

Substantive Consolidation Survives *Grupo Mexicano*¹

Grupo Mexicano

The theory that *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) impacts or destroys the ability of substantive consolidation in a bankruptcy case was first promulgated by J. Maxwell Tucker.² The *Grupo Mexicano* case had nothing to do with substantive consolidation, but instead addressed whether a District Court could issue a Rule 65 injunction in aid of securing a judgment yet to be rendered in lieu of Rule 64. The Supreme Court, in holding that such relief was not available, relied upon the long held rule that “the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Judiciary Act, 1789 (1 Stat. 73).” *Grupo Mexicano*, 527 U.S. at 318 (quoting A. Dobie, Handbook of Federal Jurisdiction and Procedure, 660 (1928)).

In light of *Grupo Mexicano*'s reiteration³ of the

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² J. Maxwell Tucker, *Grupo Mexicano and the Death of Substantive Consolidation*, 8 Am. Bankr. Inst. L. Rev. 427 (Winter 2000).

³ The holding in *Grupo Mexicano* is nothing new. *Atlas Life Insurance Co. v. W.I. Southern, Inc.*, 306 U.S. 562, 568 (1939) (“The ‘jurisdiction’ thus conferred on the federal courts to entertain suits in equity [the Judiciary Act of 1789] is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.”); *Gordon v. Washington*, 295 U.S. 30, 36 (1935) (“From the beginning, the phrase ‘suits in equity’ has been understood to refer to suits in which relief is sought according to the principles applied by the English Court of Chancery before 1789, as they have been developed in the federal courts.”); *Robinson v. Campbell*, 16 U.S. 212, 222-223 (1818) (“The court, therefore think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States, are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of

rule respecting the boundaries of a federal court’s equity jurisdiction, Tucker concludes that the right of substantive consolidation is “dead.” Tucker premises his finding on two assumptions: (1) the equitable relief of substantive consolidation is not altered by the Bankruptcy Code and remains dependant upon traditional principals of equity jurisdiction; and (2) the concept of substantive consolidation did not exist in 1789. J. Maxwell Tucker, *Grupo Mexicano and the Death of Substantive Consolidation*, 8 Am. Bankr. Inst. L. Rev. 427, 438 and 443-444 (Winter 2000).

Grupo Mexicano Specifically Recognized That the Bankruptcy Courts’ Equity Jurisdiction is More Vast Than Other Federal Courts

Justice Scalia , in *Grupo Mexicano*, recognized that traditional rules of equity do not constrict the exercise of equity by a bankruptcy court. *Grupo Mexicano*, 527 U.S. a 322 (“there is absolutely nothing new about debtors’ [sic] trying to avoid paying their debts, or seeking favor from some creditors over others – or even about their seeking to achieve these ends through “sophisticated ... strategies [citation omitted]. The law of fraudulent conveyances and bankruptcy was developed to prevent such conduct; an equitable power to restrict a debtor’s use of his unencumbered property before judgment was not.”). Where a statute other than the Judiciary Act of 1789 authorizes equitable relief, the historic constraints upon such equitable relief are no longer applicable so long as the equitable relief involves property which is the subject to a final decree. *Grupo Mexicano*, 527 U.S. at 325.⁴

those principles.”)

⁴ Justice Douglas, writing for the Court in *United States v. First National City Bank*, 379 U.S. 378 (1965) concluded that the language of 26 U.S.C. 7402(a) was sufficient to support an injunction to prevent the dissemination of assets prior to judgment. Section 7402(a) gives the District Court power to grant injunctions “necessary or appropriate for the enforcement of the internal revenue laws.” 26 U.S.C. 7402(a). The foregoing text is directly analogous to 11 U.S.C. § 105(a), which provides that a “court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Justice Douglas reasoned that the relief was appropriate because “there is here property which would be ‘the subject of the provisions of any final decree in the cause’” unlike the situation which arose in *De Beers Consol. Mines v. United States*, 325 U.S.

