Assigning a Franchise Agreement over the Franchisor's Objection: Bankruptcy May Make It Possible

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Generally speaking, the franchise relationship consists of four elements: (1) the franchisor's grant to the franchisee of the right to sell the franchisor's goods and services, (2) a trademark that is licensed to the franchisee, (3) a community of interest wherein the franchisor exercises some measure of control over the franchisee, and (4) a fee paid by the franchisee to the franchisor.[1] This hornbook definition, however, does not adequately describe the nature of the relationship between a franchisor and franchisee.

It is true that the relationship includes aspects typically present in any arm's-length business transaction, such as a detailed written contract and payment for specified rights or services; it is also true, however, that a franchisor-franchisee relationship is not entirely at arm's length. The parties generally expect to be doing business together for an extended period of time and have mutual interests in the expansion of the business and in preserving its hard-earned goodwill. From this perspective, franchisors and franchisees often consider themselves business partners rather than simply parties to a contract.

If, for any reason, problems or disputes occur in this business relationship, both parties may look to a variety of federal and state laws and regulations and case law to address their concerns. In particular, a franchisor can rest assured that the franchisee, for a number of reasons, cannot assign the franchise agreement without consent. General policy considerations weigh heavily against allowing such an assignment. The relationship between a franchisor and its franchisee is a fundamental aspect of any franchise. How can that relationship be expected to function if the franchisor is forced to accept an objectionable franchisee? Second, fundamental legal tenets would prohibit such an assignment. The plain language of a franchise agreement typically prohibits assignment over the franchisor's objection. Such a provision is enforceable under basic contract law.[2] Moreover, franchise agreements involve trademark licenses and, as discussed below, federal law generally prohibits the assignment of a trademark license without the licensor's consent. Finally, a franchisor can argue that the franchise agreement is unassignable because it is a personal service contract. Most franchisors would agree with the statement that because money, time, and effort are spent to find just the right franchisee, the law should not permit a stranger to be substituted into this carefully orchestrated relationship. The franchisor will almost always be on solid legal ground when making these various arguments.

The exception is when the franchisee files bankruptcy. In a bankruptcy filing, the rights of the franchisor and the sanctity of the franchise relationship are not the only policy considerations at play. Once the franchisee files bankruptcy, bankruptcy judges will consider the effect of their rulings on all of the franchisee's creditors. In this context, it is not at all uncommon for a meaningful creditor recovery to turn on whether the franchisee is permitted to assign the franchise agreement. Franchisors therefore should be aware that, given the right set of circumstances, a franchisee in bankruptcy may be permitted to assign the franchise agreement over the franchisor's objection.

This is not to say that franchisors are powerless to stop such an assignment. Outside of bankruptcy, the law weighs heavily in the franchisor's favor. Inside bankruptcy, a good argument can be made that much of this law remains enforceable. The key for a franchisor facing the situation is to understand that not all of the legal tools available to it outside of bankruptcy are effective in protecting its rights. The key for a franchisee attempting to assign the franchise agreement over the franchisor's objection is to acknowledge that success could be an uphill legal battle and often requires a special set of circumstances. The franchisee, however, can take solace in the fact that it would not be the first franchisee in bankruptcy to accomplish such an assignment. In fact, bankruptcy judges have permitted it a number of times in particular cases.

This article discusses assumption and assignment of executory contracts in bankruptcy and how a franchisee in bankruptcy could structure an argument to allow assignment of the franchise agreement to a third party over the franchisor's objection. The discussion then addresses arguments available to a franchisor attempting to prevent such an assignment.

Assumption and Assignment of Executory Contracts

Bankruptcy is a jargon-heavy practice. The various terms of art tossed about by bankruptcy attorneys could fill a book.[3] Luckily for franchisors and franchisees (and their attorneys, who may not regularly practice in bankruptcy court), understanding the principal bankruptcy concepts at issue requires familiarity with only a handful of bankruptcy terms.

