

TECHNOLOGY AND REGULATORY BLACK HOLES: ISSUES IN PROTECTING IP RIGHTS IN INSOLVENCY FOR BOTH LICENSORS AND LICENSEES

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Australia’s insolvency laws have a curious deficiency: There are virtually no provisions on the treatment of ongoing contracts. Such contracts may well represent some of the most valuable assets of a business debtor, small or large, especially in this new era of rapid technological innovation, where tangible property often pales in value to that inherent in intellectual property. Indeed, IP rights are often the nucleus around which a small business’ vitality revolves. The inability of businesses predictably to rely on, manage, and protect license contracts preserving IP rights is a problem that is sure to become more acute in the coming decades, as both the importance of IP rights and the incidence of business insolvency rise. Experience from across the Pacific portends a potential wave of coming disputes involving such rights in developed economies like Australia’s, potentially hitting small entrepreneurs hard and undermining the effectiveness of insolvency proceedings for these crucial debtors and their creditors. This article reveals a proliferation of disputes concerning IP license rights and several salient challenges confronted by both licensors and licensees, debtors and non-debtors, in domestic and cross-border insolvency proceedings in US insolvency proceedings. The common root of these challenges seems to be legislation that did not foresee the rise of IP licensing as a mainstay of modern entrepreneurship. The simple common solution, and a guide for Australian regulators, is more careful consideration of non-obvious pitfalls in laws that preserve IP license rights in insolvency cases to maximise value not only for the parties involved, but for modern societies who increasingly depend on innovation and entrepreneurship.

I INTRODUCTION: A CURIOUS GAP IN AUSTRALIAN LAW

A recent book-length comparative survey of the treatment of contracts in insolvency proceedings in nearly 20 countries reveals a curious lacuna in Australian law: Unlike the laws of many other advanced economies, Australian law contains no specific treatment of ongoing contract rights when one of the contracting parties enters insolvency proceedings.¹ To one degree or another, many if not most national insolvency laws attempt to enhance the debtor’s position with respect to contracts on which both sides have ongoing obligations—so-called ‘executory contracts’²—while

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¹ Christopher Symes and Jeffrey Fitzpatrick, ‘National Report for Australia’ in Dennis Faber, Niels Vermunt, Jason Kilborn and Kathleen van der Linde (eds), *Treatment of Contracts in Insolvency* (Oxford University Press, 2013) [1.07], [1.12], [1.57]. See also Richard Chesley, Oksana Koltko Rosaluk and Joe Riches, INSOL International, ‘The Protection of Intellectual Property Rights in Insolvency Proceedings’ (INSOL International, 2017) (examining insolvency-specific IP contract protections in a dozen jurisdictions, from North American to Europe to Asia, but not mentioning Australia).

² The US was among the first countries to include such a concept in its insolvency law, but ‘executory contract’ is not defined in that law. Courts generally apply the so-called Countryman or ‘material breach’ test, developed in a



at the same time balancing the rights of the non-debtor counterparties to such contracts to accommodate other, general policies with respect to certain types of arrangements. The particular balance ultimately struck can make or break a struggling debtor-entrepreneur, maximising or decimating the value of key business rights.

The void in Australian law is particularly striking in the context of contracts relating to temporary permission to exploit intellectual property (hereafter, ‘IP’), most notably licenses to use patented or copyrighted works, products, or processes, or the right to sell items under a customer attention-grabbing trademark. Potentially huge value resides in such contracts for both the licensor and the licensee (and their creditors). Perhaps due to the lack of specific treatment of such contracts in the law, the Australian legal literature has paid scant attention to the complex and particularly sensitive balance to be struck in treating IP license contract rights in insolvency.³

US insolvency law, in contrast, has long regulated executory contracts, but in recent years it has confronted severe challenges in the context of IP licenses. One explanation for the ferocity of this collision between insolvency and IP law is simple timing. The US Bankruptcy Code was adopted in 1978, at a time when IP played a relatively minor role in the US economy, and the law and practice of regulating IP rights were just beginning to take off. Five years after the Bankruptcy Code went into effect, the Internet was all but unknown to the general public, and the US Patent and Trademark Office was issuing only about 61,000 patents per year, only one-third of the volume ten years later, and only one-fifth of the some 300,000 patents issued twenty years later in the year 2013.⁴ The US Congress can be forgiven for drafting an insolvency law designed for the problems of its day in the late-1970s, but with the explosion in volume, value, and economic importance of IP rights forty years later, when we now speak of an ‘internet of things’ and virtually every business relies on copyrighted software code, patented products or processes, or trademarked goods, the twentieth-century Bankruptcy Code deals at best awkwardly with key twenty-first-century problems.

Today, IP rights are no less central to advancing Australian entrepreneurship, and like in the US, Australian insolvency law will doubtless be called on to resolve IP license-related issues increasingly in the coming years. Yet Australian lawmakers have just begun to attend to this crucial area of regulation. The Federal Government as of 1 July 2018 implemented ‘the most significant reforms to Australia’s insolvency regime for the past 30 years,’ finally addressing one

pair of law review article by the eponymous Vern Countryman, a Harvard Law School academic. See Vern Countryman, ‘Executory Contracts in Bankruptcy: Part I’ (1973) 57 *Minnesota Law Review* 439; Vern Countryman, ‘Executory Contracts in Bankruptcy: Part II’ (1974) 58 *Minnesota Law Review* 479. This test posits that a contract is executory if performance remains on both sides, so that failure by either side to perform would be a ‘material’ breach and excuse the other side from performance. *Part I* 460. The scope of the term and its application remain controversial, however, especially in modern contexts such as options, intellectual property licenses, and limited liability company operating agreements. See, eg, Jay Lawrence Westbrook and Kelsi Stayart White, ‘The Demystification of Contracts in Bankruptcy’ (2017) 91 *American Bankruptcy Law Journal* 481.

³ Charlie George and Kenneth Stanton, ‘The Interaction Between Bankruptcy and Intellectual Property Rights’ *ARITA Journal*, June 2018, 25 (noting that ‘[l]ittle ink has been spilt over the interaction between bankruptcy and intellectual property rights’ in Australian law).