Since the inception of the Bankruptcy Code, bankruptcy courts have held that section 105 supports orders of substantive consolidation. *In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000) (“At present, consistent with its historical roots, the power of substantive consolidation derives from the bankruptcy court’s general equity powers as expressed in § 105 of the Bankruptcy Code.”); *In re Richton International Corporation*, 12 B.R. 555, 557 (Bankr. NY 1981). Prior to 1978 and the implementation of the Bankruptcy Code, bankruptcy courts also had no difficulty in finding the power to substantively consolidate different entities. “The bankruptcy court’s power of substantive consolidation has been considered part of the bankruptcy court’s general equitable powers since the passage of the Bankruptcy Act of 1898. *See In re Reider*, 31 F.3d at 1105; *see also Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219, 61 S.Ct. 904, 85 L.Ed. 1293 (1941).” *Bonham*, 229 F.3d at 763.

In light of the foregoing, an order of substantive consolidation, in the context of a plan of reorganization, appears to be more than appropriate in light of the historical context. The right of substantive consolidation is clearly an equitable right. Even assuming Tucker is correct as regards the extent of equity jurisdiction in 1789 in the English Court of Chancery, that right exists today pursuant to Section 105 of the Bankruptcy Code and *United States v. First National City Bank*, 379 U.S. 378 (1965).

The Concept of Substantive Consolidation in the Cases of Joint and Separate Bankrupts was Recognized by the Court of Chancery in 1789

The concept of substantive consolidation of separate bankrupt estates was clearly recognized by the Court of Chancery in 1789. While the concept of multi-tiered corporations did not yet exist, one can see the use of remedy in the context of partnerships and partners. The “jingle rule” makes the analogy to partners and partnerships most appropriate when analyzing the usage of substantive consolidation in 1789 by the Court of

212 (1945).

Chancery.⁵ As explained by the bankruptcy court in *In re R.L. Kelly & Sons, Millers*, 125 B.R. 945 (Bankr. D.Md. 1991):

Under the jingle rule, partnership creditors take from partnership assets, partner creditors take from partner assets, and anything left over from either goes to the other. [Citations omitted]. The portion of the rule which precluded partnership creditors from collecting from partner property until partner creditors were paid, however, was inconsistent with nonbankruptcy partnership law that holds general partners liable for partnership obligations. [Citations omitted]. This inconsistency did not extend to the second part of the jingle rule because partnership law does not hold a partnership liable for the obligations of a general partner acting in his individual capacity.

R.L. Kelly, 125 B.R. at 952.

Accordingly, it was the law of the day “in bankruptcy, that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over the separate debts of the bankrupt; and so, in the converse case, the separate debts are primarily payable out of the separate effects of the bankrupt, and possess a like preference; and the surplus only, after satisfying such priorities, can be reached by the other class of debt.” Joseph Story, LL.D., *Commentaries on the Law of Partnership as a Branch of Commercial and*

⁵ *In re R. Kelly & Sons, Miller*, 125 B.R. 945, Under the jingle rule, partnership creditors take from partnership assets, partner creditors take from partner assets, and anything left over from either goes to the other. *Id.*; *Safren*, 65 B.R. at 572-573; *Elsab*, 66 B.R. at 186. The portion of the rule which precluded partnership creditors from collecting from partner property until partner creditors were paid, however, was inconsistent with nonbankruptcy partnership law that holds general partners liable for partnership obligations. Kennedy, *supra*, at 57. Accord, Md. Corps. & Ass'ns Code Ann. § 9-307 (1985 Repl.Vol.). This inconsistency did not extend to the second part of the jingle rule because partnership law does not hold a partnership liable for the obligations of a general partner acting in his individual capacity.

Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law, § 376 (1841); see also, William Cooke, *The Bankrupt Laws, 4th Edition*, § XV, page 237 (1799) (“This is settled as a rule of convenience, and it is resolved, that if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be allotted in due proportion to separate estate of each partner, and applied to the separate creditors. And if there be on the other hand a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors.”). Nonetheless, the Court of Chancery did, at times, find it appropriate to deviate from the “jingle rule” and permit separate and joint creditors to share the assets of an estate on a pro rata basis. *Bankrupt Laws*, § XV, page 239.

Lord Thurlow (1731-1806) presided as the Lord Chancellor during the period of 1778 through 1792⁶. During his tenure as Lord Chancellor, Lord Thurlow presided over several bankruptcy matters that resulted in orders permitting joint and separate creditors from sharing the assets of an estate on a pro rata basis contrary to the well established “jingle rule”. In other words, contrary to law, but in accord with equity, joint and separate creditors were ordered to stand *pari passu* as to each other.

Lord Thurlow apparently opened the floodgates on the issue in *Ex parte Cobham* (December, 1784). *Bankrupt Laws*, § XV, page 239. The *Cobham* case is summarized by Cooke as follows:

A separate commission had been taken out against *Ferryman*, who was one of three partners. The joint creditors petitioned to prove their debts under the separate commission.

The Lord Chancellor said, as the present petition was consented to, he would make the order now upon the consent, and would leave the point whether joint

creditors were intitled to come under a separate commission, to be decided upon more consideration.

Bankrupt Laws, § XV, page 239. The first such case after *Cobham* was *Ex parte Haydon*, wherein the petitioner (petitioning creditor) was the beneficiary of a promissory note executed by Prior (the bankrupt) and Stevens on account of their having entered into a partnership. The partnership was never formed and there were no effects (assets) of the partnership. The petitioner was permitted to prove his debt under Prior’s commission, but when sought to prove it against Steven’s commission, he was refused. Lord Thurlow reversed the denial ordering “the petitioner be at liberty to prove his debt, and be admitted a creditor for what he shall prove, and be paid his dividends in respect thereof ratably, and *in equal proportion with the rest of the creditors* of the said bankrupt.” *Bankrupt Laws*, § XV, page 240 (emphasis added).

Later in 1785 Lord Thurlow had the opportunity to once again examine the application of the “jingle rule” in *Ex parte Hodgson*, 2 Bro. C. C. 5 (1785). The *Hodgson* opinion is quoted in full below as reported in Brown’s Chancery Cases:

Burney, the bankrupt was partner with *Davidson*, who was in the *East Indies*, and being indebted separately to _____, to whom he had given a note, she pressed him for a better security; upon which he gave her a partnership note. Upon a separate commission against *Burney*, she proved this note; and the present petition was, that the proof of this joint debt upon the separate commission might be rescinded.

Lord Chancellor [Thurlow] refused the prayer of the petition, there being no distinction as to sole or separate debts, and said he thought proper to declare that debts, whether sole or joint, out to be paid out of the bankrupt’s estate; which is composed of his separate estate, and of his moiety of the joint estate, and therefore ordered that she should come in *pari passu* with separate creditors.

⁶ Lord Thurlow was Lord Chancellor from 1778 to 1783 (when Lord fox contrived to get rid of him) and from 1783 to 1792.

Ex parte Hodgson, 2 Bro. C. C. 5 (1785); see also *Ex parte Copland*, 1 Cox 421 (1787) (“But as I think the Commissioners were very wrong in the point of form, I think it proper to declare that a joint creditor is entitled to prove his debt under a separate commission taken out against one of the partners.”); and *Ex Parte Clowes* 2 Bro. C. C. (1789) (“But, *Lord Chancellor* [Thurlow] thought that, as the money was admitted by all the partners to have come to use of the joint fund, it would entitle the creditors to consider themselves as joint or several creditors, and ***therefore to prove against the joint or separate estates***, it being a joint debt, in respect to its having come to the joint use...” (emphasis added)).

