claim via 11 U.S.C. § 524. Section 524 allows a debtor to create a trust fund, calculated by determining the likelihood, number, and value of future claims. *See* Findley v. Trs. of the Manville Pers. Injury Settlement Trust (*In re* Joint E. & S. Dists. Asbestos Litig.), 237 F. Supp. 2d 297, 303 (E.D.N.Y. 2002) (considering "projected number of claims, rate of filing, and average liquidated value"); Official Comm. Of Asbestos Claimants v. Asbestos Prop. Damage Comm. (*In re* Fed.-Mogul Glob., Inc.), 330 B.R. 133, 157 (D. Del. 2005) (providing lengthy list of factors to consider in creating trust fund, including "rate of filing of claims," "total number of claims to be expected," "valuation . . . based upon settlement values for claims close to the filing date," "a future value of filing date indemnity values," and "a discount rate"). Those claimants might lack any relationship with the debtor or any reason to believe that they hold claims against the debtor, but when those claims arise, the trust fund (if not depleted) provides a means of recovery for the claimants. Section 524(g) developed out of precedent. In *In re* Johns-Manville Corp., 68 B.R. 618, 638 (Bankr. S.D.N.Y. 1986), the court upheld the ability to utilize a trust remedy to protect future unknown asbestosis claimants. In so doing, the court determined that the trust arrangement satisfied the due process concerns outlined by *Mullane*, through the use of a representative for the rights of future claimants. *Id.* at 626.

Section 524 strikes a balance in the context of asbestos cases—allowing the bankruptcy case to provide a fresh start to a reorganizing debtor or to create final resolution for a liquidating debtor and its creditors, while ensuring to the extent reasonably possible a means of recovery for

test would present a due process challenge because it would leave potential plaintiffs with no relationship to debtor or reason to know of a potential claim without notice of the proceeding or a remedy against the debtor. Thus, the relationship and fair contemplation tests provide better alternatives for the courts.

In many cases, the result remains the same under any of these tests.[174] This occurs because the wrongful conduct occurs pre-petition, the relationship between the parties exists pre-petition, and reason exists for the potential plaintiff to recognize his or her status as a potential plaintiff pre-petition. Consider, for example, the *Frenville* facts. *Frenville* arose out of a situation in which the wrongful conduct by the debtor—preparation of false

unknown creditors. *See In re* W.R. Grace & Co., 729 F.3d 311, 323 (3d Cir. 2013) ("[T]he potential due process issue associated with channeling claims to a trust is the fairness of forcing future claimants, many of whom might have had no notice at all of the bankruptcy, to bring their claims against a trust rather than against the debtor directly. That concern is addressed by the proper application of § 524(g)."). The *Grossman's* court recognized the need to consider due process in its decision, and recommended considering "the circumstances of the initial exposure to asbestos, whether and/or when the claimants were aware of their vulnerability to asbestos, whether the notice of the claims bar date came to their attention, whether the claimants were known or unknown creditors, whether the claimants had a colorable claim at the time of the bar date, and other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by § 524(g)." *Grossman's*, 607 F.3d at 127–28; *see* Bowles, *supra* note 66, at 35. This suggests that the *Grossman's* court also felt that a § 524 trust provided the due process needed for claimants who could not be known at the time of the bankruptcy filing.

[174]The *Grossman's* court noted that the result remained the same, and that the courts applying the variety of tests sometimes use one standard while calling it another: "[t]he court of appeals observed that 'the courts applying the conduct test also presume some prepetition relationship between the debtor's conduct and the claimant.'" *Grossman's*, 607 F.3d at 125. This concept is further illustrated by discussion of the *Piper* court:

> During the pendency of the case, the future claimants' legal representative advanced the argument that the prepetition relationship test "effectively disregards and removes the words 'contingent' and 'unmatured' from the statutory definition of 'claim.'" Although the *Piper* court acknowledged this argument, the court never reconciled this argument with its application of the prepetition relationship test. The court's failure to recognize the broad scope of the statutory definition of "claim" caused it to interpret the conduct test and the prepetition relationship test as requiring the same elements. The *Piper* court ignored the fact that the conduct test originated to facilitate the broad statutory definition of "claim" in section 101(5). Indeed, under this original interpretation, a "contingent" claim existed if the claim "depend[ed] upon a future uncertain event."

Cf. Morgan, *supra* note 55, at 33.

financial statements—did not actually harm the potential plaintiff. The plaintiff suffered no harm unless and until the true victim of the false financial statements sued to recover from Avellino & Bienes (A&B), the insurer.[175] But the tests consider when the debtor's conduct occurred, not when the contingency (here, a lawsuit by the injured party) occurred. The debtor's conduct that eventually led to the plaintiff's claim occurred pre-petition and, thus, the conduct test would deem it a pre-petition claim. What result under the relationship or fair contemplation test? A&B entered into a contractual relationship with *Frenville* pre-petition, and that relationship could cause A&B to recognize that it might hold a claim in the bankruptcy case against Frenville if any of its pre-petition creditors sought indemnification from A&B. Regardless of the test adopted, A&B arguably held a pre-petition claim against Frenville.

