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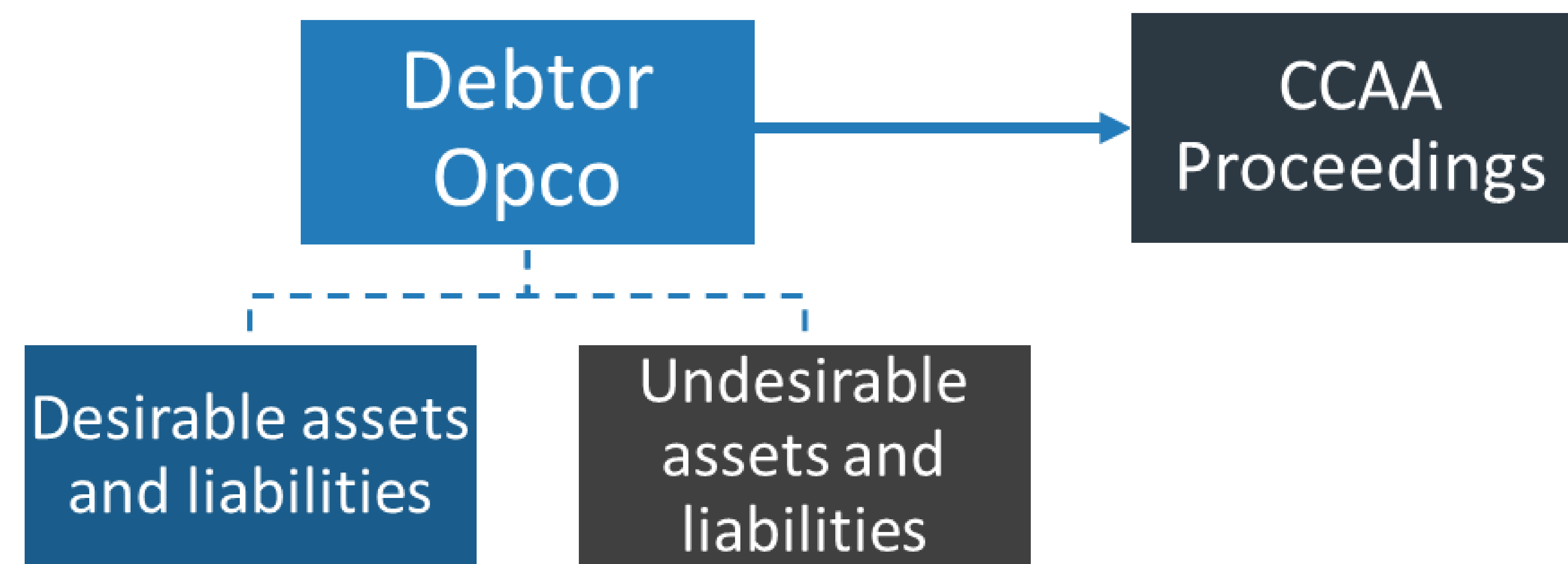
Overview of an RVO Transaction

Step 1: Insolvent operating company (Debtor Opco) commences CCAA proceeding. Its shareholder may or may not be a CCAA debtor.



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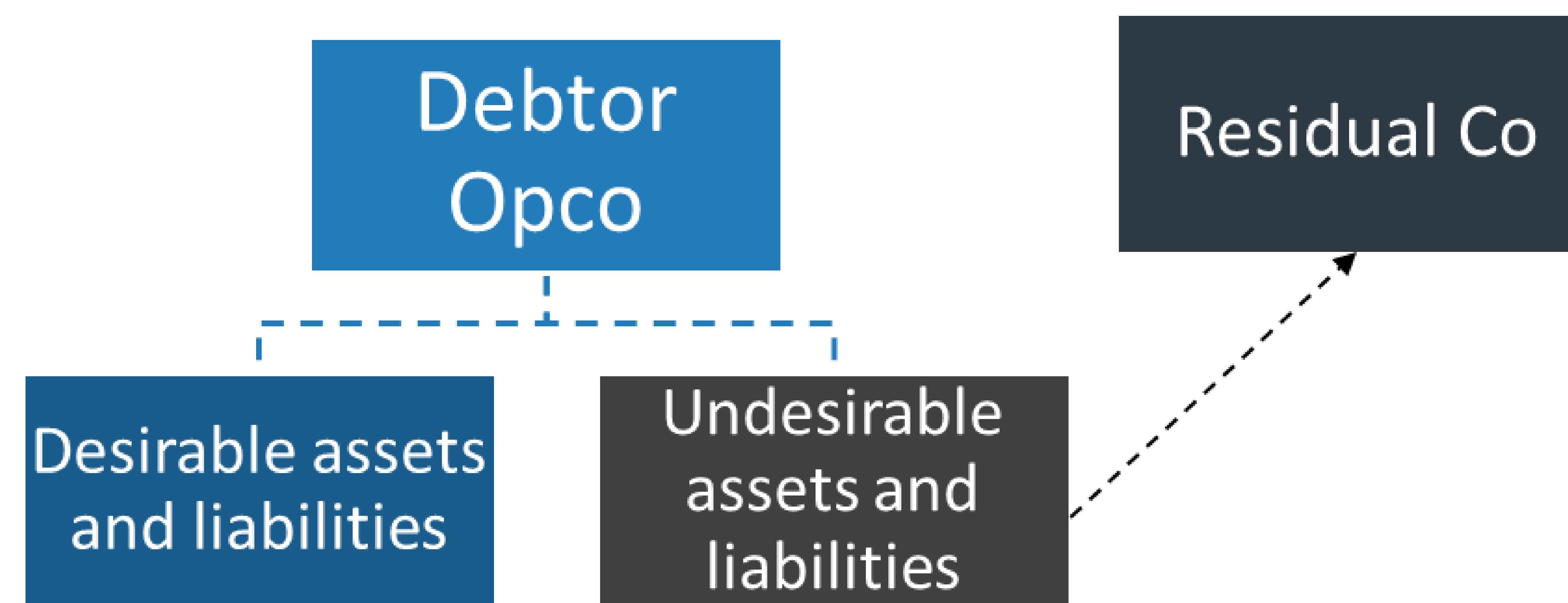
Completing an RVO Transaction

Step 2: A new Residual Co is incorporated, and all unwanted liabilities and assets are transferred from Debtor Opco to Residual Co.

Debtor Opco retains its desirable assets, key contracts, permits, licences, tax attributes, etc.