The franchise agreement is known in bankruptcy as an executory contract. This simply means that when the bankruptcy case was filed, the party filing bankruptcy (i.e., the

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debtor) and the other party to the contract (in this case, the franchisor) each had material unperformed obligations under the contract. Section 365 of the Bankruptcy Code[4] gives a debtor two options with respect to an executory contract—assumption or rejection. If the debtor chooses to reject the contract, the nondebtor counterparty will seek a claim for damages as a creditor in the bankruptcy case. If the contract is assumed, the debtor must cure all past defaults, meaning that it must immediately pay all past-due amounts. The debtor must also provide the nondebtor party with "adequate assurance of future performance."[5]

In order to assign an executory contract, the debtor must first assume it. A debtor may not assume only the portions of a contract that it finds favorable. Rather, the contract must be assumed "cum onere," i.e., with all of the benefits and obligations that existed prior to the bankruptcy filing.[6] If a contract is not executory, it cannot be assumed by the debtor, in which case debtors cannot take advantage of the bankruptcy law provisions that potentially allow the debtor to assign the contract over the objection of the counterparty. Unfortunately for franchisors, however, challenging the executory nature of a franchise agreement is not a viable option. Given the mutual obligations inherent in a franchise relationship, franchise agreements are clearly executory.[7]

When seeking to assign an executory contract, the debtor typically files a single motion in the bankruptcy court to both assume and assign. Often, the proposed assignee agrees to make the cure payments. Moreover, the bankruptcy court looks at the characteristics of the proposed assignee, such as creditworthiness, in determining what assurances of future performance must be provided to the contract counterparty.

Anti-assignment Provisions and the Applicable Law Exception

Bankruptcy law changes what is and what is not enforceable under a contract. Bankruptcy Code § 365(f)(1)[8] is a clear example. Section 365(f)(1) authorizes a debtor to assign an executory contract or lease "notwithstanding a provision in [the agreement], or in applicable law, that prohibits, restricts or conditions the assignment of such contract or lease."[9] As such, a bankruptcy court will not enforce a provision in the agreement stating that the agreement is unassignable. The underlying policy reasoning is that debtors should be allowed to assign their agreements to third parties in order to maximize the potential return to creditors and increase the chances of a successful reorganization.[10] For this reason, courts have interpreted § 365(f)(1) broadly to also invalidate contractual provisions that, although not explicitly prohibiting assignment, are so restrictive as to effectively make assignment impracticable.

Section 365(c) sets forth an exception to the limitations of § 365(f)(1) by providing that a debtor

> may not assume or assign any executory contract or lease . . . whether or not such contract or lease prohibits or restricts assignment of rights or delegations of duties if—
> (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
> (B) such party does not consent to such assumption or assignment.[11]

A franchisee's ability or inability to assign a franchise agreement almost always turns on a bankruptcy court's determination of whether § 365(f)(1) or § 365(c)(1) applies to the particular assignment scenario. Deciphering the meaning of *applicable law* is the key to determining whether § 365(c)(1) applies and therefore whether the franchise agreement is unassignable over the franchisor's objection.

Which Applicable Law?

The Bankruptcy Code provides no guidance on the meaning of *applicable law* in § 365(c)(1). Adding to the confusion is the fact that § 365(f)(1) uses the identical term in describing unenforceable anti-assignment provisions. As described by one court, it appears at first glance that "§ 365(f)(1) 'giveth' and § 365(c)(1) 'taketh away.'"[12]

To reconcile the sections, and to keep the § 365(c)(1) exception from swallowing the § 365(f)(1) rule, courts generally have limited the § 365(c)(1) *applicable law* definition to law dealing in some way with the identity of the proposed assignee.[13] The classic example deals with personal service contracts. If a nightclub executes a contract with a famous singer and the singer later files bankruptcy, it is well accepted that the singer would not be permitted to assume the contract and assign it to another performer. In that case, the applicable law is the state contract law protecting the nightclub's right to enjoy the truly unique services that can only be provided by a particular person.[14] In the context of the Bankruptcy Code, the provision of the agreement stating that the agreement was unassignable and could only be performed by the singer would be an anti-assignment provision normally unenforceable under § 365(f)(1). However, because applicable state law addresses the issue of the assignee's identity, the anti-assignment provision is enforceable in bankruptcy.

