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Rights of Trademark Licensees: Protection for Non-Debtors After Rejection of Trademark License Agreements

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Introduction

The year 2014 brought some important decisions affecting trademark licenses and all distressed investors. The Eight Circuit in *Interstate Bakeries*[1] joined the Seventh Circuit in fashioning protection for trademark licensees. Congress enacted Bankruptcy Code subsection 365(n) to protect many forms of intellectual property licenses by protecting licensee's right to use intellectual property rights after the debtor/licensor rejects an intellectual property license. However, trademarks are not included in the definition of "intellectual property" in the Bankruptcy Code[2] and therefore do not receive such protection. A number of judges have written dissenting opinions in various decisions arguing that trademark licenses deserve the same protection as other intellectual property. The Seventh Circuit expanded the protection given to trademarks licensees in *Sunbeam*[3] when it held that rejection of a trademark license does not deprive the licensee of the trademark license. In the Eighth Circuit's opinion, however, the court found that the trademark license was not executory and therefore did not reach the effect of rejection on a trademark license agreement.

In 2014, doubt once again arose regarding the right of secured creditors to credit bid. In 2012, the Supreme Court in *Radlax Gateway Hotel*[4] resolved the issue that secured creditors have the right to credit bid in asset sales implemented by plans of reorganization.[5] Just when secured creditors thought credit bidding rights were safe, 2014 brought two new decisions that challenged secured creditors' rights to credit bid where the creditors purchased their secured claims on the secondary market. The Bankruptcy Court for the District of Delaware and the District Court for Eastern District of Virginia lowered the bar for the type of behavior that constitutes "cause" sufficient to deprive a secured creditor of its ability to credit bid. These cases hold that there is no "absolute right" to credit bid, and that creating more interest in

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[1] *Lewis Bros. Bakeries Inc. v. Instate Brands Corp. (In re Interstate Bakeries Corporation),* 751 F.3d 955 (8th Cir. 2014).
[2] 11 U.S.C. § 101(35A).
[3] *Sunbeam Prods., Inc. v. Chicago Am. Mfg., LLC*, 686 F.3d 373 (7th Cir. 2012).
[4] *Radlax Gateway Hotel*, 132 S. Ct. 2065 (2012).
[5] *Id.*

an auction appears to be sufficient reason to revoke a secured creditor's ability to credit bid if the secured creditor engaged in some inequitable behavior. Both cases involved secured creditors that purchased their claims on the secondary market and pursued "loan to own" strategies in the bankruptcy court. The Bankruptcy Court for the District of Delaware, no stranger to aggressive loan to own strategies, was one of the courts that greatly limited the ability of a secured claimant to credit bid. When a court revokes a secured creditor's ability to credit bid, it is time to pay attention to the reasons why.

Rights of Trademark Licensees: Protection for Non-Debtors after Rejection of Trademark License Agreements

A recent decision by the Eighth Circuit joined the Third Circuit in finding that a business sold along with its trademark license does not risk termination of its trademark license after the sale is consummated. However, the Eighth Circuit did not reach the issues decided by the Seventh Circuit in deciding whether rejection of a trademark license terminates the right to use a trademark license or whether such rights are preserved pursuant to application of state law's result in the event of a breach of a trademark license.

Trademark licensees often invest significant amounts to create businesses centered around their trademark licenses. Business decisions and expenditures are made in reliance on rights bestowed under the trademark license agreement. The Third Circuit in *In re Exide*,[6] relied on a finding that a trademark license agreement was no longer executory to prevent the termination of a non-debtor's rights to use trademarks licensed by the debtor. The presumption was that if the trademark license had been executory, the debtor could have rejected the license agreement, and deprived the non-debtor of its rights to use trademark. Trademarks licensees can rest a little easier about their investments, because the Eighth Circuit has ruled that when trademark licenses are part of an integrated sale of a business, the license agreements are not executory after the sale of the business has been consummated, and therefore cannot be rejected. While the Seventh Circuit expanded the

[6] *In re Exide Techs.*, 607 F.3d 957, 961 (3d Cir. 2010).

protection for trademark licensees, the Eight Circuit did not reach the issue of the effect of rejection on a trademark license agreement in *Interstate Bakeries*.

In 2010, Judge Ambro argued in his concurring opinion in *Exide* that judges should use their equitable powers to prevent termination of trademark rights after rejection of trademark licenses.[7] The bankruptcy court in the *Sunbeam* case reached the same conclusion.[8] However, the Seventh Circuit in *Sunbeam* specifically rejected equity as a basis for decision-making regarding trademark licenses in bankruptcy.[9] A little background is helpful in understanding the issue.