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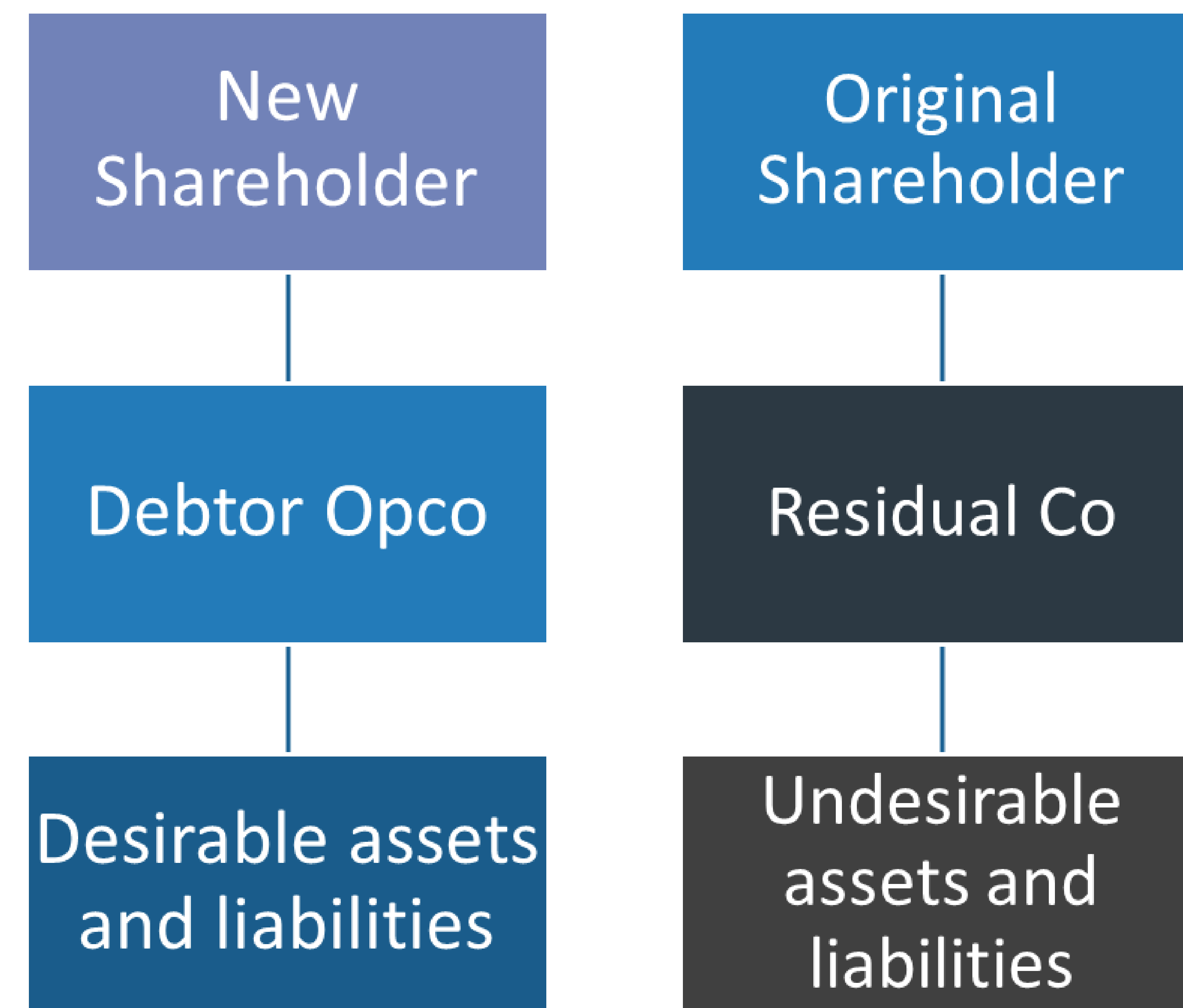
Completing an RVO Transaction

Step 3: The shares of Debtor Opco are transferred to New Shareholder and the Original Shareholder retains Residual Co.

New Shareholder becomes the sole shareholder of Debtor Opco, which then exits the CCAA proceedings with full releases, cleansed of all “bad” liabilities

The assets and liabilities transferred to Residual Co are then addressed through a bankruptcy or similar process, where claims of creditors attach.

The removal of Debtor Opco and inclusion of Residual Co in the insolvency proceeding is done through the same court order, pursuant to section 11 of the CCAA.



Overview of an RVO Transaction

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Result: Purchaser becomes sole shareholder of Debtor Opco, cleansed of any assets or liabilities the purchaser does not want.

Step 1

Insolvent operating company (Debtor Opco) commences CCAA proceeding.

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A new Residual Co is incorporated. Unwanted liabilities and assets are transferred from Debtor Opco to Residual Co; assets, contracts, etc. are retained by Debtor Opco.

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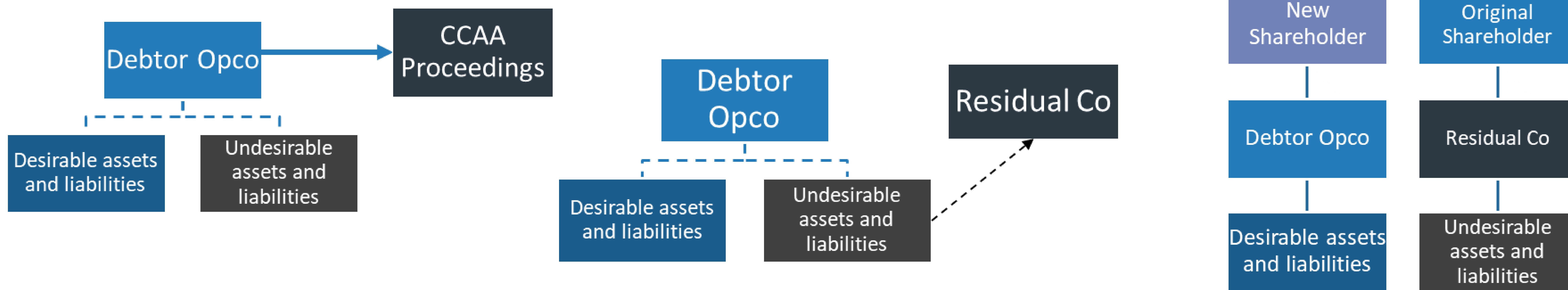
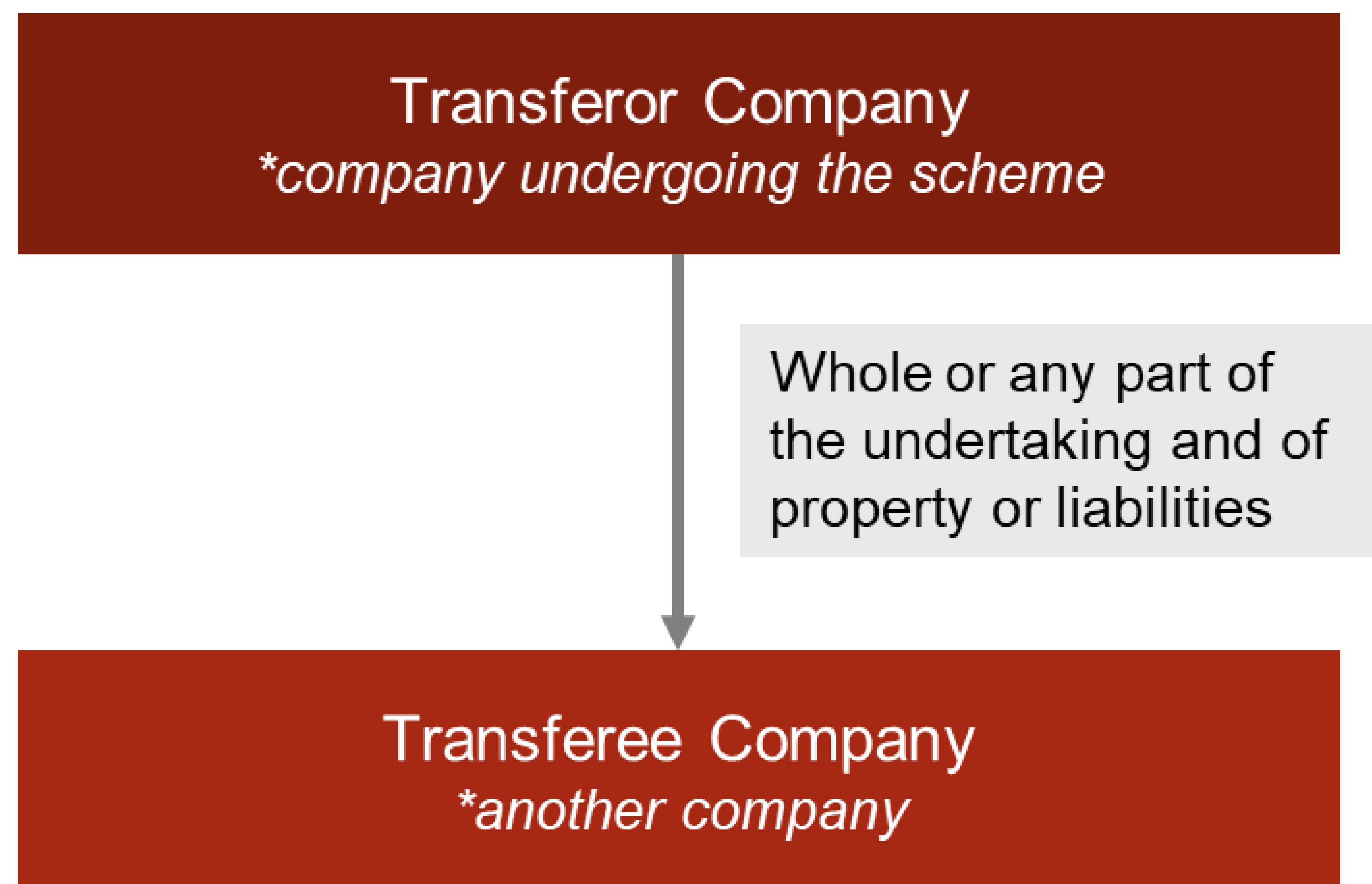


Section 212 of the Singapore Companies Act 1967



- Requires Court's approval
- Applies to:
  - (1) regular amalgamation of any 2 or more companies;
  - (2) a scheme under section 210 of the Companies Act; or
  - (3) a pre-pack scheme under section 71 of the Insolvency, Restructuring and Dissolution Act
- How does this compare with an RVO?

