The Tangled Intersection of Mass Torts, Bankruptcy, and Regulatory Law: What Can be Learned from PG&E?
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This program is designed to provide an overview of the issues that arise when bankruptcy law interfaces with the highly developed areas of mass tort and regulatory law (and vice versa) using the Pacific Gas & Electric (“PG&E”) bankruptcy as a case study. The panelists will engage in a discussion about how the mass torts and regulatory issues are affecting the bankruptcy case and best practices for cases involving similar issues.

The format for this program will be presentations by the three panelists about these issues and interactive panel discussions in which the panelists will respond to questions from the moderator and other panelists.
ABSTRACT

The Tangled Intersection of Mass Torts, Bankruptcy, and Regulatory Law: What Can be Learned from PG&E?

By: R. J. Shannon

Pacific Gas & Electric Company (“PG&E”) is one of the largest combined natural gas companies in the United States, serving approximately 16 million customers in Northern and Central California. On January 29, 2019, PG&E and its parent company filed for chapter 11 bankruptcy in the Northern District of California.

At first glance, PG&E’s financials do not indicate financial distress. With $6.62 billion of EBITDA against $22.11 billion of consolidated debt (in a capital-intensive industry), one might think that PG&E should be fine outside of bankruptcy. So what gives?

A. Causes of PG&E’s Bankruptcy

i. The 2017 and 2018 Northern California Wildfires

In October 2017, massive wildfires spread throughout Northern California. The fires burned at least 245,000 acres and destroyed 8,900 structures. Forty-Four people were killed. The California Department of Forestry and Fire Protection (“Cal Fire”) attributed all but one of the fires to PG&E equipment.

In 2018, Northern California was again devastated by the “Camp Fire.” That fire destroyed 153,336 acres, killing 86 people and destroying 13,972 residences, 528 commercial structures, and 4,293 other buildings. Approximately five months after PG&E filed bankruptcy, Cal Fire attributed the Camp Fire to PG&E equipment as well.

As the putative cause of the fires, PG&E faces tens-of-billions of dollars in contingent and unliquidated liabilities. California’s inverse condemnation doctrine imposes strict liability for damage caused by utilities’ equipment. Through an inverse condemnation action, private property owners can obtain compensation for damages caused to their property by “public use” without the need to show negligence. The principle is that the cost of public improvements—e.g., the damage from wildfires caused by electric transmission lines—should be distributed throughout the community. PG&E may have additional liability if it was negligent (e.g., wrongful death and personal injury) in connection with the fires.

As of January 2, 2019, more than 700 complaints on behalf of 3,600 plaintiffs had been filed against PG&E related to the 2017 wildfires. PG&E expected more to come from the 2018 fire.
ii. Regulatory Limits on Rate Increases

Compounding PG&E’s financial difficulties, the rates that utilities charge consumers in California must be approved by the California Public Utilities Commission (“CPUC”). According to CPUC Decision 17-11-033 at 65 (November 30, 2017), a utility’s inverse condemnation liability is irrelevant to whether the utility can increase rates. The result is that PG&E has no means to spread the public cost of the wildfires among consumers.

After intense lobbying by the utilities, the California Legislature passed Senate Bill (“SB”) 901, which addresses wildfire-related liabilities. Governor Brown signed the bill into law on September 21, 2018. Importantly, although SB 901 creates a new reasonableness standard that allows the CPUC to permit utilities to recover costs associated with wildfires occurring after December 31, 2018, it does not allow the commission to consider prior wildfires.

B. The Effect of Regulatory and Mass Tort Issues on the Bankruptcy

As PG&E is a highly regulated entity that had to file bankruptcy because it caused fires that devasted an entire region, regulatory and mass tort issues naturally feature prominently in its bankruptcy case. These issues manifest in ways that are broadly applicable.

i. Public Interest

Both in the sense of capturing the attention of the public and in the sense of involving matters that effect the public welfare, PG&E’s case is one of public interest. A large percentage of the residents of Northern California have some ties to PG&E, from paying it for electricity to being displaced because of the 2017 or 2018 wildfires. Because of this, regulators and politicians look to their ability to advance policy goals through—or protect policy goals from—the bankruptcy process.

The effect in PG&E’s bankruptcy case has been the participation of many representative groups in the case. The U.S. Trustee appointed an official committee of tort claimants (in addition to the standard committee of unsecured creditors) and several ad hoc committees have been formed. Various elements of state government, including the governor’s office and regulatory agencies, have also been heavily involved.

ii. Numerous Claimants and Parties in Interest

The large number of claimants and parties in interest in the case is also related to the mass tort and regulatory issues involved. In addition to the normal slate of stakeholders in a large bankruptcy case, all of PG&E’s 16 million customers and the thousands of people displaced in the 2017 and 2018 wildfires have an interest in the case. This has required the frequent and extensive use of publication notice. The large number of claimants also prompted the Debtors’ Motion Pursuant to 11 U.S.C. §§ 105(a) and 502(c) for the Establishment of Wildfire Claims Estimation Procedures.
Finally, the clash of competing laws is a prominent aspect of PG&E’s bankruptcy. State and federal regulations, well-settled procedures for addressing mass torts, and the Bankruptcy Code do not always fit together easily.

This issue came to a head in PG&E and FERC’s dispute over the ability of the bankruptcy court to approve the rejection of power purchase agreement. FERC asserted that it had concurrent jurisdiction. The bankruptcy court disagreed, holding that the bankruptcy court could approve the rejection and that a contrary FERC ruling was a legal nullity.

The California legislature took a different tack. Assembly Bill No. 1054, set out a program providing money to pay wildfire claims provided that the utilities took certain actions. For PG&E to participate, however, it must among other things have a plan of reorganization that is approved by CPUC by June 30, 2020.

C. Lessons from the PG&E Case

PG&E’s current bankruptcy case will be a salient example not only for future bankruptcy cases involving extensive regulatory and mass tort issues but in any case involving the public interest, numerous parties in interest, and substantive law at odds with the Bankruptcy Code. The things that work well should be copied and the things that do not should be avoided.