In 1985, the Fourth Circuit in the *Lubrizol*[10] case held that rejection of a technology license terminated the licensee's rights. In determining that the technology license was executory, the Fourth Circuit determined that the debtor and the licensee both had material ongoing obligations under the license. Next, the court examined whether the rejection bestowed an advantage on the debtor. The court deferred to the debtor's business judgment in ruling that the rejection was within the realm of reasonableness, leading the court to conclude it would not interfere. The rejection of the technology agreement resulted in a prepetition breach. Under state law, the licensee was entitled to keep its rights under the license. However, the Fourth Circuit found that even though the trademark license was breached, not rescinded, the licensee was entitled only to a damage claim. The license was driven out of business due to the licensor's bankruptcy.

The implications of the *Lubrizol* case were clear. Starting a business based on a technology license was risky business. Congress sought to address the issue by enacting Subsection 365(n) of the Bankruptcy Code. The goal of the subsection was exactly what trademark licenses needed – to maintain a licensee's right to the licensed trademark in the event a debtor rejects the trademark license. The only catch is that trademarks are not included in the definition of "intellectual property" in Bankruptcy Code

7 *Id.* at 967.
8 *Sunbeam Prods., Inc.*, 686 F.3d at 375.
9 *Id.* at 375-76.
10 *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.,* 756 F.2d 1043 (4th Cir. 1985).

section 101(35A).[11] The legislative history is clear that Congress thought trademark licenses were important, but that the issues of quality control and continuing relationships with the trademark licensors needed further study. Therefore, the issue of trademark licenses was not ready to be included in Subsection 365(n).[12] Section 365(n) left the treatment of trademark licenses up to the courts.

Circuit Courts did not address the trademark license issue in a major bankruptcy case until 2010. Excide Technologies filed a Chapter 11 case in 2002. Ten years earlier, Excide had sold substantially all of its battery business to EnerSys, including a trademark and trade name license agreement. The Bankruptcy Court, in an unchallenged order, had ruled that the 1991 asset purchase agreement, the trademark license agreement and two other agreements constituted a single agreement.[13] Exide thereafter sought to reject the trademark license agreement. Finding that the integrated agreements were executory, the Bankruptcy Court of the District of Delaware entered an order authorizing Exide to reject the trademark license agreement, as well as the rest of the integrated agreement. The Third Circuit heard the appeal in 2010. In *Exide*,[14] the Third Circuit reasoned that only executory contracts could be rejected. Therefore, the Third Circuit applied the Countryman test to determine whether non-performance of the remaining obligations under the agreement by either the debtor or the non-debtor would constitute a material breach sufficient to excuse performance of the other party's remaining obligations.[15] The Third Circuit found that the sale had closed more than ten years prior, the purchase price had already been paid, the purchaser had possession of the manufacturing plant and had been producing batteries for the last ten years. Exide had already received the benefit of the agreement. The purchaser's continuing obligations, such as quality control standards, were either minimal or not sufficient to outweigh the factors supporting substantial performance. The Third Circuit's decision in *Exide* gives comfort to purchasers of businesses that include trademark license agreements, because the trademark

[11] 11 U.S.C. § 101 (35A).
[12] *Id.* § 365(n); *See* S. REP. NO. 100-505 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3204.
[13] *In re Exide Techs.*, 607 F.3d 957, 961 (3d Cir. 2010); *In re Exide Techs.*, 340 B.R. 222, 227-28 (Bankr. D. Del. 2006) (reversed on other grounds).
[14] *In re Exide Techs.*, 607 F.3d at 957.
[15] *Id.* at 962.

licenses will not be terminated after the sales of the businesses are consummated. However, the decision continues to rely on a finding that trademark licenses are not executory. Licensees under rejected trademark licenses are not receiving the same protection granted to licensees of other intellectual property under Section 365(n) of the Bankruptcy Code.

In the concurring opinion in the *Exide* case, Judge Ambro, a former bankruptcy practitioner, concluded that rejecting a trademark license should not deprive the licensee of the right to use the trademarks. Judge Ambro reviewed the legislative history of Section 365(n) to conclude that there should be no negative inference drawn from the exclusion of trademark licenses from the definition of intellectual property.[16] Judge Ambro argued that courts should use their equitable powers to prevent rejection of a trademark license to allow the debtor to "take back" trademark rights licensed to a third party.