Although some courts hold that § 365(c)(1) applies only to personal service contracts, a large amount of case law has expanded the scope of § 365(c)(1) to include other types of law applicable to a particular contract. Franchisors seeking to prohibit the assignment of the franchise agreement are likely to point to trademark law, which deals with the identity of a party (i.e., the licensee) and which prohibits the assignment of a trademark license over the objection of the licensor.

Options for the Debtor-Franchisee

(1) Take Advantage if the Franchisor Is Not Paying Attention

It is possible for a franchisee to assign a franchise agreement without waging a difficult legal battle with the franchisor over which applicable law the court should apply. Simply put, the franchisee will win if the franchisor is not paying attention. If

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the franchisor does not object to the franchisee's motion to assume and assign the franchise agreement, the bankruptcy court generally will not wade into these thorny legal issues. Most likely, the court will simply enter the order approving the assumption and assignment. Such an order, which would have been drafted by the franchisee and submitted to the court for entry, would have provisions stating that any anti-assignment provisions in the franchise agreement are unenforceable under § 365(f)(1) of the Bankruptcy Code. Once the franchisor finally starts paying attention to the situation, it would find itself bound by court order to do business with what may otherwise be an objectionable franchisee. Although the new franchisee would be required to comply with all terms of the franchise agreement, many franchisors would still find this result to be very undesirable.

In addition, although this scenario does not seem to have played out in a published decision with respect to franchise agreements, *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*[15] provides an example of where it has occurred in the context of a real property interest. *Qualitech Steel* involved the very common circumstance of a debtor seeking to sell substantially all of its assets free and clear of interests pursuant to Bankruptcy Code § 363(f). The debtor owned certain real property that it leased to a company called Precision. Despite receiving notice of the sale, Precision did not object to the broad *free and clear* language in the sale order, nor did Precision object to the fact that the lease was also rejected by the sale order. The purchaser later asserted that the debtor's real property was sold free of the lease to Precision and took steps to evict Precision from the premises. Precision argued that it was entitled to remain on the premises pursuant to protections provided under other sections of the Bankruptcy Code.[16] The bankruptcy court held that Precision was bound by the terms of the sale order because it failed to object. The district court reversed after performing an analysis of the competing Bankruptcy Code provisions. The Seventh Circuit reversed the district court, holding that § 363(f) permitted the bankruptcy court to enter its broadly worded sale order and that because Precision failed to assert its rights, it lost its possessory interest in the real property.[17]

There is no reason to believe that a court, under similar circumstances, would find a franchisor's interests any more important than the property interest asserted by Precision in *Qualitech Steel*. The lesson that franchisors should learn from *Qualitech Steel* is not to sleep on their rights. Although an order could not be entered without notice to the franchisor and an opportunity to object, bankruptcy cases can move very quickly, especially in § 363 sale cases where the debtor convinces the bankruptcy court to apply expedited procedures to preserve the value of the debtor's estate. A franchisor has strong substantive arguments in its attempt to prevent a franchisee from assigning the franchise agreement over its objection. However, the franchisor must fully understand the relief that the franchisee is seeking from the bankruptcy court, file a timely objection, and voice these substantive arguments.

(2) Focus on Personal Service Contract Law

For the debtor franchisee that is unlucky enough to have an alert franchisor, the franchisee's substantive argument needs to be an exercise in directing the bankruptcy court's focus. First, the franchisee should frame the Bankruptcy Code § 365(c)(1) exception as applying only to personal service contracts.[18] After establishing the limited scope of the § 365(c)(1) exception, the franchisee's next step is to demonstrate that, under applicable state law, the franchise agreement is not a personal service contract. Prevailing on this point spells victory for the franchisee. The franchisee will be able to argue that because the § 365(c)(1) exception does not apply, the general rule expressed in § 365(f)(1) is applicable and any anti-assignment provision in the franchise agreement is unenforceable.

