MarkMonitor
Learn Best Practices for Fighting Fakes on the Internet
Wednesday, 12/14, 10am PT/1pm ET Register Now

New York Law Journal

ALM Properties, Inc.
Page printed from: *New York Law Journal*

Back to Article

Select '**Print**' in your browser menu to print this document.
Print Options: With Ads | Without Ads

Font Size: + −

District Courts May Get Firms' Unfinished Business

Sara Randazzo

The American Lawyer

11-15-2011

When it comes to litigation involving defunct law firms, clawback suits may be on the way out—of bankruptcy court, that is.

In a series of recent court actions involving the Coudert Brothers, Heller Ehrman and Thelen estates, law firms hit with so-called unfinished business claims in bankruptcy court argue that the claims should be litigated in federal district court instead.

And if a Nov. 2 ruling by Southern District Judge Colleen McMahon in Manhattan is any indication, the argument appears to be working.

That decision came in response to an August motion filed by Akin Gump Strauss Hauer & Feld, Duane Morris, Jones Day, and seven other firms asking that claims filed against them in 2008 by the Coudert Brothers estate be withdrawn from bankruptcy court.

The Coudert estate hopes to recover profits from work that originated at Coudert and went elsewhere as partners fled the firm in the months prior to its 2006 dissolution.

Arguing in favor of moving the claims, the 10 firms pointed specifically to the U.S. Supreme Court's January decision in *Stern v. Marshall*, 10-179. In *Stern*, which involved the bankruptcy of deceased former Playmate of the Year Anna Nicole Smith, the Court found that district court judges, not their bankruptcy court counterparts, have the constitutional authority to rule on common law questions such as the unfinished business claims that can arise in bankruptcy cases.

Granting the withdrawal request, Judge McMahon noted in *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld,* 11 civ. 5944, that absent *Stern*, "the firms' motion could and probably would be denied."

William Brandt, president of Development Specialists, a consulting firm that often advises bankrupt law firms and their estates, predicted that Judge McMahon's ruling will reshape the legal landscape for firms embroiled in clawback suits around the country.

"I think her decision will have a major impact on a lot of other cases," said Mr. Brandt, whose own efforts to recover money for the Coudert and Heller Ehrman estates have been delayed by change-of-venue motions.

Indeed, it did not take long for one firm targeted in such an action to seize on Judge McMahon's ruling.

On Nov. 4, Thompson Hine filed a motion asking Southern District Judge William H. Pauley III to take over a claim brought in bankruptcy court by Yann Geron, the Chapter 7 trustee of the bankrupt Thelen estate. At issue: Mr. Geron's attempt to recoup profits from work brought to Thompson Hine by former Thelen partner Michael Shannon, who left Thelen about two months before its partnership voted to dissolve on Oct. 28, 2008, according to the Thompson Hine filing.

In its motion requesting the withdrawal, Thompson Hine pointed specifically to Judge McMahon's Nov. 2 ruling and its reliance on *Stern*, noting that "a decision from this district recently granted a motion for withdrawal of the reference in a case very similar to this one, in which the trustee for a bankrupt law firm brought unfinished business claims against the law firms joined by the bankrupt firm's partners."

Thompson Hine is represented in *Geron v. Thompson Hine*, 11-cv-07891, by one of its New York partners, Barry Kazan, who did not return a call seeking comment. Contacted on Nov. 7, Mr. Geron, a Fox Rothschild partner in New York, said it was too soon for him to comment on the Thompson Hine motion because he was still in the process of formulating a legal strategy for responding to it.

Thompson Hine's motion marked the third time since late summer that law firms facing clawback suits have cited *Stern* as a reason for moving the claims out of bankruptcy court. In September, 16 firms facing such suits brought by the Heller estate filed a similar motion in bankruptcy court in San Francisco. (Since then, many of the firms have settled or dropped out.)

Thompson Hine does not rely solely on *Stern* in seeking to move Mr. Garon's suit to district court. The firm also argues that the case should be withdrawn from bankruptcy court because unfinished business questions in New York should only apply in contingency fee cases.

In making the argument, the firm cites a recent New York case in which a judge dismissed an unfinished business claim contained in a lawsuit brought by high-profile divorce lawyer Norman Sheresky against his former partners at what was then known as Sheresky Aronson Mayefsky & Sloan. New York Supreme Court Justice Eileen Bransten ruled in the case that "the court is not inclined to recognize a cause of action for unfinished business for hourly fee cases which has, hitherto, not been recognized by the New York courts" (NYLJ, Sept. 21).

That precedent may not hold for law firm dissolutions, according to Mr. Brandt, who thinks the fact pattern in the Sheresky case differs too much from the bankruptcy cases on which he works. Instead, he said, the Coudert case is the one to watch.

In California, where case law is much clearer on how to recover money related to unfinished business because of precedent set in the 1984 California Court of Appeals case known as *Jewel v. Boxer*, 156 Cal. App. 3d 171,203 Cal. Rptr. 13,1984 Cal. App., the question of venue and of whether hourly work can be included in recouped payments are still at issue.

Last month, Bankruptcy Court Judge Dennis Montali, who is overseeing the bankruptcies of Brobeck, Phleger & Harrison, Heller, and Howrey, filed a motion arguing that Heller's unfinished business claims should stay in his court. In court papers, Judge Montali said that *Stern* is being interpreted too broadly, and that he can still offer a final judgment on the claims, which would not exist if not for a bankruptcy.

Jonathan Hughes, a director at Howard Rice Nemerovski Canady Falk & Rabkin who represents Orrick, Herrington & Sutcliffe in its withdrawal motion in the Heller case, said that because of *Stern*, litigating the issue in bankruptcy court would only slow the process because it would likely have to be relitigated in district court to conclusively resolve the issue.

"Ultimately our client hopes to have a ruling by the highest court who will hear it, so there can be certainty in the law," Mr. Hughes said, adding that Orrick also argues that hourly rate cases should not be included in unfinished business claims.

Before *Stern* was decided, bankrupt law firm estates in California had found success in unfinished business claims, with the estates of both Brobeck and Heller recovering millions of dollars from the firms where former partners landed. (In one twist of fate, Brobeck even settled with a postbankrupt Heller for $471,000 in such claims.)

In the Howrey bankruptcy, which is also playing out in San Francisco, no claims have yet been filed against former firm partners, but newly appointed Chapter 11 trustee Allan Diamond said in a recent interview with The Am Law Daily that he expects the bankruptcy to get litigious and that he will not shy from bringing *Jewel v. Boxer* claims.

Whatever the venue, DSI's Brandt believes the unfinished business claims he and others seek to win on behalf of bankrupt firms will remain an important source of revenue for the estates of those firms. And to those who argue that partners should be free to take work with them without repercussions, Mr. Brandt counters that as practicing law evolves into more of a business than a profession, "then when creditors are left holding the bag and have significant claims, they have a right to sit down and say: What part of this valuable business migrated away? How do we share in that value?"

@|Sara Randazzo is a reporter for The American Lawyer, an affiliate of the New York Law Journal. She can be contacted at srandazzo@alm.com.

Copyright 2011. ALM Media Properties, LLC. All rights reserved.