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MBA COMPLEX COMMERCIAL LITIGATION SECTION NEWSLETTER FEBRUARY 2020

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A FRESH START: SELLING FREE AND CLEAR OF DISPUTED OWNERSHIP CLAIMS IN BANKRUPTCY

BY CHRISTOPHER M. CONDON

"Fresh start" is a term typically used to describe the benefits an individual debtor receives when discharged of his or her debts in bankruptcy. The discharge settles the debtor's liabilities and ends pursuit by and disputes with creditors. There is no equivalent corporate discharge, but the bankruptcy process can provide a "fresh start" for a corporation's assets, which may be sold free and clear of disputed claims and interests to be utilized by a new non-debtor acquirer.

Increasing creditor leverage, resulting both from revisions to the Bankruptcy Code and market forces, has increased the use of asset sales as a means of reorganization in Chapter 11. A bankruptcy sale will typically be approved if the decision of the debtor to sell is supported by "reasonable," "proper" or "sound" business judgment, a rule commonly referred to as the "business judgment test." *In re Genesys Research Inst. Inc.,* No. 15-12794-JNF, 2016 Bankr. LEXIS 2376 (Bankr. D. Mass. June 24, 2016) at *62. "A debtor's business decision to sell should be approved unless it is shown to be so manifestly unreasonable that it could not be based upon sound business judgment, but only on bad faith, or whim or caprice." *In re Cadkey Corp.*, 317 B.R. 19, 22-23 (D. Mass. 2004).

A Chapter 11 sale is a powerful tool. It provides an expedient and efficient substitute for the traditional bankruptcy plan process, especially where the debtor's assets are in decline but have value if they can be uncoupled from the failing business. Assets are conveyed quickly upon a motion by the debtor. At closing, the buyer receives the benefit of both a bill of sale and a federal court order, which provide the buyer with protections not available outside of bankruptcy. Principal among those protections is the release of claims and interests associated with the assets, which claims and interests attach to the proceeds of the sale. *See, e.g., In re DVI Inc.*, 306 B.R. 496, 504-05 (Bankr. D. De. 2004) (collecting cases).

The sale power is not without limits. In order to approve a sale, the bankruptcy court must determine that there is good business reason for the sale and that the sale adheres to the substantive protections of Chapter 11. *Mission Prod. Holdings Inc. v. Old Cold LLC (In re Old Cold LLC)*, 879 F.3d 376, 383 (1st Cir. 2018). The debtor must also demonstrate that the "transaction has a proper business justification" and is not designed to circumvent or evade the Chapter 11 sale process. *In re GMC*, 407 B.R. 463, 491 (Bankr. S.D.N.Y. 2009). Bankruptcy courts have limited jurisdiction and can typically only authorize sales of assets of the bankrupt debtor, or "property of the bankruptcy estate." *See, e.g., DeGiacomo v. Travers (In re Traverse)*, 753 F.3d 19, 27-28 (1st Cir. 2014).

Creditors or other parties-in-interest may object or attempt to forestall a sale by claiming that the debtor does not own what it is trying to sell. Legitimate disputes as to ownership arise frequently in intellectual property disputes, where, as a for instance, technology may be determined to be dominant or subservient to other patented technology. Litigation of such disputes is inevitably lengthy and costly. Fully adjudicating such a dispute prior to a sale closing would almost certainly erode the benefits of the bankruptcy sale process and either drain or exhaust the resources of an already financially distressed seller.