There is case law to support this argument. For example, strong language supporting the franchisee's argument can be found in *In re Bronx-Westchester Mack Corp.*,[19] decided by the Bankruptcy Court for the Southern District of New York. In that case, debtor Bronx-Westchester Mack was a party to a Mack Truck distribution agreement. Bronx-Westchester Mack moved to assume the distribution agreement and assign it to Jamaica Truck. Jamaica Truck was an authorized servicer of Mack Trucks and sought the assignment of the distribution agreement so that it could start selling Mack Trucks as well. For its part, Mack Trucks wanted to terminate the distribution agreement on the grounds that there were already too many Mack Truck dealers in the area and that Jamaica Truck had no sales experience. The bankruptcy court cited to Bankruptcy Code § 365(c)(1)(A) and framed the issue as a question of whether the distribution agreement was a personal service contract. The court held that the § 365(c)(1) exception "relates to executory contracts that are personal in nature. A distributorship or franchise agreement which does not depend upon a special relationship between the parties is not within the reach of this exception."[20] The court went on to note that the distribution agreement could not be seen as a personal service contract because the distribution agreement originally was entered into between Mack Truck and a predecessor-in-interest to the debtor. In other words, how could the distribution agreement be based on the unique services of a particular person if it was later assigned from the original party to the current debtor? The *Bronx-Westchester* court went on to allow the assumption and assignment, over Mack Truck's objection, because there was "no special relationship between the

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parties to the [distribution agreement] other than the dealer's ability to sell Mack Trucks and support the operations called for under [that] contract."[21] The *Bronx-Westchester* decision shows how the framing of the argument can result in a franchise (or distribution) agreement being assumed and assigned over the franchisor's objection.[22]

A case decided by the Bankruptcy Court for the Middle District of Florida, *In re Varisco*,[23] also bears mentioning. In addition to adopting the same position as the *Bronx-Westchester* court on the issue of personal service contracts, the *Varisco* decision provides a helpful summary of several other matters that could arise in franchisee bankruptcy filings: (1) whether a franchisee's rights under the franchise agreement are property of the bankruptcy estate and therefore protected by the automatic stay, (2) whether a franchisee can assume an agreement that was terminated prior to the bankruptcy filing, (3) whether Bankruptcy Code § 365(c)(1) applies even if the franchisee is not seeking to assign the agreement, and (4) whether franchise agreements are personal service contracts and therefore subject to the § 365(c)(1) limitation.

Varisco provides a road map for franchisees seeking to assume and assign an agreement over the franchisor's objection.

The case involved Philip Varisco, a franchisee authorized to distribute food products under a distribution agreement with Oroweat Food Company. Varisco obtained his rights under the agreement by assignment from a previous Oroweat franchisee. Varisco later filed Chapter 11 bankruptcy. Varisco, apparently not convinced that the automatic stay would provide him with sufficient protection, later filed an adversary proceeding against Oroweat seeking an injunction prohibiting it from terminating the agreement and canceling Varisco's franchise rights. The court found that Varisco's rights under the agreement were property of the estate and therefore protected by the automatic stay. This is a well-accepted rule.

The *Varisco* court then turned to the question of whether the agreement had been terminated prior to the bankruptcy case. If the agreement was terminated prior to his filing bankruptcy, then there would be no contract for Varisco to assume in his bankruptcy case. Filing bankruptcy does not resurrect rights that were terminated before bankruptcy pursuant to the contract and applicable state law. The court found that the distribution agreement was subject to assumption because it was not terminated prior to the filing. Although prebankruptcy termination of the agreement was not a dispositive issue in the *Varisco* case, as discussed in more detail below, arguing that the franchise agreement was terminated before the bankruptcy filing is one of the principal means for a franchisor to prevent a bankrupt franchisee from assuming and assigning the agreement.