⁴ See, eg, Brink Lindsey and Steven M Teles, ‘Intellectual Property Laws: Wolves in Sheep’s Clothing’ on *ProMarket blog* (15 September 2017) <<http://promarket.org/intellectual-property-laws-wolves-sheeps-clothing/>> (characterizing IP use and its regulation in the US until the late-1970s and especially 1980s as ‘a sleepy little backwater of American law’).

aspect of the treatment of ongoing contract rights (so-called ‘ipso facto’ clauses).⁵ While this new regulation certainly affects many IP licenses,⁶ Australian lawmakers have only begun to scratch the surface of a problem that extends far deeper than the issue of ipso facto termination clauses. As the conversation on these issues develops, decades of experience from across the Pacific provides a map of pitfalls to be avoided on the path toward effective treatment of IP contract rights in Australian insolvency law.

II THE BASIC FLAW IN THE US REGIME OF ‘EXECUTORY’ IP LICENSE CONTRACTS

The basic US legal provision on executory contracts has a simple animating idea arising in a simple—perhaps overly simplistic—context. While insolvency law generally frees debtors from obligations for which they have already received the benefit (eg, a loan and obligation to repay), sometimes debtors have ongoing obligations for which they have not yet received the full corresponding benefit. US insolvency law gives debtors the freedom to choose to either fulfill such future obligation and hold the counterparty to its duty to deliver the benefit, or to slough off the future obligation, voluntarily breach the contract, forego its benefit, but limit the impact of the counterparty’s ensuing damage claim on other creditors and the potential reorganisation effort. The ordinary operation of Australian contract law produces a largely parallel result, with an insolvent debtor facing a choice between continuing to perform a contract and holding the counterparty to its end of the bargain, or repudiating the contract and facing a claim for damages.

A simple example is suggested by the title of the operative US provision: ‘Executory contracts and unexpired leases.’⁷ This is something of a redundancy, because an unexpired lease is by definition an executory contract, as both sides have material ongoing obligations (at the very least, the lessee owes rent and must not destroy the premises, while the lessor owes a duty to keep the premises in order and allow the tenant ‘quiet enjoyment’). The paradigm case envisions the debtor as lessee. If the lease is beneficial to the debtor’s business, and the debtor can bear its ongoing expense, the debtor can freely opt to ‘assume’ such a lease and enjoy its ongoing benefits.⁸ If, on the other hand, the lease is no longer necessary to the debtor’s business, or it is more expensive or otherwise burdensome than an alternative available on the current market (due to a downturn in rental rates, for example), the debtor can again freely opt to ‘reject’ such a lease. In both the US and Australia, such a rejection is the equivalent of a repudiation in the ordinary, non-insolvency context, but the insolvency context severely curtails the counterparty’s claim. The lessor’s damage claim is treated not as a post-insolvency expense of administration of the reorganisation (owed full payment), but rather as a pre-insolvency breach, sharing equally with all other general creditors in

⁵ Zina Edwards and Monty Loughlin, ‘Consultation Process on Ipso Facto Insolvency Regulations begins’ on *K&L Gates Legal Insight* (April 2018) < <http://www.klgates.com/consultation-process-on-ipso-facto-insolvency-regulations-begins-04-20-2018/>>; *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* (Cth); *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018* (Cth). For a discussion of a case implicating the similar US and Korean laws related to ipso facto clauses, see below Part IV B.

⁶ Gordon Hughes and Lachlan Sadler, Davies Collison Cave, ‘Australia’s ipso facto Reforms Have Serious Consequences for IP Agreements’ *Lexology* (2 July 2018) < <https://www.lexology.com/library/detail.aspx?g=1857c473-806e-44c7-b2f9-73949ec52f40>>.

⁷ 11 USC § 365.

⁸ 11 USC § 365(a)-(b).

the available (likely limited) distribution of value.⁹ Thus, rejection of an executory contract generally allows the debtor to reduce the damages claim of the counterparty by a significant margin, distributing the pain felt by all of the debtor's other general unsecured creditors and increasing the value available to fund ongoing operations and a plan of reorganisation.¹⁰

The US Congress's attempt at balancing interests can be seen in the statute's treatment of this simple context. In the opposite case, where the debtor is not the lessee seeking to avoid burdensome lease payments, but rather a real property lessor seeking to evade upkeep obligations or perhaps benefit from an upturn in the rental market, Congress foresaw the extreme disruption that rejection of such a lease could cause to the counterparty-tenant.¹¹ It is one thing to deprive a lessor of the monetary profit from a lease arrangement and to force a return to the market; it is quite another to deprive a tenant of the right of possession and quiet enjoyment, turning the tenant out on the street and seriously disrupting its own ongoing business operations or home life. In such cases, Congress balanced the competing interests by protecting the tenant's expectations. The debtor-lessor can indeed reject its ongoing burden to keep up the leased property and respond to the lessee's maintenance demands, but the tenant facing rejection of its real property lease also enjoys a free election. It can choose to face the eviction and collect damages (limited as described above), or it may remain on the premises, continue to pay rent, and enjoy the remainder of its possessory and other rights, although it may not force the debtor-lessor to fulfill its upkeep or other duties.¹² Australian law contains no similar interest-balancing regulation like this, relegating the parties to ordinary contract law remedies, likely limited to a damages claim.

Having thus struck a sensible compromise between the interests of debtors and third parties on both sides of a real property lease, the US law at that point shared with current Australian law a failure to legislate similar compromises that would be crucial in the analogous context of another paradigmatic executory contract of unanticipated importance: IP licenses. IP licenses often if not generally qualify as 'executory' in much the same way as unexpired leases, in that the licensor retains some obligation to maintain the licensed IP rights or at least allow the licensee to continue to use the licensed rights (analogous to quiet enjoyment of rented premises) and the licensee is obliged to continue to pay licensing fees and perhaps comply with other license duties (eg, maintaining quality of production and marketing of goods sold under trademark).¹³ A similar imbalance of the equities in the case of debtor-licensees facing rejection of their rights revealed itself a few years after the implementation of the new US Bankruptcy Code. As discussed

⁹ 11 USC § 365(g).

¹⁰ In addition, for leases specifically, the lessor's claim for unpaid rent beyond one year is capped at 15 per cent of the remaining lease term, up to a maximum of 36 months. That is, a claim for only 12 months of damages is unlimited, but a claim for 8 years of rent is capped at 15 per cent of those 96 months (14.4 months), and a claim for 20 or more years of rent is capped at the maximum three years, as 15 per cent of 20 is the maximum three years' damages claim. 11 USC § 502(b)(6).

