Business Bankruptcy Committee Newsletter

"Business Bankruptcy Committee: The World's Largest Organization of Bankruptcy Restructuring Lawyers"

The Business Bankruptcy Committee looks forward to seeing you at the ABA Business Law Section Annual Meeting in Washington, D.C. from September 12-14, 2019.

This edition includes two excellent articles: (i) one from Shaheen A. Etemadi, which analyzes the Supreme Court of decision in Mission Product Holdings, Inc. v. Tempnology, LLC, 139 S.Ct. 1652 (2019) regarding the treatment of rejection of trademark licenses in bankruptcy; and (ii) one from Samuel R. Henninger discussing bankruptcy standing issues. We are also excited to continue our spotlight series, this time with an interview with Jeffrey Bast of Bast Amron LLP.

Note from Susan Freeman:

On behalf of the Committee, I’d like to encourage anyone who wants to network with non-bankruptcy business attorneys from around the country, and those unable to come to the National Conference of Bankruptcy Judges, to join some of us in Committee leadership and the speakers at programs described in the next pages at the Business Law Section Annual Meeting. Because the NCBJ takes place so soon thereafter, I know many of you will opt for coming only to that meeting. You can register for the NCBJ and our Committee meeting and programs now. The first, recommended, option is to register for both the NCBJ and the ABA so that you will receive all the benefits that both organizations have to offer. This will give you access to not only the excellent NCBJ programs, but also the breakfasts, beverages and snacks, receptions and events. NCBJ registration will include the cost of one lunch, which can be used for one of our ABA lunch programs, a $90 savings. If you don’t also register for the NCBJ and receive a NCBJ nametag in addition to your ABA nametag, you will be excluded from the NCBJ's food and beverage area, and from the rooms where NCBJ programs, receptions and events take place. You can click on the “Education” tab for the NCBJ conference, and scroll down to see ABA program and subcommittee meeting information.

For more information, including registration links, click here
The NCBJ is held this year at the Marriott Marquis DC | 901 Massachusetts Ave NW, Washington, DC, October 30-November 1. The NCBJ has a group rate of $323/per night (plus tax and fees). Please use this link to make your hotel reservation; do not book through the hotel's website or 800 number – you will not access the NCBJ rate there, which is lower than any rate you will find online! This group NCBJ rate is available through Monday, September 30, or when the rooms sell out, whichever comes first. I look forward to seeing you there!
Friday, September 13, 2019: CLE AND NON–CLE PROGRAM:

4:00 PM to 5:30 PM: The Tangled Intersection of Mass Torts, Bankruptcy and Regulatory Law: What Can Be Learned from PG&E?

Sponsored by the Business Bankruptcy Committee

Using the PG&E bankruptcy as a case study, this panel will begin with a discussion of rules and regulations governing regulated utilities. The panelists will then discuss unique issues that have arisen in the context of a utility bankruptcy, using the PG&E bankruptcy case as a case study. The panel will then conclude with a discussion of how the courts and utility regulators are handling the interplay of utility regulatory law and the Bankruptcy Code.

Program Chair/Moderator: Kyung S. Lee, Kasowitz Benson Torres LLP, Houston, Texas

Program Speakers:
Charles Read, Latham & Watkins, Los Angeles, CA.
Patrick Maxcy, Dentons, Chicago, IL.
Honorable Elizabeth S. Stong, Bankruptcy Judge for the Eastern District of New York, Brooklyn, NY

2:00 PM to 3:30 PM: Converting a Chapter 13 to a Chapter 7 Absent the Debtor's Consent: Marrama, Law v. Siegel and 1307

Co-Sponsored by the Business Bankruptcy Committee

Section 1307 of the Bankruptcy Code governs dismissal of a chapter 13 or conversion to chapter 7. The provisions of 1307 may conflict when a party in interest seeks conversion and the debtor seeks dismissal. A split in caselaw based on two Supreme Court precedents is discussed, with ethical considerations and practice points.

