

WHAT'S IN A CLAIM?: UTILIZING THE BANKRUPTCY CONDUCT AND  
PRE-PETITION RELATIONSHIP TESTS TO EVALUATE EXISTING CLAIMS  
AGAINST A TERMINATED FILING ENTITY

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I. INTRODUCTION

Hypothetical 1: On March 26, 2013, Lucky purchased a product manufactured by Uh-Oh, Inc. On May 1, 2013, Uh-Oh, Inc. filed a certificate of termination with the Secretary of State. On July 3, 2013, Lucky is injured by Uh-Oh's defective product. Lucky seeks to sue Uh-Oh, Inc. for his injuries, but the company is no longer in business. Does Lucky have any recourse?

What if Lucky purchased the product on July 3, 2013 and was injured the same day? What if Lucky was injured before termination but did not bring suit until after May 1, 2013?

Hypothetical 2: On August 13, 2013 Chance purchased a product from Yikes, Inc. The product contained a substance that began to cause latent injuries immediately due to Chance's exposure to the product. On October 12, 2013, Yikes, Inc. filed a certificate of termination with the Secretary of State. On December 14, 2013, after the corporation has terminated its existence, Chance is diagnosed with a disease caused from the exposure to Yikes' product. Chance seeks to sue Yikes for his injuries. Is Chance's claim barred?

This article will attempt to answer these questions by analyzing the meaning of an "existing claim" against a terminated entity under the Texas Business Organizations Code.

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## II. THE CURRENT STATUTORY SCHEME

The Texas Business Organizations Code “is a substantive codification of the existing Texas statutes governing nonprofit and for-profit . . . entities.”<sup>1</sup> Chapter 11 enumerates the requirements for winding up and terminating a domestic entity.<sup>2</sup>

Under Texas law, a terminated entity includes: (1) any domestic entity whose existence has been terminated voluntarily or involuntarily, unless the entity has been reinstated, and (2) any corporation whose charter has been forfeited pursuant to the Tax Code, unless forfeiture has been set aside.<sup>3</sup> A terminated entity continues in existence for three years from the date of termination,<sup>4</sup> for the following limited purposes:

- (1) Prosecuting or defending in the terminated filing entity’s name an action or proceeding brought by or against the terminated entity;
- (2) Permitting the survival of an existing claim by or against the terminated filing entity;
- (3) Holding title to and liquidating property that remained with the terminated filing entity at the time of termination or property that is collected by the terminated filing entity after termination;
- (4) Applying or distributing property, or its proceeds, as provided by Section 11.053; and
- (5) Settling affairs not completed before termination.<sup>5</sup>

A terminated entity has potential liability after termination only for existing claims.<sup>6</sup> Claims against a corporation must be brought prior to

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<sup>1</sup>Daryl B. Robertson, et al., *Introduction to Texas Business Organizations Code*, 38 TEX. J. BUS. L., 57, 57 (2002). Because the Business Organizations Code took effect on January 1, 2010, case law interpreting the previous statutory scheme—TEX. BUS. CORP. ACT ANN. art. 7.12—provides instructive and persuasive guidance in discerning the current statute’s meaning. *See* Act of Sept. 6, 1955, 54th Leg., ch. 64, 1955 Tex. Gen. Laws 294, 294 (amended 1987, 1989, 1991, 1993) (expired Jan. 1, 2010) (hereinafter TEX. BUS. CORP. ACT ANN. art. 7.12).

<sup>2</sup>*See* TEX. BUS. ORGS. CODE ANN. ch. 11 (West 2012 & Supp. 2014).

<sup>3</sup>*See id.* § 11.001(4)(A), (B).

<sup>4</sup>*Id.* § 11.356(a).

<sup>5</sup>*Id.* When a claim is brought by or against an entity within three years of termination, the entity continues in existence until “all judgments, orders, and decrees have been executed.” *See id.* § 11.356(c)(1), (2); *see also* ANCO Ins. Servs. of Houston, Inc. v. Romero, 27 S.W.3d 1, 5–6 (Tex. App.—San Antonio 2000, pet. denied).

<sup>6</sup>*See* BUS. ORGS. § 11.351.

termination or within three years of the date of termination.<sup>7</sup> A “claim” is defined as a right to payment, damages, or property, whether liquidated or unliquidated, accrued or contingent, matured or un-matured.<sup>8</sup> An “existing claim” is either: (1) a claim against the entity that existed before the entity’s termination and is not barred by limitations; or (2) a contractual obligation incurred after termination.<sup>9</sup> The Texas Business Organizations Code, therefore, places a statutory bar on any claims brought more than three years after termination,<sup>10</sup> in addition to tort claims arising after termination.<sup>11</sup>

Due to the rather inclusive definition of the word “claim,” an uncertainty in the law exists as to whether a personal injury or products liability claim—with both pre- and post-termination acts and omissions—qualifies as a contingent liability and thus may be brought against a terminated entity. There is no clear method to determine what constitutes an existing claim under the Business Organizations Code. This article attempts to clarify this issue by drawing on two common-law bankruptcy tests, both utilized to determine whether a claim against a debtor is a pre-petition claim and thus dischargeable in bankruptcy.

Part III of this article explains the statutory scheme in play before the enactment of the Business Organizations Code. Case law interpreting Texas Business Corporation Act Article 7.12 provides useful insight for analyzing what currently constitutes an existing claim. Part III also compares cases interpreting Article 7.12 and the 1991 amendment to Article 7.12, wherein the definition of “existing claim” was added. Part IV discusses the analyses used to interpret what constitutes a “claim” under section 101(5) of the Bankruptcy Code. Because the timing of a claim is also important in bankruptcy, case law determining whether a claim exists in bankruptcy can be used as a tool to discern the meaning of an “existing claim” under the Business Organizations Code. Part IV discusses two tests applied in bankruptcy, the conduct test and the pre-petition relationship test. Part V

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<sup>7</sup> See *id.* § 11.359(a). Claims must also be brought within the applicable statute of limitations. See *id.* § 11.001(3).

<sup>8</sup> *Id.* § 11.001(1).

<sup>9</sup> *Id.* § 11.001(3).

<sup>10</sup> See, e.g., *Anderson v. Hodge Boats & Motors, Inc.*, 814 S.W.2d 894, 896 (Tex. App.—Beaumont 1991, writ denied); *Martin v. Tex. Woman’s Hosp., Inc.*, 930 S.W.2d 717, 720 (Tex. App.—Houston [1st Dist.] 1996, no writ).