	S 212	RVO
Solvency	Solvent and Insolvent	Insolvent only
Creditors' Approval	Yes	No

Singapore

Deed Poll Structure

Group

Company X

Company Y

Company Z

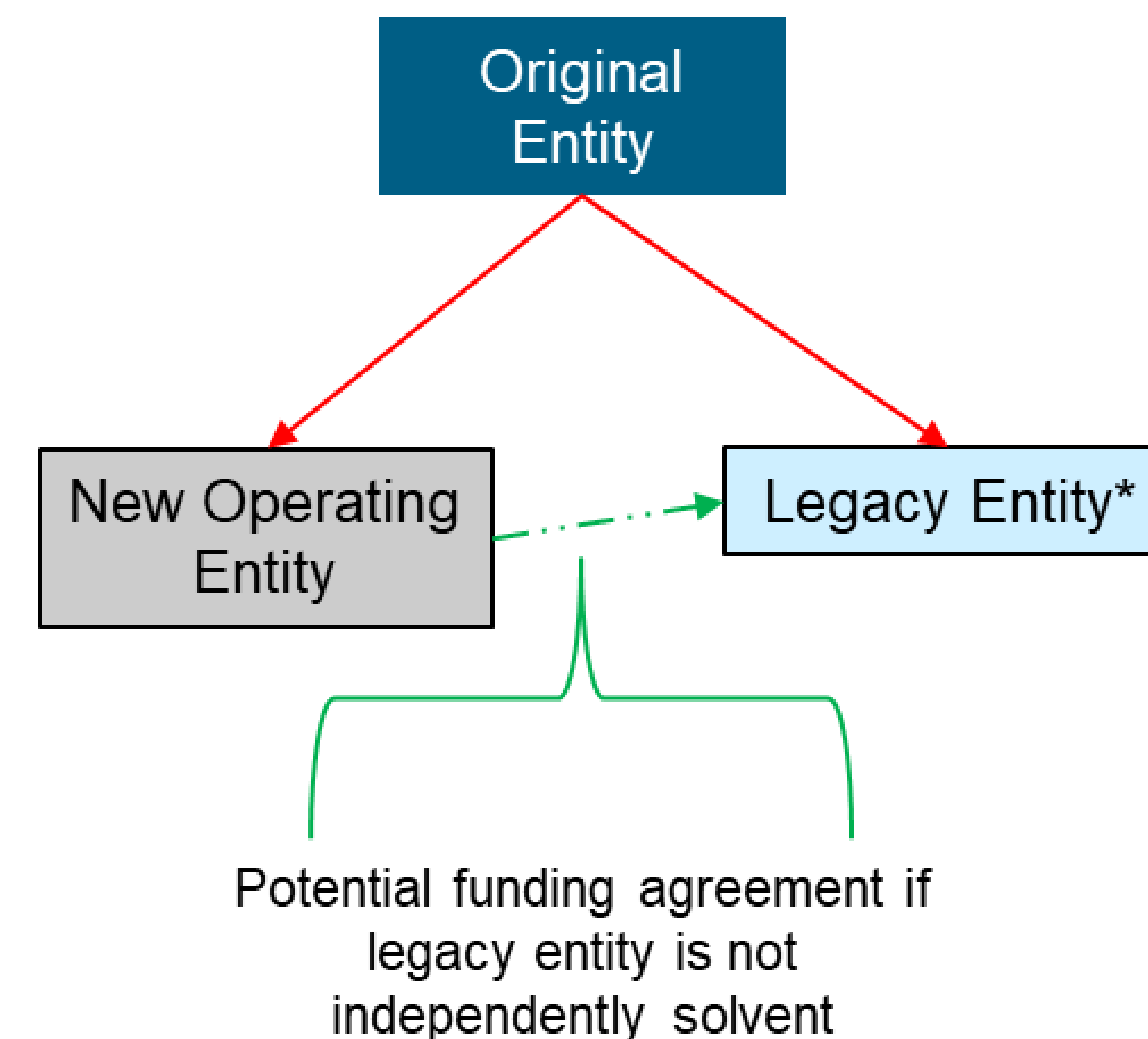
Substantial Consolidation of the Group's assets, liabilities and/or claims

Company A
Propose a single scheme

Single company executes a deed poll to become primary co-obligor in respect of all claims against the companies in the Group.

Divisive Merger Structures

- In a divisive merger, the original entity undergoes a divisive merger dividing into two separate companies:
  - (a) one that holds most of Original Entity's operating assets ("New Operating Entity"); and
  - (b) one that is responsible for Original Entity's legacy liabilities / business operations ("Legacy Entity").
- The New Operating Entity is needed because Original Entity may retain secondary liability for the litigation liabilities.
- Depending on the situation, Legacy Entity often receives assets or funding from Original Entity or an affiliate to resolve liabilities.
- New Operating Entity or a parent entity may enter into a funding agreement with Legacy Entity to the extent Legacy Entity is unable to fund its obligations.



Funding Agreements

- At the time of the divisive merger, the New Operating Entity often enters into a funding agreement with the Legacy Entity to provide for funding to the extent the Legacy Entity is unable to fund its operations.
  - Funding agreements are not necessary if the Legacy Entity is solvent and able to perform its obligations.
  - However, solvency can be difficult to determine as it often hinges on an estimation of litigation liabilities (a contemporaneous actuarial valuation may be helpful here.)
- Funding agreements typically include some or all of the following terms:
  - New Operating Company will reimburse Legacy Entity's expenses.
    - Such funding obligation is typically uncapped to minimize fraudulent transfer risk, and is structured so as not to be construed as a loan.
    - Certain situations may allow for the ability to cap funding with a sufficient cushion.
- No restrictive covenants on New Operating Company.
  - Certain agreements have restricted New Operating Company's ability to pay dividends or settle intercompany claims.
- No third-party beneficiaries.

Divisive Merger Challenges

- Separation transactions may be attacked by creditors under numerous theories, including fraudulent transfer, alter ego, veil piercing, and breaches of fiduciary duty.
  - Specifically, divisive mergers are expressly subject to challenge and avoidable as fraudulent transfers in every state with a divisive merger statute except Texas (where the question is open).
  - Legislation has also been proposed that may have implications in chapter 11 for companies that have undertaken a separation transaction.
- Any unwinding or reversal of the transaction will generally seek to put the company back into the same position it was prior to the transaction.
- Although not a silver bullet, adequate capitalization of the Litigation Entity and a good business reason and business process for the separation transaction can mitigate these risks.
  - Prior to implementing a divisive merger, a company should consider appropriate corporate governance for the circumstances, including appointment of independent directors.
  - A tax analysis should also be performed to determine the tax consequences of the potential transactions.

Reverse Vesting Orders

International Insolvency Institute – 24th Annual Conference

June 10-11, 2024

D.J. Miller

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What is a Reverse Vesting Order (RVO) Transaction?