Cooke, in *The Bankrupt Law*, provides greater detail of the *Copland* case. In that context, Cooke states:

Upon hearing the petition his Lordship [Thurlow] declared *that a joint creditor of two or more co-partners in trade, is to be at liberty to prove such joint debt, under a separate commission of bankrupt against one of such co-partners*, and he ordered that the petitioners should be at liberty ... to prove such joint debts as they may be advised, and be admitted creditors under such separate commission, for such joint debts which they shall prove, *and be paid a dividend in respect thereof ratably and in equal proportion with the separate creditors of the [Bankrupt], seeking relief under said commission, but so as not to disturb any dividend or dividends already made under the said commission.*

Bankrupt Laws, § XV, page 244.

While the Court of Chancery will eventually reestablish the “jingle rule” as the sole method for distribution in a bankruptcy case involving joint debts, in 1789, the “jingle rule” was not absolute and Lord Thurlow, at times found it appropriate to deviate and permit the creditors of the joint estate to share ratably with the creditors of the separate estate. *Bankrupt Laws*, § XV, page 244.

What Lord Thurlow accomplished in the aforementioned joint debt cases, is no different than what bankruptcy judges are asked to do today when requested to substantively consolidate related entities. While the form may differ, the result does not. In either case, the requested relief permits creditors of one entity to share in the distribution of a separate entity to which they would otherwise have no legal claim. There can be no doubt that Lord Thurlow would be comfortable with the concept of substantive consolidation as it is akin to his reasoning in the foregoing cases.

**Grupo Mexicano is Not New
or Revolutionary: Sampsell v. Imperial
Paper & Color Corp. Remains Viable**

The Supreme Court approved of the concept of substantive consolidation in *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941). The Supreme Court’s first and only reference to the phrase “substantive consolidation” is in *Central Trust Co., Rochester, N.Y. v. Official Creditors’ Committee*, 454 U.S. 354 (1982). In *Central*, the Supreme Court acknowledged the benefits to be derived from the substantive consolidation of the related entities. *Central*, 454 U.S. at 359-360 (“That the Court of Appeals thought consolidation of Geiger’s petition with those of its subsidiaries and affiliates would serve the best interests of the estate, or would conserve judicial resources, does not justify its disregard of a clear congressional directive. ... While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress.”).

Central involved a case where one of the debtor entities was a debtor under the Bankruptcy Act while the other debtor entities were debtors under the Bankruptcy Code. In that situation, despite the clear benefits to be derived from substantive consolidation, the Supreme Court was unable to ignore the clear and unambiguous language of 11 U.S.C. § 403(a) (repealed) of the Bankruptcy Code, a transitional rule enacted by Congress to govern cases pending under the Bankruptcy Act on the effective day of the Bankruptcy Code. Section 403(a) provides:

A case commenced under the Bankruptcy Act, and all matters and

proceedings in or relating to any such case, shall be conducted and determined under such Act as if [the Bankruptcy Code] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the [Bankruptcy Code] had not been enacted.

Central, 454 U.S. at 355-356. The Supreme Court held that it would be inappropriate for the debtor entity under the Bankruptcy Act to be allowed to dismiss its case and re-file under the Bankruptcy Code so as to facilitate a substantive consolidation.

The *Central* opinion does not condemn the use of substantive consolidation. To the contrary, *Central* acknowledges its usage and sings its praises.

Any assertion that *Grupo Mexicano* suddenly heralded the demise of substantive consolidation is without foundation. The holding in *Grupo Mexicano* is nothing new, as was averred above in footnote 2. In fact, Justice Scalia states:

We have long held that “[t]he ‘jurisdiction’ thus conferred ... is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.” *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568, 59 S.Ct. 657, 83 L.Ed. 987 (1939). See also, e.g., *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382, n. 26, 69 S.Ct. 606, 93 L.Ed. 741 (1949); *Guaranty Trust Co. v. York*, 326 U.S. 99, 105, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945); *Gordon v. Washington*, 295 U.S. 30, 36, 55 S.Ct. 584, 79 L.Ed. 1282 (1935). “Substantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at

the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73).” A. Dobie, *Handbook of Federal Jurisdiction and Procedure* 660 (1928).