In 2012, the Seventh Circuit decided *Sunbeam*.[17] Prior to having an involuntary case filed against it, a company that sold consumer products gave a trademark license to one of its manufacturers to sell a product directly to stores, if the company did not purchase all the product that it ordered. Thereafter, an involuntary bankruptcy case was filed against the company, and its business was then sold to another company, Sunbeam. Sunbeam did not want to compete with the manufacturer, nor did it want to purchase the products ordered, but not purchased by the debtor. Instead, Sunbeam directed the trustee to reject the trademark license agreement and then filed a motion to enjoin the manufacturer from using the trademark.

The Seventh Circuit first determined that the trademark license was executory and therefore the rejection was proper. It then sought to determine the effect of rejection. The Bankruptcy Court had followed Judge Ambro's concurrence and applied equity to allow the licensee to maintain its rights to use the trademarks.[18] The Seventh Circuit rejected equity as a basis for determining the effect of rejection. Instead, the Seventh Circuit

[16] *Id.* at 964.
[17] *Sunbeam Prods., Inc v. Chicago Am. Mfg., LLC*, 686 F.3d 372, 375 (7th Cir. 2012).
[18] *Id.*

ruled that Bankruptcy Code Section 365(g)[19] classifies rejection as a prepetition breach. Rejection does not terminate a contract. Because state law does not eliminate trademark license rights in the event the licensor breaches a trademark license agreement, the Seventh Circuit held that a rejection of a trademark license does not terminate the licensee's rights under the trademark license.

In June of 2014, the Eighth Circuit decided *Interstate Bakeries*[20] a case with facts substantially similar to those in *Exide*. In *Interstate Bakeries*, certain assets were spun off due to an anti-trust ruling resulting from a merger. The trademark license agreement was entered into as part of the sale, which was consummated more than eight years prior date the action was brought. While the Eighth Circuit could have discussed or adopted the broader ruling of the Seventh Circuit, it adopted the reasoning of the Third Circuit in *Exide* finding that the trademark license constituted part of an integrated agreement to sell the business. Therefore, the trademark license was no longer executory and could not be rejected. The Eighth Circuit did not address the effect of rejection of a trademark license.

Credit Bidding Is Not a Sure Thing

There had been some uncertainty regarding a secured creditor's right to credit bid in a plan of reorganization since the Third Circuit's decision in *Philadelphia Newspapers*.[21] In that case, the Third Circuit held that a debtor could sell its assets free and clear of liens, over the objection of its secured creditors and without allowing credit bids, as long as the sale occurred pursuant to a plan of reorganization. The Third Circuit reasoned that the Bankruptcy Code[22] allowed a debtor to confirm a plan over a secured creditor's objection in three different circumstances: First, if the debtors kept the collateral and the secured creditors kept their liens; two, if the debtor sold the collateral and the secured creditor maintained its right to credit bid and third, if the secured creditor

[19] 11 U.S.C. § 365(g).
[20] *Lewis Bros. Bakeries Inc. v. Instate Brands Corp. (In re Interstate Bakeries Corporation),* 751 F.3d 955 (8th Cir. 2014).
[21] *In re Philadelphia Newspapers, LLC,* 599 F.3d 298 (3d Cir. 2010).
[22] 11 U.S.C. §1129(b)(2)(A).

received the indubitable equivalent. The Third Circuit held that each of the three options stood on equal footing and as long as any of the tests were satisfied, the plan could be confirmed. The Supreme Court disagreed and resolved the uncertainty in favor of allowing secured creditors to credit bid in assets sales under plans.[23] But just as one uncertainty regarding credit bidding is cleared up, other uncertainties regarding the amount that can be credit bid have been raised.

