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Barring Unknown and Unknowable Claims: The Search for the Holy Grail

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Barring Unknown and Unknowable Claims:
The Search for the Holy Grail

The question of whether and to what extent so-called unknown or unknowable future claims can be barred in a bankruptcy case has been debated by practitioners and courts alike for decades. The purpose of this article is to help distill some of the key factors pulled from prominent "unknown" claims cases in an effort to assist in dealing with this challenging issue. Beginning with an overview of what constitutes "unknown," "unknowable," or so-called "future" claims, the discussion below then provides an overview of key court decisions addressing future claims, and, in conclusion, practical considerations to take into account in light of the factors raised in case law.

A. What is an "Unknown" or "Unknowable" Claim?

A "claim" is defined in Title 11 of the United States Code (the "**Bankruptcy Code**") to include the "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ." Bankruptcy Code, Section 101(5)(A). In turn, "unknown" or "unknowable" claims are future claims – none of which are defined in the Bankruptcy Code – that have been described by one court as claims of those "whose injuries are caused by prepetition conduct but do not become manifest until after confirmation." *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991).

There are many examples and variations of these types of claims, but they typically involve an injury to a third party that occurred (1) prior to confirmation but is unknown to the debtor and/or the third party, (2) following plan confirmation as a result of some action or event that took place prior to the bankruptcy, or (3) prior to the consummation of a Section 363 sale free and clear of liens, claims, and interests but is unknown to the debtor or the third party. Regardless, it should be noted that the United States Supreme Court has recognized that the term "claim" should be interpreted as broadly as possible. *See FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 302 (2003).

B. Overview of Key Cases Addressing "Unknown" Claims.

There are many bankruptcy-related cases that have dealt with the issue of "unknown" or future claims over the last several decades. The following key cases have been identified as providing significant guidance to practitioners in their evaluation of future claim issues:

1. *Arch Wireless, Inc. v. Nationwide Paging, Inc. (In re Arch Wireless, Inc.)*, 534 F.3d 76 (1st Cir. 2008) (the "**Arch Wireless Case**");

2. *Jeld-Wen, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114 (3d Cir. 2010) (the "**Grossman's Case**");

3. *Williams v. Placid Oil Company (In re Placid Oil Co.)*, 753 F.3d 151 (5th Cir. 2014) (the "**Placid Oil Case**");

4. *In re Energy Future Holdings Corp.*, 522 B.R. 520 (Bankr. D. Del. 2015) (the "**Energy Future Holdings Case**"); and

5. *Elliott* v. *General Motors LLC (In re Motors Liquidation Co.),* Case Nos. 15-2844, 15-2847, and 15-2848 (2d Cir. July 13, 2016) (the "**New GM Case**").

The factual and procedural backgrounds of each of these cases, along with an overview of the analysis and holding of each, are discussed next.

1. Arch Wireless Case.

The Arch Wireless case is important for practitioners given its focus on what is a "known" claimant and the corresponding due process rights of the claimant.

a. Case Background and Lower Court Holdings.

Arch Wireless, Inc. ("**Arch Wireless**") was in the business of supplying its customers with paging network airtime and pagers. In December 2001, Arch Wireless filed a Chapter 11 bankruptcy petition with the United States Bankruptcy Court for the District of Massachusetts. The bankruptcy court thereafter issued an order setting March 29, 2002, as the last day to file proofs of claim in the case. Notice of the bar date was given to known creditors by mailed notices and to unknown creditors by notices published in the USA Today and the Wall Street Journal. Arch Wireless then confirmed a plan of reorganization on May 15, 2002. *See* Arch Wireless Case, at 79.

Before and after filing bankruptcy, Arch Wireless had been exchanging correspondence with Nationwide Paging, Inc. ("**Nationwide**") over various billing disputes where Nationwide alleged that Arch Wireless had provided it with invoices containing billing errors and with multiple bills for defective pagers. Notwithstanding, Arch Wireless did not list Nationwide as a creditor in its case or ever provide Nationwide with any notices regarding its bankruptcy proceedings. The dispute between the two grew to the point that in June 2002, Nationwide sued Arch Wireless in state court. Approximately two years later, Arch Wireless sent Nationwide a copy of its Chapter 11 plan confirmation order and demanded that Nationwide withdraw its pre-confirmation claims. *See* Arch Wireless Case, at 79-80.