- Overview of a Reverse Vesting Order ("RVO") Transaction
- Advantages and Criticisms of RVO Transactions
- Case Law Developments
- International Context and Availability

Traditional Transaction Approaches under the CCAA

- **1. Pursuant to a Plan of Arrangement or Compromise**: the debtor company is either:
  - (a) restructured with the debtor continuing to operate; or
  - (b) sold as a going concern to a purchaser / liquidated and the debtor no longer operates the business.
- **2. Pursuant to a Court Order**:
  - (a) the assets or business of the debtor is sold and the debtor ceases operating; or
  - (b) certain assets of the debtor are sold, and the debtor continues to operate in a slimmed down model

Traditional Transaction Approaches under the CCAA

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- **Plan of Arrangement**:
  - Affected creditors' claims are reviewed, determined and permitted to vote
  - Broad releases (including D&O and third-party releases) are typically an integral part
  - Requires approval of a Plan by double-majority of every class of creditors (no cross-class cramdown)
  - If the debtor will no longer continue to operate, a Plan will typically only be presented where releases are important (i.e. to non-debtor guarantors, D&Os, Plan sponsors, insurers)
- **Court Order:**
  - Granted in the absence of any Plan, or sometimes prior to a Plan being presented
  - Does not involve any creditor vote and therefore no creditor veto
  - May only provide value for secured creditors, so a full claims process may not be required
  - Generally, does not include any releases. Proceeds stand in place of the assets.
  - If the sale is for substantially all assets or the business of the debtor, the insolvency proceeding can be terminated once any residual assets are disposed of

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What is an RVO?

- RVO is a multi-step process that results in the purchaser becoming the sole shareholder of the debtor, clear of all liabilities and unwanted assets

- RVOs utilize the benefits of a traditional Vesting Order, and allow for value to be realized where it may not have otherwise been possible

- In contrast to standard sales process/vesting order (where assets are transferred to a purchaser free and clear of all claims), with an RVO the assets remain with the debtor and all claims and liabilities (other than those that a purchaser may wish to assume) are vested out and transferred to a newly-incorporated shell company

- RVOs are quickly gaining popularity in Canadian insolvency proceedings, although they are referred to as an exception, rather than the rule, in insolvency proceedings

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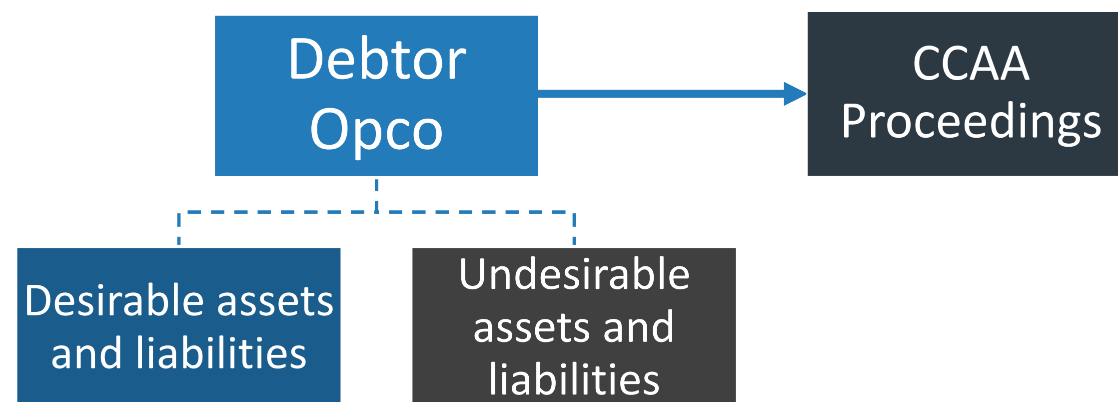

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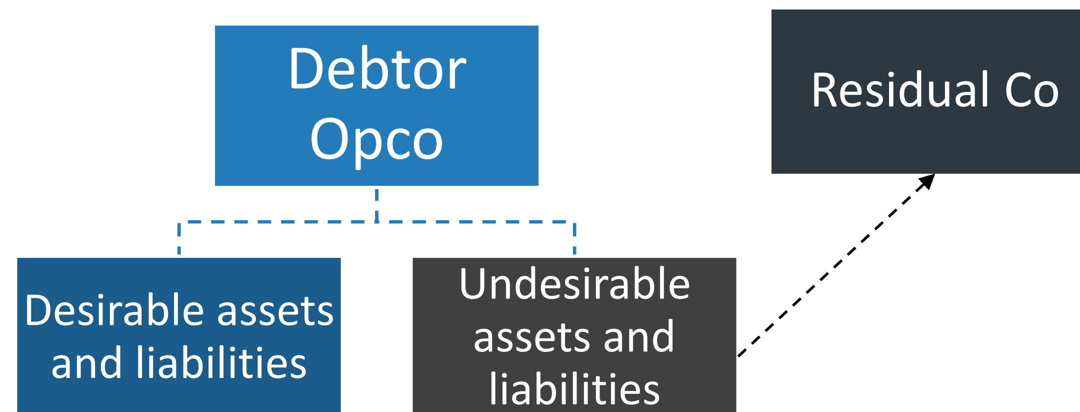

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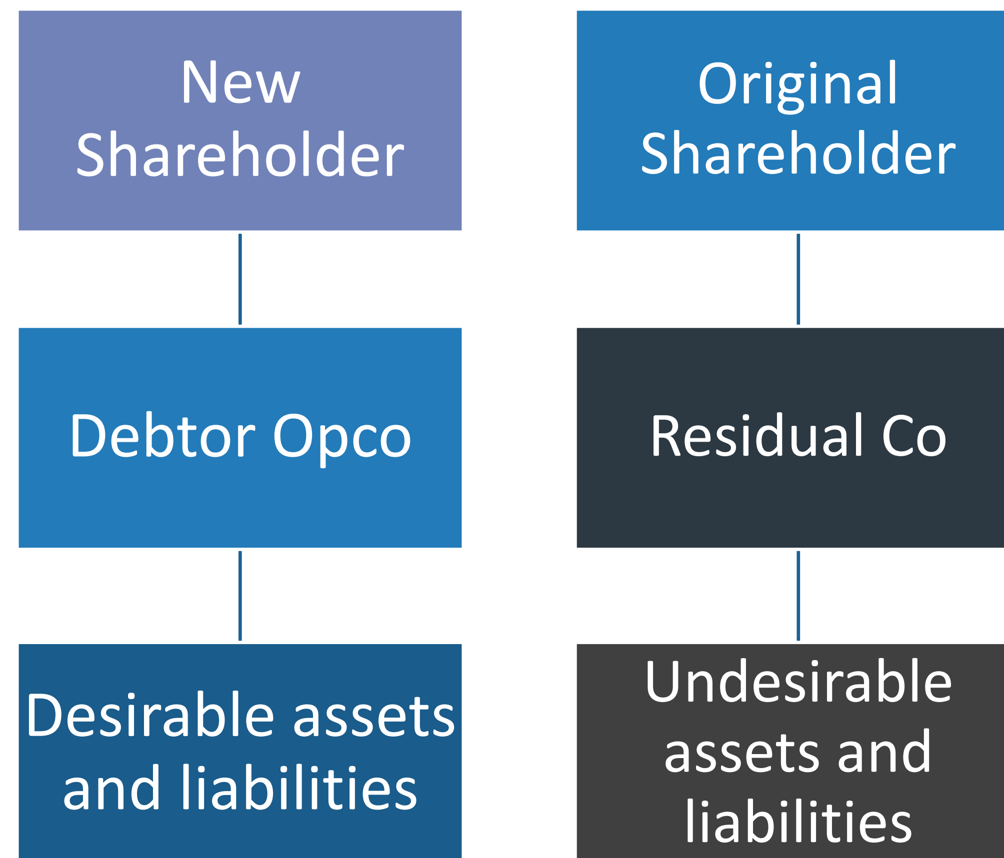