Program Chair/Moderator: Steven Fender, Steven Fender P.A., Fort Lauderdale, FL

Program Speakers:
Leslie Berkoff, Moritt Hock & Hamroff LLP, Garden City, NY
Warren E. Agin, Swiggart & Agin LLC, Boston, MA
Judge Christopher Klein, Bankruptcy Judge for the Eastern District of California, Sacramento, CA
Friday, September 13, 2019: CLE AND NON–CLE PROGRAM:

2:30 PM to 4:00 PM: Bankruptcy Appellate Case Law Updates

Co-Sponsored by the Business Bankruptcy Committee

The program will review and discuss bankruptcy case decisions from the Supreme Court of the United States, Circuit Court of Appeals and Bankruptcy Appellate Panels from July 1, 2018, through June 30th, 2019. Our panel will discuss the decisions from the viewpoints of the debtor, creditor, and bench.

Program Chair/Moderator: Alan C. Hochheiser, Maurice Wutscher LLP, Beachwood, OH

Program Speakers:
Honorable Elizabeth S. Stong, Bankruptcy Judge for the Eastern District of New York, Brooklyn, NY
Linda Liali, Linda Liali P.A., Fort Lauderdale
Michael A. Sabella, BakerHostetler, New York, NY
Neil Ackerman, Ackerman Fox LLP, East Meadow, NY

Saturday, September 14, 2019: CLE & NON-CLE PROGRAMS:

8:30 AM - 10:00 AM: Prepping Clients in Corporate Divorce & Complex Ownership Disputes for Mediation and Arbitration

Co-Sponsored by the Business Bankruptcy Committee

Disputes between business owners can be very emotional and contentious. Clients may be seeking to fully explain their complaints and the injustices they feel they have faced, yet they may have no experience with the mediation and arbitration process, lack clarity in articulating the substantive issues in a resolvable manner, and have not yet evaluated whether there is a way to explore whether both parties can work to find a middle ground on any issues that are mutually agreeable. This can be further complicated where a company is in distress and resources may be limited and/or personnel may be changing over during the process. This panel discussion will focus on: (i) Preparing clients for mediation and arbitration; (ii) Crystalizing issues for resolution through mediation and arbitration; and (iii) Using this process to identify whether there are issues on which a middle ground could be sought.

Program Chairs/Moderators:
John Levitske, Ankura Dispute Analysis, Chicago, IL
Leslie Berkoff, Moritt Hock & Hamroff LLP, Garden City, NY

Program Speakers:
Justice Timothy S. Driscoll, Supreme Court of the State of New York, County Commercial Division, Mineola, NY
Janel M. Dressen, Anthony Ostlund Baer & Louwagie P.A., Minneapolis, MN
Ingeuneeal C. Gray, American Arbitration Association, Houston, TX
Neal A. Jacobs, Jacobs Law Group, Philadelphia, PA
Saturday, September 14, 2019: CLE & NON-CLE PROGRAMS:

10:30 AM - 12:00 PM: Resolving Distressed Corporate Divorce Disputes through Litigation and/or Court Annexed Mediation and Arbitration

Co-Sponsored by the Business Bankruptcy Committee

A Case Study / Mock-Dispute Resolution. Disputes between business owners can be very emotional and contentious. Furthermore, these cases often involve complicated issues of corporate governance and fiduciary duties, plus breach of contract claims. However, commonly a shared interest exists in maintaining the value of the company. Therefore, ownership disputes can be a good place to consider the potential benefits of mediation and arbitration, inside and outside of court litigation. The panel discussion with focus on: (i) How to smartly select and use the forms (or a combination of forms) of dispute resolution to make the difficult disputes resolvable? (ii) What are good practices by mediators, arbitrators and judges who handle recalcitrant, emotionally charged and contentious situations in business owners’ disputes to manage them towards resolution?; and (iii) How to achieve this while maintaining the value of the company and avoiding decimating the resources and future of the business at issue? What if the subject company is in financial distress?