<sup>11</sup> See, e.g., *Landrum v. Thunderbird Speedway, Inc.*, 97 S.W.3d 756, 758–59 (Tex. App.—Dallas 2003, no pet.); *Weibel v. Martin Indus., Inc.*, 806 S.W.2d 345, 346 (Tex. App.—Fort Worth 1991, writ denied).

applies the bankruptcy tests to the introductory hypotheticals to evaluate whether a claimant has an “existing claim” against a terminated filing entity. Finally, part VI concludes with a summary of the major points discussed in the article.

### III. CLAIMS BEFORE THE TEXAS BUSINESS ORGANIZATIONS CODE

#### A. Article 7.12

Prior to the adoption of the Texas Business Organizations Code, the post-dissolution existence of a corporation was governed by Article 7.12 of the Texas Business Corporation Act.<sup>12</sup> Article 7.12 states that a dissolved corporation may continue its corporate existence for three years from the date of dissolution to: (1) prosecute or defend in its corporate name any action or proceeding by or against the dissolved corporation; and (2) permit the survival of any existing claim by or against the dissolved corporation.<sup>13</sup> Before 1991, Article 7.12 did not contain the expansive definition of the word “claim” included in the Texas Business Organizations Code today.

*Hunter v. Fort Worth Capital Corp.* analyzed the meaning of an existing claim under Article 7.12.<sup>14</sup> In *Hunter*, the Supreme Court of Texas reviewed whether the plaintiff could recover damages against the former shareholders of a dissolved corporation.<sup>15</sup> In 1960, Hunter-Hayes installed an elevator in a building under construction.<sup>16</sup> The company inspected and serviced the elevator until 1964, when it was issued a certificate of dissolution by the Secretary of State.<sup>17</sup> About 11 years later, Theodore Moeller was permanently injured when the elevator fell on him.<sup>18</sup> Moeller sued the

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<sup>12</sup>Under The Texas Business Corporation Act, the term “dissolution” was used to define a corporation that terminated its existence by filing articles of dissolution with the Secretary of State. TEX. BUS. CORP. ACT ANN. art. 7.12 (expired Jan. 1, 2010). Under the current statutory scheme, “termination” is the phrase used when a corporation has terminated its existence. BUS. ORGS § 11.001(4). Termination is effective upon filing a certificate of termination with the Secretary of State. *See id.* § 11.101. Therefore, the phrase “dissolution” and “termination” are synonymous, in that they both refer to a corporation terminating its existence.

<sup>13</sup>TEX. BUS. CORP. ACT ANN art. 7.12 (expired Jan. 1, 2010).

<sup>14</sup>620 S.W.2d 547, 549 (Tex. 1981).

<sup>15</sup>*See id.* at 548.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

former shareholders of Hunter-Hayes to recover damages for his personal injuries.<sup>19</sup>

The Court noted that, under the common law, once a corporation was dissolved it could neither sue nor be sued, and all legal proceedings in which it was a party abated.<sup>20</sup> Departing from the common law, Article 7.12 expanded a corporation's liability to provide recovery for pre-dissolution claims, while at the same time protecting "shareholders, officers and directors of a dissolved corporation from prolonged and uncertain liability."<sup>21</sup> Although the statute allowed recovery for pre-dissolution claims, it still followed the common law by completely barring post-dissolution claims.<sup>22</sup>

In analyzing Moeller's claim, the Court noted that Moeller's cause of action did not accrue until he was injured—more than 11 years after the company dissolved.<sup>23</sup> Consequently, Moeller's post-dissolution claim against the corporation was barred, and Moeller could not recover against the shareholders.<sup>24</sup>

In his dissent, Justice Spears pointed out that "[p]ersons sustaining post-dissolution loss or injury resulting from the negligence, a defective product, or breach of warranty of the dissolved corporation are left completely without a remedy under the rule announced by the majority."<sup>25</sup> He emphasized that claimants with injuries from pre-dissolution claims that occurred after dissolution were left without a remedy.<sup>26</sup>

### B. Contingent Liability Under Amended Article 7.12

In 1991, Article 7.12 was amended to include the definitions "claim" and "existing claim," which were then carried forward in the adoption of the Business Organizations Code.<sup>27</sup> In *Anderson Petro-Equipment, Inc. v.*

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<sup>19</sup> *Id.*

<sup>20</sup> *See id.* at 549–50 (citing *Nardis Sportswear v. Simmons*, 218 S.W.2d 451, 453 (Tex. 1949)).

<sup>21</sup> *Id.* at 551.

<sup>22</sup> *See id.* at 552.

<sup>23</sup> *See id.* at 549.

<sup>24</sup> *See id.*

<sup>25</sup> *Id.* at 555 (Spears, J., dissenting).

<sup>26</sup> *See id.*

<sup>27</sup> *See Anderson Petro-Equip., Inc. v. State*, No. 03-13-00176-CV, 2013 WL 5858010, at \*3 (Tex. App.—Austin Oct. 22, 2013, pet. denied) (mem. op.). A major difference between Article 7.12 and the Business Organizations Code, however, is that the Business Organizations Code broadened the discussion of an "existing claim" to apply to all terminated entities. TEX. BUS.

*State*, the Austin Court of Appeals analyzed whether the State's claims against Anderson Petro were contingent claims, thus enabling the State to bring suit within three years after the corporation's dissolution.<sup>28</sup>

Anderson Petro operated three wells that had fallen out of compliance with the Texas Railroad Commission rules and statutes.<sup>29</sup> The Railroad Commission initiated enforcement actions against Anderson Petro, resulting in three final orders dated May 11, 2004, October 5, 2005, and April 11, 2006.<sup>30</sup> Anderson Petro forfeited its corporate privileges on October 13, 2004, after failing to pay its 2004 franchise taxes when due on May 17, 2004.<sup>31</sup> Although the May 2004 Order was issued while Anderson Petro was still in good standing, both the October 2005 and April 2006 orders were issued after Anderson Petro had forfeited its corporate privileges and corporate charter.<sup>32</sup>

The State of Texas brought an action in district court to enforce the final orders issued by the Railroad Commission and to recover administrative penalties, attorneys' fees, and clean-up costs.<sup>33</sup> The district court rendered judgment against Anderson Petro.<sup>34</sup> On appeal, Anderson Petro challenged the district court's judgment, contending that "because the October 2005

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ORGS. CODE ANN. § 11.001(3) (West 2012). Article 7.12 of the Texas Business Corporation Act discusses existing claims only in regards to a terminated corporation. TEX. BUS. CORP. ACT ANN. art. 7.12 (expired Jan. 1, 2010).