¹¹ Actually, Congress was prompted to see this by pre-1978 disputes raising the issue. Charles Jordan Tabb, *Law of Bankruptcy* § 8.8, 807 (2013) (describing the *New York Investors* case and section 365(i)). Note that this interest-balancing provision does not apply to rejection of leases of *movable* property, such as cars or equipment. 11 USC § 365(h)(1)(A).

¹² 11 USC § 365(h)(1)(A)-(B) (allowing the tenant to offset against future rent any damages from the debtor-landlord's failure to fulfill upkeep and other obligations).

¹³ If the entire license fee has been paid in advance, or if the court concludes that ongoing obligations by at least one of the parties to the IP license are not 'material,' the IP license will not qualify as 'executory,' avoiding the problems discussed here, though perhaps raising others. See, eg, *In re Interstate Bakeries Corp*, 751 F 3d 955 (8th Cir, 2014).

immediately below, Congress responded with uncharacteristic swiftness to impose a similar compromise as in the lease context. This ad hoc response gives rise to several cautionary tales for Australian legislators.

When Congress returned to the Code to fill this gap, in its haste it left a half-solution that has thrust courts back into a thorny exploration of the fundamental purpose and effect of the notion of rejecting executory contracts. The courts have come to contradictory conclusions with respect to the effect of rejection of trademark licenses, in particular, and they have taken puzzlingly contrary positions on IP license rejection in international insolvency cases. In addition, a third conflict has erupted around IP licenses in light of the unanticipated effect of another body of general contract law—non-delegation of personal service contracts—one side of the conflicted resolution of which runs directly contrary to Congress’ reaffirmed policy of balancing the rights of licensors and licensees.

III DEBTOR-LICENSORS AND THE DISPUTED EFFECTS OF REJECTION OF IP LICENSES

The most longstanding, fundamental, and perennially controverted problem with rejection of ‘executory’ IP licenses is the effect of rejection by debtor-licensors, especially of trademarks. It is clear that rejection in this context absolves the debtor from further responsibility to perform under the license, and the licensee has a pre-petition claim for whatever damages flow from that breach of ongoing obligation. But what of the already conveyed rights the licensee enjoys in the IP? Does rejection vitiate these rights and require the licensee to relinquish what is now the property of an insolvency estate?¹⁴ This question remains controversial, but in one important respect, Congress has clarified its intent to strike a balance of interests between debtor-licensors and third party-licensees.

A The Original and Enduring Dispute: Lubrizol

Richmond Metal Finishers owned the patent to a metal coating process, which it licensed to Lubrizol Enterprises in 1982.¹⁵ That patent was Richmond’s principal asset, and when Richmond initiated insolvency proceedings a year later, maximizing the patent’s value was Richmond’s only way out of insolvency.¹⁶ Preventing Lubrizol from using the patented technology, and offering an exclusive license to another licensee (or to Lubrizol at a higher price), was the clearest and perhaps only path to advancing Richmond’s reorganization effort and benefitting its estate. Lubrizol asserted that rejection, as discussed above, simply created a pre-petition damage claim for Richmond’s failure to continue to perform under the license; the law says nothing about retracting Lubrizol’s still existing rights, however, and excluding Lubrizol’s further use of the patented technology. In one of the most controversial bankruptcy opinions in US history, the Fourth Circuit Court of Appeals held that Lubrizol had *only* a damages claim and ‘could not seek to retain its contract rights in the technology by specific performance’ because ‘the legislative history of §

¹⁴ See 11 USC § 542(a).

¹⁵ *Lubrizol Enterprises, Inc v Richmond Metal Finishers, Inc (In re Richmond Metal Finishers, Inc)*, 756 F 2d 1043, 1044-5 (4th Cir, 1985).

¹⁶ 756 F 2d 1047.

365(g) makes clear that the purpose of the provision is to provide only a damages remedy for the non-bankrupt party'.¹⁷

This was a fairly plain misreading of the legislative history and language of section 365,¹⁸ as well as a fairly plain misconstruction of the ordinary effect of a breach by the debtor-licensor. Under ordinary contract law, which is not generally displaced by bankruptcy law, the licensee would bear no burden to bring a specific performance action to extract any further duties from the debtor-licensor; rather, it would simply continue to enjoy its already conveyed, existing contractual rights in the licensed patent while collecting monetary damages for the debtor-licensor's breach. This is probably the current result under ordinary Australian contract law, as well. No specific performance remedy to burden the debtor-licensor with ongoing obligations would be necessary (or allowed), and section 365 says nothing other than that a rejection should be treated as a pre-petition breach, not a retraction of the licensee's rights.

B The Congressional Half-Fix: Section 365(n) and 'Intellectual Property'

Congress stepped in fairly quickly to fill this gap in its intended balance of rights, but it did so in a piecemeal and rather unartful way that sustained an important part of the controversy. Much as it had in 1978 expressly protected the rights of lessees with pre-conveyed leasehold interests in real property,¹⁹ Congress in 1988 added a new section 365(n) to give a similar choice to licensees of intellectual property—to treat the license contract as terminated or to retain their rights to use the licensed IP, though specifically excluding any right to specific performance of any affirmative duty of the licensor.²⁰ Congress expressed its purpose as a response to a 'particular problem arising out of recent court decisions' and its intent 'to *make clear* that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off'.²¹ The italicised words seem to indicate that Congress was simply clarifying its earlier intent, not modifying the statute, though it would have been far preferable for Congress to confirm more fundamentally the limited effect of a rejection as a simple breach under ordinary contract law, not extraordinary termination of counterparty rights.

In addition, the term 'intellectual property' deserves scare quotes, here, as Congress specifically limited the application of this new 'clarifying' protection. It both added the shield for licensees of IP and reduced the coverage of that shield by defining IP to exclude one of the three most common forms. The new definition of 'intellectual property' includes concepts protected by patent and copyright,²² but Congress intentionally excluded trademarks and licensees' associated rights to market, distribute, and sell trademarked items, concluding that the different context required patient deference to 'the development of equitable treatment of this situation by bankruptcy

¹⁷ 756 F 2d 1048.

¹⁸ For an excellent discussion of the technical problem of 'provability' that the executory contract rejection-and-damages-claim provision was designed to resolve, see John AE Pottow, 'A New Approach to Executory Contracts' (2018) 96 *Texas Law Review* 1437, 1440-6; Westbrook and Stayart, above n 2, 491-2.