"Credit bidding" is the term used when a secured creditor is allowed to set off its allowed, prepetition secured claim against the purchase price in a postpetition sale for some or all of the debtors' assets. Section 363(k) of the Bankruptcy Code, which allows a secured creditor to bid in its allowed, secured claim, serves as a failsafe for secured creditors. Valuing a debtor's assets is more of an art than a science, particularly when it is not clear whether the business can be sold as a going concern. If the secured creditor believes that the assets are being undervalued, the creditor can credit bid its secured claim as some or all of the purchase price for the assets. In this way, credit bidding keeps the plan process honest. The countervailing balance is that a financial institution typically does not want to run the debtor's business and prefers to be paid the proceeds from the sale.[24] In 2014, the Supreme Court essentially adopted the reasoning in Judge Ambro's dissenting opinion in *Philadelphia Newspapers*. Having been a distinguished, practicing bankruptcy lawyer for many years prior to being appointed to the Third Circuit bench, Judge Ambro employed his understanding of the background, legislative history and reasons for credit bidding to adopt a statutory interpretation consistent with the purpose of credit bidding.[25] Where the debtors sought to cram down a plan that sold its assets without honoring the credit bidding rights of the secured creditors, Judge Ambro viewed the three options to cram down secured creditors differently than the majority of the Third Circuit judges. Judge Ambro reasoned that the second option (the requirement that the secured creditor must maintain its right to credit bid, if its collateral is sold) is the only condition by which a debtor can sell its assets over the

[23] *In re Philadelphia Newspapers, LLC,* 599 F.3d at 318.
[24] In contrast, secondary market purchasers may become involved in the bankruptcy case to gain control of the debtor's business.
[25] *In re Fisker Auto. Holdings,* 510 B.R. 55 (Bankr. D. Del. 2014).

objection of a secured creditor. Judge Ambro reasoned that the third (the secured creditor must receive the indubitable equivalent) was available only in situations that were not already covered by the first two provisions of Section 1129(b)(2(A). Therefore, only way a debtor can sell a secured creditor's collateral over the creditor's objection is to preserve the creditor's right to credit bid.

In a separate case before the Supreme Court on the same issue, *Radlax Gateway Hotel*,[26] the Supreme Court jumped right into the statutory interpretation and reached the same conclusion as that in Judge Ambro's dissent in *Philadelphia Newspaper*. Judge Scalia relied on the principle that where a statute contains a specific provision and a general provision, the general provision does not apply to the circumstances in the specific situation so as to make the specific provision superfluous.[27] In the case at hand, where the second prong of the cram down provisions deals with an asset sale and the third prong is a general provision that makes no reference to an asset sale, the general provision does not create another option to cram down a plan in an asset sale. The second provision is the sole manner in which to cram down a dissenting secured creditor in an asset sale under a plan of reorganization. Therefore, the secured creditor is entitled to credit bid.

***Fisker* and *Free Lance* Add to the Uncertainty**

Two recent cases have again brought the right to credit bid into question. The first case, *In re Fisker Automotive Holdings*, *Inc.*[28] limited the amount a secured creditor can credit bid to the price it paid to purchase the claim on the secondary market. The holder of the secured claim was a hedge fund that purchased the claim from the Department of Energy (the DOE). The DOE purchased notes from the debtor for the face value of $168 million. Once Fisker defaulted on the notes, Hybrid Tech Holdings, LLC (Hybrid) purchased the secured notes for $25 million. It is not uncommon for distressed debt purchasers to buy debt after it defaults, before a bankruptcy case is filed. The market for buying distressed debt from original holders is referred to as the "secondary

[26] *Radlax Gateway Hotel,* 132 S. Ct. 2065 (2012).
[27] *Id.* at 2071-72.
[28] *In re Fisker Auto. Holdings,* 510 B.R. 55.

market," although there is no uniform definition. Most likely, the purchaser has bought the debt at a fraction of the face value and is seeking to make a profit from its purchase. As long as the distribution from the restructuring or bankruptcy case is higher than the purchase price actually paid for the debt, the distressed debt buyer can make a profit. Public perception can be hostile toward distressed debt buyers, and some prominent lawyers have made public statements criticizing hedge funds. I feel the opposite way. Having practiced long before there was a secondary market in distressed debt, I represented secured financial institutions. For a client that made the original loan at one hundred cents on the dollar, getting less than one hundred cents on the dollar is painful. Although the debt, when it goes into default in a financial institution, gets transferred from the person who made the loan to the workout department, getting a return of less than one hundred cents on the dollar is still a loss. However, when a buyer on the secondary market pays a fraction of the face amount, it is much easier to get a deal done. The distressed debt buyer is making money, and will be motivated by the economics of the deal. In contrast for the original holder, it is much more difficult to reach a settlement when every proposed deal is a loser. For the financial institution, the only thing worse than making a deal for less than one hundred cents on the dollar is making that same deal after incurring legal fees, after months of wrangling. When the original holder can sell its claim to a distressed debt purchaser, the original holder can get cash quickly and can walk away from the bankruptcy case. Even if the cash is only a fraction of the face value of the debt, it is still a better deal than getting that same return after spending legal fees and waiting through the court process for months or years. The original lender can put the capital to work on more promising loans. Further, the distressed debt buyer sometimes is willing to be more creative, because this is its business and it is making a profit. The idea of penalizing hedge funds and other distressed debt purchasers is counter-productive to the interests of original lenders and to the bankruptcy process itself.