But, while many cases present situations in which any test yields the same result, that is not always the case. As noted above, the conduct test may create due process concerns when potential plaintiffs cannot be identified,[176] or the potential plaintiff cannot recognize a need to file even upon receiving notice of a bankruptcy filing. The same holds true for the relationship test. For that, consider the *Lemelle* fact scenario, in which the plaintiffs purchased a defective mobile home from debtor pre-petition that caught fire post-petition.[177] Under the conduct test, because the debtor manufactured the home pre-petition, plaintiffs hold a bankruptcy claim. And under the relationship test, because the plaintiff purchased the home from the debtor pre-petition, plaintiffs would hold a bankruptcy claim. But under a fair contemplation standard, the plaintiffs would only hold a bankruptcy claim if the plaintiffs appreciate the need to bring a claim,[178]

[175] *See supra* note 21 and surrounding text.

[176] In cases where even the debtor cannot identify potential plaintiffs, non-dischargeability may also be an option against a surviving debtor. *See* Cal. Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925, 928–29 (9th Cir. 1993) (discussing Sylvester Bros. Dev. Co. v. Burlington N. R.R., 133 B.R. 648, 653 (D. Minn. 1991) (refusing to discharge a CERCLA claim because the debtor did not schedule the potential claim)).

[177] *See supra* notes 81–89 and surrounding text.

[178] Though the *Jensen* court initially phrased the fair contemplation test as whether the "parties" could fairly contemplate the claim, many courts since that time focus on plaintiff's contemplation of the claim. *E.g.*, Zilog, Inc. v. Corning (*In re* Zilog, Inc.), 450 F.3d 996, 1000–01 (9th Cir. 2006); *Jensen*, 995 F.2d at 930; Conseco, Inc. v. Schwartz (*In re* Conseco, Inc.), 330 B.R. 673, 685–86 (Bankr. N.D. Ill. 2005). Mandating plaintiff's ability to fairly contemplate the claim makes sense from the due process perspective because the mandated notice of the proceeding lacks effect if the putative plaintiff does not realize that a claim exists.

such as when the fire occurred (post-petition) or if they knew that a manufacturing defect caused fires.[179] Nothing suggests such pre-petition awareness. Examples like this show that a mere relationship with the debtor does not necessarily provide a potential claimant with a reason to know of the existence of a claim, such that the claimant will protect its interest in the bankruptcy case. Due process requires not just that a claimant know of the proceeding, but that the notice be "reasonably calculated to" notify plaintiff of its potential need to file a claim.

The National Bankruptcy Review Commission (NBRC) proposed modifying the definition of claim to mirror the conduct test.[180] However, the NBRC went on to suggest that a future claimant's potential claim only arises when the debtor already faces liability for the conduct in question and future claimants can be identified.[181] This moves the proposal from one of a conduct test toward fair contemplation of the potential claim—though it focuses on whether the debtor would contemplate the claim, not whether the creditor can contemplate the claim—and adds a component of due process into the determination of the existence of a claim.

D. Use of the Fair Contemplation Test in Specific Factual Scenarios

The fair contemplation test provides flexibility needed to handle a variety of factual scenarios. In some cases, a claimant may not be able to fairly contemplate a claim until an injury occurs.[182] In those cases, fair contemplation reaches a result similar to that of the state law accrual test. In other cases, a claimant may be able to fairly contemplate a claim before an injury occurs simply because the claimant and debtor's pre-petition relationship suggests a potential claim, mirroring the relationship test.[183] And in other cases, a claimant who lacks a significant relationship with a debtor might be able to foresee a claim despite the lack of a relationship, reminiscent of the conduct test.[184] The fair contemplation test provides the

[179] *See supra* notes 81–89 and surrounding text.

[180] Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 125 (3d Cir. 2010).

[181] *See* Resnick, *supra* note 6, at 2075 (citing National Bankruptcy Review Commission Report at 322, 326–29).

[182] *See, e.g.*, *Zilog*, 450 F.3d at 1001; discussed at notes 130–136 and surrounding text.

[183] *See, e.g.*, *Jensen*, 995 F.2d at 929; discussed at notes 113–120 and surrounding text.

[184] *See, e.g.*, CPT Holdings, Inc. v. Indus. & Allied Emps. Union Pension Plan, Local 73, 162 F.3d 405, 409 (6th Cir. 1998); discussed at notes 121–128 and surrounding text.

courts with the ability to tailor the application of the standards to the unique facts of every case and every debtor.