Following Nationwide's refusal to withdraw its claims, Arch Wireless filed a motion for contempt in the bankruptcy court. The bankruptcy court denied the motion filed by Arch Wireless seeking to have Nationwide held in contempt; instead, holding that Nationwide was a "known creditor" at the time of the bankruptcy filing and, as a result, had not been provided sufficient notice. The bankruptcy court then held that because Nationwide was not properly noticed, due process concerns prevented the discharge injunction in Arch Wireless' plan confirmation order from applying to Nationwide's pre-confirmation claims. The district court, in turn, affirmed the bankruptcy court. *See* Arch Wireless Case, at 80.

b. First Circuit's Holdings.

The First Circuit quickly recognized in its analysis that "[f]or notice purposes, bankruptcy law distinguishes between 'known creditors,' who are entitled to receive direct notice of each stage in the reorganization proceedings, and 'unknown creditors,' for who publication notice is sufficient." Arch Wireless Case, at 80 (*citing City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 296 (1953)). In doing so, the court rejected Arch Wireless's argument that Nationwide was an unknown claimant, drawing on the fact that the two had engaged in correspondence prior to the bankruptcy filing regarding Nationwide's asserted claims, and, therefore, "Nationwide was a 'known creditor' because its claim against Arch [Wireless] was reasonably ascertainable from the correspondence between the two companies." *Id*., at 81.

Finally, in turning to a review of due process concerns, the court of appeals rejected the argument by Arch Wireless that its discharge injunction should nonetheless apply to Nationwide because Nationwide knew of the bankruptcy filing. The court relied on the bankruptcy court's findings that while Nationwide's president had general knowledge that Arch Wireless had filed bankruptcy, there was no evidence to support Nationwide having actual knowledge of the claims bar date, confirmation hearing, or the contents of Arch Wireless's Chapter 11 plan. Because Nationwide was a known creditor, the court held that publication notice was insufficient and that Nationwide was entitled to formal notice of the bankruptcy filing and claims process. *See* Arch Wireless Case, at 82-83, 87.

2. <u>Grossman's Case</u>.

The Grossman's Case is important in understanding future claims issues given its analysis of when a claim arises.

a. <u>Case Background and Lower Court Holdings</u>.

Grossman's Inc. ("**Grossman's**") filed Chapter 11 bankruptcy in April 1997. As part of its bankruptcy case, Grossman's provided publication notice of the proof of claim filing deadline in its case. Thereafter, Grossman's plan of reorganization was confirmed in December 1997. *See* Grossman's Case, at 117.

Approximately 20 years prior to Grossman's bankruptcy filing, Mary Van Brunt ("**Ms. Van Brunt**") was remodeling her home and bought products from Grossman's that contained asbestos. She did not file a claim in the bankruptcy case because, at the time of confirmation, she manifested no systems related to asbestos exposure and, therefore, was unaware of any claim. It wasn't until 2006 that Ms. Van Brunt first started manifesting symptoms of an asbestos-related illness. In March 2007, she was then diagnosed with mesothelioma. Prior to her death in 2008, she filed suit against Jeld-Wen, Inc. ("**Jeld-Wen**"), the successor-in-interest to Grossman's. Jeld-Wen then filed a motion to reopen the bankruptcy case and requested a determination that Ms. Van Brunt's claims were discharged by the 1997 confirmation order. *See* Grossman's Case, at 117-18.

Relying on then-applicable law in the Third Circuit, the bankruptcy court ultimately entered judgment in favor of Ms. Van Brunt, concluding that Grossman's plan of reorganization did not discharge Ms. Van Brunt's asbestos-related claims because they arose after the effective date of the plan. *See* Grossman's Case, at 118. The district court, in turn, affirmed the bankruptcy court's decision in all respects (other than with regard to one matter not relevant here). Jeld-Wen then appealed the decision to the Third Circuit. *See id*.

b. <u>Third Circuit Holdings</u>.