<sup>28</sup> 317 S.W.3d 812, 818 (Tex. App.—Austin 2010 pet. denied). There is also a 2013 opinion involving the same parties. *See generally Anderson Petro-Equip.*, 2013 WL 5858010. The 2013 opinion follows a similar analysis to the 2010 *Anderson Petro* opinion. *Id.* at \*2–3. What is notable about the 2013 opinion, however, is that the State appears to have sued Anderson Petro after the expiration of the three-year post-termination survival period. *Id.* at \*2. The court concluded that the claim for the costs to plug the well at issue was an "existing claim" because the actions giving rise to the cause of action occurred before Anderson Petro's dissolution. *Id.* at \*3. Oddly, there is no discussion of the rule that an existing claim is extinguished if an action or proceeding is not brought on the claim by the third anniversary of the termination of the entity. *See* TEX. BUS. ORGS. CODE ANN. § 11.356(a); TEX. BUS. CORP. ACT ANN art. 7.12(C) (expired Jan. 1, 2010). Because the claim for the plugging costs was an existing claim at the time of dissolution, the court overruled Anderson Petro's contention that the trial court erred in granting summary judgment against Anderson Petro. *Anderson Petro-Equip.*, 2013 WL 5858010, at \*3. Apparently, Anderson Petro did not make the argument that the claim was extinguished when the State did not sue Anderson Petro on the claim within three years of its dissolution.

<sup>29</sup> *Anderson Petro-Equip.*, 317 S.W.3d at 814.

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *See id.* at 815.

<sup>33</sup> *See id.* at 814.

<sup>34</sup> *See id.* at 815.

Order and the April 2006 Order were issued after Anderson Petro forfeited its corporate charter, the State's claims did not exist prior to the corporation's dissolution."<sup>35</sup> Anderson Petro argued that the State's claims were not "existing claims," but rather post-dissolution claims for which the corporation could not be held liable under Article 7.12.<sup>36</sup>

The court first discussed the definition of "contingent liability," noting that it is a liability that "is not now fixed, but which will become so upon the occurrence of some future event."<sup>37</sup> Contingent liabilities include obligations that are reasonably anticipated but have not yet been incurred.<sup>38</sup> The court stated:

Once the actions that may give rise to future liability have occurred, the contingent claim comes into existence. Article 7.12 requires only that the actions giving rise to the liability occur before dissolution. If they do, the statute plainly provides for the survival of a party's right to assert claims arising out of or resulting from those actions even after the corporation's dissolution.<sup>39</sup>

Thus, the ultimate question was whether the actions that gave rise to liability occurred before dissolution.<sup>40</sup> If so, "the State's claims existed as contingent liabilities of Anderson Petro, and as unmatured and unliquidated claims against it, prior to its dissolution."<sup>41</sup>

In discussing the October 2005 Order, the court noted that the well had ceased production on or before March 31, 2002, was not properly plugged in compliance with the Commission's rules, and was out of compliance from April 1, 2003 until October 18, 2004.<sup>42</sup> Thus, all of the events giving rise to the assessment of penalties occurred *prior* to the forfeiture of Anderson Petro's corporate charter.<sup>43</sup> As a result, "[f]rom the

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<sup>35</sup> *Id.* at 815–16.

<sup>36</sup> *Id.* at 816–17.

<sup>37</sup> *Id.* at 817 (citing *United States v. Leal*, 30 F.3d 577, 586 (5th Cir. 1994)); *see also* *Warren Co., Inc. v. Comm'r*, 135 F.2d 679, 684 (5th Cir. 1943) (contingent liability is potential liability that may become absolute upon the happening of a future event).

<sup>38</sup> *See Anderson Petro-Equip.*, 317 S.W.2d at 817 (citing *Arch Petroleum, Inc. v. Sharp*, 958 S.W.2d 475, 478 (Tex. App.—Austin 1997, no pet.)).

<sup>39</sup> *Id.*

<sup>40</sup> *See id.* at 818.

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See id.*

commencement of the period of non-compliance, Anderson Petro had a contingent liability to the Commission for administrative and civil penalties.”<sup>44</sup> Additionally, the State had an unmatured claim against Anderson Petro for civil penalties in the event that Anderson Petro failed to pay the assessed penalties.<sup>45</sup>

The court reached a similar result regarding the April 2006 Order.<sup>46</sup> As with the October 2005 Order, the events giving rise to the assessments contained in the April 2006 Order and the claims asserted by the State occurred prior to the date Anderson Petro forfeited its corporate charter.<sup>47</sup> Consequently, the State’s claims existed as “either a contingent liability of, or an unmatured claim against, Anderson Petro prior to its dissolution.”<sup>48</sup> Because the actions giving rise to liability occurred prior to dissolution, the State was entitled to recover from Anderson Petro, and its claims were not barred.<sup>49</sup>

### C. Comparing *Hunter* and *Anderson Petro*

Because of *Anderson Petro*’s relatively broad analysis under the new statutory scheme,<sup>50</sup> an uncertainty exists as to whether *any* conduct giving rise to liability before termination may create an existing claim. In *Hunter*, though, the negligence giving rise to Moeller’s injury—the failure to service the elevator—occurred prior to dissolution.<sup>51</sup> The Court in *Hunter* concluded that Moeller’s claim was a post-dissolution claim, since the injury occurred after termination.<sup>52</sup>

Arguably the two opinions can be reconciled. In *Anderson Petro*, the conditions giving rise to liability—the failure to plug the wells for 12 months—occurred prior to dissolution.<sup>53</sup> At that point, the State merely needed to reduce the amount spent on plugging the well to judgment, which occurred post-dissolution.<sup>54</sup> The conditions for liability had occurred; it was

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<sup>44</sup> *Id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See id.* at 819.

<sup>47</sup> *See id.*

<sup>48</sup> *Id.*

<sup>49</sup> *See id.* at 817, 819–20.

<sup>50</sup> *See id.*

<sup>51</sup> *See Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 548 (Tex. 1981).

<sup>52</sup> *See id.* at 552.

<sup>53</sup> *See* 317 S.W.3d at 818.

<sup>54</sup> *See id.* at 819–20.



merely a matter of the State taking the procedural steps necessary to reduce the amount incurred to a judgment that could be enforced against the corporation.

However, the Austin Court of Appeals in *Anderson Petro* did not limit its analysis to specifically state that the claim was contingent only because the 12 months had expired, and that the State merely needed to reduce the amount owed to judgment.<sup>55</sup> What if the 12 months had not expired? What if *Anderson Petro* had only stopped drilling? What if the well was producing oil when the corporation dissolved?

The potentially broad applicability of the term “contingent liability” has raised the following questions: (1) whether personal injury claims, with some events giving rise to liability occurring prior to termination can be brought post-termination; and (2) whether products liability claims, with exposure occurring prior to termination, can be brought post-termination. Because the Texas Business Organizations Code is a relatively new statute<sup>56</sup> and the definitions of “claim” and “existing claim” have only been in existence since the 1991 definitions under Article 7.12 were added, there is little to no guidance on the issue in either the statute itself or from subsequent case law interpretation.