What might cause a potential plaintiff to contemplate a claim? A contractual right, such as in *Hemingway*'s contractual indemnification situation;[185] having purchased something already known as defective, such as in the *Grady* case;[186] or a known (or discoverable) environmental spill not yet remediated, such as in *Signature Combs*.[187] In each of these cases, any of the current tests—conduct, relationship, or fair contemplation—would create a bankruptcy claim. But in the *Lemelle* situation—one in which the wrongful conduct already occurred and the parties have a relationship, but in which the plaintiff lacks a reason to foresee the need to file a claim—only the fair contemplation test protects that plaintiff by maintaining the claim for the post-bankruptcy future.[188]

The contract scenario provides the easiest example of use of fair contemplation. When parties enter into a contract, parties often attempt to contemplate future liabilities.[189]

Likewise, environmental clean-up claims provide an example of a situation in which fair contemplation may provide a more justified response and, indeed, this is the context in which the test developed. For example, if a debtor causes an environmental spill that may require clean-up by a governmental entity, the conduct likely occurred pre-petition. But what

[185] *See supra* notes 102–112 and surrounding text.

[186] *See supra* notes 34–44 and surrounding text.

[187] *See supra* note 120.

[188] Although the *Lemelle* court professed to use the conduct test, in reality the analysis more resembled the fair contemplation (or even state accrual) test because it used the moment of the fire, not the moment of defective manufacture, as the measuring point for when the claim arose:

> Where, as here, the injury and the manifestation of that injury occurred simultaneously . . . we think that, at a minimum, there 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.

Lemelle v. Universal MFG. Corp., 18 F.3d 1268, 1277 (5th Cir. 1994) (citing United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1003 (2d Cir. 1991); *In re* Piper Aircraft, Corp., 162 B.R. 619, 628 (Bankr. S.D. Fla. 1994)).

[189] *See* Conseco, Inc. v. Schwartz (*In re* Conseco, Inc.), 330 B.R. 673, 686 (Bankr. N.D. Ill. 2005) (noting that courts have used fair contemplation in contract actions, and that courts "conclude that a contingent claim arises at the time of contracting, not at the time of a subsequent breach").

results under *Piper*'s relationship test? If the fact that the debtor pays taxes or registered with the government suffices to establish a pre-petition relationship, the claim accrues pre-petition. Or a pre-existing relationship with an environmental agency resulting from a prior contamination issue might suffice to cause a claim to accrue pre-petition. But because the government *always* maintains a relationship with *every* debtor, and may even have an environmentally-based relationship with that debtor, reading the relationship standard so broadly would mean that, as to the government, conduct alone would dictate when a claim accrues.[190] Fair contemplation provides a more justifiable result. If it knows of the spill, the government can contemplate the potential need for clean-up, even if the only relationship it maintains with the debtor before the bankruptcy petition date is as tax collector or registering entity. On the other hand, with an undiscovered environmental spill, the government might not contemplate the need to bring a claim, no matter how extensive its pre-petition relationship with the debtor.[191]

Perhaps the most challenging situation presents in the tort liability context. In 1997, the Ninth Circuit's Bankruptcy Appellate Panel rejected the "fair contemplation" test used by its circuit in other cases, indicating that a conduct test is more appropriate in the tort context in order to promote the debtor's fresh start.[192] But other courts distinguish tort cases by *delaying* accrual of tort claims to allow more notice to claimants who do not intentionally engage in a relationship with the debtor and cannot contemplate potential claims. For example, in the Seventh Circuit case of *Fogel v. Zell*, Interpace Corporation manufactured concrete pipe used in sewage systems.[193] A defect in the pipe began to be recognized in the 1980s, by which time Madison Management acquired Interpace.[194] Madison filed for bankruptcy protection in 1991, eventually liquidating its assets.[195] The City of Denver previously installed Interpace pipes, but did not file a

[190] Saville, *supra* note 31, at 353.

[191] *See id.* at 359 ("In assessing whether the debtor's CERCLA liability was foreseeable, courts should examine two factors: whether hazardous substances previously had been detected on the debtor's property or on property to which the debtor had processed or shipped waste; and whether the debtor's prebankruptcy activities involved potential hazardous substance releases.").

[192] Hassanally v. Republic Bank (*In re* Hassanally), 208 B.R. 46, 54 & n.11 (B.A.P. 9th Cir. 1997).

[193] 221 F.3d 955, 958 (7th Cir. 2000).

