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Trademarks and Bankruptcy Litigation in the Shadow of *Tempnology*

Every so often, litigators need to be reminded how to interpret a statute, and one could be forgiven for having the impression that bankruptcy litigators need the most frequent reminders. All the talk of "equity" and the "purpose" and "aim" of the Bankruptcy Code—by bankruptcy litigators and bankruptcy courts alike—has led to some memorable admonitions from the Courts of Appeals over the years.[1] But, alas, the opportunity for a little "Bankruptcy Code 101" presented itself again in the recent case of *Mission Product Holdings, Inc. v. Tempnology, LLC*, this time to the Supreme Court of the United States. *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019).

Since 1988, the Bankruptcy Code (11 U.S.C. § 101(35A)) has defined "intellectual property" in such a way as to exclude trademarks. This was the same year that Congress enacted Section 365(n) to establish special rules for the treatment of "IP" licenses in a bid to overrule a decision by the Court of Appeals for the Fourth Circuit which held that a debtor's rejection of an executory contract had the effect of *revoking* its grant of a patent license. *Lubrizol Enterprises v. Richmond Metal Finishers*, 756 F.2d 1043 (4th Cir. 1985). Section 365(n) gives the non-debtor/licensee a valuable option when the debtor/licensor rejects the IP license pursuant to Bankruptcy Code section 365(a): treat the rejection as terminating the license, or (on certain conditions) retain its rights under the license, as such rights existed immediately before the bankruptcy filing.

So in 1988 the law became clearer for parties to a patent license and other licenses of "IP," but for the better part of the ensuing three decades, bankruptcy litigators have argued about trademark licenses. Because Congress did not include trademarks within the definition of "IP," and Section 365(n) does not apply, debtors sometimes argued that rejection of a trademark license serves to revoke the license altogether, and courts sometimes agreed, including, in this instance, the Court of Appeals for the First Circuit. *In re Tempnology, LLC*, 879 F.3d 389 (1st Cir. 2018).

Not so, said the Supreme Court, for it turns out that Section 365(g) has always had something to say about the effect of executory contract rejection: "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease…." A breach is nothing more and nothing less (though in bankruptcy, a Section 365(g) breach constitutes a pre-bankruptcy breach, meaning that the licensee's claim for damages will be paid on a pro-rata basis with other unsecured claims). In other words, a breach is not a termination or a revocation, but rather (surprise!) a *breach*. Outside of bankruptcy the breach of a trademark license does not mean the license is revoked; the licensee continues to have its rights if it so elects. Just so in bankruptcy: "breach" actually means breach.

But what of the "negative inference" that Sections 365(n) and 101(35A) create by omitting any reference to trademarks? No such inference arises, held the Supreme Court: "Congress did nothing in adding Section 365(n) to alter the natural reading of Section 365(g)—that rejection and breach have the same results." *Tempnology*, 139 S. Ct. at 1665. So the debtor/licensor cannot gain a right by negative inference when the Bankruptcy Code specifically negates that right elsewhere in Section 365.

Finding no inference that "rejection" means "revocation," the Supreme Court turned to the debtor's equitable arguments of old. According to the debtor/licensor, a rejection-is-breach reading of Section 365 "would impede a [debtor's] ability to reorganize," thus "undermining a fundamental purpose of the Code" because debtors will have to continue monitoring and exercising quality control over goods associated with a trademark. This is the argument the First Circuit adopted in its decision favoring the debtor/licensor. *Tempnology*, 879 F.3d at 402.

The Supreme Court dismissed this argument with two sentences that creditors will surely be quoting for years to come, in many different contexts: "The Code of course aims to make reorganizations possible. But it does not permit anything and everything that might advance that goal." *Tempnology*, 139 S. Ct. at 1665. Lest the point be unclear, the Supreme Court went on to explain that Section 365 does not "relieve the debtor of the need … to make economic decisions about preserving the estate's value—such as whether to invest the resources needed to maintain a trademark." 139 S. Ct. at 1666.

So once again, the Supreme Court reminds us that the Bankruptcy Code is the clearest indicator of what Congress intended by its complex balancing of the interests of debtors and creditors. None of this is to say that reasonable people cannot disagree on the trademark question. Two Circuit Courts of Appeal disagreed here, which is why the Supreme Court stepped in. Compare *Sunbeam Products, Inc. v. Chicago Am. Mfg., LLC*, 686 F.3d 372 (7th Cir. 2012) with *Tempnology*, 879 F.3d 389. In the end, however, the Supreme Court appears to have had little trouble with this one: seven Justices joined the majority opinion by Justice Kagan. Only Justice Gorsuch dissented, and then only because he believed the appeal was moot. Pretty straightforward after all was said and done, but no less a welcome resolution to a debate that has carried on for some 30 years.

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1. *See, e.g., In re Milwaukee Cheese Wisconsin, Inc.*, 112 F.3d 845, 848 (7th Cir. 1997) (the argument that "'a bankruptcy court is a court of equity' is not a mantra that makes the Bankruptcy Code dissolve").