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WHERE DOES A FRESH START END?: THE CASE FOR IMPOSING JOINT AND SEVERAL LIABILITY ON A REORGANIZED DEBTOR THAT CONTINUES TO PARTICIPATE IN AN ANTITRUST CONSPIRACY POST-DISCHARGE

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Introduction

It is well-recognized that one who joins an antitrust conspiracy is jointly and severally liable for all damages caused by the conspiracy from the inception of the conspiracy until its conclusion, irrespective of when the conspirator first joined. It is equally well-recognized that, under Chapter 11 of the Bankruptcy Code, a reorganized debtor is generally entitled to a ''fresh start'' and is therefore released from all claims that could have been asserted against it prior to the Bankruptcy Court's confirmation of the reorganized debtor's bankruptcy plan.

In light of antitrust conspiracy principles of joint and several liability and the bankruptcy maxim that a reorganized debtor is entitled to a ''fresh start,'' an intriguing question emerges. What is the scope of antitrust liability for a reorganized debtor that has participated in an antitrust conspiracy both before and after its bankruptcy discharge? Or, as Judge Forrest recently framed the questions: (1) Can a reorganized debtor's ''post-Effective date[1] conduct cause discharged damages to 'come alive again' — or are discharged damages discharged forever?''; and (2) where a reorganized debtor, along with its co-conspirators, engaged in post-effective date conduct constituting an antitrust violation, does the bankruptcy discharge preclude a court from holding the reorganized debtor jointly and severally liable for pre-effective date damages that relate only to the unlawful conduct of its co-conspirators?[2]

[1] ''Effective date'' refers to the date in which the bankruptcy court entered an order confirming the bankruptcy plan and discharging the reorganized debtor from all preexisting debts.

[2] In re Lear Corp., 12 Civ. 2626 (KBF), 2012 BL 292536 at 3 (S.D.N.Y. Nov. 5, 2012).

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In this article, the authors briefly summarize the current status of the law as well as the policy rationale behind the concepts of a ''fresh start'' under the Bankruptcy Code and joint and several liability as applied to antitrust conspiracies. Next, the authors examine the Eastern District of Pennsylvania's opinion in *In re Lower Lake Erie Iron Ore Antitrust Litigation* (''*Lower Lake Erie*'')[3], which provides support for the argument that a bankruptcy discharge does not limit a reorganized debtor's liability for its continued participation in a conspiracy post-discharge. Finally, the authors analyze the public policy behind the Bankruptcy Code's ''fresh start'' and conclude that it should not insulate a reorganized debtor from joint and several liability resulting from its continued participation in an antitrust conspiracy post-discharge.

The Bankruptcy Code's Fresh Start for Reorganized Debtors Under Chapter 11

As a general matter, ''the confirmation of a [Chapter 11 bankruptcy] plan discharges the debtor from any debt that arose before the date of such confirmation.''[4] The Bankruptcy Code defines a ''debt'' as a liability on a ''claim,''[5] which in turn is defined as a ''right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secure or unsecured.''[6]

Congress intended to give the term ''debt'' the ''broadest possible'' scope in order to facilitate comprehensive proceedings dealing with all of a debtor's legal obligations in a bankruptcy case.[7] Accordingly, ''[i]f a plaintiff asserts a claim that arose before the confirmation of the debtor's reorganization plan, the claim will generally be dismissed as having been discharged.''[8] Given the broad definition, a claim may have arisen for purposes of a bankruptcy discharge even if it could not yet be asserted as a viable claim in a non-bankruptcy proceeding.[9] The broad discharge of claims afforded by the Bankruptcy Code is justified by the fundamental purpose of the bankruptcy law to give debtors a ''fresh start.''[10]

In *Lear*, several groups of plaintiffs (direct purchasers, dealers and end-payors) filed putative class actions against manufacturers of automotive parts, including Lear. In re Automotive Parts Antitrust Litig., MDL 2311 (E.D. Mich.) (Battani, J.). The complaints alleged that defendants participated in a conspiracy to fix prices and rig bids for automotive wire harnesses. *Id* at 1. Lear sought an order from the bankruptcy court declaring that, among other things, its bankruptcy discharge immunized it from liability for damages which pre-dated its discharge, irrespective of whether it continued to participate in the conspiracy post-discharge. In re Lear Corp., No. 09-14326 (ALG), 2012 BL 67193 (Bankr. S.D.N.Y. Feb. 10, 2012) (Gropper, J.). The bankruptcy court held that the question of whether Lear's post-discharge conduct could give rise to antitrust liability for unlawful conduct prior to its bankruptcy discharge should be decided by the antitrust court and not the bankruptcy court. *Id* at 5.