¹⁹ 11 USC § 365(h).

²⁰ 11 USC § 365(n)(1)(B). Unlike lessees of real property, however, IP licensees electing to retain their rights may *not* offset their royalty payments for any damages from the debtor's failure to perform its obligations under the license agreement: 11 USC § 365(n)(2).

²¹ *Mission Products Holdings, LLC v Tempnology, LLC (In re Tempnology, LLC)*, 879 F 3d 389, 397-8 (1st Cir, 2018) (quoting S Rep No 100-505, 1, 5, emphasis added).

²² 11 USC § 101(35A).

courts'.²³ So while it is now clear that the rights of licensees of patents and copyrights are insulated from unilateral termination by debtor-licensors, trademark licensees remain exposed, at least until the fundamental debate raised in *Lubrizol* is resolved. The US Congress thus offered Australian legislators a fine example of how *not* to legislate in this area.

C *The Lower Appellate Courts Take Up Sides*

As of 2018, the courts are now firmly split on the issue of interpreting Congress's ambiguous law on the effect of the rejection of trademark license contracts. Two appellate courts have announced opposing rulings that track the debate raised originally in *Lubrizol*.

1 *Seventh Circuit: Sunbeam*

On the one side sits the Seventh Circuit, based in Chicago, which has adopted the narrow view of rejection as a simple breach. Chicago American Manufacturing ('CAM') was hesitant to make the USD\$1.2 million investment to gear up for production of fans patented and marketed by Lakewood Engineering and Manufacturing, but it did so when Lakewood agreed to license its patent for the fans and trademark for the brand name to allow CAM to sell the fans if Lakewood failed to pay for them.²⁴ Midway into the contract, Lakewood's creditors pushed it into bankruptcy, a trustee sold Lakewood's IP portfolio to a company called Sunbeam, and Sunbeam insisted that the trustee reject CAM's license contract to prevent CAM from selling the fans in competition with Sunbeam.²⁵ CAM continued to produce and sell the fans pursuant to its license contract despite the rejection, and Sunbeam sued for trademark infringement.²⁶

In a phrase that has become a rallying cry for the narrow view of trademark license contract rejection, Judge Easterbrook explained that rejection is equivalent to ordinary breach, giving rise to a damages claim against the debtor-licensor, but 'nothing about this process implies that any rights of the other contracting party have been vaporized'.²⁷ Judge Easterbrook went on to analogise the situation to the rejection of a real property lease, noting forcefully that 'rejection does not abrogate the lease ... [or] end the tenant's right to possession' to allow the debtor-lessor to re-let the premises for a higher price.²⁸

He did not, however, note that this limitation is specifically codified in section 365(h). If it followed naturally from the obvious construction of breach giving rise to a simple damage claim in section 365(g), why would Congress have felt the need to insert this specific provision protecting the rights of lessees? And why does this protection apply only to real property lessees—and now

²³ 879 F 3d 401 (quoting S Rep No 100-505, 5).

²⁴ *Sunbeam Products, Inc v Chicago American Manufacturing, LLC*, 686 F 3d 372, 374 (7th Cir, 2012).

²⁵ 686 F 3d 374.

²⁶ 686 F 3d 374. No cause of action for patent infringement would lie, as CAM was specifically entitled by section 365(n) to retain its rights under the patent license from Lakewood; only the associated trademark license was an issue.

²⁷ 686 F 3d 377.

²⁸ 686 F 3d 377.

also only a specific subset of IP licensees? Does the negative inference not suggest a contrary intention by Congress in cases not addressed specifically, such as personal property leases and trademark license contracts? Or does it simply reflect a messy, piecemeal legislative process in which Congress is incapable of either addressing every conceivable exception or of crafting a universal provision that clearly states the rejection-as-simple-breach rule? Judging by the legislative history, it seems most likely that Congress prefers Judge Easterbrook's view (and the virtually universal view among academics); the problem is that Congress has never really said that clearly, and the intention of a bitterly divided, constantly morphing body like Congress is very difficult to nail down without clear guidance.

2 First Circuit: Tempnology

Which leaves a foothold for intelligent, reasonable people to take the contrary position, as happened in January 2018 when the First Circuit, based in Boston, reaffirmed the *Lubrizol* rejection-as-termination-of-rights position. Tempnology, LLC, made specialised sports apparel products with a patented process that allowed them to remain at low temperatures when used during vigorous exercise, and it marketed these products under the trademarked brand names 'Coolcore' and 'Dr Cool'.²⁹ To expand the reach of its products, Tempnology licensed its patents and trademarks to Mission Product Holdings, and it granted Mission exclusive distribution rights within the US.³⁰ Tempnology grew to rue this grant of exclusive distribution rights, faulting it for producing feeble revenue and hampering Tempnology's own efforts to market its products more aggressively. So in September 2015, Tempnology filed a Chapter 11 reorganisation case and immediately sought to reject the contract with Mission and prevent Mission from competing with Tempnology's own renewed marketing and distribution plans.³¹

Mission predictably opposed this deprivation of its IP rights. In addition to relying on section 365(n) to protect its patent license rights, Mission also revisited the *Lubrizol* debate and invited the First Circuit to follow the Seventh Circuit (and dictum from the Third Circuit³²) and hold that rejection does not deprive a trademark licensee of its rights to market and sell the trademarked products. The First Circuit declined the invitation. The court noted that Congress specifically excluded trademarks from the new protection of section 365(n), and it emphasised the particular burdens of trademark agreements, from which Congress might well have intended to unencumber reorganising debtors.³³ A trademark holder bears an unavoidable duty under trademark law to monitor and control the quality of the products bearing its licensed trademark; otherwise, by standing by as the licensor operates under an unmonitored 'naked license', the debtor-licensor faces a potential claim of abandonment, jeopardising the continued validity of its own trademark rights.³⁴ Especially when the licensor and licensee are at odds following a contract rejection, the court warned, this monitoring duty is likely to be both especially heavy and especially important.³⁵

²⁹ 879 F 3d 392.

³⁰ 879 F 3d 392-3.

³¹ 879 F 3d 394.