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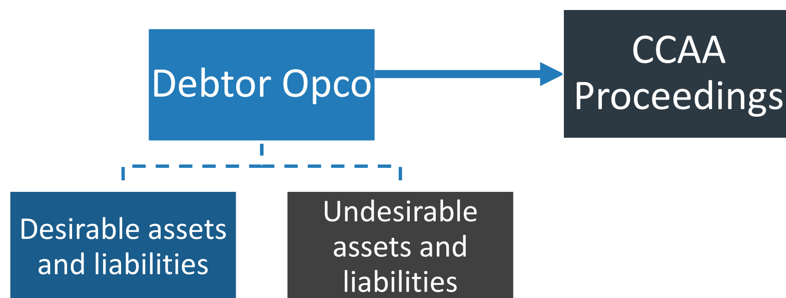

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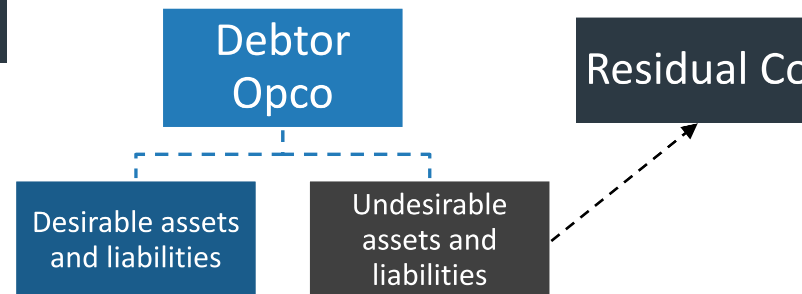

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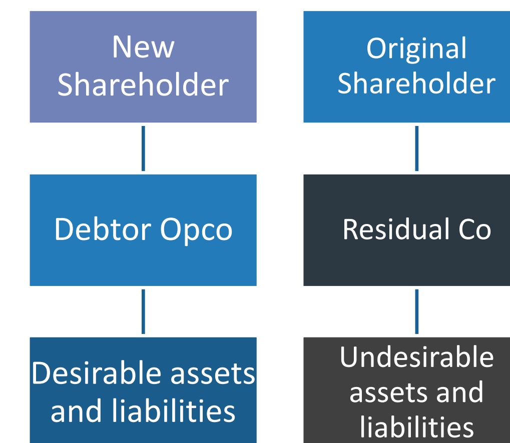

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Advantages of this Structure

- **Preserves existing corporate structure:** purchaser buys operating business with existing corporate entity, preserving tax benefits, non-assignable licenses, and regulatory and other types of permits
- **Saves time and avoids costs:** no requirement for it to be undertaken through a Plan of Arrangement with double majority approval of the Plan by creditors
- **Often the only option:** typical sale process can be difficult or unfeasible in certain regulated industries (i.e. cannabis; mining)
- **Removes "bad liabilities":** removing all unwanted liabilities makes the going concern sale more attractive
- **Permits sale of business or assets for an ongoing operation:** avoids liquidation
- *Value typically only flows to senior secured lenders and the purchaser

Criticisms

- Given the lack of a claims process, some concern that RVOs bypass key component of the statutory framework intended to balance creditor rights and interests
- Overriding creditor rights runs counter to CCAA policy objectives (i.e. creditor democracy)
- In certain instances, RVOs can be complex and costly to structure, thereby limiting one of the advantages of an RVO transaction
- Not yet clear whether an RVO can be used to shed certain environmental remediation obligations or mass tort litigation claims

Case Law Developments

- Some suggestion that the first use of an RVO in Canada came in *Re T Eaton Co* in 1999, however in that case creditors were given the opportunity to vote on share purchase at creditor meeting
- In *Stornoway Diamond Corporation* (2019) the transaction was structured through an RVO credit bid to preserve going concern operations, mining privileges, and tax losses, while non-assumed liabilities were vested into a new corporation
- The use of RVOs has gained popularity since *Stornoway Diamond Corporation*, particularly during the COVID-19 pandemic

Re Harte Gold Corp., 2022 ONSC 653

- *Harte Gold* was the first decision to outline limitations on the Court’s authority and discretion to approve RVOs
- Prior to then, the use of an RVO was mostly uncontested and no clear limitations or legal test placed on the Court’s authority to approve RVOs
- The legal test established by the Court involves a two-step framework:
  - 1. Application of the statutory criteria and baseline factors for an AVO;
  - 2. Consideration of additional circumstances

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Application of Statutory Criteria

- The Court is to consider the factors listed in s. 36(3) of the CCAA:
  - a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
  - b) whether the monitor approved the process leading to the proposed sale or disposition;
  - c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
  - d) the extent to which the creditors were consulted;
  - e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
  - f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
- The Court will also weigh the "Soundair Principles" [*Royal Bank of Canada v Soundair Corp* (1991) (Ontario Court of Appeal)]:
  - 1. whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;
  - 2. the interests of all parties;
  - 3. the efficacy and integrity of the process by which offers were obtained; and
  - 4. whether there has been any unfairness in the sale process.
- The Court also relies on section 11 of the CCAA which provides for the general authority of the CCAA supervising judge to "make any order that it considers appropriate in the circumstances"

Additional Test for RVO

- When seeking an RVO the debtor, the purchaser and the court-appointed Monitor must be prepared to answer certain additional questions, including the following:
  - 1. Why is the RVO necessary in this case?
  - 2. Does the RVO structure produce an economic result that is at least as favorable as any other viable alternative?
  - 3. Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative?
  - 4. Does the consideration that's being paid for the debtor's business reflect the importance and value of the assets being preserved under the RVO structure?

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Just Energy Group Inc., 2022 ONSC 6354

- First time that an RVO was recognized in a foreign jurisdiction (US)
- Retail energy provider incorporated under the *Canada Business Corporations Act*, with dual headquarters in Ontario and Texas
- Just Energy Group held more than 80 permits and licenses, many were non-transferrable or difficult to transfer
- CCAA proceedings commenced in Canada. The initial plan of arrangement failed
- A SISP was initiated, the purchaser acted as a stalking horse bidder with an RVO structure. No superior bids materialized. The Court ultimately approved the sale by means of the RVO, relying on the reasoning in *Harte Gold*

Just Energy Group Inc., 2022 ONSC 6354

- Debtors sought and obtained recognition of the RVO in the U.S. Bankruptcy Court for the Southern District of Texas

- District Court recognized that the RVO transaction was in the best interest of the entities and necessary for their survival as a going concern

- Court considered that recognition through ancillary proceedings is permitted provided the foreign procedure is not so inconsistent with US law, or contrary to public policy that US courts should not recognize it

- The recognition of RVOs in cross-border insolvency proceedings between Canada and the US creates opportunities for their use in complex, international restructuring proceedings in other foreign jurisdictions that have also adopted the UNCITRAL Model Law.