On appeal to the Southern District of New York, Judge Forrest reversed this portion of the bankruptcy court's order on the ground that ''abstention was not appropriate.'' In re Lear Corp., 12 Civ. 2626 (KBF), 2012 BL 292536 at 3 (S.D.N.Y. Nov. 5, 2012). To the contrary, Judge Forrest concluded that the question of Lear's pre-discharge liability was ''properly before the bankruptcy court [because it was a question] that the bankruptcy court was best positioned to answer.'' *Id*.

Accordingly, Judge Forrest remanded the matter to the bankruptcy court for determination of the scope of Lear's antitrust liability for its post-discharge conduct. *Id* at 3, n.1. On September 10, 2013, the Bankruptcy Court heard oral argument on the issue. At the time of publication, the matter is pending before the bankruptcy court *sub judice*.

The authors of this article, both of whom participated in the bankruptcy proceedings before Judge Gropper and the appeal before Judge Forrest, are co-lead counsel for a putative class of end-payor plaintiffs (*i.e.*, consumers who purchased automobiles not for resale) who allege that manufacturers of various automotive parts, including Lear, participated in a continuing conspiracy to fix prices, rig bids, and allocate markets for these products. *See* In re Automotive Parts Antitrust Litig., 12-MD-02311 (E.D. Mich.).

[3] 710 F. Supp. 152 (E.D. Pa. 1989).

[4] 11 U.S.C. § 1141(d) (1).

[5] 11 U.S.C. § 101(5).

[6] 11 U.S.C. § 101(12).

[7] Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 558 (1990) (quoting H.R. Rep. No. 95-595, at 309 (1977). The legislative history indicates that Congress defined ''claim'' broadly so that ''all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case'' and to ''permit[] the broadest possible relief in the bankruptcy court.'' H.R. Rep. No. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266; *see also* United States v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997, 1003 (2d Cir. 1993).

[8] DPN Holdings (USA), Inc. v. United Airlines, Inc., 871 F. Supp. 2d 143, 151 (S.D.N.Y. 2012) (collecting cases).

[9] *See* In re Rodriguez, 629 F.3d 136, 139 (3d Cir. 2010), *cert denied*, 132 S. Ct. 573, 181 (2011).

[10] Browning v. MCI, Inc. (In re WorldCom, Inc.), 546 F.3d 211, 216 (2d Cir. 2008); *see also* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363-64 (2006) (''Critical features of every bankruptcy proceeding [include] . . . the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts.'')

As Judge Gleeson noted in a recent opinion, however, ''the goal of giving debtors a fresh start may conflict with other important interests . . . . Thus, determining whether a claim arose before the bankruptcy court's confirmation is not always a straightforward task.'' *See* DPWN Holdings (USA), Inc. v. United Airlines, Inc., 871 F. Supp. 2d 143, 151-52 (2012) (appeal pending).

Moreover, it is well-settled that before a claim may be discharged in a bankruptcy proceeding, the claimant must be afforded notice and an opportunity to be heard. *See, e.g.*, Banks v. Sallie Mae Servicing Corp. (In re Banks), 299 F.3d 296, 302 (4th Cir. 2002) (''We agree a bankruptcy court confirmation order generally is afforded a preclusive effective. ***But we cannot defer to such an order if it would result in a denial of due process*** . . .'' (footnote omitted) (emphasis added), *abrogated on other grounds by* United Student Aid, Inc. v. Espinosa, 130 S. Ct. 1367 (2010); Am. Bank & Trust Co. v. Jardine Ins. Servs. Tex., Inc. (In re Barton Indus., Inc.), 104 F.3d 1241, 1245 (10th Cir. 1997) (''[A] creditor's claim is not subject to a confirmed bankruptcy plan when the creditor is denied due process because of inadequate notice.'')