To avoid these costly and time-consuming disputes that inevitably delay the bankruptcy process, Section 363(f)(4) of the Bankruptcy Code allows a debtor to "sell property under subsection (b) or (c) . . . of this section free and clear of any interest in such property of an entity other than the estate, only if . . . (4) such interest is in *bona fide* dispute." 11 U.S.C. § 363(f)(4). While the statute's only precondition is that such a dispute exists, in the 2004 *Rodeo Canyon* case, the Ninth Circuit ruled that courts cannot authorize a sale under Section 363(f) until an ownership dispute is resolved. *In re Rodeo Canyon Dev. Corp.,* 362 F.3d 603 (9th Cir. 2004), withdrawn and superseded, 126 Fed. Appx. 353 (9th Cir. Mar. 8, 2005). The opinion is of limited precedential value given that it was later withdrawn by the court when the parties to the matter filed a stipulation stating that certain operative facts upon which the opinion was based were incorrect. Regardless, it has been repeatedly cited for the proposition that "[a] bankruptcy court may not allow the sale of property as 'property of the estate,' without first determining whether the debtor in fact owned the property." *Id.* at 608-09. Thus, under *Rodeo Canyon* and its progeny, any third party could hold estate assets hostage by merely questioning whether such assets are property of the estate.

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More recently, two Massachusetts bankruptcy courts have considered and rejected the logic of *Rodeo Canyon* and adopted the majority view regarding the authority under Section 363(f)(4). *In re Genesys Rsch. Inst. Inc.,* Case No. 15-12794-JNF, 2016 WL 3583229 (Bankr. D. Mass. June 24, 2016); *In re IDL Dev. Inc.*, Case No. 18-14808 (Bankr. D. Mass. June 14, 2019). In both *Genesys* and *IDL*, the court recognized the very real problem of adjudicating a disputed claim of ownership in estate property prior to conducting a sale, and ruled that the debtor has the burden only to demonstrate that there was a *bona fide* dispute with respect to the debtor's interest in the property, not to prevail in the ownership dispute prior to the sale. The *Genesys* court stated, "[s]ection 363(f)(4) does not contemplate or require that the court resolve or determine any dispute about ownership before a sale hearing, but rather requires only an examination of whether there is an objective basis for either a factual or legal dispute about ownership." *Id.* at *20 (emphasis added). Indeed, "'[t]he purpose of § 363(f)(4) is to permit property of the estate to be sold free and clear of interests that are disputed by the representative of the estate so that liquidation of the estate's assets need not be delayed while such disputes are being litigated.'" *Id.* at *19 (internal quotations omitted). This burden to demonstrate a *bona fide* dispute is significantly lower than the burden to resolve the ownership dispute itself. Section 541(a)(1) of the Bankruptcy Code prescribes property of the bankruptcy estate as encompassing "all legal or equitable interests of the debtor in property

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MISSION PRODUCT HOLDINGS V. TEMPNOLOGY: WHAT REJECTION MEANS UNDER THE BANKRUPTCY COURT

BY DEREK DOMIAN

In *Mission Product Holdings v. Tempnology LLC,* 139 S. Ct. 1652 (2019), the U.S. Supreme Court answered what it means for a debtor to "reject" an executory contract under Section 365 of the Bankruptcy Code. The issue arose in the context of a trademark licensing agreement. The licensor, which had filed for bankruptcy, sought to terminate the licensee's trademark rights by rejecting the license agreement under Section 365(a). The Supreme Court (Kagan, J.) held that the debtor's rejection of the license did not terminate the licensee's trademark rights. More broadly, the Supreme Court held that a rejection under Section 365 of the Bankruptcy Code functions as a breach of contract, but not as the rescission of that contract.

The Supreme Court's holding thus rejected the view that a breach of contract in the bankruptcy setting means something different from a breach of contract in the common law setting. Section 365(g) of the Bankruptcy Code states that the "rejection of an executory contract" — a contract that neither party has finished performing — "constitutes a breach of such contract." Under the common law, the non-breaching party has a choice: it may treat the contract as terminated and seek damages — a paltry remedy in bankruptcy where recovery is often cents on the dollar — or it may continue the contract — here, the continued use and enjoyment of trademark rights under the license agreement. In other words, in the world outside of bankruptcy, a party cannot create its own rescission remedy by breaching the contract. If rescission does not occur in the real world, the Supreme Court asked, why should it occur in bankruptcy?