Canadian and US Sales Process

- Section 363 of the US Bankruptcy Code and section 36 of the CCAA both provide for the court-sanctioned sale of certain assets or the sale of the debtor as a going concern
- The sales process in both jurisdictions generally involves marketing the assets, soliciting offers, seeking court-approval of the transaction
- Section 363 of the US Bankruptcy Code expressly allows for credit bids and will often involve a stalking horse bidder
- While the CCAA does not explicitly provide for credit bids or stalking horse bids, Canadian courts routinely endorse both

US Experience: Texas Two-Step

- Mechanism utilized in US Chapter 11 mass tort claim cases to shield corporate entity from liability before entering bankruptcy proceedings
- The Texas two-step enables a corporate debtor to "merge" into two companies: one that holds operational assets and one that holds targeted liabilities.
- This enables the corporate debtor to keep operating assets out of the bankruptcy process, while still enabling access to bankruptcy powers to resolve mass tort liabilities
- Existing debtor company must first transform into a Texas corporation because Texas corporate law allows a company to divide into two or more entities as a merger "without… any transfer or assignment having occurred" thereby bypassing the fraudulent transfer aspect of the US Bankruptcy Code

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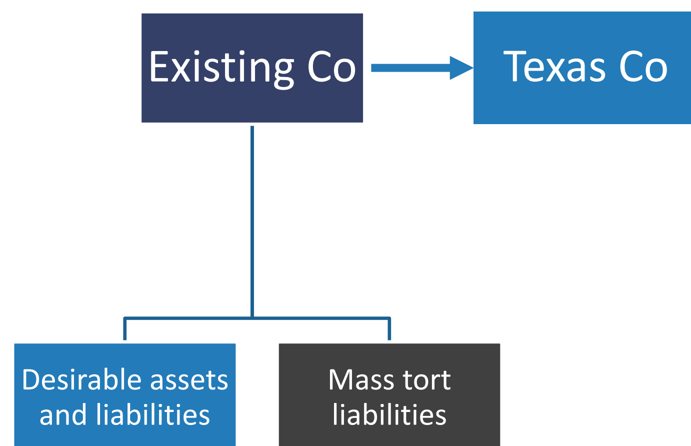
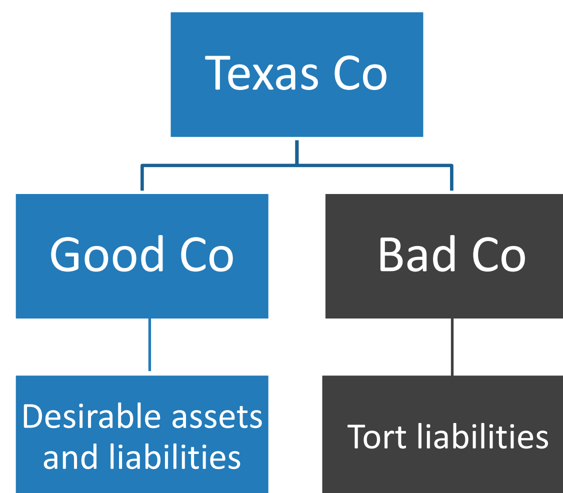
Mechanics of the Texas Two-Step

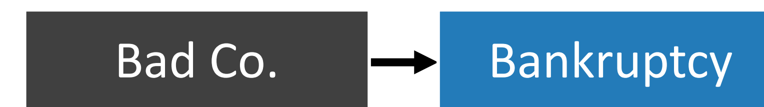
Existing Co transforms into Texas corporate entity



Step 1: New Texas entity undertakes a "divisive merger", splitting Texas Co in two. Assets are allocated to Good Co and mass tort liabilities are allocated to Bad Co. A funding agreement is entered into between Good Co and Bad Co sufficient to pay all creditors in full.



Step 2: Bad Co files for bankruptcy, Good Co continues operating free of tort liabilities. Bankruptcy proceedings allow Bad Co to stay all lawsuits against them, create an orderly procedure for resolving claims, and provide for a global resolution of these claims. Operational assets of Good Co are shielded from the bankruptcy proceedings.



Benefits and Criticisms of the Texas Two-Step

- **Benefits:**
  - Uniformity of treatment for all tort plaintiffs;
  - Bankruptcy proceedings could lead to quicker resolution of claims;
  - Consolidating the claims process into a single proceeding theoretically reduces legal fees, thereby increasing the pool of money available to tort victims
- **Criticisms**:
  - Argument that this is an abuse of the bankruptcy system to shield large, often healthy corporate entities from exposure to tort liabilities while obtaining "bankruptcy discounts";
  - By insulating operating assets from the bankruptcy process, there is less transparency regarding available corporate assets and the bargaining power of tort victims may be diminished;
  - Perception of unfairness to victims because the tort victims are denied their "day in court"

RVO is not Texas Two-Step

- No requirement for insolvency under Chapter 11 of US Bankruptcy Code. Corporate entities that are otherwise healthy can use the bankruptcy process to adjudicate mass tort claims without exposing operational assets to bankruptcy proceedings
- In contrast, to obtain CCAA protection in Canada a corporate debtor must: (1) be insolvent; and (2) have at least $5 million in liabilities
- RVO occurs *within* a CCAA proceeding involving an **insolvent entity**; Texas Two-Step occurs *before* a bankruptcy proceeding often involving a **solvent entity**

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RVO is not Texas Two-Step

- Use of the Texas Two-Step in the US is not as entrenched as RVOs in Canada and the Texas Two-Step remains subject to judicial and political controversy

- ***In re LTL Management:*** Third Circuit Court of Appeals dismissed LTL's bankruptcy petition on the grounds that it was not filed in good faith
  - Johnson & Johnson ("J&J") faced approximately 40,000 claims related to asbestos exposure in its talcum powder. Through pre-bankruptcy divisive merger, all talc liabilities were allocated to LTL, which then filed for bankruptcy
  - The funding agreement between J&J and LTL provided approximately $61.5 billion to satisfy talc-related liabilities. The Court held that because this figure significantly exceeded LTL's likely talc liabilities, LTL could not have filed for bankruptcy in good faith (a bankruptcy law requirement)

- ***In re Bestwall***: Fourth Circuit Court of Appeals denied an attempt to strike down a Texas Two-Step in a similar scenario, applying a more stringent standard for dismissal
  - BestWall Gypsum Co. ("BestWall") faced 64,000 asbestos related tort claims. Through a divisive merger, tort liabilities were siloed into a separate corporate entity, which then filed for Chapter 11
  - Bankruptcy Court held that attempting to resolve asbestos claims through bankruptcy proceedings was a valid reorganizational purpose, and insolvency is not a requirement to file for Chapter 11
  - Decision has been appealed to the US Supreme Court. The Senate Judiciary filed an *amicus* brief against the use of the Texas Two-Step, urging the Court to overturn the Fourth Circuit's decision

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Tests for RVO vs. Texas Two-Step

- US courts have established differing standards for the use of the Texas two-step with no clear legal test to apply
  - The bankruptcy court in *In re Bestwall* held that the presence of the funding agreement helped ensure Bestwall's ability to reorganize, which constituted a valid bankruptcy purpose.
  - However, in *In re LTL Management*, the bankruptcy court held that the presence of the funding agreement meant that LTL was not in financial distress. Therefore, the Chapter 11 filing did not constitute a valid bankruptcy purpose
- Canadian courts have articulated a clear legal test to apply with respect to the use and availability of RVO transactions within CCAA proceedings

Unique Canadian Statutory Basis

- There is no statutory equivalent in the US Bankruptcy Code to s. 11 of the CCAA, which may create limitations on the ability of US courts to fashion flexible remedies in the same way that Canadian courts can under s. 11 of the CCAA

CCAA: General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act [CCAA] in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, **make any order that it considers appropriate in the circumstances**.

- Canadian courts have also permitted the use of RVOs in receiverships, applying a similar test to the CCAA (see *Royal Bank of Canada v Canwest Aerospace Inc.*, 2024 BCSC 585; *Peakhill Capital Inc. v Southview Gardens Limited Partnership*, 2023 BCSC 1476.

For Further Information

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Corporate Optimization Strategies

Optimization & Separation Transactions Overview

- Optimization and separation transactions can realign a corporate group along business lines or other segments to enhance value and strategic opportunities while creating optionality to address future uncertainty.

Transaction Objectives & Goals
• Isolate entities and assets subject to current and potential future claims.
• Provide adequate assets and cash flow to address current and future liabilities of those entities.
• Position the company and its subsidiaries optimally for future growth and to enhance strategic options and opportunities, including potential acquisitions and divestitures.
• Prevent liabilities from inhibiting the company's growth and affecting other entities within the company's corporate structure.
• In some instances, transfer the liabilities and related assets to a third-party for administration of the tort claims.