Accordingly, in *DPWN Holdings*, the court held that United's bankruptcy discharge did not bar plaintiff from asserting antitrust claims against United relating to United's pre-discharge participation in a price-fixing conspiracy where plaintiff alleged that it did not have notice of its claim because United fraudulently concealed its participation in the conspiracy. DPW Holdings USA, 871 F. Supp. at 153 (appeal pending); *but see* In re Penn Cent. Transp. Co., 771 F.2d 762, 778 (3d Cir. 1985) (concluding that, notwithstanding plaintiff's allegations of fraudulent concealment, bankruptcy discharge barred claimants' antitrust claims for reorganized debtor's pre-discharge conduct where the claimants ''admit that the trustees had no knowledge of facts which would suggest that the

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The ability of the bankruptcy court to discharge all claims of a debtor, or in modern bankruptcy parlance, to provide the reorganized debtor with a ''fresh start,'' is essential to an effective reorganization because it allows the reorganized debtor to attract fresh capital.[11] Moreover, the discharge of less than all claims disadvantages those creditors who assert their claims in the bankruptcy proceeding.[12] It allows claimants who assert their claims subsequent to the bankruptcy proceedings to potentially recover their claims in full from the debtor while claimants who filed timely claims may have recovered pennies on the dollar. And those same creditors may now be the owners of the reorganized company so their recovery is further reduced to the extent the reorganized company remains liable for any pre-confirmation claims.[13]

Well-Established Principles of Antitrust Law Provide That One Who Joins An Antitrust Conspiracy is Jointly and Severally Liable for All Damages Caused by the Conspiracy from its Inception to its Conclusion

It is well-recognized in the antitrust context that ''any member of a conspiracy is liable for the acts of another co-conspirator if done in furtherance of the agreed upon conspiracy, even if acts may have been performed before the member joined the conspiracy.''[14] Put another way, absent an affirmative concrete withdrawal from the conspiracy, one who joins an antitrust conspiracy is jointly and severally liable for all damages caused by the conspiracy from its inception to its conclusion, irrespective of when the conspirator joined the conspiracy.[15]

The imposition of joint and several liability in the antitrust context maximizes deterrence by increasing the likelihood that ''a violation [will] be detected and pursued''.[16] Prospective antitrust conspirators know that parties damaged as a result of a conspiracy will more vigorously pursue antitrust actions under a joint and several liability system than under an individual liability system.[17] They also know that they may be held liable for treble the entire amount of damages sustained by a plaintiff. Accordingly, ''joint and several liability is a strong *ex ante* deterrent to potential conspirators.''[18]

Additionally, joint and several liability promotes settlement in antitrust litigation, and it appropriately holds co-conspirators jointly responsible for their illegal actions. Joint and several liability also encourages defendants to provide critical information to plaintiffs in exchange for partial settlements. This information, which is often necessary to prove an antitrust case, increases the likelihood that co-conspirators will be punished and plaintiffs will be sufficiently compensated.

Perhaps most importantly, joint and several liability in the antitrust context encourages violators to admit their crimes, identify their co-conspirators, and effectively end the conspiracy. In June of 2004, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (''ACPERA''), which offers reduced civil damages exposure to a cartel participant who receives amnesty under the Department of Justice Antitrust Division's (''DOJ'') Corporate Leniency Pro-

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instant alleged antitrust claims existed''); Eisenberg Bros., Inc. v. Clear Shield Nat'l, Inc. (In re Envirodyne Indus., Inc.), 214 B.R. 338, 350 (N.D. Ill. 1997) (holding that bankruptcy discharge barred claimants' antitrust claims for pre-discharge conduct where ''allegations against [debtor] were capable of detection prior to their being discharged by the Confirmation Order'').

[11] *See* In re Ionosphere Clubs, Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) (stating that the ''paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor''); In re Mercado, 124 B.R. 799, 802-803 (Bankr. C.D. Cal. 1991) (noting that the discharge of all claims and liabilities against corporate debtors existing at the time of plan confirmation is absolute precisely because such clarity is necessary for the bankruptcy process to work; any alternative would 'impose[] unwarranted limitations on debtors seeking to reorganize under Chapter 11''); In re Barbour, 77 B.R. 530, 532 (Bankr. E.D.N.C. 1987) (''There is nothing more essential to a bankruptcy case than the preservation of the integrity of the debtor's discharge.'').