The debtor offered several arguments. It first pointed to other provisions in Section 365 of the Bankruptcy Code that make clear the counterparty's retention of rights "notwithstanding rejection" and argued that, beyond these specific (and inapplicable) provisions, the ordinary consequence of rejection should be the termination of these rights. The Supreme Court rejected this argument as overlooking the history of these particular provisions, histories that expressed multiple legislative interventions to prevent rescission, not endorse it, thus supporting the general rule that rejection does not mean rescission under Section 365. The debtor then argued that trademark law imposes on a licensor the duty to monitor and exercise quality control over the goods and services sold under a license, an onerous burden anathema to the relief a debtor should find under the Bankruptcy Code. The Supreme Court rejected this argument as an attempt to equate the debtor's power of rejection with avoidance, "the exceptional cases in which trustees (or debtors) may indeed unwind pre-bankruptcy transfers that undermine the bankruptcy process." The Supreme Court noted that the Bankruptcy Code seeks to limit the avoidance power, not unleash it at the discretion of trustees or debtors. The ultimate goal of reorganization is not the tail that wags the Bankruptcy Code.

Rejection is universal. According to the Supreme Court, so are the consequences of breach of contract. A breach in the bankruptcy world does not give the debtor a power or prerogative that a breaching party does not have in the real world. Rejection hurts, wherever it happens. ■

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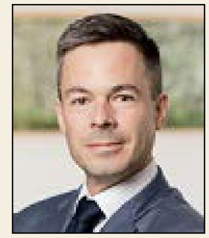

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as of the commencement of the case." Bankruptcy courts typically take a broad view in determining whether the debtor has something to sell. The "threshold" determination is satisfied so long as "the disputed property is or could become property of the bankruptcy estate." *In re Robotic Systems Inc.*, 322 B.R. 502, 508 (Bankr. D. N.H. 2005) (emphasis provided). "'In fact, every conceivable interest of the debtor, future, nonpossessory, contingent, speculative and derivative is within the reach of Section 541.'" *Wood v. Premier Capital Inc.*, 291 B.R. 219, 224 (1st Cir. B.A.P. 2003) (internal quotations omitted).

As the *Genesys* court explained, the "evidentiary record required to support a finding of a bona fide dispute for purposes of § 363(f) depends upon a case-by-case consideration of: (i) the procedural posture of the case, (ii) the need to expedite the sale, and (iii) the nature of the basis for determining that a dispute exists." 2016 WL 3583229 at * 20 (internal quotations omitted). The party asserting an interest in property being sold, not the bankrupt debtor, "has the burden of showing the validity and extent of its interest." *Id.* at 21. A *bona fide* dispute may be established in the context of a contested sale motion and does not require extensive discovery that might otherwise be associated with litigation of the underlying disputed claims of the parties. The disputed assets may then be sold free and clear of such interest, with the interest attaching to the proceeds of the sale, rather than the buyer's ongoing business.

Bankruptcy sales can be desirable for both the buyer and the seller. The buyer can acquire clean title to a bankruptcy company's assets supported by a bankruptcy court order determining the purchased assets to be free and clear of disputed claims. Section 363(f)(4) provides a mechanism to sell free and clear of disputed ownership interests, which is a significant tool to quickly and efficiently convey assets to a willing buyer to restart the debtor's business without the burden of the ownership litigation. ■

THE SJC PROVIDES FURTHER GUIDANCE ON ANTI-SLAPP MOTIONS

BY CATHERINE M. SCOTT

On Sept. 23, 2019, the Supreme Judicial Court (SJC) issued its second decision in *Blanchard v. Steward Carney Hospital Inc.*, 483 Mass. 200 (2019) (*Blanchard II*), and further explained its newly augmented standard for filing an "anti-SLAPP" motion under Massachusetts law, G.L. c. 231, § 59H. By way of background, the Legislature enacted the anti-SLAPP statute to counteract "SLAPP" or "strategic lawsuits against public participation," which are "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Duracraft Corp. v. Holmes Prods. Corp.,* 427 Mass. 156, 167-168 (1988). The anti-SLAPP statute provides a procedural remedy for early dismissal of these disfavored lawsuits, which is a special motion to dismiss that can be brought prior to engaging in discovery and is intended to dispose of claims that are based solely on a party's exercise of its right to petition. *Id.*