Both the bankruptcy and district courts based their opinions on then-controlling Third Circuit law found in *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984). *See* Grossman's Case, at 119-20. Sitting *en banc*, the Third Circuit Court of Appeals ultimately overturned the *Frenville* case and reversed and remanded the district court's decision. *See id*., at 121. One of the main reasons the court was persuaded to overturn *Frenville* was the "expansive treatment of the term 'claim'" followed by the majority of other courts and that the United States Supreme Court has recognized that the term "claim" should be interpreted as broadly as possible. *Id*. (*citing FCC v. NextWave Pers. Commc'ns Inc*., 537 U.S. 293, 302 (2003)).

Because the court overruled *Frenville*, it recognized that it was left with a void in jurisprudence of when a claim arises. *See id*. The court then analyzed this issue and determined that "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." *Id*., at 125. The court then remanded the matter back to the district court for further considerations based on the court's ruling. *See id*., at 127-28.

3. <u>Placid Oil Case</u>.

The Placid Oil Case is particularly helpful to bankruptcy attorneys given its analysis of the sufficiency of publication notice to satisfy due process requirements related to the discharge of claims of unknown creditors.

a. <u>Case Background and Lower Court Holdings</u>.

Placid Oil Company ("**Placid Oil**"), who owned and operated a natural gas production and processing operation in Louisiana, filed bankruptcy in 1986. The bankruptcy court set January 31, 1987, as the claims bar date. Placid Oil subsequently published notice of the bar date in the Wall Street Journal and then obtained confirmation of its Chapter 11 plan on September 30, 1988. *See* Placid Oil Case, at 153.

In March 2004, Jimmy Williams ("**Mr. Williams**"), an employee of Placid Oil from 1966 to 1995, along with his children (together with Mr. Williams, the "**Williamses**"), brought tort claims against Placid Oil in conjunction with the asbestos-related illness and death of Mr. Williams' wife, Myra Williams ("**Ms. Williams**"). They alleged that Ms. Williams' illness and death were a result of being exposed to asbestos found on Mr. Williams' clothing when he returned home from work each day while employed by Placid Oil. In November 2008, Placid Oil filed a motion to reopen its bankruptcy case, and then in September 2009, it filed a complaint asking the bankruptcy court to determine whether the Williamses' claims were discharged in 1988. *See id*.

During the adversary proceeding involving Placid Oil and the Williamses, the bankruptcy court granted a motion for summary judgment filed by Placid Oil. In doing so, the court found that the claims filed by the Williamses were pre-confirmation claims and were discharged as part of the Placid Oil's constructive publication notice. The district court subsequently affirmed the bankruptcy court decisions.

b. <u>Fifth Circuit Holdings</u>.

On appeal to the Fifth Circuit Court of Appeals, the Williamses alleged that publication notice of the claims bar date failed to satisfy due process standards and, therefore, their claims were not discharged. One of the keys to the court's decision was its recognition that the "level of notice required by the Due Process Clause depends on whether a creditor is "known" or "unknown." Placid Oil Case, at 154 (*citing City of New York v. New York, N.H. & H.R. Co.*, 344

U.S. 293, 296 (1953)). Like a number of other courts, the Fifth Circuit found that actual notice must be given to "known creditors," while publication (or constructive) notice was sufficient for "unknown creditors." *See id*., at 154-55.

Upon consideration of whether the Williamses were "known" or "unknown" creditors, the court of appeals held that the bankruptcy court did not err in its finding that the Williamses were unknown creditors. In doing so, the court noted that while Placid Oil knew of the danger of asbestos at the time of its bankruptcy filing, along with Mr. Williams' exposure as an employee of Placid Oil, "information suggesting only a risk to the Williamses does not make the Williamses known creditors." Placid Oil Case, at 157. These facts, along with its conclusion that Placid Oil did not have any specific knowledge of any actual injury to Ms. Williams prior to confirmation of its plan, resulted in the court upholding the bankruptcy court's decision to grant summary judgment. *See id*.