³² *In re Exide Technologies*, 607 F 3d 957, 964-8 (3rd Cir, 2010) (Ambro J, concurring in the holding that the agreement was not executory and therefore not subject to rejection, but explicitly disagreeing with the notion that, if the contract were executory, rejection of a trademark license would deprive the licensee of ongoing use rights).

³³ 879 F 3d 398-9, 401-3.

³⁴ 879 F 3d 402-3.

³⁵ 879 F 3d 404.

The First Circuit refused to believe Congress intended for rejecting debtors to bear such burdens, undermining the intended benefits of the notion of rejecting executory contracts in the first place. Accordingly, over a spirited dissent reiterating the legislative history and endorsing the Seventh Circuit's contrary approach, the First Circuit has reinvigorated the decades-old debate on the effect of rejection of a trademark license contract.

D Words Versus Purpose: Finding a Way Out?

When the US Supreme Court weighs in on this question,³⁶ it will face a difficult choice between reading Congress's mind or reading its words. Unfortunately, while the latter is the Court's most common method of resolving statutory disputes. Congress's chosen words have made a royal mess of section 365. Congress failed—originally and then again after prompting by *Lubrizol*—to make clear the scope of the notion of executory contract rejection; instead, it slowly and incompletely filled in gaps with half-fixes that raise more questions than they resolve. The quick fixes for real property lessees in 365(h) and 'intellectual property' licensees in 365(n) beg the question whether Congress intended the negative inference of termination of rights in other contexts (such as rejection of personal property leases and trademark licenses). As the Seventh and First Circuits have demonstrated, reasonable minds can differ on the 'plain' language of the statute, but it is quite plain that some degree of interpretation of Congress' Delphic language is required here in the context of trademark license rejection.

The fairly clear purpose of section 365 and the notion of rejecting executory contracts is to allow debtors to avoid the types of burdens that bankruptcy law generally allows them to avoid; that is, monetary obligations. The First Circuit's assessment of the 'burdens' that Congress might have wanted trademark licensors to evade is overly capacious, as indicated by reference to related sections of the Bankruptcy Code. US bankruptcy law was not designed to allow debtors to evade all 'burdens'. The principal object of regulation in the Bankruptcy Code is an expanded definition of 'claims' to be administered in insolvency proceedings. No longer, as before 1978, must claims be 'provable' in a precise, established, non-contingent amount; rather, the 1978 Code expanded the scope of claims to encompass any 'right to payment,' regardless of whether such right is 'reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured'.³⁷ The Code's design is to free (discharge) debtors from the burdens of such 'claims' only.³⁸

A burden that does not constitute a 'claim,' however, cannot be avoided; for example, equitable duties such as injunctions to stop or even clean up environmental damage or to comply with

³⁶ The *Tempnology* case is currently under review before the Court, with a ruling expected sometime in the spring or summer of 2019. In a potential sign of things to come, a Bankruptcy Court in yet another circuit recently sided with the Seventh Circuit in rebuffing a liquidation trustee's effort to gain exclusivity and increase the value of a liquidating estate's IP portfolio, holding that the 'plain language' of section 365(g) indicates that rejection of a trademark license does not vitiate the licensee's ongoing rights. *In re SIMA Int'l, Inc* (Bankr D Conn, No 17-21761, 17 May 2018).

³⁷ 11 USC § 101(5)(A).

³⁸ 11 USC §§ 101(12), 727(b), 1141(c), (d).

covenants not to compete.³⁹ The burdens of paying rent and licensing fees are the types of monetary obligations that the Code targets in reducing the debtor's load to encourage financial rehabilitation, and rejection of an executory contract clearly and sensibly frees debtors from such burdens. In contrast, the non-monetary 'burden' of monitoring products sold under licensed trademark is not one that the Bankruptcy Code was designed to allow debtors to evade. This is little more than the 'burden' of responsible property management. An aggressive non-compete clause might also severely burden a small business debtor attempting to reorganise, but such clauses are generally unavoidable in bankruptcy. A trademark licensor's monitoring and control burdens are not even equitable injunctions, they are simply prudent asset management duties, and even if they were enforced by injunction, they are not the sorts of 'claims' that the Bankruptcy Code affects.

Indeed, it is not this burden that trademark licensors seek to avoid via rejection; rather, as in *Tempnology's* case, it is the 'burden' of abiding by a previous grant of rights rather than recovering and re-conveying those rights and reaping a windfall at the expense of the previous grantee. Congress has not allowed this in other contexts, and it most likely did not intend to do so here. If a debtor conveyed its IP in toto via a sale, no one would suggest that such a debtor should be able upon filing for insolvency to rescind that sale and resell the IP either to the original buyer or a new third party for a windfall second profit.⁴⁰ The differences between conveyance of permanent ownership and conveyance of a temporary license are, of course, significant, but the imbalance of reversing these conveyances as between the benefit to the insolvency estate and the harm to the third party buyer/licensee is congruent. The harm to a trademark licensee is even more congruent with the potential harm suffered by the lessee of a rejected real property lease or the licensee of a rejected license for other IP rights, and after thirty years, the courts have yet to identify a convincing reason to distinguish between the congressionally mandated protection for licensees of 'intellectual property' rights and the lack of protection for trademark rights.

IV THE DISPUTE EXTENDS BEYOND US BORDERS, DISFAVORING NON-US LAW IN BOTH DIRECTIONS

Meanwhile, not only have US courts dealt with internal collisions between duelling interpretations of the law protecting IP licensees, they have faced external collisions between US law and the law of other countries implicated in cross-border insolvency cases. Despite the adoption of the substance of the UNCITRAL Model Law on Cross-Border Insolvency in a new Chapter 15 of the US Bankruptcy Code,⁴¹ the US courts have not been particularly cooperative with foreign insolvency representatives in recent, notable IP-related cases. The two cases discussed here raise what is essentially a vexing choice of law (ie, private international law) problem. That is, while Chapter 15 requires procedural cooperation from US courts with recognised foreign insolvency representatives, it says nothing specific about the particular substantive or insolvency law to be

³⁹ An equitable obligation may be a 'claim' only if failure to fulfill the duty 'gives rise to a right to payment.' 11 USC § 101(5)(B). Because equitable remedies generally do not lie if the legal remedy of money damages is sufficient to make the claimant whole, injunctions are not likely to qualify as claims from which debtors can escape by seeking bankruptcy relief: *Tabb*, above n 11, § 7.3.