#### IV. EXISTING CLAIMS UNDER THE BANKRUPTCY CODE

The clear issue, then, is: what actions give rise to liability such that a claim may be considered a contingent liability and be brought post-termination? Although there is no case law directly on point—other than the extent to which the *Anderson Petro* cases address the issue—the timing of a claim is also important in bankruptcy.<sup>57</sup> Therefore, case law interpreting

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<sup>55</sup> *See id.*

<sup>56</sup> On January 1, 2010, the Texas Business Corporation Act expired and was replaced by the Texas Business Organizations Code. *See* TEX. BUS. CORP. ACT ANN. art. 11.02(B) (expired Jan. 1, 2010). For entities formed before January 1, 2006, the provisions of the Business Organizations Code did not apply until January 1, 2010, unless the entity elected early adoption. *See Anderson Petro*, 317 S.W.3d at 815–16 n.2. Although the Texas Business Corporation Act was replaced by the Business Organizations Code, the Business Organizations Code incorporates the 1991 amended Article 7.12 definitions of “claim” and “existing claim.” *See* TEX. BUS. ORGS. CODE ANN. § 11.001(1), (3) (West 2012).

<sup>57</sup> Another source of law that analyzes existing and future claims is the Uniform Fraudulent Transfer Act. TEX. BUS. & COM. CODE ANN. §§ 24.001–.013 (West 2009). Texas Business and Commerce Code section 24.002 defines “claim” similarly to the definition under the Business Organizations Code. *Id.* § 24.002(3). Additionally, Sections 24.005 and 24.006 discuss fraudulent transfers as to present and future creditors. *Id.* §§ 24.005, 24.006. Thus, case law interpreting the

whether a claim exists in bankruptcy can be used as a guidepost to evaluate the meaning of “existing claim” and contingent liability under the Business Organizations Code.<sup>58</sup>

Under the Bankruptcy Code, all pre-petition claims are generally subject to discharge.<sup>59</sup> The Bankruptcy Code defines a claim as a “right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, secured or unsecured.”<sup>60</sup> The legislative history of the Bankruptcy Code reflects Congress’s intent that the term “claim” be given broad interpretation so that all legal obligations of the debtor, no matter how contingent, will be dealt with in the bankruptcy case.<sup>61</sup> The definition of “claim” is broad in order to further the fresh-start policy of the Bankruptcy Code.<sup>62</sup>

To analyze what qualifies as a “claim” under the Bankruptcy Code, two major tests have surfaced: (1) the conduct test; and (2) the pre-petition relationship test.<sup>63</sup>

#### A. *The Conduct Test*

The “conduct test” looks to the inclusive definition of claim and holds that a claim arises when the acts giving rise to a debtor’s liability were

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Texas Uniform Fraudulent Transfer Act, or any fraudulent transfer act encompassing similar definitions, would also be insightful to discern the meaning of an “existing claim” under the Business Organizations Code. That discussion is outside the scope of this article, however.

<sup>58</sup>Note the irony here, however. Under the Business Organizations Code, a terminated entity will argue that a claim is a post-termination claim so that a party is barred from asserting that claim against the entity. In Bankruptcy, an individual or entity filing bankruptcy usually will argue that the claim is a pre-petition claim and thus dischargeable in bankruptcy. Thus, terminated entities have an interest in a claim being a post-termination claim, while bankrupt individuals and entities have an interest in a claim being a pre-petition claim.

<sup>59</sup>See 11 U.S.C. § 727(b) (2012); *cf.* In re Hexcel Corp., 239 B.R. 564, 567 (N.D. Cal. 1999) (a future claim that cannot be contemplated by the parties is not discharged under the Bankruptcy Code, even if the claim stems from the pre-petition conduct of the debtor).

<sup>60</sup>11 U.S.C. § 101(5).

<sup>61</sup>See In re Nat’l Gypsum Co., 139 B.R. 397, 405 (N.D. Tex. 1992) (citing H.R. Rep. No. 95-595, at 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6266); In re Kennise Diversified Corp., 34 B.R. 237, 244 n.6 (Bankr. S.D.N.Y. 1983); Kallen v. Litas, 47 B.R. 977, 982 (N.D. Ill. 1985), *rev’d on other grounds by* In re Brass Kettle Restaurant v. Ash, 790 F.2d 574 (7th Cir. 1986); In re Barnett, 42 B.R. 254, 257 (Bankr. S.D.N.Y. 1984).

<sup>62</sup>See In re Indian River Estates, Inc., 293 B.R. 429, 434 (Bankr. N.D. Ohio 2003).

<sup>63</sup>See James T. Markus & Donald J. Quigley, *Treating Latent Medical Tort Claims in Bankruptcy*, 21 AM. BANKR. INST. J., July–Aug. 2002, at 18, 18.

performed, not when the harm itself manifested.<sup>64</sup> A right to payment is created when the conduct giving rise to the alleged liability occurs.<sup>65</sup>

In *A.H. Robins*, Grady was inserted with a Dalkon-Shield intra-uterine device several years prior to the petition date.<sup>66</sup> After the petition was filed, Grady manifested injuries related to the Dalkon Shield.<sup>67</sup> Grady argued that she was not stayed from bringing suit against the debtor because her claim arose post-petition.<sup>68</sup> The Fourth Circuit disagreed and held that Grady's claim was a pre-petition contingent claim, since all of the acts constituting the tort other than the manifestation of injury occurred prior to the petition date.<sup>69</sup> Thus, Grady's pre-petition claim was subject to discharge.<sup>70</sup>

A similar test was applied in *In re Waterman S.S. Corp.*<sup>71</sup> In *Waterman*, former employees of the debtor sought a declaratory judgment that their post-confirmation asbestosis claims were not discharged by the confirmation order.<sup>72</sup> Following the lead of the *Johns-Mansville* asbestosis cases, the court noted that—since the asbestos was manufactured pre-petition, and since the individuals were exposed pre-petition—the former employees were creditors under the Bankruptcy Code.<sup>73</sup> Basing its decision on the Code's definition of "claim," the legislative history surrounding 11

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<sup>64</sup> See *In re Parker*, 264 B.R. 685, 696 (B.A.P. 10th Cir. 2002) (legal malpractice claim arises when malpractice actually occurs, despite the fact that claimant was not aware of malpractice pre-petition and continued to be represented by debtor after filing bankruptcy); *Grady v. A.H. Robins Co.*, 839 F.2d 198, 198–99, 202–03 (4th Cir. 1988); *In re Emons Indus., Inc.*, 220 B.R. 182, 192 (Bankr. S.D.N.Y. 1998) (claimants suing for injuries sustained as a result of their exposure to drug, none of whose identities was known to debtor on plan confirmation date, were pre-petition claimants); *In re Edge*, 60 B.R. 690, 705 (Bankr. M.D. Tenn. 1986) (dentist's alleged negligent treatment received prior to filing but discovered afterwards arose at the time of the debtor's prepetition misconduct).