Program Chairs/Moderators:
John Levitske, Ankura Dispute Analysis, Chicago, IL
Leslie Berkoff, Moritt Hock & Hamroff LLP, Garden City, NY

Program Speakers:
Byeongsook Seo, Snell & Wilmer L.L.P., Denver, CO
David J. Katz, PJN Strategies LLC, New York, NY
Frances Floriano Goins, Ulmer & Berne LLP, Cleveland, OH
John C. Sciacotta, Aronberg Goldgehn, Chicago, IL
Alisa Moen, Dillon Gage Metals, Wilmington, DE
The Supreme Court has finally resolved a critical, longstanding disagreement in lower courts regarding trademark rights in chapter 11 cases: whether a “rejection,” which amounts to a breach of an agreement, also rescinds the entire agreement. In *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S.Ct. 1652 (2019) (“Tempnology”), the Court held that rejection breaches, but does not rescind, an executory trademark licensing agreement. More specifically, the Court held that a debtor licensor’s rejection of an executory trademark licensing agreement does not necessarily deprive the trademark licensee of its rights to use the trademark. The Court’s 8-1 opinion, authored by Justice Kagan, resolves a circuit split between the First and Seventh Circuits in the latter’s favor.

Typically, unexpired trademark licensing agreements are “executory contracts” because the licensee must appreciate the quality specifications of the licensor and, of course, pay royalties to the licensor, while the licensor must monitor and supervise the quality of the licensee’s goods or services and refrain from suing the licensee for trademark infringement. In simpler terms, an unexpired trademark licensing agreement is an “executory contract” because neither party has finished performing. Accordingly, in a chapter 11 case, a debtor-licensor must make an important decision: whether to assume the executory trademark license agreement, or reject it. On the one hand, assuming the agreement would require the debtor-licensor to accept both the benefits and obligations of the agreement in full, including, without limitation, rendering future performance. On the other hand, rejecting the agreement would terminate the agreement and excuse the debtor-licensor from any further obligation under the agreement’s original terms. This decision is designed to allow debtors to maximize the value of the bankruptcy estate by assuming assets, including trademark licensing agreements, that are profitable and rejecting “assets” that are unprofitable.

*Tempnology* arises from an agreement between Mission Product Holdings, Inc. and Tempnology, LLC, whereby Tempnology gave Mission a license to use Tempnology’s COOLCORE trademarks in connection with the distribution of certain cooling athletic gear and accessories, including hats, neck gaiters, towels, and more. Particularly, the agreement granted Mission the exclusive license to distribute certain COOLCORE products in the United States and, more important to the issues before the Court in *Tempnology*, a non-exclusive license to use the COOLCORE trademarks in the United States and around the world. Like most unexpired trademark licensing agreements, the agreement at issue in *Tempnology* was an executory contract because neither party had completed performing the terms of the agreement. After the parties entered into the agreement, Tempnology filed for chapter 11 and sought to reject the agreement under Section 365 of the Bankruptcy Code, which enables a debtor to “reject any executory contract.” 11 U.S.C. § 365(a). In rejecting the agreement, Tempnology wanted to both terminate its obligations under the agreement and retract Mission’s non-exclusive right to use Tempnology’s COOLCORE trademarks.

The Bankruptcy Court for the District of New Hampshire held that the rejection terminated Mission’s rights to use Tempnology’s COOLCORE trademarks. The Bankruptcy Appellate Panel for the First Circuit reversed, relying on Section 365(g)’s statement that rejection “constitutes a breach” to hold that rejection does not terminate rights that would survive a breach of contract outside bankruptcy. The First Circuit rejected the Bankruptcy Appellate Panel’s judgment and reinstated the Bankruptcy Court’s decision. The United States Supreme Court granted *certiorari* in October 2018, heard oral argument on February 20, 2019, and issued its opinion reversing the decision of the First Circuit on May 20, 2019.

Adopting the reasoning of the Seventh Circuit, the Court held that the express language of Section 365(g) of the Bankruptcy Code—“the rejection of an executory contract . . . constitutes a breach of such contract”—and the “fundamental principles of bankruptcy law” command rejection be treated as a breach, and not as a rescission. The Court reasoned, in layman’s terms: “A rejection does not terminate the contract. When it occurs, the debtor and counterparty do not go back to their pre-contract positions. Instead, the counterparty retains the rights it has received
under the agreement. As after a breach, so too after a rejection, those rights survive.” Tempnology, 139 S.Ct. at 1662. Tempnology holds that this rule applies equally to trademark license agreements—e.g., non-debtor trademark licensees—both inside and outside of bankruptcy.