4. Energy Future Holdings Case.

The Energy Future Holdings Case is also helpful given its detailed analysis of due process issues, especially regarding whether publication notice by unknown claimants at the time of the bankruptcy filing was appropriate.

a. Case Background.

Energy Future Holdings Corp. and various related parties (collectively, "**Energy Future Holdings**") filed Chapter 11 bankruptcy petitions on April 29, 2014, with the United States Bankruptcy Court for the District of Delaware. These debtors then filed a motion on July 23, 2014, asking the court to set a bar date for the filing of pre-petition claims. *See* Energy Future Holdings Case, at 523-24.

Energy Future Holdings was faced with a number of asbestos-related cases at the time of the bankruptcy filing. Because of these existing cases, and the belief that the bankruptcy case would be heavily focused on asbestos claims, Energy Future Holdings sought to bar all claims that were not properly and timely filed, including all claims related to unmanifested asbestos-related injuries. *See* Energy Future Holdings Case, at 523-24.

b. Bankruptcy Court Holdings.

The bankruptcy court ultimately granted the debtors' request to establish a bar date for filing all claims in the case, including future claims. In doing so, the court stressed the following:

> "[t]he objectives of finality and fixing the universe of claims permeate the law of bankruptcy, and in achieving those ends, the setting of a bar date is no more unfair, assuming reasonable notice, than is a statute of limitations, a finality concept firmly embedded in our legal system generally. Tort claimants can have their right to pursue their claims foreclosed if they fail to take action before the expiration of a statute of limitations. It is no more unfair to require that they here take action before expiration of the bar date."

Energy Future Holdings Case, at 527 (*citing In re Eagle-Picher Indus., Inc.*, 137 B.R. 679, 682 (Bankr. S.D. Ohio 1992)).

Building off of the fundamental fairness of establishing bar dates, the court then turned to what it called "the heart of the issue" – the issue of whether the discharge of the debtors' liability for unmanifested claims was consistent with due process. *Id*., at 528. In making this determination, the court then focused on prior United States Supreme Court precedent holding that the level of notice required for due process purposes depends on whether a creditor is "known" or "unknown." Further, it noted that a debtor is required to provide actual notice to all "known creditors" in order to discharge their claims. *See id*., at 529 (*citing City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 295-97 (1953)). In contrast, the bankruptcy court recognized that a debtor is only required to provide "unknown creditors" with constructive notice by publication. *See id*. (*citing Chemetron Corp. v. Jones*, 72 F.3d 341, 348 (3d Cir. 1995)).

Finding that unmanifested creditors are "unknown" claimants, the bankruptcy court then followed the "weight of the developing authority" which holds that publication notice may be sufficient to satisfy due process. Based on this legal conclusion, as well as the facts before it, the bankruptcy court ultimately granted the debtors' request for a claims bar date. *See id*., at 537.

5. New GM Case.

The decision of the United States Court of Appeals for the Second Circuit in the New GM Case provides a detailed analysis of the core "unknown" claims issues. However, greater certainty will have to wait for another day as the United States Supreme Court denied the petition of General Motors LLC ("**New GM**") for a writ of certiorari in April 2017 on the holdings in the New GM Case, leaving the issue of future claims unsettled.

a. Case Background and Lower Court Holdings.

General Motors Corporation ("**Old GM**") sought Chapter 11 bankruptcy protection on June 1, 2009, before the United States Bankruptcy Court for the Southern District of New York. Old GM then quickly moved forward with the sale of substantially all of its assets to New GM, the majority of which was owned by the U.S. Department of Treasury, while Old GM retained most of its liabilities. The sale occurred under Section 363(f) of the Bankruptcy Code and purported to be free and clear of liens, claims, and interests. *See* New GM Case, at 10-12.