The *Varisco* court then analyzed whether the debtor could assume the distribution agreement. The court wrote that "[i]t is beyond dispute that by virtue of § 365(c)(1)(A), if applicable law excuses a party from accepting performance from or rendering performance to the [debtor] such executory contract is not assumable or assignable."[24] It is noteworthy that nothing in the *Varisco* opinion indicates that Varisco was actually seeking to assign the distribution agreement. Rather, the case revolved completely around his ability to assume it.

Varisco points to an issue that has since developed into a split among the federal courts of appeal in how to interpret the language of § 365(c)(1)(A). Some courts, deemed hypothetical jurisdictions, analyze a debtor's ability to assign an executory contract under applicable law even if the debtor is seeking only to assume the contract.[25] In those jurisdictions, if applicable law prohibits the debtor from assigning the contract, the debtor is prohibited from assuming it. In other jurisdictions, deemed actual jurisdictions, the court performs a § 365(c)(1)(A) analysis only if the debtor actually seeks to assign the contract.[26] This article focuses on franchisees that actively seek to assign the franchise agreement after assumption. In such cases, a § 365(c)(1)(A) analysis is required in every jurisdiction. Nevertheless, this split in the case law regarding whether a franchise agreement can be assumed at all bears mentioning because of its potential impact on franchisees that are considering a bankruptcy filing. Even if a financially distressed franchisee has no desire to assign the agreement in a bankruptcy case, it should carefully consider where it files to ensure that assumption is permitted.

The final issue in the *Varisco* case was the same issue addressed by the *Bronx-Westchester* court, that is, whether the distribution agreement was a personal service contract. The court found that Oroweat did allow for assignment under certain conditions, thus weighing against Oroweat's argument that its relationship with Varisco was based on particularized trust between the parties. The court also stated that nothing in the record otherwise indicated such a level of trust and confidence.

Like the *Bronx-Westchester* case, *Varisco* provides a road map for franchisees seeking to assume and assign a franchise agreement over a franchisor's objection. Whether a franchise agreement is a personal service contract is usually decided under state law. Franchisees should therefore, where possible, direct the bankruptcy court to state law decisions finding that franchise agreements are not personal service contracts.[27]

(3) Use Bankruptcy Law to Counter Trademark Law Arguments

If the franchisee fails to maintain the narrow focus on personal service contracts, the court will turn to whether trademark law also qualifies as applicable law under § 365(c)(1). Courts applying § 365(c)(1) to trademark law have relied upon two non-mutually exclusive interpretations of the law. First, courts have cited to federal statutes as the applicable law that

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prohibits the assignment of trademark licenses over the licensor's objection, notably the Lanham Act of 1946,[28] codified at 15 U.S.C. §§ 1051–1127.[29] Although the Lanham Act is the most obvious choice in determining which statutory law governs the assignment of a trademark license, courts also have analyzed the Copyright Act of 1976 and the Patent Act of 1952 to determine the assignability of copyrights and patents and to apply such concepts by analogy to trademarks.[30] The second interpretation of trademark law is reliance upon the common law of trademarks.[31]

Franchisors can make a strong argument that trademark law qualifies as applicable law under § 365(c)(1)(A) and that such law prohibits assignment of a franchise agreement over the franchisor's objection. That said, even if it is accepted that § 365(c)(1) should be expanded beyond personal service contracts, there are viable counterarguments to the default rule that trademark licenses are unassignable.

First, the franchisee can attack the premise that applicable statutory law prohibits assignment of a trademark license. Although some courts have vaguely cited to the Lanham Act to support the nonassignability rule, the franchisee should point out that the only Lanham Act restriction on assignability is that the assignment of a trademark (not a trademark license) must be in writing.[32]