Put another way, when there is a rejection, a non-debtor licensee (in this instance, Mission) is treated the same as a licensee outside of bankruptcy, except a non-debtor licensee is still limited to filing a general unsecured claim in bankruptcy (and, as a result, may receive much less than the face value of their claim). In so holding, the Court rejected the contrary approach that rejection should be treated as rescission, reasoning that: “the rejection-as-rescission approach would circumvent the Code’s stringent limits on ‘avoidance’ actions” and “Congress enacted the provisions, as and when needed, to reinforce or clarify the general rule that contractual rights survive rejection...” Tempnology, 139 S.Ct. at 1663, 1664.

Most trademark licensees now need not worry whether they will lose their right to use a specific trademark if the licensor is forced into a chapter 11 proceeding. However, as Justice Sotomayor noted in her concurring opinion, Tempnology does not stand for the proposition that “every trademark licensee has the unfettered right to continue using licensed marks postrejection.” Tempnology, 139 S.Ct. at 1666 (Sotomayor, J., concurring). Rather, the true extent of what post-rejection rights a licensee may retain depends on the terms of the underlying licensing agreement, or state law.

Nevertheless, future chapter 11 debtor-licensors—especially debtors in the apparel, entertainment, gaming, and toy industries—and their other unsecured creditors are now at risk. Namely, Tempnology could have a devastating impact on the valuation of the bankruptcy estates of debtor-licensors. Critically, chapter 11 debtor-licensors can no longer use chapter 11 as a sword to target valuable intellectual property. The Court’s ruling presents a risk if the roles are reversed. Now, debtor-licensees may attempt to use Tempnology as a sword by rejecting the trademark license, refusing to pay anything further to the licensor, and retaining the trademark rights. Recent entertainment-industry chapter 11 debtors did not take this position, but after Tempnology they likely will, making this one of the biggest risks facing apparel, entertainment, gaming, and toy industry licensors moving forward. But Justice Sotomayor’s concurring opinion is directed towards dampening any enthusiasm for skirting around state law.

Although Tempnology may limit the options of some debtors by taking away one arrow in the quiver, chapter 11 still offers debtors some significant tools, including the automatic stay, which generally precludes creditors and other parties from taking most, but not all, actions against property of the bankruptcy estate, debtors, and debtors’ property once a bankruptcy case is filed; lien avoidance or extinguishment, e.g., liens can be extinguished if they are “dealt with” in a plan under Section 1141(c) of the Bankruptcy Code; and non-consensual “cram-down” contract modifications, which ultimately require compliance with all the requirements of Section 1129(a) of the Bankruptcy Code (except Section 1129(a)(8)), plus a showing that the chapter 11 plan does not discriminate unfairly and is fair and equitable with respect to each impaired class of claims or interests that has rejected the plan.

Finally, business bankruptcy attorneys will endlessly ponder the Court’s holding that the case is not moot because Mission presented a plausible claim to reopen the chapter 11 plan to recover lost profits arising from its inability to use Tempnology’s COOLCORE trademarks that were already distributed to creditors. Tempnology argued that Mission’s case was moot because the trademark license agreement had expired by its own terms and all assets had already been distributed to creditors in the bankruptcy case.
Justice Gorsuch’s dissenting opinion, in line with Tempnology’s argument, noted that nothing the Court might say could possibly restore Mission’s ability to use Tempnology’s COOLCORE trademarks because the agreement expired by its own terms following the Bankruptcy Court’s ruling. The 8-1 majority, however, did not agree, and found Mission’s case was not moot primarily because it found that Mission may be able to seek the “unwinding of prior distributions” to receive its “fair share” of the bankruptcy estate. Tempnology, 139 S.Ct. at 1661. But, in that regard, the Court’s rationale presents a potential slippery slope: “Ultimate recovery on [a] demand may be uncertain or even unlikely for any number of reasons, in this case as in others. but that is of no moment. If there is any chance of money changing hands, [Mission’s] suit remains alive.” Tempnology, 139 S.Ct. at 1660. Hopefully, clarity is forthcoming.