As part of this sale, New GM assumed both the liability for accidents that happened after the sale occurred and for repairs covered by warranties on cars sold by Old GM. Otherwise, the sale was "free and clear" of claims related to cars sold by Old GM. *See* New GM Case, at 14-15. The purpose of the "free and clear" provision was to shield New GM from claims related to Old GM. Notice of the sale was given by publication in a number of national publications, as well as direct mail notice to various other parties, including those "known to have asserted any lien, claim, encumbrance, or interest in or on [the to-be-sold assets] . . . ." New GM Case, at 14.

The sale to New GM was approved by the bankruptcy court on July 5, 2009, notwithstanding over 850 objections filed to the sale. *See* New GM Case, at 14. Once the sale was approved, it closed just five days later on July 10, 2009. *See* New GM Case, at 15. New GM then proceeded to move forward with the business of manufacturing and selling vehicles using substantially all of the assets of Old GM, while Old GM moved forward with liquidating its assets and establishing a trust to pay out unsecured claims against Old GM (the "**GUC Trust**"). *See id.*, at 15-16.

However, in February 2014, New GM started issuing recalls of cars related to certain Old GM-manufactured vehicles due to a defect in the ignition switch that could prevent airbag deployment. In total, New GM issued over 60 recalls impacting over 25 million vehicles in just the United States alone. Dozens of class action lawsuits soon followed, alleging that the defect had caused injuries and financial losses both before and after the sale to New GM closed. In response, New GM argued that the order approving the sale from Old GM gave it the assets "free and clear" of the claims alleged. In all, New GM sought to bar an estimated $7 to $10 billion in economic losses plus an indeterminate amount of damages from pre-closing accidents related to ignition switch failures. *See* New GM Case, at 24.

On April 21, 2014, an adversary proceeding was filed against New GM in the Old GM bankruptcy case by Steven Groman and others seeking damages caused by the ignition switch defects. *See* New GM Case, at 24. New GM countered by seeking to enforce the order approving the sale (the "**Sale Order**") and thereby enjoin such claims. *See* New GM Case, at 25. Other plaintiffs impacted by the Sale Order also included: (a) individuals who had allegedly sustained injuries prior to the sale to New GM from ignition switch defects; (b) those who had suffered economic losses arising from the ignition switch in the Old GM cars; and (c) those with damages arising from defects other than the ignition switch in Old GM cars. *See* New GM Case, at 25.

Ultimately, on April 25, 2015, the bankruptcy court found that while the plaintiffs were not given proper notice of the sale, they were not prejudiced thereby, and, as a result, enforced the Sale Order enjoining many of the claims against New GM. *See* New GM Case, at 26, 29. As such, "New GM could not be sued -- in bankruptcy court or elsewhere -- for ignition switch claims that otherwise could have been brought against Old GM, unless those claims arose from New GM's own wrongful conduct." *Id.*, at 26. These groups of plaintiffs then appealed the bankruptcy court's holdings, with the following issues on appeal being discussed below: (1) "the bankruptcy court's jurisdiction to enforce the Sale Order", (2) "the scope of the power to sell assets 'free and clear' of all interests", and (3) "the procedural due process requirements with respect to notice of such a sale." New GM Case, at 29.

b. <u>Second Circuit's Holdings</u>.

As the Second Circuit Court of Appeals began its substantive discussion regarding the appeals before it, the court noted that "no party seeks to undo the sale of Old GM's assets to New GM, as executed through the Sale Order." New GM Case, at 28. Instead, the court noted that the plaintiffs were challenging "the extent to which the bankruptcy court may absolve New GM, as a successor corporation, of Old GM's liabilities." *Id.* The court then proceeded to engage in a detailed analysis of the matters before it, ultimately ruling as follows:

i. <u>Jurisdiction</u>.

The bankruptcy court had jurisdiction to interpret and enforce the Sale Order. *See* New GM Case, at 33. Specifically, "[a] bankruptcy court's decision to interpret and enforce a prior sale order falls under . . . 'arising in' jurisdiction." *Id.*, at 31. As such, the court determined that a bankruptcy court "plainly" has "jurisdiction to interpret and enforce its own prior orders." *Id.*, at 31 (*citing Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009)).

ii. "Free and Clear".