<sup>65</sup> See *Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1577 (11th Cir. 1995).

<sup>66</sup> See *A.H. Robins*, 839 F.2d at 199.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.* at 201.

<sup>69</sup> See *id.* at 203.

<sup>70</sup> See *id.*

<sup>71</sup> 141 B.R. 552 (Bankr. S.D.N.Y. 1992), *vacated on other grounds*, 157 B.R. 220 (S.D.N.Y. 1993).

<sup>72</sup> See *id.* at 554.

<sup>73</sup> *Id.* at 556–57; see also *In re Johns-Manville Corp.*, 57 B.R. 680 (Bankr. S.D.N.Y. 1986) (“[T]he focus should be on the time when the acts giving rise to the alleged liability were performed. . .”).

U.S.C. § 101(5), and the “fresh start,”<sup>74</sup> the court held that “a claim arises at the moment when acts giving rise to the alleged liability are performed.”<sup>75</sup> Therefore, the claims arose at the moment the claimants came into contact with the asbestos, prior to confirmation of the Chapter 11 reorganization plan.<sup>76</sup>

While the conduct test carries out the full meaning of the Code’s definition of “claims,” the test has been criticized by several courts and commentators<sup>77</sup> as expanding the number of claims that can be asserted against debtors,<sup>78</sup> while also greatly limiting the rights of claimants who have had no exposure to the product or action giving rise to their claims.<sup>79</sup>

### B. The Pre-petition Relationship Test

The pre-petition relationship test contains an additional requirement of some type of pre-petition relationship—such as contact, impact, exposure or privity—between the claimant and the debtor’s pre-petition conduct.<sup>80</sup> The creditor must have had some pre-petition involvement with the product that

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<sup>74</sup>“Fresh start” is defined as “a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.” *Brown v. Felsen*, 442 U.S. 127, 128 (1979).

<sup>75</sup>*In re Waterman*, 141 B.R. at 556.

<sup>76</sup>*See id.*

<sup>77</sup>C.R. Bowles, Jr., *Is It All About Time? The End of Frenville and Its Impact on Environmental Claims*, 30 AM. BANKR. INST. J., Mar. 2011, at 34, 35.

<sup>78</sup>*See, e.g., Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1577 (11th Cir. 1995) (noting this approach defines claim too broadly and stretches the scope of § 101(5) too far).

<sup>79</sup>Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2071 (2000) (claimants who did not use, or have any exposure to, the product until long after the bankruptcy case concluded would nonetheless be characterized as a preexisting claim); *In re Grossman’s Inc.*, 607 F.3d 114, 123 (3d Cir. 2010) (quoting Resnick, *supra* note 79, at 2071 (“claimants may be unidentifiable because of their lack of contact with the debtor or product, and thus may not have had an opportunity to participate in the bankruptcy case”).

<sup>80</sup>Markus & Quigley, *supra* note 63, at 18. Pertaining specifically to products liability, *Epstein* holds:

[A]n individual has a § 101(5) claim against a debtor . . . 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.

58 F.3d at 1577.

later resulted in harm.<sup>81</sup> Although more widespread, the pre-petition relationship test has been criticized by some for narrowing the definition of “claim” under 11 U.S.C. § 101(5).<sup>82</sup>

In *In re Lemelle*, the plaintiff brought a wrongful death action against a mobile home manufacturer that had emerged from Chapter 11 reorganization proceedings.<sup>83</sup> The plaintiff alleged that the decedent’s death was caused by the manufacturer’s defective design and construction.<sup>84</sup> The decedent died in a fire allegedly caused by the manufacturing defect about two years after the debtor’s reorganization plan was confirmed, and approximately 15 years after the design and manufacture of the mobile home.<sup>85</sup> The district court determined that the reorganization plan discharged all of the debtor’s obligations, including liability on the plaintiff’s tort claim.<sup>86</sup>

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<sup>81</sup> See Markus & Quigley, *supra* note 63, at 18; *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1277 (5th Cir. 1994) (quoting *In re Piper Aircraft*, 162 B.R. 619, 627 (Bankr. S.D. Fla. 1994)); *In re Chateaugay*, 944 F.2d 997, 1004–05 (2d Cir. 1991) (relationship between environmental regulating agencies and those subject to regulation provides sufficient contemplation of contingencies to bring most obligations based on pre-petition conduct within the definition of “claims”); *In re Chance Indus., Inc.*, 367 B.R. 689, 706 (Bankr. D. Kan. 2006) (where no pre-petition relationship existed between debtor and minor, confirmation order did not discharge claims of minor who, following confirmation of Chapter 11 reorganization plan, allegedly was injured on an amusement ride manufactured pre-petition by debtors); *In re Pan Am. Hosp. Corp.*, 364 B.R. 839, 847 (Bankr. S.D. Fla. 2007) (wrongful death claim, based on alleged negligence in failing to properly intubate patient pre-petition, was pre-petition claim due to patient’s admission to the hospital and resulting relationship with doctors all occurring pre-petition); *In re Pettibone Corp.*, 90 B.R. 918, 930 (Bankr. N.D. Ill. 1988) (claimant’s employer purchased forklift post-petition, and therefore the claimant had no pre-petition contact with the debtor). The Ninth Circuit has adopted a similar test known as the “fair contemplation” test. See *In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993) (claim of environmental liability arises under Bankruptcy Code once it is within the claimant’s fair contemplation); *In re Nat’l Gypsum*, 139 B.R. 397, 409 (N.D. Tex. 1992) (pre-petition conduct of debtor must be such that the parties can fairly contemplate a problem in the future); *In re Hexcel*, 239 B.R. 564, 567 (N.D. Cal. 1999) (claim cannot fall within the purview of § 101(5), and thus be discharged as a pre-petition claim, unless the claim could have been contemplated by the parties prior to the bankruptcy proceedings).

<sup>82</sup> *In re Grossman’s Inc.*, 607 F.3d at 125 (citing 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, 31–35 (1995)).

<sup>83</sup> See *Lemelle*, 18 F.3d at 1270–71.

<sup>84</sup> See *id.* at 1271.

<sup>85</sup> See *In re Grossman’s Inc.*, 607 F.3d at 123–24 (citing *Lemelle*, 18 F.3d at 1271).

<sup>86</sup> *Lemelle*, 18 F.3d at 1274.