⁴⁰ If the sale were preferential or at under value (what we would call in the US a fraudulent conveyance), then it might be undone, but none of the cases discussed here (or any other normal case of trademark licensing) implicates this possibility.

⁴¹ 11 USC §§ 1501-32.

applied in cases of disputes affecting particular rights or property. The thicket of complex issues implicated by such a private international law perspective remains unresolved.⁴² But these two cases illustrate the hesitancy of US courts in embracing foreign law, especially relating to IP rights, if it has untoward consequences for the interests of US parties.

A Jaffé v. Samsung (In re Qimonda AG): IP Licenses Über Alles!

In a temporarily revived dispute about IP license rejection, the Fourth Circuit clearly heard Congress' rebuke of its 1985 *Lubrizol* decision and has, as of 2013, swung to the other extreme on the preservation of IP license rights. In contrast with post-*Lubrizol* US law, German insolvency law allows an insolvency administrator to reject and vitiate patent license rights to enhance the value of the estate's patent rights, with no special protection for licensees.⁴³ So asserted the administrator of German semiconductor manufacturer Qimonda AG after being recognised by a US Bankruptcy Court as the representative of the company's 'foreign main proceeding' in Germany.⁴⁴ Accordingly, the German administrator sought to invoke the cooperation of the US court in administering Qimonda's assets in the US, including the rejection of outstanding patent license rights.⁴⁵

Chapter 15 envisions precisely this type of cooperation with foreign insolvency representatives and deference to foreign law,⁴⁶ but with two important provisos. Cooperation is mandated 'only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected',⁴⁷ and the US courts may refuse cooperation if the result would be 'manifestly contrary to the public policy of the United States'.⁴⁸

The Bankruptcy Court initially approved the Qimonda administrator's gambit to invoke German law to cancel and renegotiate the company's patent licenses, but then after an appeal and remand, it held that this move ran afoul of both of the provisos to US cooperation mentioned above.⁴⁹ Despite the German administrator's pledge to renegotiate a 'reasonable and non-discriminatory royalty' with the original licensees, the Bankruptcy Court concluded that vitiating the licensees' rights would not properly balance the interests of the debtor and its (US) creditors, and section 365(n) and its protection for patent licensees represents fundamental public policy of the United States, which cannot cede to contrary German rules that are insensitive to the rights of IP licensees. The Fourth Circuit court of appeals affirmed, finding the Bankruptcy Court had not abused its discretion in assessing the situation as it did.⁵⁰

⁴² See, eg, Allan L Gropper, 'The Curious Disappearance of Choice of Law As an Issue in Chapter 15 Cases' (2014) 9 *Brooklyn Journal of Corporate, Financial & Commercial Law* 57; Jay Lawrence Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 *Brooklyn Journal of International Law* 499.

⁴³ *Jaffé v Samsung Electronics Co, Ltd*, 737 F 3d 14, 17, 20 (4th Cir, 2013).

⁴⁴ 737 F 3d 17.

⁴⁵ 737 F 3d 17-18.

⁴⁶ 11 USC § 1521(a)(5).

⁴⁷ 11 USC § 1522(a).

⁴⁸ 11 USC § 1506.

⁴⁹ 737 F 3d 20-3.

⁵⁰ 737 F 3d 27-32.

In the same court and a factual context almost identical to that in *Lubrizol*, what a difference thirty years makes! One wonders what the result would have been had the licenses related not to patents but to trademarks. Is the protection of only one of these a US public policy in light of Congress' response to *Lubrizol* in section 365(n)? Given the dispute discussed in section II above, it seems likely that foreign representatives would have much greater success in rejecting and vitiating the rights of trademark licensees, though perhaps only in the First Circuit. Again, uncertainty reigns.

B *SunEdison: Who's the Protected Debtor?*

In a distinct but closely related dispute concerning the preservation of IP license rights, a confused choice of law dispute led a New York Bankruptcy Court to a result contrary to both US and Korean insolvency law (and reformed Australian law, as well). SMP Ltd is a Korean entity formed to produce polysilicon (for use in solar power cells) in a joint venture between a subsidiary of SunEdison (a US energy company) and one of the members of the Korean Samsung family of companies.⁵¹ The cornerstone of the joint venture was a license from SunEdison to allow SMP to use patented polysilicon production technology at its plant in Korea. The license agreement contained two key provisions, one that allowed either party to terminate the agreement upon the other's filing for insolvency or failing to pay debts as they come due (an 'ipso facto' clause), and another choosing New York state and US federal law as the governing law for the contract.⁵²

SunEdison filed a Chapter 11 reorganisation case in New York in April 2016, and SMP followed its lead two weeks later, initiating a rehabilitation proceeding under the Korean Debtor Rehabilitation and Bankruptcy Act in May 2016.⁵³ As part of its reorganisation, SunEdison sought to sell its solar materials business, including the related IP that it had licensed to SMP, but the buyer insisted on exclusive rights, so in March 2017, SunEdison notified SMP that it was terminating SMP's license based on the ipso facto clause.⁵⁴ Section 365(n) would protect SMP's rights only if SunEdison sought to 'reject' the license contract, but not if it was allowed to terminate the contract on its own terms.⁵⁵ Even more broadly than section 365(n) protects IP licensees, however, section 365(e) nullifies the effect of ipso facto clauses like the one in SMP's license agreement (much like the revised Australian anti-ipso facto law).⁵⁶ SMP's license rights should have emerged unscathed.

In a curious series of procedural gaffes, however, SMP apparently did not invoke this protection. One month later, SMP successfully sought Chapter 15 recognition in New York of its Korean insolvency proceeding, but it did not request relief from SunEdison's termination of its license agreement under US bankruptcy law in its Chapter 15 case.⁵⁷ Instead, SMP filed a separate action in SunEdison's Chapter 11 case asking the court to apply Korean law, which just like its US

⁵¹ *SMP Ltd v SunEdison, Inc (In re SunEdison, Inc)* (Bankr SDNY, 13 Oct 2017, No 17-01057 (SMB)) slip op 2, 4.

⁵² *In re SunEdison* slip op 4-5.

⁵³ *In re SunEdison* slip op 5-6.

⁵⁴ *In re SunEdison* slip op 6-7.

⁵⁵ The court makes this point specifically. *In re SunEdison* slip op 3.

⁵⁶ 11 USC § 365(e)(1).