[12] *See* J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand That Relief Be Afforded Unknown and Unknowable Claimants*, 12 Bankr. Dev. J. 1, 76 (1995).

[13] *See*, *e.g.*, Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC), 576 F.3d 108, 126 (2d Cir. 2009) (''To allow the claimants to assert successor liability claims . . . while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme.'') (internal quotation marks and citation omitted), *vacated and remanded with instructions to dismiss appeal as moot*, 130 S. Ct. 1015 (2009), *judgment vacated and appeal dismissed as moot*, 592 F.3d 370 (2d Cir. 2010).

[14] United States v. Castillo, 814 F.2d 351, 355 (7th Cir. 1987); *see also* Havaco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 554 (7th Cir. 1980) (''It is well recognized that a co-conspirator who joins a conspiracy with knowledge of what has gone on before and with an intent to pursue the same objectives may, in the antitrust context, be charged with the preceding acts of its co-conspirators''); United States v. Benson, 79 Fed.Appx. 813, 822 (6th Cir. 2003) (''A co-conspirator can generally be held liable for 'actions done in furtherance of a conspiracy before [the particular co-conspirator] joined.' '') (quoting United States v. Gravier, 706 F.2d 174, 177-78 (6th Cir. 1983) (alteration in the original); United States v. Gallerani, 68 F.3d 611, 620 (2d Cir. 1995) (''Once a conspiracy has been established, the criminal liability of its members extends to all acts of wrong doing occurring during the course of and in furtherance of the conspiracy''); Dextone Co. v. Bldg. Trades Council, 60 F.2d 47, 48 (2d Cir. 1932) (''every person who participates in a conspiracy is liable for everything done during the period of its existence regardless of the exact time at which he becomes a member or the extent of his participation'').

[15] *See supra*, n.14.

[16] *See* W. Stephen Cannon, *The Administration's Antitrust Remedies Reform Proposal: Its Derivation and Implications*, 55 Antitrust L.J. 103, 120 (1986); Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 633 (7th Cir. 2002) (Easterbrook, J.) (emphasizing that joint and several liability is a ''vital instrument for maximizing deterrence''). In *Nippon*, Judge Easterbrook explained that improving deterrence has consistently been a goal of the Supreme Court's antitrust jurisprudence. *Id.* at 633; *see also* Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 392-394 (4th Cir. 1982) (citing the deterrent effect of the rule against claim reduction as a basis for prohibiting defendants from using it as a defense in an antitrust suit).

[17] Written Testimony of Michael Hausfeld for the Antitrust Modernization Committee Panel, ''Civil Remedies: Joint & Several Liability, Contribution, and Claim Reduction'' (''Hausfeld''), at 5, *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Hausfeld.pdf.

[18] *Id.*

gram.[19] Under § 213(a) of ACPERA, the amnesty recipient can limit its civil liability to ''the actual damages'' sustained by civil plaintiffs which are ''attributable [to the amnesty recipient's] commerce . . . in the goods or services affected by the violation.''[20] Thus, the admitted cartel participant avoids not only criminal responsibility, but also both treble damages and joint and several liability in civil litigation.

In light of ACPERA, the imposition of joint and several liability serves an important public policy. Joint and several liability encourages participation in the leniency program by vastly increasing the economic worth of a successful application.

Lower Lake Erie and Beyond

We turn now to the question at the heart of this article. What is the scope of antitrust liability for a reorganized debtor that has participated in an antitrust conspiracy both before and after its bankruptcy discharge?

While no court to date has squarely addressed the question, a 1989 opinion from the Eastern District of Pennsylvania, although in a slightly different context, is instructive.[21] In *Lower Lake Erie*, the defendant, Conrail, was a privately held company created by Congress pursuant to the Regional Reorganization Act of 1973 (''Rail Act'').[22] A brief description of the Rail Act is helpful in understanding the relevance of the opinion.