[194] *Id.*

[195] *Id*.

claim because its pipes showed no sign of damage.[196] Of course, the City's pipes did eventually burst, and the City sought reimbursement for $17 million in damage caused by the pipe burst.[197] Judge Posner considered when Denver held a claim against Madison, noting that a contingent claim makes sense in a contract action but not necessarily in a tort action.[198] As the court pondered:

> Suppose a manufacturer goes bankrupt after a rash of products-liability suits. And suppose that ten million people own automobiles manufactured by it that may have the same defect that gave rise to those suits but, so far, only a thousand have had an accident caused by the defect. Would it make any sense to hold that all ten million are tort creditors of the manufacturer and are therefore required, on pain of having their claims subordinated to early filers, to file a claim in the bankruptcy proceeding? Does a pedestrian have a contingent claim against the driver of every automobile that might hit him? . . . Driving carelessly is not a tort and neither is the sale of a defective product. The products-liability tort occurs when the defect in the design or manufacture of the product causes a harm, and this didn't happen to Denver until the defective pipes burst. It is a fundamental principle of tort law that there is no tort without a harm.[199]

But, while recognizing the challenge in identifying a contingency in the occurrence of the tort itself, the court also acknowledged that payment to some potential plaintiffs in bankruptcy and some outside of bankruptcy created a potentially arbitrary solution.[200] Ultimately, the court did not need to determine whether or when the claim accrued because notice to Denver was constitutionally insufficient.[201] The hypotheticals posed by the court, however, provide a contrast of tort situations in which a putative plaintiff could (if given proper notice of the case) fairly contemplate the possibility

[196] *Id*.

[197] *Id.* at 958–59.

[198] *Id.* at 960 ("A claim implies a legal right, however, and before a tort occurs the potential victim has no legal right, 'contingent' or otherwise . . . .").

[199] *Id.* (citations omitted).

[200] *Id.* at 961.

[201] *Id.* at 962.

of a tort claim and in which the future claimant lacks reason to anticipate a potential tort claim. The cities that installed Interpace pipes could understand that potential for a tort claim if they knew that Interpace manufactured the pipes installed *and* that a defect existed in Interpace pipes. In the same way, consumers who own or lease a defective car know of the potential defect once notified of a recall, or maybe sooner based on news coverage of the defect. By contrast, the pedestrians or other drivers who may at some point suffer harm from defects in another driver's car or by careless driving of another person would have little reason to anticipate that future tort claim.[202] This fair contemplation comes from many of the factors laid out by the courts espousing the "relationship" test,[203] and by the NBRC—a known relationship between the debtor and the potential claimant and knowledge on the part of the claimant of the existence of a defect.[204] But it goes beyond the *Piper* standard by requiring not only that the conduct occurred pre-petition, but that the claimant *knows* of the defect and of the relationship with the debtor such that the claimant can recognize the need to establish that claim. It would not suffice that Interpace or

[202] As the court noted in *Schweitzer*, constitutional questions are raised with holders of possible future tort claims:

> Finally, an interpretation of "interests" that included plaintiffs' future tort actions would raise constitutional questions. For example, the general rule is that all known creditors must receive personal notice. *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 318–20 (1950). This requirement has proven to be manageable where creditors have a present legal relationship with the debtor, such as in the *Radio-Keith-Orpheum* case. But if contingent claims were held to include possible future tort claims, then every hypothetical chain of future events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim. The holder of any such "claim" whose whereabouts were known would then seem to be a "known creditor." Thus, in our case, every employee who had worked near asbestos and whose address was known would be a known creditor, yet none received personal notice in the prior reorganization proceedings. We believe that our interpretation, which avoids such thorny constitutional issues, is the proper view of Congressional intent.

Schweitzer v. Consol. Rail Corp., 758 F.2d 936, 944 (3d Cir. 1985).

[203] *See* Epstein v. Official Comm. of Unsecured Creditors, of the Estate of Piper Aircraft Corp. (*In re* Piper Aircraft, Corp.), 58 F.3d 1573, 1577 (11th Cir. 1995); *In re* Mooney, 532 B.R. 313, 321 (Bankr. D. Idaho 2015) ("Under the fair contemplation test, '[t]he debtor's prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established . . . between an identifiable claimant or group of claimants and that prepetition conduct.'" (alterations in original) (citing Hassanally v. Republic Bank (*In re* Hassanally), 208 B.R. 46, 52 (B.A.P. 9th Cir. 1997))).

[204] *See* Resnick, *supra* note 6, at 2075 n.114.

Madison knows that it manufactured defective pipes if Denver lacks reason to know of the defect or if Denver, knowing of the defect, lacks reason to know that Interpace manufactured its pipes.

III. CONCLUSION

Only the fair contemplation test can cover each factual situation. In the tort or environmental context, fair contemplation does not require manifestation of the illness or remediation of contamination, but would require known exposure and an understanding of the risks. In the contract context, fair contemplation of a potential claim often occurs because parties create the contingency themselves and thus understand the potential for a cause of action at some point in the future. The fair contemplation test provides due process that the conduct standard and relationship standard often lack because it ensures that the parties, upon receiving notice (whether in person or by publication) have the opportunity to understand the potential for liability on the part of the debtor, and an opportunity to protect their interests in the bankruptcy court.