The court first issued a decision outlining its augmented standard in *Blanchard v. Steward Carney Hospital Inc*., 477 Mass. 141 (2017) (*Blanchard I*). In *Blanchard* I, nine of the nurses who formerly worked in the adolescent psychiatric unit of Steward Carney Hospital brought suit for defamation (among other things) against the hospital and William Walczak, former president of the hospital, for statements he made to the *Boston Globe* and other employees concerning the reasons for those nurses' termination. 477 Mass. at 144-145. The hospital filed an anti-SLAPP motion seeking early dismissal of the nurses' defamation claims, which was denied in the trial court and appealed as a matter of right. *Id.* at 142-143.

Upon further consideration, the SJC issued a new standard for dismissal pursuant to an anti-SLAPP motion in *Blanchard I* and remanded the matter to the lower court for further consideration under the new standard. *Id.* at 161.

Under the new *Blanchard I* standard, at the threshold stage, the moving party (usually the defendant) must establish by a preponderance of the evidence that the allegations in the lawsuit are "solely based on [the moving party's] own petitioning activities." *Blanchard II*, 483 Mass. at 203. Under the newly augmented *Blanchard II* standard, once this threshold is met, the burden shifts to the non-moving party (usually the plaintiff) to demonstrate that dismissal is not required through one of two routes: (1) by establishing by a preponderance of the evidence that the moving party's petitioning activity was, in essence, a "sham"; or (2) by establishing "such that the motion judge may conclude with fair assurance … that its suit [is] 'colorable'; and that the suit was not 'brought primarily to chill the moving party's legitimate exercise of its right to petition,' i.e., that [the lawsuit is] not retaliatory." *Id.* at 203-204.

In *Blanchard II,* the lower court reconsidered the hospital's anti-SLAPP motion under the new framework and again denied the motion. 483 Mass. at 201. The SJC affirmed the denial of the motion again, but took the time to explain how lower courts should analyze anti-SLAPP motions under the new framework. *Id.*

The newly issued framework to defeat an anti-SLAPP motion set forth in *Blanchard I* has caused the lower courts significant confusion, as the court provided little guidance as to how courts should determine whether the plaintiff's lawsuit was "brought primarily to chill the moving party's legitimate exercise of its right to petition." 483 Mass. at 204. Recognizing this potential confusion, the *Blanchard II* court outlined several factors that could be used to make such a determination, including, but not limited to, the following: (1) "whether the case presents as a 'classic' or 'typical' SLAPP suit, i.e., whether it is a lawsuit [] directed at individual citizens of modest means for speaking publicly against development projects"; (2) whether the lawsuit was commenced close in time to the petitioning activity; (3) whether the anti-SLAPP motion was filed promptly; (4) the centrality of the challenged claim in the context of the litigation as a whole, and the relative strength of the nonmoving party's claim; (5) evidence that petitioning activity was, in fact, chilled; and (6) whether the damages requested by the nonmoving party, such as attorneys' fees, would burden the moving party's exercise of the right to petition. *Id.* at 206-207 (internal quotations and citations omitted). The court recognized that in conducting this analysis, "these factors are not exhaustive; that no single factor is dispositive; and that not every factor will apply in every case."