The Rail Act was passed to supplement Section 77 of the Bankruptcy Act which governed the reorganization of railroads engaged in interstate commerce.[23] At the time of the Rail Act's passage, eight major railroads in the Northeast and Midwest had filed petitions for reorganization under Section 77 of the Bankruptcy Act.[24]

A key component of the Rail Act was that the debtor railroads transferred designated rail properties to Conrail in return for securities of Conrail.[25] After a railroad transferred all or substantially all of its rail properties to Contrail, the debtor railroad was to be reorganized or liquidated pursuant to Section 77 of the Bankruptcy Act.[26] Importantly, the Rail Act provided that Conrail was created and the railroads' assets were transferred to it, pursuant to Section 303(b)(2), ''free and clear'' of all encumbrances.[27] Accordingly, as the court in *Lower Lake Erie* recognized, ''it was plainly the intent of Congress that Conrail start with a 'clean slate,' insofar as the liabilities of the bankrupt railroads were concerned.''[28]

In *Lower Lake Erie*, plaintiffs sought to hold defendant Conrail liable for damages sustained as a result of an almost 22 year conspiracy (from 1958 to 1980) to monopolize the transportation of iron ore, based on Conrail's conduct after its assumption of ownership in 1976 of bankrupt northeastern railroads that allegedly had participated in the conspiracy. Conrail contended that: (1) it could not be held liable for damages occurring before 1976; and (2) subjecting it to liability for the entire period of the conspiracy would be contrary to Congress's intention in enacting the statute that Conrail ''start with a 'clean slate.' ''[29]

The *Lower Lake Erie* court rejected both of Conrail's contentions and held that Conrail was potentially liable for the entirety of damages caused by the conspiracy. First, the court emphasized the well-established principle of joint and several liability imposed on antitrust conspirators:

> Those who, with knowledge of the conspiracy, aid or assist in the carrying out of the purposes of the conspiracy, make themselves party thereto and are equally liable [for] or guilty with the original conspirators.[30]

Second, the court noted that the while the ''Rail Act does reflect a congressional intent to enable Conrail to start out, as of April 1, 1976, with a clean slate[,] there is plainly no basis for suggesting that Congress wished to enable Conrail to engage in an antitrust conspiracy thereafter without incurring the same penalties as other antitrust violators.''[31] Thus, if plaintiffs' allegations concerning Conrail's participation in the conspiracy post-1976 proved true, ''Conrail would thereby be rendered liable for all of the damages caused by the conspiracy . . .''[32] In so holding, the *Lower Lake Erie* court looked

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[19] *ACPERA*, Pub. L. No. 108-237, 118 Stat. 661, 665, *amended by* Pub. L. No. 1111-190, 124 Stat. 1275 (June 9, 2010).

[20] *Id*. at § 213(a).

[21] Lower Lake Erie, 710 F. Supp. 152 (E.D. Pa. 1989). Other than *Lower Lake Erie*, the authors are not aware of a single case that has addressed the question of whether a reorganized debtor's post-discharge affirmative conduct may give rise to antitrust liability for conduct that took place prior to the reorganized debtor's discharge. As discussed *supra*, n.3, the question is presently being litigated by the authors in the Bankruptcy Court, Southern District of New York before Judge Gropper. In re Lear Corp., No. 09-14326 (ALG), (Bankr. S.D.N.Y)

[22] *See* Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 45 U.S.C. § 701 *et seq*.

[23] *See* 11 U.S.C. 1970 § 205 (1970); *see also* Erie Lackawanna Railway Company v. Henning (In re Erie Lackawanna Railway Company), 803 F.2d 881, 882 (6th Cir. 1986) (stating that ''[t]he Rail Act was promulgated by Congress to facilitate the reorganization of these railroads into a single viable system to be operated by Conrail. Thus, we are dealing with a 'hybrid' proceeding in which we must consider the interaction of Section 77 with the Rail Act'').

The Bankruptcy Act was replaced by the current Bankruptcy Code, which was enacted in 1978 by § 101 of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (November 6, 1978).

[24] *See* Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 109 (1974) (describing the context leading to the passage of the Rail Act and the basic provisions of the Rail Act).

[25] 45 U.S.C. § 716(d).