With regard to the "free and clear" issues, those provisions of the Sale Order cover "pre-closing accident claims and economic loss claims based on the ignition switch and other defects." The court determined, however, that they did not cover "independent claims" against New GM or the claims of those who had purchased used General Motors' vehicles after the sale to New GM. *See* New GM Case, at 43. In summary, the Second Circuit stated: "[A] bankruptcy court may approve a § 363 sale 'free and clear' of successor liability claims if those claims flow from the debtor's ownership of the sold assets. Such a claim must arise from a (1) right to payment (2) that arose before the filing of the petition or resulted from pre-petition conduct fairly giving rise to the claim. Further, there must be some contact or relationship between the debtor and the claimant such that the claimant is identifiable." *Id*., at 39-40.

iii. Procedural Due Process.

The Second Circuit focused its due process analysis on two issues, namely (1) what notice plaintiffs were entitled to and (2) if they were provided inadequate notice, whether the bankruptcy court erred in denying relief on the basis that the plaintiffs were not prejudiced. *See* New GM Case, at 43-44. After determining that legal claims constitute property and the deprivation thereof triggers a due process analysis, the Second Circuit then looked at the question of "what process is due." *Id*., at 45. The court then held that "[i]f the debtor knew or reasonably should have known about the claims, then due process entitles potential claimants to actual notice of the bankruptcy proceedings, but if the claims were unknown, publication notice suffices." *Id*., at 46-47. The court then confirmed the bankruptcy court finding that "Old GM knew or reasonably should have known about the ignition switch defect prior to bankruptcy . . ." and, therefore, "should have provided direct mail notice to vehicle owners." *Id*., at 47.

With regard to whether the plaintiffs were prejudiced by inadequate notice, the court noted that "prejudice" is a requirement of the Due Process Clause of the United States Constitution and that "even if inadequate notice deprived an individual of property without meaningful opportunity to be heard, there is no prejudice if in hindsight the outcome would have been the same with adequate notice." *Id*., at 52. On the other hand, the court stated that it "need not decide whether prejudice is an element when there is inadequate notice of a proposed § 363 sale . . . ." Nonetheless, the court found that the plaintiffs were prejudiced as it could not "say with fair assurance that the outcome of the § 363 sale proceedings would have been the same had Old GM disclosed the ignition switch defect and these plaintiffs voiced their objections to the 'free and clear' provision." *Id*., at 56. The court therefore reversed the bankruptcy court decision enforcing the Sale Order provision enjoining ignition switch defect claims. *See id*., at 56, 65. In doing so, the court stated: "Because enforcing the Sale Order would violate procedural due process in these circumstances, the bankruptcy court erred in granting New GM's motion to enforce and these plaintiffs thus cannot be 'bound by the terms of the [Sale] Order' . . . ." *Id*., at 65-66.

The foregoing cases, along with many others around the United States, present a host of issues that are critical for practitioners to both be aware of and to evaluate as part of any case that may involve "unknown" claims. Doing so may save all parties significant time and expense both before a case is filed, leading up to confirmation, and, even, many years after the case is closed. A number of these key future claims issues are briefly highlighted next as a starting point for this analysis.

C. **<u>Key "Unknown" Claim Issues to Consider</u>.**

There are a variety of factors to consider when evaluating "unknown" claim issues. The following key factors are at the heart of the future claims quandary and will serve as a primer for those dealing with these issues:

1. **<u>What Constitutes a "Claim"</u>?** Although it may sound simple, the determination of what constitutes a "claim" can be a hotly contested issue and merits analysis in any case, especially cases involving future claims. The majority of courts treat the term "claim" expansively (*see* Grossman's Case, at 121), while the United States Supreme Court has recognized that the term "claim" should be interpreted as broadly as possible (*see FCC v. NextWave Pers. Commc'ns Inc*., 537 U.S. 293, 302 (2003)).