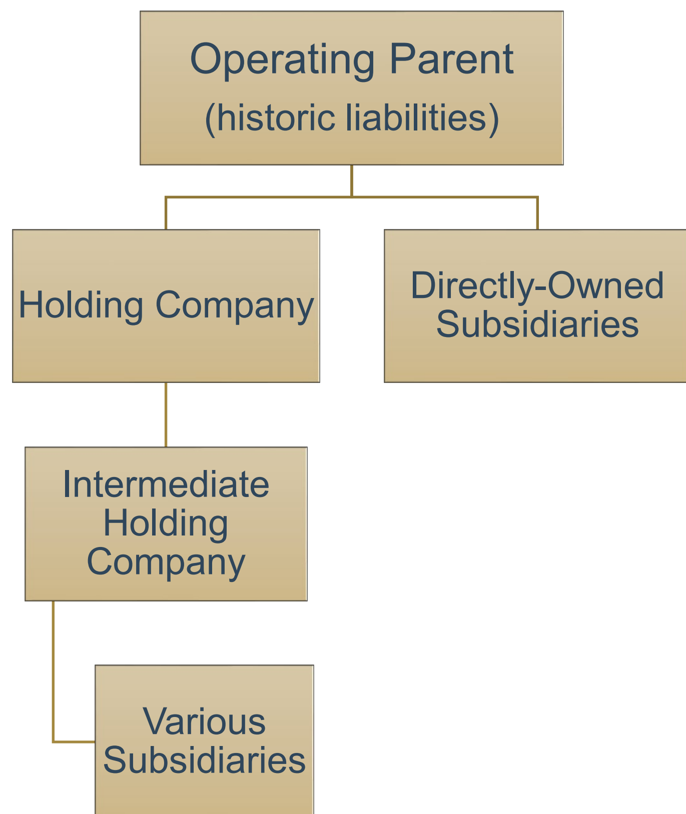
- Such processes take into account liability-limitation principles and address the volume and pattern of current and future liabilities.

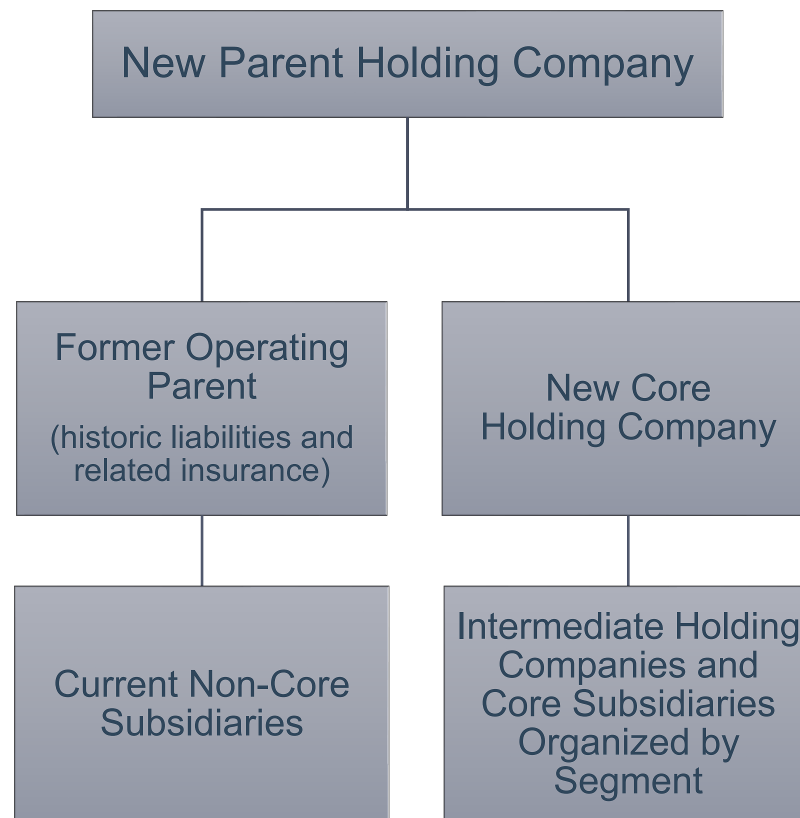
Potential Optimization Structures

There are various potential optimization structures that may be available, including:

- Creation of a new holding company through a reverse triangular merger under Section 251(g) of the Delaware General Corporation Law;
- Creation of a new sister company(ies) (the “New Entities”) and transfer of assets, liabilities and contracts to the New Entities in exchange for fair market value (which may include a promissory note); or
- Conversion of entities from corporations to LLCs and, if desired, change of the existing state of incorporation to a location with favorable divisive merger statute – then, consummate a divisive merger to effectuate a structure similar to the immediately preceding bullet.
  - Note that Delaware permits divisive mergers but the statute only applies to contracts entered into after the date the Delaware statute was enacted and not those contracts existing prior to such date. This can cause issues where consent would be required to “assign” contracts to a new entity in the divisive merger.
  - Texas is known to have a more company-friendly divisive merger statute, which would not require conversion to an LLC but which would require re-domestication of an entity in Texas (see further slides for more details).

Illustrative Optimization Structure





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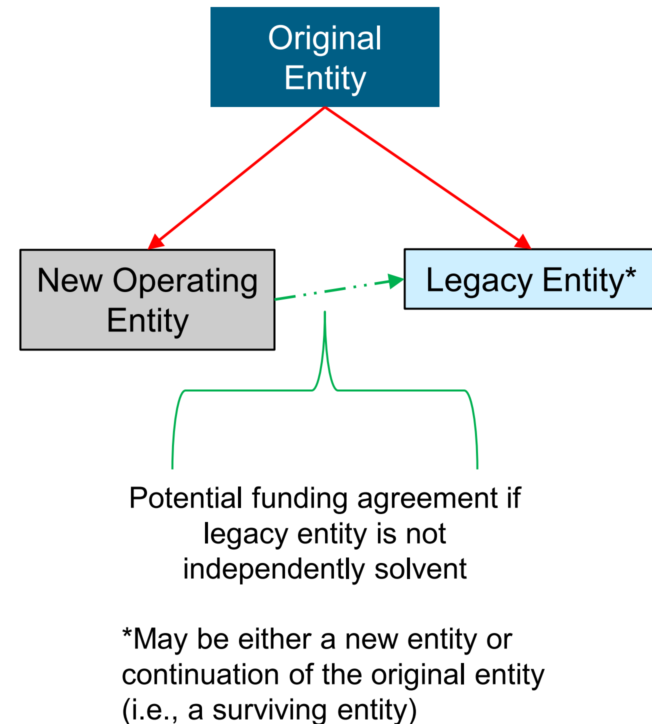

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Divisive Merger Challenges

- Separation transactions may be attacked by creditors under numerous theories, including fraudulent transfer, alter ego, veil piercing, and breaches of fiduciary duty.
  - Specifically, divisive mergers are expressly subject to challenge and avoidable as fraudulent transfers in every state with a divisive merger statute except Texas (where the question is open).
  - Legislation has also been proposed that may have implications in chapter 11 for companies that have undertaken a separation transaction.
- Any unwinding or reversal of the transaction will generally seek to put the company back into the same position it was prior to the transaction.
- Although not a silver bullet, adequate capitalization of the Litigation Entity and a good business reason and business process for the separation transaction can mitigate these risks.
  - Prior to implementing a divisive merger, a company should consider appropriate corporate governance for the circumstances, including appointment of independent directors.
  - A tax analysis should also be performed to determine the tax consequences of the potential transactions.