The Fifth Circuit reversed, holding that for the plaintiff's claim to have been discharged, "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."<sup>87</sup> The claimant failed to produce any evidence of a pre-petition relationship between the debtor and the claimant.<sup>88</sup> Therefore, the plaintiff's claims were not discharged in the debtor's bankruptcy proceedings.<sup>89</sup> In the court's opinion, even the broad definition of "claim" could not be construed to include "claimants whom the record indicates were completely unknown and unidentified at the time [the debtor] filed its petition and whose rights depended entirely on the fortuity of future occurrences."<sup>90</sup>

Similarly, in *Epstein*, the court held that a class of future claimants, who might assert personal injury or property damage claims against Piper based on products manufactured or sold prior to confirmation, did not have claims under § 101(5).<sup>91</sup> Piper manufactured and distributed general aviation aircrafts, 50,000 to 60,000 of which were still operational in the United States at the time of filing for bankruptcy.<sup>92</sup> Prior to bankruptcy, Piper had been a defendant in several lawsuits based on its manufacture, design, sale, and distribution of aircrafts and parts.<sup>93</sup> With 50,000 to 60,000 Piper aircrafts still in operation, accidents would undoubtedly occur.<sup>94</sup> Thus, additional though unidentifiable individuals would have similar product liability claims as a result of incidents occurring after confirmation of the debtor's Chapter 11 reorganization plan, but arising out of aircraft or parts manufactured, designed, or distributed prior to bankruptcy.<sup>95</sup>

In its analysis, the court stated that the debtor's pre-petition conduct gives rise to a claim "only if there is a relationship established before confirmation between an identifiable claimant or group of claimants and that prepetition conduct."<sup>96</sup> Here, the future products-liability claimants did not have pre-confirmation claims since there was no pre-confirmation

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<sup>87</sup> *Id.* at 1277 (citation omitted).

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See* 58 F.3d 1573, 1575-76 (11th Cir. 1995).

<sup>92</sup> *In re Piper Aircraft*, 162 B.R. 619, 621 (Bankr. S.D. Fla. 1994).

<sup>93</sup> *See id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Epstein*, 58 F.3d at 1577.

exposure to a specifically identifiable defective product or any other pre-confirmation relationship between Piper and the future claimants.<sup>97</sup> Thus, the future claimants did not hold claims as defined under § 101(5) of the Bankruptcy Code.<sup>98</sup>

### C. *Are the Two Tests Reconcilable?*

The cases involving the conduct test involve facts that would have satisfied the relationship test.<sup>99</sup> In all cases, the exposure occurred pre-petition, thus creating the necessary “relationship” with the debtor’s conduct.<sup>100</sup> Moreover, “under the actual facts, there was no possibility of future exposure to new and currently unknowable plaintiffs because the offending products had in effect been removed from the stream of commerce.”<sup>101</sup> Conversely, in the relationship-test cases, the offending products were still at large, thus creating an ongoing risk of future injuries on unsuspecting and unknowable plaintiffs.<sup>102</sup> The factual distinction between the two types of cases “may be summarized as ‘future manifestation’ cases vs. ‘future injury’ cases.”<sup>103</sup>

*In re Piper Aircraft* even acknowledges that the conduct and pre-petition relationship tests are not mutually exclusive.<sup>104</sup> In fact, the court noted that “[r]equiring that there be some prepetition relationship between the Debtor and claimant would not change the analysis or results of the Conduct Test cases.”<sup>105</sup> A prepetition relationship is implicit in the opinions applying the conduct test.<sup>106</sup> For example, in the asbestos cases, the future claimants were known to have had pre-petition exposure to the dangerous substance.<sup>107</sup> And in *In re Edge*, the court noted that the Bankruptcy Code

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<sup>97</sup> *See id.* at 1578.

<sup>98</sup> *See id.*

<sup>99</sup> *See* Markus & Quigley, *supra* note 63, at 18.

<sup>100</sup> *Id.* at 18–19.

<sup>101</sup> *Id.* at 19.

<sup>102</sup> *See id.*

<sup>103</sup> *Id.*

<sup>104</sup> 162 B.R. 619, 627 (Bankr. S.D. Fla. 1994); *see also* Concord West of the Ashley Homeowners’ Ass’n v. J.A. Jones, Inc., No. 3:09-CV-00182-GCM, 2010 WL 148432, at \*2 (W.D.N.C. Jan. 12, 2010).

<sup>105</sup> *In re Piper Aircraft*, 162 B.R. at 627.

<sup>106</sup> *See id.*

<sup>107</sup> *See id.* (citing *In re Waterman*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992), *vacated on other grounds*, 157 B.R. 220 (S.D.N.Y. 1993)).

recognizes a pre-petition claim “at the earliest point in the relationship between victim and wrongdoer.”<sup>108</sup>

#### *D. Due Process Concerns*

Further issues that must be addressed when choosing the test to define what claims survive corporate termination are those concerns raised by the Due Process Clause. Courts have discussed the due process problems that could arise from the discharge of a claim before the parties could contemplate that a claim existed.<sup>109</sup> In *In re Kewanee Boiler Corp.*, for example, the plaintiff was injured in a post-petition boiler room accident as a result of alleged defects in a boiler manufactured pre-petition by the debtor.<sup>110</sup> The court held that even if a claim could be asserted by Smith pre-petition, “this would raise other serious questions under the Code and Constitution. Such ruling would force Smith to be bound by proceedings in which he did not and could not participate.”<sup>111</sup> The debtor cannot constitutionally discharge the claims of persons like Smith whose causes of action might accrue under state law post-confirmation.<sup>112</sup>

The Second Circuit has also recognized the potential due process problems associated with the discharge of future claims that could not have been contemplated pre-petition.<sup>113</sup> In an illustrative anecdote, the court imagines a bridge-building company that builds 10,000 bridges.<sup>114</sup> After having built 10,000 bridges, the company files for bankruptcy.<sup>115</sup> “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?”<sup>116</sup> Huge practical and constitutional problems would arise from the recognition of such a claim, since the potential victims are unidentified and impossible to

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<sup>108</sup> *Id.* (quoting *In re Edge*, 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986) (internal quotations omitted)).

<sup>109</sup> *See, e.g.*, *In re Hexcel Corp.*, 239 B.R. 564, 571 (N.D. Cal. 1999); *see also* *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1277 (5th Cir. 1994); *In re Fairchild Aircraft Corp.*, 184 B.R. 910, 927 (Bankr. W.D. Tex. 1995), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998); *In re UNR Indus., Inc.*, 29 B.R. 741, 747–48 (N.D. Ill. 1983).

<sup>110</sup> *In re Kewanee Boiler Corp.*, 198 B.R. 519, 522 (Bankr. N.D. Ill. 1996).

<sup>111</sup> *Id.* at 528–29.