Although Tempnology addresses the critical question of whether a rejection should be treated as a termination or a rescission, the case will undoubtedly give rise to several additional issues and policy considerations in future cases. For example, attorneys for non-debtor parties, including non-debtor licensees, must analyze the non-debtor party’s post-rejection rights under applicable non-bankruptcy law, as noted in Justice Sotomayor’s concurring opinion. This inquiry will likely lead to some degree of uncertainty in planning and strategizing chapter 11 reorganizations and restructurings. Furthermore, disputes over non-debtor parties’ post-rejection rights under applicable non-bankruptcy law will likely magnify the persistent problem of ever-increasing prodigious chapter 11 costs.

Needless to say, the implications of Tempnology go far beyond trademark license agreements, as the Court expressly stated its decision applies broadly to every type of contract rejected by a debtor under Section 365 of the Bankruptcy Code. Tempnology, 139 S.Ct. at 1660-1666. In light of the fact that non-debtor parties will likely retain certain post-rejection rights after Tempnology, debtors will have to consider how rejection will address their reorganization and restructuring plans while non-debtor parties will have to strategize on how to maximize the leverage afforded them by the Court. These considerations will play a large role in the drafting and negotiation of trademark licensing agreements post-Tempnology.
Since Congress established our current system of bankruptcy courts, their judicial power has been a tricky issue. In a recent case, the Sixth Circuit addressed a relatively simple issue of standing to object to a trustee’s final report, in the case Carl F. Schier PLC v. Nathan (In re Capital Contracting Co.), 924 F.3d 890, 893 (6th Cir. 2019). But the Sixth Circuit also raised several interesting questions related to the judicial power of bankruptcy courts that have yet to be answered. The litigation began when Capital Contracting Co. sued Longhorn Estates, LLC in state court. Id. Capital Contracting fared poorly in the case—it was hit with a $5 million judgment. Id. One month after the state-court judgment was entered, Capital Contracting filed for bankruptcy. Id. As a new creditor of Capital Contracting, Longhorn Estates filed a claim.Id.

In the state-court litigation, Carl F. Schier PLC (Schier) represented Capital Contracting. In addition to Longhorn Estates, Schier filed a claim in the bankruptcy proceedings. Id. Schier’s claim was for unpaid legal fees. But when Schier filed that claim, the chapter 7 trustee countered with a malpractice suit against Schier based on the firm’s work on the Longhorn Estates state-court case. Id. In sum, Schier and the trustee settled. Id. In return for a release of further malpractice liability, Schier agreed to pay $600,000 and withdraw its claim for unpaid legal fees and the bankruptcy court approved the settlement. Id.

After the parties settled, the trustee filed its final account of the administration of the estate pursuant to § 704(a)(9) of the Bankruptcy Code. Id. Even though Schier settled earlier, it objected to the trustee’s final report. Id. Schier claimed that the trustee should have administered or abandoned an asset of the estate. Id. This asset, Schier alleged, was Capital Contracting’s right to appeal the $5 million judgment in the Longhorn Estates state-court case. Id. The bankruptcy court overruled Schier’s objection, and the district court later dismissed its appeal. Id. at 893-94. If Schier had raised the issue when it had a pending claim for unpaid legal fees, the bankruptcy concluded that Schier would have had standing to object. Id. at 893. But because it withdrew that claim and thus was no longer a party in interest, Schier no longer had standing. Id. On appeal, the district court drew a related but distinct conclusion. Id. at 893-894. Because Schier failed to meet the person-aggrieved test—a higher standard than Article III standing—the district court concluded that Schier lacked standing to appeal. Id. at 894.

The Sixth Circuit affirmed the dismissal of Schier’s appeal because Schier failed to show that it suffered an Article III injury. Id. at 897, 899. To appeal to an Article III court such as the district court or court of appeals, a party must at least meet Article III standing requirements. Id. at 897. To meet the elements of Article III standing, “a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” Id. (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992))). When the trustee filed its final report, which Schier objected to because of the trustee’s handling of Capital Contracting’s right to appeal the state-court judgment, Schier no longer had a financial stake in that judgment. Id. at 893, 897. In short, Schier failed to meet the standing requirements to appeal. Id. at 897. The Sixth Circuit concluded that the district court properly dismissed Schier’s appeal. Id. at 899.
In addition to resolving the issue of whether Schier had standing to appeal, the court raised several unanswered questions about standing in bankruptcy court. Here are a few of them:

- “Must parties who appear in non-Article III bankruptcy courts meet the justiciability requirements that apply in Article III courts?” Id. at 894.