As to the common law of trademarks, a franchisee should make the case that courts have only recently adopted a common law rule that trademark licenses are unassignable. This issue was discussed in depth in a 2004 decision of the U.S. District Court for the Central District of California, which was later affirmed by the Ninth Circuit. In *Miller v. Glenn Miller Productions*, the court recognized decades of common law precedent holding that copyrights and patents are unassignable without "express permission from the licensor."[33] The court cited to other more recent decisions applying this rule to trademark licenses. The court went on to note, however, that the Ninth Circuit had not addressed as of 2004 whether this rule should be expanded to trademark law. In considering the issue, the court acknowledged "fundamental differences" between patent and copyright law versus trademark law.[34] Notwithstanding these differences, the court went on to apply the unassignability rule to trademark licenses on policy grounds, writing that because "'the licensor-trademark owner has the duty to control the quality of goods sold under its mark, it must have the right to pass upon the abilities of the new potential licensees.'"[35]

Although the *Miller* court closely analyzed the arguments for and against applying the common law unassignability rule to trademarks, most other courts addressing this issue have simply accepted the rule as an uncontroversial tenet of trademark law.[36] Franchisees therefore should understand that successfully defending against a franchisor's trademark law arguments requires a court that is willing to analyze the legal underpinnings of what otherwise might be considered a default rule. In many courts, it will be difficult for the franchisee to get to that point. Accordingly, a franchisee's best chance at success may hinge on convincing the court not to expand § 365(c)(1) beyond personal service contracts.

That said, depending on the case law in the applicable jurisdiction, challenging the common interpretation of trademark law may be worth the fight. In such cases, a franchisee can make the point that, unlike copyright and patent law,[37] there is no long-standing (i.e., decades-long) common law rule prohibiting the assignment of trademark licenses. Moreover, courts adopting the common law rule have done so on the policy grounds that licensors must have the right to ensure that their licensees meet a particular standard. This policy reasoning sets up the final point that a franchisee can make to counter the franchisor's trademark law argument: the franchisee can acknowledge that the policy reasoning set forth in the *Miller* decision and in the many other cases discussing the assignability of trademark licenses is correct as to attempted assignments outside the bankruptcy context; and the franchisee can then argue that, within a bankruptcy case, the policy concerns do not apply because franchisors are protected by bankruptcy law. Specifically, Bankruptcy Code § 365(b)(1)(A) provides that the bankrupt franchisee attempting to assign the franchise agreement must provide the franchisor with "adequate assurance of future performance." Although the Bankruptcy Code does not define this phrase, the general requirement in the context of an assignment is that the assignee must have characteristics similar to those of the debtor. For example, the assignee typically must be able to demonstrate financial resources similar to those of the debtor at the time the agreement was executed. This requirement is to ensure that the counterparty to the assigned agreement (in this case, the franchisor) is not saddled with a new and financially

The franchisor has every right to insist on assurances that the new assignee meets qualifications for new franchises.

unstable party to the agreement. Depending on the circumstances, such assurances can range between simple promises to perform and cash deposits to protect the counterparty against the risk of future default.

In the specific context of a franchise agreement assignment, the franchisor has every right to insist on assurances that the new assignee meets all of the qualifications for new franchisees, including every financial and nonfinancial requirement normally imposed by the franchisor. As stated in a recent decision by the Bankruptcy Court for the Northern District of Mississippi involving the assignment of a Sonic drive-in restaurant franchise agreement, this requirement of adequate assurance of future performance "provides the most sensible and practicable protection" for the franchisor.[38]

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To summarize the franchisee's counterargument on this point, the franchisee should (1) acknowledge that a franchisor is entitled to insist that an assignee meet certain standards as part of the franchisor's obligation to protect its brand and (2) follow this acknowledgment by arguing that the franchisor is not entitled to prohibit the assignment solely because the assignee is not the exact same person, or the exact legal entity, as the bankrupt franchisee. Given the protections otherwise provided to the franchisor under the Bankruptcy Code, such a refusal should be painted by the franchisee as "unreasonable, arbitrary and violative of the principles and rules of equity jurisprudence" that form the foundation of bankruptcy law.[39]

Preventing Assignment

(1) Terminate the Franchise Agreement Prior to the Bankruptcy Filing

The automatic stay goes into effect the moment that a franchisee files bankruptcy. Because the franchisee's rights under the franchise agreement are property of the franchisee's bankruptcy estate, the franchisor is prohibited from terminating the agreement without first obtaining an order from the bankruptcy court lifting the automatic stay. Obtaining such an order is possible, but it involves an evidentiary hearing where, generally speaking, the franchisor will be required to show that the chances of the franchisee reorganizing are hopelessly unrealistic. Bankruptcy courts may accept such an argument if the case has continued for several months with no apparent progress. Early in the case, however, bankruptcy courts often deny motions to lift the automatic stay in order to provide the debtor with time and a fair chance to formulate and implement a plan of reorganization.