<sup>112</sup> *See id.* at 540.

<sup>113</sup> *See In re Chateaugay*, 944 F.2d 997, 1003 (2d Cir. 1991).

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> *Id.*



identify.<sup>117</sup> Thus, discharge of an arguably pre-petition claim can give rise to due process concerns.<sup>118</sup>

## V. APPLICATION TO CLAIMS AGAINST A TERMINATED FILING ENTITY

After analyzing the Bankruptcy Code's interpretation of a pre-petition claim, a similar analysis can be applied to evaluate whether Lucky and Chance will have a claim against the two terminated entities Uh-Oh, Inc. and Yikes, Inc.

### A. *Uh-Oh, Inc.'s Potential Liability*

Lucky purchased the product before Uh-Oh, Inc. formally terminated its corporate existence. His injuries caused by the defective product, however, did not occur until after Uh-Oh, Inc. had filed its certificate of termination with the Secretary of State. Beginning with the conduct test, Lucky most likely has an existing claim that he may assert, so long as he files suit within three years of May 1, 2013.<sup>119</sup> Assuming that the product Lucky purchased is defective, the conduct causing the product defect occurred prior to termination—namely, the defective design and/or manufacture.<sup>120</sup> Under the broad conduct test, then, Lucky can sue Uh-Oh, Inc. to recover for his injuries caused by the defective product.<sup>121</sup>

Under the pre-petition relationship test, Lucky may have a more difficult time asserting a claim against Uh-Oh, Inc. If Lucky had purchased the product and sustained physical injury prior to termination, Lucky's claim against Uh-Oh would be an "existing claim," and he would be permitted to sue after termination.<sup>122</sup> Lucky's claim would have accrued and

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<sup>117</sup> See *id.*

<sup>118</sup> See *id.*; *In re Kewanee Boiler Corp.*, 198 B.R. 519, 540 (Bankr. N.D. Ill. 1996).

<sup>119</sup> See TEX. BUS. ORGS. CODE ANN. § 11.359(a) (West 2012); *Grady v. A.H. Robins Co.*, 839 F.2d 198, 203 (4th Cir. 1988). Lucky must also file suit within the applicable statute of limitations. TEX. BUS. ORGS. CODE ANN. § 11.001(3).

<sup>120</sup> See *In re Hassanally*, 208 B.R. 46, 54–55 (B.A.P. 9th Cir. 1997) (negligent construction claim was pre-petition contingent claim and thus discharged in debtor's bankruptcy, even though the bank did not discover the construction defect until post-petition).

<sup>121</sup> But see *Markus & Quigley*, *supra* note 63, at 19 (pointing out that in cases applying the conduct test there was no possibility of future exposure to new and currently unknowable plaintiffs because the offending products had in effect been removed from the stream of commerce). If Uh-Oh, Inc.'s defective product is still in the stream of commerce, Uh-Oh, Inc. has the potential for boundless liability from all claimants injured by its product.

<sup>122</sup> See *In re Pettibone Corp.*, 90 B.R. 918, 932 (Bankr. N.D. Ill. 1988).

need only be reduced to judgment at that point.<sup>123</sup> Here, however, Lucky was injured *after* termination. Whether Lucky has a claim depends on if there was a sufficient pre-petition relationship between Lucky and Uh-Oh, Inc. to show that his claim arose prior to termination.

Lucky will argue that his purchase of the defective product created a sufficient pre-petition relationship such that he is not barred from recovery. The solution is not clearly defined under the bankruptcy common law, however. In fact, *In re Pettibone* specifically chose not to answer this difficult question, stating “[o]ne question that need not be reached here is this: Whether a party endangered by a defective product pre-petition through contract privity, use, or otherwise but not injured until post-petition has an unaccrued claim . . . .”<sup>124</sup>

A similar result occurred in *In re Correct Manufacturing Corp.*, where Simmons asserted claims for personal injuries that occurred after the filing of the bankruptcy petition.<sup>125</sup> Simmons argued that his claim arose prepetition, when the equipment was allegedly negligently manufactured.<sup>126</sup> In its decision, the court held that there would need to be prepetition events directly linking the debtor to Simmons.<sup>127</sup> The court refused to rule on that issue, though, because Simmons failed to produce any evidence of a relationship that might have existed between Simmons and the debtor.<sup>128</sup>

*In re Piper* provides some guidance, but is not definitive either.<sup>129</sup> First, *In re Piper* notes that not every pre-petition relationship gives rise to a claim.<sup>130</sup> *In re Piper* concerned an unascertained class of future plaintiffs who would be injured by Piper products in the future.<sup>131</sup> The fact that unknown persons might suffer personal injury or property damage in the future was insufficient to create a “prepetition exposure to a specific identifiable defective product or to any other prepetition relationship

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<sup>123</sup> See *Anderson Petro-Equip., Inc. v. State*, No. 03-13-00176-CV, 2013 WL 5858010, at \*3 (Tex. App.—Austin Oct. 22, 2013, pet. denied) (mem. op.).

<sup>124</sup> *In re Pettibone*, 90 B.R. at 932; see also *In re Chateaugay*, 944 F.2d 997, 1004 (2d Cir. 1991), (“[w]e need not decide how the definition of ‘claim’ applies to . . . the extreme case of pre-petition conduct that has not yet resulted in any tortious consequence to a victim.”).

<sup>125</sup> 167 B.R. 458, 459 (Bankr. S.D. Ohio 1994).

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> See *id.* at 459–60.

<sup>129</sup> See 162 B.R. 619, 621 (Bankr. S.D. Fla. 1994).

<sup>130</sup> See *id.* at 627 (noting that a pre-petition relationship connecting the conduct to the claimant is essential).

<sup>131</sup> See *id.* at 621.

between the Debtor and the broadly defined class . . . .”<sup>132</sup> The court did not analyze whether those injured by malfunctioning aircraft post-petition would have a claim dischargeable in bankruptcy.

However, in delineating the boundaries of the pre-petition relationship test, *In re Piper* did hold that pre-petition “contact” is sufficient to create a relationship between debtor and claimant.<sup>133</sup> Lucky can therefore argue that he came into contact with Uh-Oh’s defective product prior to termination, and that contact is sufficient to create an “existing claim” under the Business Organizations Code.<sup>134</sup> In many of the cases that characterized a claim as post-petition, the creditor does not come into contact with the defective product until after the bankruptcy case is filed.<sup>135</sup> Lucky, though, purchased the defective product prior to termination. Thus, Lucky has a strong argument in his effort to bring a claim against Uh-Oh, Inc.