[26] 45 U.S.C. § 791(b)(4).

[27] *See* 45 U.S.C. § 743(b)(2); Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 183 (1974) (''In a sale or conveyance of assets pursuant to a plan under § 77, any lien on those assets is transferred to the proceeds. § 77(o). But by reason of § 303(b)(2) of the Rail Act, the transfer is 'free and clear of any liens or encumbrances.' '') (Douglas J., Dissenting).

[28] *Lower Lake Erie*, 710 F. Supp. at 154. The *Lower Lake Erie* court's use of the term ''clean slate'' as opposed to the term ''fresh start,'' which is used in modern day bankruptcy parlance, appears to be a distinction without a difference. It is clear from the *Lower Lake Erie* opinion that, in the court's view, Congress intended that Conrail would not retain any liabilities, including those of an antitrust nature that existed prior to its assumption of the bankrupt railroads' assets. *Id.*; *see also* Schultz v. Shapiro (In re Shapiro), 59 B.R. 844, 847 (Bankr. E.D.N.Y. 1986) (''The relief of discharge is a cornerstone of the debtor's 'fresh start' in bankruptcy. It enables the debtor to begin his post-bankruptcy life with a ***clean slate vis-à-vis*** his creditors.'') (emphasis added).

[29] *Lower Lake Erie*, 710 F. Supp. at 154.

[30] *Id*.

[31] *Id*. at 155.

[32] *Id*.

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closely at the statutory text and legislative history of the Rail Act and concluded that ''there is no basis for implying antitrust immunity, or reduction in antitrust liability, from any other provision of the statute, or the statute as a whole, or the policies which led to its enactment.''[33] The *Lower Lake Erie* court noted that the Supreme Court has held that '' '[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.' ''[34]

Limiting the Antitrust Liability of a Reorganized Debtor for its Post-Discharge Conduct Would Create a Moral Hazard

While *Lower Lake Erie* did not involve application of the current Bankruptcy Code, the ''clean slate'' afforded to Conrail under the Rail Act would certainly appear analogous to the ''fresh start'' provided to a reorganized debtor under Chapter 11 of the Bankruptcy Code. Accordingly, the Eastern District of Pennsylvania's well-reasoned opinion in *Lower Lake Erie* should be applicable to a reorganized debtor under Chapter 11 of the Bankruptcy Code. Indeed, numerous courts have emphasized that ''[a] 'fresh start' means only that; it does not mean a continuing licen[s]e to violate the law.''[35]

There can be no dispute that under well-established antitrust and conspiracy principles, a reorganized debtor that first joins a conspiracy after its bankruptcy discharge is liable for all of the damages caused by the conspiracy, including those which preceded its discharge.[36] The result should not be any different with respect to a reorganized debtor that participated in an antitrust conspiracy both before and after its bankruptcy discharge. In other words, a reorganized debtor should not be treated better than its co-conspirators simply because it elected to participate in a criminal antitrust conspiracy ***before*** its discharge as well as ***after***.[37] To conclude otherwise would create the ''moral hazard'' of rewarding a reorganized debtor for its participation in an antitrust conspiracy prior to its discharge by limiting its liability for its conspiratorial conduct post-discharge.[38]

Moreover, if a reorganized debtor were able to insulate itself from full liability in connection with its post-discharge conduct, the salutary purposes of ACPERA would be severely diminished for an antitrust violator who, by virtue of its pre-discharge conduct, could avoid the specter of joint and several liability for any damages caused by the conspiracy prior to its discharge. With a free pass for all of the damages caused by the conspiracy prior to its discharge, the reorganized debtor that chooses to continue its participation in the price-fixing conspiracy post-discharge would have little incentive to expose the conspiracy by filing an amnesty application with the DOJ, or concern itself with the risk of engaging in unlawful activities which damages others.

Conversely, limiting a reorganized debtor's liability for its post-discharge unlawful conspiratorial conduct does not advance the purposes of the bankruptcy law nor any other public policy. As stated, *supra*, a ''fresh start'' is essential to the effective reorganization of a debtor because it: (1) allows the reorganized debtor to attract fresh capital; and (2) ensures that the debtors' creditors who participate in the bankruptcy proceedings and agree to forego their claims in return for what often amounts to pennies on the dollar are not further prejudiced by claimants seeking to recover the full value of their pre-discharge claims *post-hoc* from the reorganized debtor.