2. **<u>When Does a Claim Arise</u>?** The question of the date a claim arises can also be troublesome in certain cases. This question is typically answered by looking to the date of the conduct giving rise to the claim. *See Grossman's Case*, at 125; *see also Watson v. Parker (In re Parker)*, 313 F.3d 1267, 1269-70 (10th Cir. 2002) (holding that a malpractice claim arose on the date it allegedly occurred).

3. **<u>When is a Claim "Unknown"</u>?** Whether a claim is a current claim or an "unknown" or future claim can be a challenging issue. The New GM Case provides excellent guidance on this issue, stating: "If the debtor knew or reasonably should have known about the claims, then due process entitles potential claimants to actual notice of the bankruptcy proceedings, but if the claims were unknown, publication notice suffices." New GM Case, at 46-47. In other words, when there is any question or doubt, actual notice should always be given. As discussed above, the failure of Arch Wireless to give notice to Nationwide, with whom it had been in pre-petition billing disputes with, serves as an excellent example of what not to do in these situations.

4. **<u>Procedural Due Process</u>.** Procedural due process issues should be at the forefront in all Chapter 11 cases, especially where "unknown" or "unknowable" claims are an issue. Procedural due process issues arising in the context of future claims have many facets, including:

   a. **<u>Rights of Known Creditors</u>.** As highlighted in the Arch Wireless Case, known creditors are entitled to certain rights upon the filing of a bankruptcy case, including formal notices in the bankruptcy proceeding. *See* Arch Wireless Case, at 80. This can be true even if the creditor knows of the bankruptcy case. *See id*., at 83.

   b. **<u>Actual Notice v. Constructive Notice</u>.** It is clear that known creditors are required to be given actual notice (such as notices and other pleadings delivered by mail delivery). On the other hand, it has been held by many courts that "unknown" claimants are only entitled to constructive notice (such as by publication). *See generally* Placid Oil Case, at 154-55; Energy Future Holdings, at 529.

c. **Prejudice.** The due process rights of a known creditor that did not properly receive actual notice may not be violated in the event a court determines that the creditor was not prejudiced by the lack of proper notice. *See* New GM Case, at 52-53.

5. **Limitations on the Ability to Sell Assets "Free and Clear" of All Claims and Interests.** One factor that every bankruptcy attorney should keep in mind – especially counsel for the debtor – is that the ability to sell a debtor's assets "free and clear" of all claims and interests is not unlimited. One fundamental determination that must be made is whether the claim asserted is against the debtor for pre-petition actions or against the successor-in-interest for its post-confirmation actions. As emphasized in the New GM Case, "a bankruptcy court may approve a § 363 sale 'free and clear' of successor liability claims if those claims flow from the debtor's ownership of the sold assets. Such a claim must arise from a (1) right to payment (2) that arose before the filing of the petition or resulted from pre-petition conduct fairly giving rise to the claim. Further, there must be some contact or relationship between the debtor and the claimant such that the claimant is identifiable." New GM Case, 39-40.

6. **Independent Claims.** The issue of "independent claims" may arise well after a Chapter 11 plan is confirmed. As mentioned in the New GM Case, independent claims "do not meet the [Bankruptcy] Code's limitations on claims. By definition, independent claims are claims based on New GM's own post-closing wrongful conduct . . . and are not claims that are based on a right to payment that arose before the filing of petition or that are based on pre-petition conduct. Thus, these claims are outside the scope of the Sale Order's 'free and clear' provision." New GM Case, at 41-42.

7. **Jurisdiction.** While it appears well settled that bankruptcy courts have the right to interpret and enforce their own orders (*see* New GM Case, at 33), this authority is often questioned and counsel needs to be prepared to refute such should challenges arise.

D. Conclusion.

Issues surrounding "unknown," "unknowable," or so-called future claims require significant factual and legal analysis in every case in which they may arise. By focusing on the procedural due process, "free and clear," independent, and other guidance given by a variety of courts, a practitioner can successfully navigate the labyrinth of future claim issues and, quite possibly, find pieces of the Holy Grail.