Lucky will have to get around Uh-Oh, Inc.’s argument relying on *Hunter v. Fort Worth Capital Corp.*, however.<sup>136</sup> In *Hunter*, the Court noted that Moeller’s cause of action did not accrue until he was injured—more than eleven years after the company dissolved.<sup>137</sup> Even though Hunter-Hayes’ allegedly negligent conduct—servicing the elevator—occurred prior to dissolution, the Court found that Moeller’s post-dissolution claim against the corporation was barred.<sup>138</sup> Uh-Oh will argue that this holding should carry forward to the current statutory scheme, since the Texas Business Organizations Code was not, for the most part, intended to substantively change the laws governing business organizations.<sup>139</sup>

The definition of “claim,” however, which includes contingent liability, did not exist at the time the *Hunter* opinion was issued. Furthermore,

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<sup>132</sup> *Id.* at 627.

<sup>133</sup> *See id.*

<sup>134</sup> *See In re Edge*, 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986) (stating that a bankruptcy claim may exist even where the claimant as yet has no access to the judicial system for recovery).

<sup>135</sup> *See, e.g., In re Grumman Olson Indus., Inc.*, 445 B.R. 243, 251, 254 (Bankr. S.D.N.Y. 2011) (while some of debtor’s vehicles would undoubtedly malfunction post-petition, accident victim who was not involved in accident until after closing the bankruptcy case did not have a “claim” against debtor that could have been dealt with in the bankruptcy case); *In re Piper*, 162 B.R. at 621; *In re Pettibone Corp.*, 90 B.R. 918, 932 (Bankr. N.D. Ill. 1988).

<sup>136</sup> 620 S.W.2d 547, 549 (Tex. 1981).

<sup>137</sup> *See id.*

<sup>138</sup> *See id.*

<sup>139</sup> *See* Slideshow Presentation: Texas Secretary of State Business and Public Filings Division, *Background Structure of the Texas Business Organizations Code*, available at [http://www.sos.state.tx.us/corp/forms/boc/structure\\_effective\\_dates.pps](http://www.sos.state.tx.us/corp/forms/boc/structure_effective_dates.pps).

Moeller's claim would have still been barred under Article 7.12 because he sought recovery more than three years after the corporation's dissolution.<sup>140</sup> Additionally, Lucky can argue that, by following *Hunter*, Lucky would be completely and unjustifiably barred from recovery, despite no inaction or delay on his part.

If Lucky purchased the product after Uh-Oh, Inc. had terminated its corporate existence and was injured that same day, Lucky is without recourse. Lucky's claim does not qualify as an "existing claim," even though Uh-Oh, Inc. wholly manufactured and sold the defective product before termination.<sup>141</sup> There is no relationship between a tort claimant and an entity "until the claimant is at least exposed to the debtor's defective product."<sup>142</sup> As a result, where the claimant is exposed to the product and injured post-termination, he has no "existing claim" against the terminated filing entity.<sup>143</sup> Lucky's claim would be barred.

### B. *Yikes, Inc.'s Potential Liability*

Starting with the conduct test, Chance most likely has an existing claim that he will be able to assert against Yikes, Inc., so long as he files within three years of the entity's termination.<sup>144</sup> Since the defective product was manufactured prior to termination, and since Chance was exposed prior to termination, Chance's claim qualifies as an "existing claim."<sup>145</sup> According to *In re Waterman*, "a claim arises at the moment when acts giving rise to the alleged liability are performed."<sup>146</sup> Therefore, Chance's claim arose at the moment he came into contact with the product, even though his injuries did not manifest until after termination.<sup>147</sup> At the time of termination,

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<sup>140</sup> See TEX. BUS. CORP. ACT ANN. art. 7.12(A) (expired Jan. 1, 2010).

<sup>141</sup> See *In re Pettibone*, 90 B.R. 918, 932 (Bankr. N.D. Ill. 1988).

<sup>142</sup> *Id.*

<sup>143</sup> See *id.* (citing *In re White Motor Corp.*, CIV. A. C84-402, 1984 WL 15645, \*2 (N.D. Ohio Feb. 10, 1984).

<sup>144</sup> See TEX. BUS. ORGS. CODE ANN. § 11.359(a) (West 2012); see also *Grady v. A.H. Robins Co.*, 839 F.2d 198, 201 (4th Cir. 1988). Chance must also file suit within the applicable statute of limitations. TEX. BUS. ORGS. CODE ANN. § 11.001(3).

<sup>145</sup> See *Grady*, 839 F.2d at 203 (right to payment arose at the time plaintiff was inserted with the Dalkon Shield); *In re Waterman*, 141 B.R. 552, 556-57 (Bankr. S.D.N.Y. 1992), *vacated on other grounds*, 157 B.R. 220 (S.D.N.Y. 1993); *In re Johns-Manville Corp.*, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986).

<sup>146</sup> 141 B.R. at 556.

<sup>147</sup> See *id.*

Chance's right to payment depended solely on manifestation, a contingent event.<sup>148</sup>

The pre-petition relationship test yields the same results. Chance's exposure to the product manufactured by Yikes, Inc., creates the necessary pre-petition relationship for an "existing claim." According to *In re Pettibone*:

[I]n [the] case of pre-petition exposure to harmful chemicals . . . the bankruptcy courts will presume that a bodily injury was sustained at the time of the exposure to the defective product. For bankruptcy purposes, the claim will be deemed to arise at that time, regardless of whether the injury remains latent and does not manifest itself until after a case is commenced.<sup>149</sup>

Similarly here, it can be presumed that the injury was sustained at the time of the exposure to the product. Thus, Chance's claim arose when he purchased the product pre-termination and is not barred.

If Chance purchases the product post-termination, is exposed to the harmful substance post-termination, and sustains injuries post-termination, Chance's claim does not qualify as an existing claim.<sup>150</sup> Chance's relationship with Yikes, Inc. did not exist until he purchased the product post-termination. Under the basic conduct test, though, Chance could argue that the conduct causing liability—the manufacture of the product—occurred prior to termination.

## VI. CONCLUSION

Because cases interpreting an "existing claim" under the Business Organizations Code are few and far between, it is necessary to look to other legal arenas to provide guidance on this issue. Bankruptcy's conduct and pre-petition relationship tests—used to determine whether a claim against a debtor is a pre-petition claim and thus discharged in bankruptcy—are useful tools in ascertaining whether a claimant has an existing claim against a terminated filing entity. Because the timing of a claim is critical in bankruptcy, case law interpreting whether a claim exists in bankruptcy provides an analytical starting point to understanding the meaning of

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<sup>148</sup> See *Grady*, 839 F.2d at 203.

<sup>149</sup> See *In re Pettibone*, 90 B.R. 918, 932 (Bankr. N.D. Ill. 1988).

<sup>150</sup> See *id.*

“existing claim” and contingent liability under the Business Organizations Code.