Though there is still significant legal ground to cover in understanding the SJC's augmented framework, the court's decision in *Blanchard II* provides some much-needed guidance to lawyers and judges alike. The more stringent standard will make these anti-SLAPP motions more difficult to win, but the intent of the court's decision in *Blanchard II* was to weed out those lawsuits meant to chill petitioning activity, and allow those that are legitimate to move forward. Whether that occurs remains to be seen once the courts begin applying the *Blanchard II* factors to newly filed anti-SLAPP motions. ■

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SETTLEMENT AND ASSIGNMENT AGREEMENTS AND THE THREAT OF 'UNDERLITIGATION'

BY MICHAEL BROWN

A recent Supreme Judicial Court (SJC) decision offers guidance for situations in which a defendant settles a case and assigns its insurance rights to the plaintiff. Settlement agreements are encouraged as a matter of general policy. However, must an insurer be bound by the terms of such an agreement, even if not a party? What happens when the parties are engaged in "underlitigation," a collusive arrangement where the parties refrain from introducing evidence that would destroy insurance coverage? What recourse does the insurer have to challenge the settlement amount?

The case of *Commerce Insurance Company vs. Justina S. Szafarowicz*, *et al.* (131 N.E.3d 782 (Oct. 1, 2019)) analyzes these issues. In a long, but clear opinion, Chief Justice Ralph D. Gants reaffirmed the SJC policy of encouraging settlement agreements, while also providing clear protections for insurers and methods of challenging agreements that might prejudice liability carriers.

THE UNDERLYING WRONGFUL DEATH ACTION

The case arises from a wrongful death action. David Szafarowicz was struck and killed by a car driven by Matthew Padovano. The decedent's estate sued Padovano, who tendered the claim to his family's auto liability insurer, Commerce Insurance Company.

Commerce agreed to defend the claim, and paid its compulsory policy limits of $20,000, but reserved its rights to deny an additional $480,000 in indemnification obligations if it was determined that the accident was caused by an intentional act, and thus not an "accident," as defined by the policy.

Commerce also filed a separate declaratory judgment action to determine whether the policy provided coverage for the estate's claim. Meanwhile, Commerce attempted to intervene in the wrongful death case. It cited to a criminal proceeding against Padovano arising out of the same accident, and evidence from that proceeding that Padovano's actions were intentional, as opposed to accidental. Commerce claimed that neither party had incentive to introduce that evidence because they both "would prefer that insurance coverage exist for this loss."

UNDERLITIGATION

The judge denied Commerce's request to intervene, but also recognized the unfairness of "underlitigation," which in this case meant that the plaintiff refrained from introducing evidence of the defendant's intentional conduct, offering instead evidence of mere negligence. As a result, the defendant's insurer would not be able to disclaim coverage on grounds that the policy did not cover intentional conduct.

The judge identified competing interests. On one hand, underlitigation is inherently unfair to the insurer, which is forced to cover claims based on cherry-picked facts. On the other, the Padovanos would be unable to defend themselves without insurance proceeds. In the end, the Superior Court reached a solution: Commerce could overcome the unfairness of underlitigation by bringing a subsequent declaratory judgment action. In that setting, it could examine whether the issue of negligent versus intentional conduct was fairly litigated and, if not, could re-litigate the issue.

THE DECLARATORY JUDGMENT ACTION

That is exactly what Commerce did. The judge in the declaratory judgment action reviewed all the evidence related to the underlying case — not just the evidence produced in that case — and concluded that Padovano's actions were intentional. As a result, the Commerce policy did not cover the claims in the underlying case.

SETTLEMENT AGREEMENT AND ASSIGNMENT OF RIGHTS

While the court was making its coverage determination, the estate and the Padovanos entered into a settlement agreement, which included an assignment of rights. They did not obtain Commerce's assent. As part of the agreement, Padovano stipulated to "gross negligence" and the parties agreed that damages would be determined at a jury-waived proceeding. Further, the estate agreed to not seek damages or enforce any judgment against the Padovanos beyond the Commerce insurance proceeds, and the Padovanos assigned all their insurance rights to the estate.

Commerce objected to the settlement, but a judge overruled the objection. After the jury-waived assessment of damages hearing, the judge determined damages in the amount of $7,669,254.41. Included in this was $2,201,744.41 in prejudgment interest.