A franchise agreement becomes part of the franchisee's bankruptcy estate if the termination is not complete.

If a franchisor believes that the franchisee is financially unstable and may soon file bankruptcy, it can avoid an automatic stay fight by terminating the franchise agreement prior to the franchisee's bankruptcy filing, assuming that it has a contractual basis for doing so and that termination complies with any state franchise law protections. Bankruptcy courts have no power to resurrect and reinstate terminated contracts, even if such reinstatement would provide for an equitable result, such as allowing the debtor to reorganize.[40]

The trick for the franchisor will be the court's determination whether the franchise agreement was fully terminated as of the filing. This may be more difficult than it sounds. Whether termination occurred is governed by the terms of the franchise agreement as well as applicable state law. If the franchisee received the notice of termination prior to the bankruptcy filing and if any time period for the franchisee to cure defaults also ended prior to the filing, the issue is simple. In such cases, the franchise agreement has been terminated, and a franchisee bankruptcy filing "does not revive the franchise relationship."[41] In other words, the franchise agreement cannot be assumed if it was terminated prior to the bankruptcy filing because the terminated agreement is not property of the franchisee's bankruptcy estate and, therefore, there is nothing for the franchisee to assume.[42] In addition, the franchise agreement is not property of the franchisee's bankruptcy estate if it expires according to its terms before or during the franchisee's bankruptcy case. The automatic stay "does not toll the mere running of time under a contract and thus has been held not to prevent automatic termination of the contract."[43] During the franchisee's bankruptcy case, the key distinction is whether the franchisor must act to terminate the franchise agreement. If the agreement terminates without any franchisor action (i.e., the term of the agreement runs out), the bankruptcy case will not stop the agreement from terminating.

The franchise agreement does become property of the franchisee's bankruptcy estate, however, if the termination is not complete or otherwise is subject to reversal under state law. One court summarized thus:

> In considering whether a franchise agreement was effectively terminated prior to bankruptcy, courts have considered whether the debtor was granted an opportunity to cure defaults. . . . "Where a franchisee is granted time to cure defaults and the franchisee files its bankruptcy petition prior to the time the cure period expires, the franchise agreement is not terminated and is property of the estate."[44]

In such cases, the automatic stay tolls the time period for the franchisee to cure defaults and, generally speaking, the franchisor is forced to wait until the franchisee makes a decision on whether to attempt to assume or reject the agreement in the bankruptcy case.[45]

In addition, a franchisor should be aware that its attempted termination may be affected by other agreements. For example, in *In re Karfakis*,[46] the Bankruptcy Court for the Eastern District of Pennsylvania analyzed whether Dunkin' Donuts' attempt to terminate both a real property lease and a franchise agreement with a franchisee was effective prior to the franchisee's bankruptcy. The court found that, notwithstanding Dunkin' Donuts' assertion that it terminated the lease pursuant to its terms, Pennsylvania law provides that the termination of a real property lease is not effective until the tenant is evicted from the property.[47] The court further found that the lease and the franchise agreement were one "indivisible" agreement.[48] That led to the conclusion that because Dunkin' Donuts did not terminate the lease, the entire agreement, including the franchise agreement, was not terminated and was part of the franchisee's bankruptcy estate. However, franchisors and franchisees should make note of case law holding that the termina-

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tion of a lease also terminates the franchise agreement under the logic that the relationship underlying the franchise agreement could not exist without the lease.[49]