Particularly when the markets are not performing, pension funds are losing value and employees are losing their jobs, the idea that someone is making money from the bankruptcy can be difficult to swallow. It is understandable that people have some hostility toward hedge funds, and cases such as *Fisker*, when the court limits credit bidding to the amount paid for the debt, rather than the face amount, seem fair to some commentators. However, the case law is consistent that the amount paid for the claim and the identity of the holder of the claim are irrelevant to how the claim is treated in the bankruptcy. The decision in *Fisker* appears to be motivated by the identity of the holder of the debt and the purchase price paid more than anything else. In the *Fisker* case, the court justified limiting the credit bid, because a competing bidder, Wanxiang America Corporation, refused to participate in the auction if Hybrid was allowed to credit bid more than $25 million. Typically, competing bidders have no power to dictate the terms of an auction. However, in *Fisker*, the court's desire for an auction, together with the heavy-handed behavior of the distressed debt purchaser by setting an aggressive schedule for the proposed sale of Fisker was sufficient to convince the judge to limit the amount of Hybrid's credit bid to the purchase price paid for its claim.

The Bankruptcy Court for the District of Delaware held that secured creditors do not have an absolute right to credit bid. The bankruptcy court held that Section 363(k) authorizes the court to revoke a secured creditor's ability to credit bid[29] based on a broad interpretation of what a court considers to constitute "cause." Hybrid argued that "cause" must be "inequitable" conduct by the secured creditor. Rejecting that narrow reading, the court held that "cause" is not defined in the statute, and therefore, the court's ability to determine what conduct constitutes "cause" is not limited.[30]

Fisker is a decision in which bad facts made bad law. The lesson is that distressed debt buyers must be aware that courts sometimes punish creditors that it considers to be trying to gain an unfair advantage. In reading the opinions for guidance, courts typically do not articulate the rarely articulated issue at the heart of the problem. For example, neither opinion articulates any legal issue with purchasing debt from the secondary market. However, the court's remedy makes it clear that profiting on the debt is problematic for the court.

[29] *Id.* at 59.
[30] *Id.* at 61.

In May of 2014, another bankruptcy case limited a secured creditors' right to credit bid based on what the court asserts is bad behavior by the creditor. In *Free Lance-Star Publishing*[31] a distressed claims buyer purchased secured debt after the debtor commenced a bankruptcy case. The bankruptcy court denied the secured creditor the right to credit bid the full amount of its secured claim based on three justifications:

(1) the secured creditor did not hold fully perfected liens on 100 percent of the debtors' assets;
(2) the creditor's inequitable conduct consisting of:

    (a) the secured creditor engaging in an overly-aggressive "loan to own" strategy,
    (b) requiring prepetition marketing materials to prominently disclose a more comprehensive security interest than it had,
    (c) attempting to force the debtor to agree to an aggressive time table for the sale and
    (d) withdrawing its support for the bankruptcy filing when the debtor refused the secured creditor's offer of post-petition financing in exchange for completing the secured lender's lien package and

(3) the creditor's inequitable conducted chilled the bidding on the debtor's assets.[32]

As a result of its findings, the bankruptcy court limited the secured creditor's credit bid to less than one-tenth the amount of its validly perfected liens. The court in *Free Lance*, relied on the court's reasoning in *Fisker*.

The opinion did not discuss how it determined that preventing the secured creditor from credit bidding nine-tenths of its claim was the appropriate remedy or why the conduct satisfied the standard of cause. There is no attempt to determine whether the secured creditor's behavior in *Free Lance* caused any actual harm. Further, other than concluding that the behavior "chilled the bidding," the court did not explain what was objectionable about a "loan to own" strategy such that it constituted

[31] *DSP Acquisition, LLC v. Free Lance-Star Pub. Co.*, 512 B.R. 808 (E.D. Va. 2014).
[32] *In re The Free Lance-Star Pub. Co.*, 512 B.R. 798, 807-08 (Bankr. D. Va. Apr. 14, 2014).

"cause" sufficient to deprive a secured creditor from exercising its credit bid. In cases such as this, it is difficult to measure whether perception played a part in the court's decision.