The imposition of joint and several liability (for damages arising from the conspiracy's inception until its conclusion) on a reorganized debtor that continues to participate in a conspiracy after its bankruptcy discharge does not undermine any of the aforementioned bankruptcy policies. To the contrary, it merely confers the same liability on the reorganized debtor as that of its co-conspirators, or for that matter, the same liability as would be imposed on the reorganized debtor had it not participated in the conspiracy prior to its discharge.

Conclusion

The salutary purposes of antitrust law mandate the imposition of joint and several liability on price-fixers from the beginning of the conspiracy until the conspiracy's conclusion. In the absence of a countervailing bankruptcy policy, a reorganized debtor should not be treated differently than any of its co-conspirators with

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[33] *Id*.

[34] *Id*. (*quoting* U.S. v. National Ass'n of Securities Dealers, 422 U.S. 694, 719-20 (1975)).

[35] *See* O'Loghlin v. County of Orange, 229 F.3d 871, 875 (9th Cir. 2000). *See also* In re Lear Corp., No. 09-14326 (ALG), 2012 BL 67193 at 9 (Bankr. S.D.N.Y. Feb. 10, 2012) (''Bankruptcy policy affords debtors a fresh start, but a debtor is responsible for the consequences of its own actions after it emerges from chapter 11, and if bankruptcy law discharges a liability, but the debtor takes new action and incurs a similar liability after receiving its discharge, there may be no entitlement to an injunction against prosecution of the latter''); In re Auto. Parts Antitrust Litig., 12-md-02311, 2013 BL 148357 at 3 (E.D. Mich. June 6, 2013) (''Although a debtor 'gets a fresh start', a debtor does not 'get a free pass to continue violating the law.' '') (quoting Tam Travel, Inc. v. Delta Airlines, Inc. (In re Travel Agent Comm'n Antitrust Litig.), 583 F.3d 896, 902 (6th Cir. Ohio 2009)).

[36] *See supra*, at __.

[37] Indeed, a number of courts have characterized a reorganized debtor that emerges from Chapter 11 bankruptcy as a ''new entity.'' *See, e.g.*, Listecki v. Official Comm. of Unsecured Creditors (In re Archdiocese of Milwaukee), No. 13-C-179, 2013 BL 205373 at 6 (E.D. Wis. July 29, 2013) (''The filing of a Chapter 11 petition causes a 'fundamental legal change in the entity.' The filing entity is legally different from what it was the moment before filing, as it now assumes the mantle of a new juridical entity, a debtor-in-possession.'') (quoting In re V. Savino Oil & Heating Co., Inc., 99 B.R. 518, 524 (Bankr. E.D.N.Y. 1989)); In re Berry Good, LLC, 400 B.R. 741, 746 (Bankr. D. Az. 2008) (''[T]he Bankruptcy Code provides a systematic approach to settling or reorganizing a company's prepetition financial obligations by placing the assets under the supervision of the bankruptcy court, creating a new debtor entity and providing rules of priority and payment under a plan of reorganization.''); In re Multech Corp., 47 B.R. 747 (Bankr. N.D. Iowa 1985) (''[I]n Chapter 11 proceedings the prebankruptcy Debtor as a juridical entity ceases to operate the business and control is transferred to a distinct legal entity, usually the Debtor-in-Possession, who runs the business under supervision of the court.'') (citation omitted)

[38] *See* In re Lear Corp., 12 Civ. 2626 (KBF), 2012 BL 292536 at 3, n.1 (Nov. 5, 2012) (Recognizing that ''[a] steep reduction in [antitrust] liability for recently discharged debtors could result in an unanticipated moral hazard.'').

respect to its post-discharge unlawful conduct. As the *Lower Lake Erie* court noted in an analogous context, "'[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.' "[39]

[39] *Lower Lake Erie*, 710 F. Supp. at 155 (quoting U.S. v. Nat'l Ass'n of Sec. Dealers, 422 U.S. 694, 719-20 (1975)).

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