Even though the court decided that the Commerce policy did not provide coverage for the wrongful death claim, Commerce would still be required to pay postjudgment

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interest on the $20,000 in compulsory limits. The interest alone would exceed the policy limits. Commerce filed a petition for interlocutory review, and the SJC transferred the appeal on its own motion.

CHALLENGING THE JUDGMENT

On appeal, the SJC addressed whether Commerce could challenge the judgment when (1) its objection to the settlement agreement was overruled, and (2) there was a substantial risk of underlitigation.

The SJC first addressed the Commerce policy's "consent to settle" clause, which provided that "[i]f any person covered under this policy settles a claim without our consent, we will not be bound by that settlement." The court acknowledged that, while "consent to settle" clauses are usually enforced if the insurer can show that it was prejudiced by the settlement, this is not the case where the insurer is defending under a reservation of rights. It is a well-settled principle that, in such cases, an insurer relinquishes the right to control its insured's defense.

When an insurer reserves the right to deny indemnification, the insured has the right to protect itself by entering into a settlement agreement. Such an agreement is enforceable against the parties to the settlement but, as the SJC pointed out, is not necessarily enforceable against the insurer.

The mere existence of a settlement agreement does not create indemnification obligations where none were present in the first place. In this case, Commerce had obtained a declaration that its policy did not cover the claims in the wrongful death case because Padovano's actions were deemed to be intentional. Therefore, there was no coverage for the claim and Commerce was not bound to pay the $7.7 million judgment. This left the court to decide whether Commerce was still responsible for postjudgment inter-

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est on the $20,000 compulsory insurance payment.

The SJC undertook a similar analysis with regard to underlitigation as the Superior Court had done, balancing the risk of collusion against the policy considerations that encourage settlement agreements. The court concluded that an insurer who defends a claim under a reservation of rights is bound by the amount of a judgment arising from a prejudgment settlement/assignment agreement where (1) the insurer is given notice of the settlement/assignment agreement and an opportunity to be heard by the court before judgment enters; (2) the insurer contests the judgment; and (3) the insured, after hearing, meets his or her burden of showing that the settlement is reasonable in amount.

Further, the court held that a “reasonable” settlement amount cannot exceed the limits of insurance coverage, since any recovery under the assignment agreement will come from the insurer. In this case, because no reasonableness review had been conducted, the SJC remanded the case for a review on the reasonableness of the settlement/assignment agreement.

CONCLUSION

This case illustrates how an insurer can challenge underlitigation in certain situations. It also shows that, while settlement and assignment agreements are useful, they cannot unfairly expose an insurer to liability that exceeds its policy limits.

This case should act as a warning to counsel to carefully assess the recoverability of judgments. In the absence of a defendant who can personally pay a large judgment, or other extraneous circumstances, such as Chapter 176D liability against the insurer, settlement and assignment agreements should be kept within the limits of any applicable insurance policy. ■

CCL HOSTS ‘LITIGATING BUSINESS TORTS’ PANEL DISCUSSION

On Oct. 23, 2019, the Complex Commercial Litigation Section Council hosted a panel discussion at Sherin & Lodgen LLP on “Litigating Business Torts.” The panel featured Judge Karen Green of the Massachusetts Superior Court, who will begin serving a term on the Business Litigation Session in 2020. Judge Green was joined on the panel by attorneys Aliki Sofis of Quinn Emanuel Urquhart & Sullivan LLP and Joshua Lewin of Bowditch & Dewey LLP, and damages expert Michael Gordon of StoneTurn. The panel was moderated by Section Council member Ryan McManus of Hemenway & Barnes LLP. The lively discussion focused on the unique considerations that arise when litigating business tort cases, how to present a client’s position as a compelling narrative, and how to try complex business disputes to a jury. The discussion was followed by a reception for the panelists and attendees hosted by Sherin & Lodgen.

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