- “What time should a court examine when assessing whether Schier has suffered an Article III injury—when it filed a proof of claim (for attorney’s fees) or when it made the relevant objection (to the final report)? And because Schier settled in between those events, has this constitutional standing inquiry really turned into a constitutional mootness inquiry?” Id. at 894-95 (citations omitted).

- Is the party-in-interest language in § 1109(b) impliedly applicable to chapter 7? Id. at 895.

- Does the party-in-interest language demand only Article III standing or a more direct interest? Id.

- What is “Lexmark’s effect, if any, on the person-agrieved test governing prudential standing in bankruptcy appeals?” Id. at 896-97.

Schier lost its case on Article III standing grounds, but in writing the decision, the Sixth Circuit did not limit its discussion to Schier’s case alone. It also raised several related jurisdictional issues that remain unresolved. As the jurisdiction of bankruptcy courts continues to be litigated, many of these questions may be answered in the coming years.

About the Author: Sam Henninger is a recent graduate of the University of Tennessee College of Law. In August 2019, he will begin serving as a Term Law Clerk for Chief United States Bankruptcy Judge Marcia Phillips Parsons of the Eastern District of Tennessee. Sam will join Waller Lansden Dortch & Davis, LLP as an Associate in the Finance & Restructuring Group following his clerkship.
We are pleased to announce that this quarter’s Member Spotlight is Jeffrey Bast!

Jeff has been practicing in the insolvency arena for more than 25 years. After two bankruptcy clerkships, he practiced in the restructuring groups at two international law firms where he was an equity partner. In 2008, Jeff left big law to start a solo practice. In 2009, he founded Bast Amron LLP, and the firm is now widely recognized as one of Florida’s top boutique firms delivering sophisticated advice to an array of clients with complex commercial disputes. Jeff’s practice focuses on corporate reorganization, workouts, and commercial litigation, with an emphasis on asset recovery. Jeff is a frequent speaker and writer both in the U.S. and abroad on topics related to insolvency. Most recently, Jeff was the US speaker on a panel of international attorneys discussing director and officer liability in Mallorca Spain. He has been recognized by his peers and numerous publications for professional excellence including: Best Lawyers in America, Chambers and Partners, Martindale Hubble, and Florida Super Lawyers.

**Spotlight Questions and Answers:**

1. **How did you come to be a bankruptcy practitioner?**
   I was an accounting major undergrad. I attended NYU School of Law with the intention of studying tax. But I hated my first tax class. Another professor suggested bankruptcy as an alternative code-based practice. That summer, I interned for Judge Cristol and then clerked for Bankruptcy Judge Steve Felsenthal (now retired) in Dallas after graduating. My path was further solidified when I took another clerkship for U.S. District Court Judge Sidney Aronovitz handling exclusively bankruptcy appeals.

2. **How did you get involved with the ABA BBC?**
   After nearly 15 years of practice in big firms, I opened my solo practice in 2008. After I announced the move, Trish Redmond suggested that I should consider the ABA BBC. I didn’t know much at that time, but I knew that when Trish makes a suggestion, you follow it. So, I signed up for the next BBC meeting.

3. **What is your most memorable ABA BBC moment?**
   There have been so many, but I guess I would say my first meeting was most memorable. As a solo practitioner, I thought the Small Business Subcommittee would be a good place to start. I showed up in the room, and no one was there to lead the meeting. So, I took the reins, led the meeting, and then reported the outcome to Trish. After that, she appointed me co-chair and I have held that title ever since.

4. **Who was the best mentor you have had, and why?**
   I suppose that would be my older brother Randy. He pushed me to work hard in school and encouraged me to blaze my own trail.

5. **What tips do you have for other mentors?**
   The key to mentoring is to always encourage your mentee. A good mentor, like a good leader, helps you dig deeper and bring out the best in yourself.

6. **What advice would you give to younger members of ABA?**
   Get involved now. My only regret about joining the ABA BBC is that I did not do it earlier in my career.