Grupo Mexicano, 527 U.S. at 318. The concept reiterated by the Supreme Court in *Grupo Mexicano* that a federal court’s equity jurisdiction is coextensive with that of the English Court of Chancery dates back to at least 1818. *Robinson*, 16 U.S. 212, 222-223 (1818).

Tucker’s hypothesis that *Grupo Mexicano* killed substantive consolidation is an oxymoron. *Robinson* and its progeny, including *Grupo Mexicano*, would have precluded the usage of substantive consolidation in the first instant if Tucker’s reasoning is correct. Yet, in point of fact, only two years after the *Atlas Life* opinion was decided in 1939, the Justice Douglas penned *Sampsel*.

Congress, by Recodifying Section 2a(15) of the Bankruptcy Act as Section 105 of the Bankruptcy Code With the Knowledge that Courts Relied Upon Section 2a(15) in Authorizing Substantive Consolidation Implicitly Approved the Concept

For over sixty (60) years bankruptcy courts have been substantively consolidating debtor entities as appropriate. *Sampsel*, 313 U.S. 215; *Bonham*, 229 F.3d 750; *Continental Vending Machine Corp. v. Wharton*, 517 F.2d 997 (2d Cir.1975); *Stone v. Eacho*, 127 F.2d 284 (4th Cir.1942); *In re Vecco Construction Industries, Inc.*, 4 B.R. 407 (Bankr. Va. 1980); *In re Commercial Envelope Mfg. Co., Inc.*, 1977 WL 182366, 3 Bankr. Ct. Dec. 647 (Bankr. S.D.N.Y. 1977); *In the Matter of Flora Mir Candy Corporation*, 432 F.2d 1060, 1062 (2nd Cir.1970). Prior to the enactment of the Bankruptcy Code in 1978, several bankruptcy courts relied upon Section 2a(15) of the Bankruptcy Act to support an order of substantive consolidation. *Vecco*, 4 B.R. at 409; *In re Food Fair, Inc.*, 10 B.R. 123, 126 (Bankr. S.D.N.Y. 1981); *Commercial Envelope*, 1977 WL 182366 at 3 (“the Bankruptcy Court has jurisdiction to consolidate proceedings and to merge the assets and the liabilities of the debtors. [Citations omitted.] This jurisdiction is based on considerations of equity, one of the touchstones of that jurisdiction, *Bank of Marin v. England*, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197

(1966), and on the broad statutory grant of Section 2a(15) of the Act, 11 U.S.C. Sec. 11a(15), to enter such appropriate orders in addition to those specifically provided for by statute, as might be necessary to enforce the provisions of the Bankruptcy Act.”⁷

Section 2a(15) of the Bankruptcy Act provided that bankruptcy courts had the authority to “[m]ake such orders, issues such process, and enter such judgments, in addition to those specifically provided for as may be necessary or the enforcement of the provisions of this Act.” 11 U.S.C. § 11(a)(2) (repealed 1978). Section 105 (a) of the Bankruptcy Code contains almost identical language: “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

It is presumed that when Congress recodifies a statute, it is aware of its judicial construction and such construction is implicitly incorporated into the new statute.

[A] statute’s longstanding meaning forms the background against which Congress legislates when it amends the law. The courts presume that Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume the new statute has the same effect as the older version.

Firststar Bank, N.A. v. faul, 253 F.3d 982, 988 (7th Cir. 2001); *See also Cottage Savings Asociation v. Commissioner of Internal Revenue*, 499 U.S. 554, 562 (1991) (“Because these decisions were part of the “contemporary legal context” in which Congress enacted § 202(a) of the 1924 Act [citations omitted], and because Congress has left undisturbed through

⁷ Tucker contends that most bankruptcy courts relied upon Section 2a(2) of the Bankruptcy Act, which section was repealed, and cites readers to *Continental Vending*. J. Maxwell Tucker, *Grupo Mexicano and the Death of Substantive Consolidation*, 8 Am. Bankr. Inst. L. Rev. 427, 446 (Winter 2000). However, a review of the case law indicates that the *Continental Vending* case was the only published opinion to so state.

subsequent reenactments of the Code the principles of realization established in these cases, we may presume that Congress intended to codify these principles in § 1001(a) [citations omitted].”).