⁵⁷ Given SunEdison's termination of the license a month earlier, SMP may have believed that it was too late to request retroactive nullification of this termination under US bankruptcy law, but it is surprising that SMP failed to even request this relief under 11 USC § 1521(a)(7), which may well have been successful.

counterpart in section 365(e), nullifies ipso facto termination clauses in executory contracts like SMP's patent license if the licensee is a debtor in Korean bankruptcy proceedings.⁵⁸

Adhering to a deep-seated philosophy of adversarial adjudication, US courts generally will not interpose themselves between the advocates and prompt a party to advance an obvious winning legal argument rather than the losing one the party is in fact asserting. And so it was in SMP's case. The court accepted SunEdison's observations that the license contract chose New York law as governing, New York state law generally allowed ipso facto clauses, and the Korean bankruptcy law had no obvious application in SunEdison's Chapter 11 case in New York. Again missing the opportunity to connect the dispute with its pending Chapter 15 case, SMP replied with a weak 'comity' argument, urging the court to recognise the Korean bankruptcy law's effect of making SunEdison's ipso facto termination unenforceable against a Korean debtor. With no reference to the US federal law that would also prevent SunEdison from terminating SMP's license, and no foundation in Chapter 15 and SMP's pending US case, the Bankruptcy Court was unmoved by an appeal to comity to support the 'remarkable proposition that SMP's Korean Bankruptcy Proceeding sweeps in the entirety of Korean insolvency law under principles of international comity, and trumps US bankruptcy and state law' specifically chosen by the parties to the contract.⁵⁹

Perhaps this is simply a cautionary tale on proper timing and careful analysis of law in a complex scenario, but it illustrates a limit to the extent to which US bankruptcy law stretches to protect IP licensees. Presumably it will be the rare case when an IP license can be *terminated* rather than rejected, but if the contract so provides, nothing in US bankruptcy law overrides the agreement between the parties—except if the termination is based on an ipso facto clause due only to the licensee's insolvency or failure to pay its debts as they come due *and* the licensee seeks protection in bankruptcy proceedings and raises the proper legal grounds for preventing such termination. The path to this protection, likely also under the newly revised Australian anti-ipso facto law, requires careful and accurate navigation.

C The Next Frontier: Sales Free-and-Clear?

Another dispute has been bubbling up in a neighbouring section of the Code, however, that might portend an ill wind for all types of IP licensees. Section 363(f) allows debtors like SunEdison to sell their property free-and-clear of the interests of other parties in the property if certain conditions are met, such as (1) applicable non-bankruptcy law permits sale of the property free-and-clear of the interest; (2) the interest is in bona fide dispute; or (3) the interest holder could be compelled to accept a money satisfaction of such interest.⁶⁰ Australian law contains nothing similar, and this may be a good thing. This provision has been invoked successfully to scrub the rights of lessees from real property sold in bankruptcy sales, despite the apparent protection of lessee rights in section 365(h).⁶¹ While IP law is generally more protective of licensee rights than real property

⁵⁸ *In re SunEdison* slip op 9.

⁵⁹ *In re SunEdison* slip op 11-23.

⁶⁰ 11 USC § 363(f).

⁶¹ *Precision Indus, Inc v Qualitech Steel SBQ*, 327 F 3d 537 (7th Cir, 2003); *Pinnacle Restaurant at Big Sky, LLC v CH SP Acquisitions (In re Spanish Peaks Holding II, LLC)*, 872 F 3d 892 (9th Cir, 2017).

law is of lessee rights, it could be that in some scenarios, applicable law would provide for a sale to or by a senior rights holder to extinguish the rights of junior licensees, with or without a compelled money satisfaction. Section 365(n) may prove to be equally unavailing for IP licensees in this context as section 365(h) has been for real property lessees. If debtors in US bankruptcy begin to use this technique to rekindle the battle over protection of IP licensees in bankruptcy, all bets may be off.

V DAMNED AS LICENSOR, DAMNED AS LICENSEE: IP LICENSES AS PERSONAL SERVICE CONTRACTS

After bending over backwards to prevent debtor-licensees from undermining their IP licensee's rights, US bankruptcy law does a complete somersault to deprive debtor-licensees of their IP license rights, at least in some parts of the country. This issue is again the result of an unanticipated application of unartful statutory language, and its resolution again differs dramatically from one circuit court of appeals to another. Here again, Australian law has no analogue, and US experience counsels in favour of mindfully avoiding this problem when and if Australian legislators eventually turn their attention to this issue.

The flip side of rejection of an executory contract is assumption.⁶² That is, a debtor who wants to preserve the benefits of an executory contract and is willing and able to fulfil its attendant obligations, may assume the contract and enjoy its benefits. This happy choice is not available, however, to debtors with respect to a narrow range of contracts that for policy reasons Congress has excluded from the regime of assumption. The policy reason generally has to do with the common second stage of the process beginning with assumption and continuing to assignment of the preserved contract rights to a third party in exchange for present value to enrich the insolvency estate.⁶³ The relevant exclusion here concerns contracts in which the identity of the original contracting parties is an essential element of the contract and thus, as the Bankruptcy Code puts it, 'applicable law [ie, non-bankruptcy law such as contract or IP law] excuses a party . . . to such contract . . . from accepting performance from or rendering performance to' any entity other than the original contracting party, the debtor.⁶⁴

As in the executory contract context generally, Congress likely envisioned the simple (simplistic?) classic case of a personal services contract, such as an arrangement with a famous artist. If Beyoncé contracted to perform 'Crazy in Love' at Madison Square Garden, but in her insolvency case proposed to assign to me the right to perform that contract (in exchange for a substantial sum I would be willing to pay to enjoy such a unique opportunity), no matter how well and faithfully I might be expected to carry out Beyoncé's duties, no one should be surprised that the law should prohibit this sort of assignment.

What should be surprising is the inarticulate way in which Congress expressed the exclusion of such contracts from the executory contract regime. The Bankruptcy Code does not simply say that such personal service contracts may not be *assigned*; it says that the 'trustee may not *assume or*

⁶² 11 USC § 365(a).

⁶³ 11 USC § 365(f) (allowing the assignment of assumed contracts and rendering unenforceable contractual prohibitions, restrictions, conditions, and limitations on assignment).