APPENDIX – TEXAS TWO STEP CASE STUDIES

Aearo Technologies LLC Case Study

- Aearo Technologies LLC ("Aearo"), a subsidiary of 3M filed chapter 11 in an attempt to obtain a stay of multidistrict litigation against 3M regarding combat earplugs produced by Aearo ("MDL Litigation").
  - On the eve of Aearo's bankruptcy filing, 3M entered into a funding agreement with Aearo to establish a trust to resolve all claims determined to be entitled to compensation and to support Aearo as it continues to operate during the chapter 11 process; 3M did <u>not</u> commence its own chapter 11 case.
- At the outset of the case, Aearo sought to extend the automatic stay to 3M. However, the Bankruptcy Court denied the injunction request and expressly rejected contrary decisions in similar mass tort bankruptcy cases. Aearo and 3M appealed to the 7th Circuit, which heard oral argument in April 2023.
  - Mediation is ongoing with 3M with regard to Aearo's MDL liability; Asbestos and other mass tort claims against 3M are continuing to proceed, and 3M has tentatively reached settlements with some of these claimants.
- On June 9, 2023, the Bankruptcy Court dismissed the Aearo bankruptcy cases citing a lack of valid reorganizational purpose.

Aearo Technologies LLC Case Study (cont'd)

- The Bankruptcy Court's dismissal relied on the Third Circuit decision in the LTL bankruptcy cases, however, the Court distinguished the LTL ruling and framed the issue in terms of a debtor's "need" for chapter 11 rather than "financial distress" because "financial distress" may be interpreted too literally and ignore the Code's lack of an insolvency requirement.
  - The Court also noted that Aearo is distinct from LTL and other Texas two-step cases because Aearo was a real company with real debts.
- The Court found that Aearo was financially healthy, and specifically relied on the following facts:
  - Aearo's sales have increased over the past few years;
  - there was no suggestion that its debt had been accelerating or that that its access to financial markets, lending, or investments has been affected by pending litigation; and
  - Aearo has not faced any judgments and had an uncapped prepetition funding agreement with 3M.
- The Court acknowledged that the MDL may present the potential for great harm, but it was premature to conclude that the MDL would result in the liquidation of either 3M or Aearo.

LTL Management LLC Case Study

Johnson & Johnson

- In October 2021, LTL Management LLC, a newly created and separate subsidiary of Johnson & Johnson established to manage and defend talc-related claims via a divisional merger, filed for chapter 11 relief.
  - Under a funding agreement between LTL and J&J, J&J would be obligated to pay all costs and expenses of the debtor including the costs of administering the chapter 11 case and any and all other costs and expenses of the debtor incurred in the normal course of its business, to the extent that LTL's estate assets were insufficient.
- In January 2023, the 3rd Circuit dismissed the LTL bankruptcy cases for lack of good faith because it found that the debtors were not in "financial distress". The Third Circuit specifically noted that the funding agreement with J&J would provide enough funding to resolve the claims.
- Within hours of dismissal, LTL refiled for chapter 11, with a proposed $8.9 billion settlement fund agreement.
  - On July 28, 2023, the Bankruptcy Court issued an opinion dismissing LTL's second bankruptcy case for lacking "imminent and immediate financial distress" as required to establish a good faith filing under the earlier Third Circuit opinion in the case.
  - Specifically, the bankruptcy court noted that "the Debtor was contractually entitled to a funding backstop—in the form of the 2023 Funding Agreement—that allowed it to access the value of [direct parent Johnson & Johnson] HoldCo's significant cash holdings, anticipated annual dividends, and equity interests having a value approaching $30 billion - exceeding the projected near term and aggregate talc liability."

Bestwall, LLC Case Study

- In 2017, Georgia-Pacific completed a divisional merger that split off its asbestos liability into a new entity, Bestwall, LLC. Bestwall entered a funding agreement with Georgia-Pacific that was sufficient to pay all asbestos claims for the foreseeable future. Bestwall then filed for chapter 11 in November 2017 in the US Bankruptcy Court for the Western District of North Carolina.
- Asbestos claimants argued multiple times to dismiss the case, on the theory that Bestwall did not have the required financial distress to file bankruptcy. Specifically, in a June 2023 motion to dismiss, the asbestos committee argued that the Bankruptcy Court was deprived of subject matter jurisdiction as Bestwall was "constitutionally [in]eligible to be a debtor in bankruptcy" because Bestwall was solvent pursuant to the funding agreement with Georgia-Pacific.
  - On July 28, 2023, the Bankruptcy Court squarely denied this argument stating the Bankruptcy Clause—which empowers Congress to make "uniform laws on the subject of Bankruptcies"—does not deprive the Bankruptcy Court of subject matter jurisdiction because of the debtor's alleged lack of financial distress due to its access to $27.8 billion from nondebtor affiliate Georgia-Pacific.
    - Further, the bankruptcy court was "not convinced the framers of the Constitution" intended that financial distress be a prerequisite for chapter 11 eligibility.
  - On November 6, 2023, the District Court dismissed the official asbestos claimants committee's appeal of a 2019 bankruptcy court decision denying the ACC's first motion to dismiss the Bestwall Texas two-step chapter 11 case.

Bestwall, LLC Case Study (cont’d)

- In June 2023 and again in August 2023, the Fourth Circuit upheld the Bankruptcy Court-issued preliminary injunction enjoining asbestos-related claims against certain non-debtor affiliates, including Georgia-Pacific LLC (New GP), the predecessor entity of New GP (Old GP), and other affiliates of the debtor and New GP.
  - Among other things, the Circuit Court found that, because the claims against the non-debtor entities are “identical” to the claims against Bestwall, the possible effect on the Bestwall bankruptcy estate of litigating thousands of those identical claims in state court is sufficient to confer “related to” subject matter jurisdiction on the Bankruptcy Court.

Paddock Enterprises, LLC Case Study

- Paddock Enterprises, LLC, spun off as a wholly owned subsidiary of O-I Glass, Inc. and, in January 2020, filed for relief under Chapter 11 of the Bankruptcy Code.
- In June 2022, Paddock emerged from chapter 11 with a plan of reorganization approved by Paddock, the Asbestos Claimants Committee, the Future Claimants' Representative and O-I Glass.
- The centerpiece of the plan was an asbestos trust funded with cash and other consideration totaling $610 million in exchange for injunctions prohibiting the assertion of asbestos claims against O-I Glass as well as its current and former affiliates and a channeling of all asbestos claims to the asbestos trust.

Maremont Corporation Case Study

- In January 2019, Maremont Corporation, a non-operating subsidiary of Meritor, and Maremont's three wholly-owned, non-operating subsidiaries, filed for relief under Chapter 11 of the Bankruptcy Code.
- Maremont consummated a joint pre-packaged plan of reorganization in May 2019 in which all current and future asbestos claims related to Maremont's' historical asbestos-related activities were channeled to an asbestos trust that would process and satisfy all such claims on a go-forward basis.
- The trust was funded with a $28 million contribution from Meritor and Maremont's remaining assets, including approximately $21 million in cash and intercompany loan receivables less certain amounts needed to pay for the remaining administrative costs of the bankruptcy cases, as well as remaining insurance assets.

Tehum Care Services, Inc. Case Study

- Corizon Health, Inc., a Delaware corporation, was once the nation's largest prison healthcare provider. Corizon was faced with substantial exposure to employment lawsuits, prisoner lawsuits, and unpaid medical provider invoices.
- On April 28, 2022, Corizon converted to a Texas corporation. On May 3, 2022, Corizon Health, Inc., undertook a Texas Two Step. The divisional merger resulted in two surviving entities: YesCare and Tehum Care Services, Inc.
  - YesCare was given all of Corizon's active contracts with state and local governments, worth hundreds of millions of dollars. YesCare received an estimated $173 million in assets and only $98 million in secured debt through the divisional merger.
  - Tehum Care Services, Inc. received the majority of Corizon's unpaid bills and legal liabilities totaling somewhere between $10 million and $50 million. The divisional merger released Tehum from $98 million in senior secured debt and left it with $1 million in cash and as the payee under a $15 million funding agreement with M2 LoanCo LLC.
- Tehum's use of bankruptcy is different from previous Two-Steps because it aims to address not just mass lawsuits but also commercial debts owed to business partners.
- The Debtor and UCC's amended joint plan and disclosure statement indicates certain non-debtor affiliates are providing $37 million into a global settlement that would be used to pay personal injury claimants and other claimants.
- The parties currently are targeting a March 2024 confirmation hearing.

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