The bankruptcy court’s continuing exercise of its equity jurisdiction to support substantive consolidation remains viable. *Bonham*, 229 F.2d at 765 (“even though substantive consolidation was not codified in the statutory overhaul of bankruptcy law in 1978, the equitable power undoubtedly survived the enactment of the Bankruptcy Code.”). In enacting Section 105 of the Bankruptcy Code, Congress codified the bankruptcy court’s power to substantively consolidate debtor entities. *Cottage Savings*, 499 U.S. at 562.

Statutory Predicate Supports Substantive Consolidation in a Plan Context

The Advisory Committee for the Bankruptcy Rules in discussing Rule 1015 stated:

Consolidation of estates of separate debtors may sometimes be appropriate, as when the affairs of an individual and a corporation owned or controlled by that individual are so intermingled that the court cannot separate their assets and liabilities. Consolidation, as distinguished from joint administration, is neither authorized nor prohibited by this rule since the propriety of consolidation depends on substantive considerations and affects the substantive rights of the creditors of different estates.

Fed. R. Bankr. P. 1015, Advisory Committee’s Note. “While Bankruptcy Rule 1015 is not a source of authority for imposing substantive consolidation, the Advisory Committee nevertheless clearly acknowledged that substantive consolidation had been discussed, debated, considered, and allowed by courts in the bankruptcy context for more than half a century.” *In re Stone and Webster, Inc.*, 286 B.R. 532, 539-540 (Bankr. Del. Nov. 14, 2002).

Moreover, the sole case to thoroughly discuss substantive consolidation in the context of *Grupo*

Mexicano, Stone and Webster, held that it was not necessary to:

determine whether *Grupo Mexicano*'s limitation on the equitable remedies administered by district court has application here, or whether the broad mandate of § 105's general equity powers of a bankruptcy court provide sufficient bases for substantive consolidation. Contrary to what some reported cases say and what the Creditors' Committee says, I find clear statutory authority in the Bankruptcy Code for substantive consolidation in Chapter 11 cases.

Stone & Webster, 286 B.R. at 540. That statutory predicate is 11 U.S.C. § 1123(a)(5)(C), which states:

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall –

(5) provide adequate means for the plan's implementation, such as –

C) merger or consolidation of the debtor with one or more persons....

11 U.S.C. § 1123(a)(5)(c)). The word "person" can include the debtor. 11 U.S.C. 101(13) ("debtor" means person ... concerning which a case under this title has been commenced.").

Conclusion

Since *Grupo Mexicano* was decided (June 17, 1999), sixty six (66) opinions have issued referencing the concept of substantive consolidation in one form or another, yet only two courts have mentioned the *Grupo Mexicano* opinion in the context of substantive consolidation. *Stone and Webster*, 286 B.R. 532; *Official Committee of Asbestos Claimants v. G-I Holdings, Inc.*, 2001 WL 1598178 (Bankr. D.N.J. April 6, 2001). Neither court was of the opinion that *Grupo Mexicano* ended the ability of a bankruptcy court to substantively consolidate one or more entities. Moreover, Tucker's article on the "death" of substantive

consolidation has never been cited in a published opinion.

There are a panoply of reasons for concluding that substantive consolidation is alive and well in the 21st century. From Sections 1123 and 105 of the Bankruptcy Code to the English Courts of Chancery there is ample support for the concept of substantive consolidation. Tucker was in error – substantive consolidation remains fully intact as an equitable remedy available to the bankruptcy courts.