⁶⁴ 11 USC § 365(c)(1)(A).

assign' such contracts without the counterparty's consent.⁶⁵ A liquidating trustee would not consider assumption but as a prelude to sale-and-assignment, so this provision makes sense in that context, but the Code also gives a reorganising debtor-in-possession all of the powers of a trustee.⁶⁶ So even if Beyoncé as debtor-in-possession in her own reorganization insolvency case wanted to assume her own contract to perform herself, the 'plain language' of the Code denies her that right unless Madison Square Garden consents.

This is senseless enough in the personal services contract context, but it extends to the IP licensing context, as well. Congress in 1978 likely did not foresee, or at least did not adequately consider, that a developing federal common law of IP would establish that IP licenses of all kinds are, like personal services contracts, by law not assignable without the consent of the licensor.⁶⁷ If this anti-assignment law and the prohibition on *assumption* or assignment in bankruptcy were taken seriously, debtors-in-possession would instantaneously lose their IP license rights upon entering insolvency proceedings (voluntarily or involuntarily) but for the grace of their licensors.

Luckily for debtor-licensees, only a subset of the US courts have taken this worst-case-scenario approach. Unfortunately, this group includes the tech-heavy Ninth Circuit, based in San Francisco, and the Third Circuit, home of the all-important Delaware Bankruptcy Court. Relying on the 'plain language' of the statute, this group of courts follows the so-called 'hypothetical' test; that is, even if the debtor intends only to assume the license, if a *hypothetical* assignment to a third party would be prohibited without the licensor's consent, so too is a simple assumption.⁶⁸ So Beyoncé would indeed be prohibited from assuming her own contract to perform in Atlantic City, New Jersey (within the Third Circuit), and the operators of the Atlantic City hotel-casino Trump Taj Mahal Casino Resort were likewise unable to assume the license to continue using the names and likenesses of the eponymous Donald and Ivanka Trump without their consent (which the Trumps withheld).⁶⁹ This anti-assumption language is plainly to be avoided in any future Australian legislative effort.

Beyoncé would be able to assume her own contract, however, to perform at Madison Square Garden in New York (and in many other districts). Though the Second Circuit has yet to weigh in on the issue, the New York bankruptcy courts have been unequivocal in their adherence to the

⁶⁵ 11 USC § 365(c)(1).

⁶⁶ 11 USC § 1107(a).

⁶⁷ Peter Bach-y-Rita and Samuel A Newman, 'Why the Assignability of Intellectual Property Licenses in Bankruptcy Might Not Be Settled After All' (2017) 25 *American Bankruptcy Institute Law Review* 315, 316. This amorphous common law continues to shift and evolve in surprising and sometimes contradictory ways. For example, the Delaware Bankruptcy Court held that the rules are different for *exclusive* and *non-exclusive* copyright licenses, though this conclusion seems to conflict with a ruling from the Ninth Circuit Court of Appeals in San Francisco. Compare *In re Golden Books Family Entertainment, Inc*, 269 BR 311 (Bankr D Del, 2001) (exclusive copyright licenses are assignable), *In re Golden Books Family Entertainment, Inc*, 269 BR 300 (Bankr D Del, 2001) (non-exclusive copyright licenses not assignable without licensor's consent) with *Gardner v Nike, Inc*, 279 F 3d 774 (9th Cir, 2002) (exclusive license not transferrable without licensor's consent).

⁶⁸ *In re West Electronics Inc*, 852 F 2d 79 (3d Cir, 1988); *In re Catapult Entertainment, Inc*, 165 F 3d 747 (9th Cir, 1999).

⁶⁹ *In re Trump Entertainment Resorts, Inc*, 526 BR 116 (Bankr D Del, 2015).

majority, so-called ‘actual test’; that is, a debtor can assume an unassignable personal services contract or IP license so long as the debtor does not *actually* intend to assign it to a third party.⁷⁰

This technical debate continues to rage, leaving serious practical problems for financially distressed IP licensees in its wake. Here again, it would be far preferable for Congress to return to the statute and confirm what it likely meant to begin with; ie, that non-consensual assignment of such contracts is prohibited, but licensors should have no holdout veto power to prevent the assumption of IP licenses by reorganising debtor companies dependent upon those licenses. Congress has expressed its fervent desire to protect IP licensees in bankruptcy in the context of debtor-licensors’ rejection of such contracts,⁷¹ so it is fairly clear that Congress has no reason to disfavour debtor-licensees when it comes to assuming their own IP licenses. But like in the trademark license rejection context, the right practical solution is difficult to square with the unfortunate language choices Congress made in the statute.⁷² The best that can be hoped for is that countries like Australia can learn from these mistakes and avoid the pitfalls into which US bankruptcy law has ambled over the past four decades.

VI CONCLUSION

While the US Congress is likely uninterested in revisiting the Bankruptcy Code to retune it for application to a new, tech-focused world, four decades of painful US experience offer red flags to Australian policymakers exploring revisions to their own insolvency laws. The confusing mishmash of duelling statutory collisions in US law offers a guide to Australian reformers as they begin to confront the necessity of considering the treatment of IP rights in insolvency in an era when such rights occupy centre stage in many cases. If IP rights once conveyed cannot be retracted under ordinary licensing law, insolvency law has no business interfering with preexisting rights that are unrelated to collection of money from a liquidating or reorganizing debtor. A fortiori, insolvency law has no business denying debtor-licensees their preexisting IP rights simply because (*ipso facto*) they have entered into insolvency proceedings, so long as the debtor or trustee does not seek to monetize those rights by conveying them to a third party in contravention of the agreement. While these truths were not self-evident when the US Bankruptcy Code was adopted in the late 1970s, neither was the advent of the Internet, the smart phone, the app, and all manner of welfare-enhancing and business-advancing technology. These truths are self-evident now, as Australian lawmakers seem to have turned their attention to the first of many issues in the treatment of contracts, including IP licenses, in insolvency. A twenty-first-century insolvency law must preserve these new keystones of entrepreneurship to drive Australia’s economy forward to the next century.

⁷⁰ *In re Footstar, Inc*, 323 BR 566, 573-4 (Bankr SDNY, 2005); *In re Footstar, Inc*, 337 BR 785, 788 (Bankr SDNY, 2005); *In re Adelpia Communications Corp*, 359 BR 65, 72 (Bankr SDNY, 2007).

⁷¹ Above Part III B.

⁷² Above Part III C-D.