These cases stress the importance of advising clients who have purchased secured claims on the secondary market about a few traps for the unwary:

- Do not underestimate the power of perception: behavior that is legal, but could be viewed as highly aggressive, may backfire.
- The corollary is to know your audience. While pursuing a "loan to own" strategy is a perfectly acceptable course of action, it may require extra caution in its execution in venues where such practices are not the norm.
- Being familiar with local practice can mean the difference between a successful strategy and losing the ability to credit bid; and
- This is true for all case law: the circumstances that lead to a ruling, particularly at the bankruptcy court level, are not always obvious. Therefore, it is important to know not only what the case holds, but also to read between the lines to figure out what seems to be bothering the judge. For example, in the *Free Lance-Star* case, the court appears to be bothered by the lack of respect shown by the secured creditor by failing to disclose to the court that the creditor filed financing statements, by assuming it could rush the court's docket and by attempting to influence the auction in what appears to be an unfair manner.

Conclusion

By enacting Bankruptcy Code section 365(n), Congress intended to protect the rights of intellectual property license holders by ensuring that a debtor's rejection of an intellectual property license did not result in the unilateral termination of the license holder's technology right.[33] While Congress believed that trademark licenses also warranted protection, Congress believed that trademark licenses raised additional concerns due to the trademark licensors' legitimate concern in regulating the quality of the trademarked products. Therefore, until further study could be performed,

[33] S. Rep. No. 100-505 (1988), reprinted in 1988 U.S.C.C.A.N. 3200, 3201.

Congress decided to allow "bankruptcy courts" to develop "equitable treatment" for trademark licenses after rejection of license agreements.[34]

More than twenty-five years after the enactment of Bankruptcy Code 365(n), courts have not yet fashioned a uniform treatment where the trademark license has been rejected. There appears to be a consensus that trademark licensees should retain their rights after the license's rejection. However, courts have differed in the legal reasoning to reach that result. The Seventh Circuit in *Sunbeam* has embraced a uniform treatment of trademarks when the license has been rejected, based on state law. The trademark rights would continue as provided under the license. This treatment is consistent with the treatment of unexpired leases for non-residential property under Bankruptcy Code section 365(h)(1). However, the 2014 Eight Circuit decision in *Interstate Bakeries* did not adopt this reasoning.

In credit bidding cases, when a distressed investor purchases its secured claim for pennies on the dollar, the investor is on notice that its ability to credit bid can be revoked, if its behavior offends the court. The behavior that courts find offensive is any perceived attempt to gain an unfair advantage. For example, setting the auction dates on such an expedited schedule that other bidders do not have a fair ability to participate, distributing notices that inflate the creditor's advantage and therefore chill the participation by other bidders and any attempt to procure favorable treatment that exceeds customary advantages bestowed on stalking horse bidders, put the distressed buyer at risk. While there are a few reported decisions where courts have revoked a creditor's ability to credit bid, I believe that these cases are not the start of a new trend. Instead, the cases reflect attempts by courts to impose remedies where behavior is perceived to impart an unfair advantage to a particular bidder.

Key Takeaways

Trademark Licenses

- Section 363(n) of the Bankruptcy Code protects the licensee in an intellectual property license, where the debtor rejects the license agreement.

[34] S. REP. NO. 100-505 (1988), reprinted in 1988 U.S.C.C.A.N. 3200, 3204.

- Case law is developing that extends this protection to trademark licensees. Courts are extending this protection by holding that trademark licenses are not executory when sold as part of an asset sale. The Seventh Circuit has extended the protection further by recognizing that rejection of a trademark license constitutes a breach of the license agreement. State law generally provides that a breach results in the licensee remaining entitled to use the trademark license for the duration of the agreement, plus any unilateral extensions the licensee may have. Monetary damages may also be appropriate. Adopting this reasoning protects a trademark licensee without the need to find the trademark license is not an executory contract.

Credit Bidding

- Recent decisions have held that the right to credit bid is not absolute and that a court can find that "cause" exists to limit credit bidding based on a variety of behaviors by the secured creditor.
- Behavior that can be widely accepted in one venue, such as a "loan to own" strategy may result in the restriction of credit bidding in a different venue.
- Distressed debt purchasers can facilitate settlements by creating a class of creditors that is not in a "loss position" and can think creatively about possible settlements.
- Buyers on the secondary markets credit liquidity that allows original lenders to monetize their prepetition, defaulted loans without a long wait and without incurring legal fees.

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