If the franchise agreement was clearly terminated under applicable law before the franchisee's bankruptcy filing, it cannot be revived, and the franchisor has no cause to be concerned about a franchisee seeking to assume and assign the franchise agreement in bankruptcy. If, however, a franchisor operates under the assumption that the agreement was terminated and the bankruptcy court disagrees, the mistake can be costly. Bankruptcy courts do not take kindly to parties that violate the automatic stay, even parties that believe, albeit incorrectly, that they are operating within the law. Because it may be difficult to know with absolute confidence whether the franchise agreement was terminated, and given the costs (including sanctions) associated with being wrong on this point,[50] the franchisor should consider seeking a protective order from the bankruptcy court acknowledging that the franchise agreement was terminated prior to bankruptcy. If the franchisor cannot secure an order, it may be stuck dealing with assumption and rejection issues in the franchisee's bankruptcy case.

(2) Establish That the Franchise Agreement Is a Personal Service Contract

As discussed above, a franchisee seeking to assume and assign the franchise agreement over the franchisor's objection is likely to argue that § 365(c)(1) is limited to personal service contracts. The franchisor can respond directly by contending that even if § 365(c)(1) is limited to personal service contracts, the franchise agreement is a personal service contract and therefore is unassignable.

Whether a franchise agreement is a personal service contract is determined under applicable state contract law. Relevant issues include "the extent of the franchisee's ownership interest in the specific franchise, the extent to which the nature of the dealership permitted personal service of the franchisee, the multifranchise character of the operation, the number of employees in the entire dealership operation, and other [similarly] relevant factors."[51] As noted in *Bronx-Westchester* and *Varisco*, previous assignments of the franchise agreement are relevant to this determination.[52] It is difficult for a franchisor to establish that the specific identity of the franchisee was fundamental when the franchisor previously agreed to substitution of one franchisee for another under the agreement.

Because this issue has the potential to be significant in a franchisee bankruptcy filing, franchisors should consider prebankruptcy planning efforts, such as amending the franchise agreement to provide details of the efforts that the franchisor took to find this specific franchisee and to otherwise state that the identity of the franchisee was fundamental to the franchisor's decision to enter into this particular franchise agreement. However, franchisors also should note that although such language may be helpful in a bankruptcy case, dropping a large amount of self-serving language into a franchise agreement does not guarantee a favorable ruling from a bankruptcy court.[53]

(3) Focus on Trademark Law

In addition to responding directly to the franchisee's personal service contract arguments, the franchisor also should argue that the franchisee's narrow scope interpretation of § 365(c)(1) is incorrect.[54] To support this argument, the franchisor can cite to courts that have included federal trademark law among the types of applicable law covered under § 365(c)(1). A franchisor's trademark is the cornerstone of a franchise system,[55] and therefore bringing trademark law within the scope of § 365(c)(1) may well make the assignability of trademark licenses the deciding issue regarding whether a franchisee can assume and assign the franchise agreement.

The Seventh Circuit adopted this broader interpretation of § 365(c)(1) in a recent decision written by the influential jurist Richard Posner. In *In re XMH Corp.*,[56] the court affirmed the district court's decision that trademark law was applicable law under § 365(c)(1). The court went on to describe the "default rule" for the assignability of trademarks as follows:

> The purpose of a trademark, after all, is to identify a good or service to the consumer, and identity implies consistency and a correlative duty to make sure that the good or service really is of consistent quality, i.e., really is the same good or service. If the owner of the trademark has broken off business relations with a licensee he cannot ensure the continued quality of the (ex-)licensee's operation, whose continued use of the trademark is therefore a violation of trademark law.[57]

Several courts have adopted this reasoning in the context of bankruptcy trademark licensees attempting to assign the license over the licensor's objection.[58] A franchisor that convinces a bankruptcy court that § 365(c)(1) should be expanded to trademark law is arguing from a relative position of strength.

(4) If Applicable, Focus on Other Law

Because every franchise agreement involves trademark law, the trademark law argument is available to every franchisor. However, expanding the scope of § 365(c)(1) also allows franchisors in certain industries to rely on state law statutes protecting the franchisors.

Statutes dealing with franchise agreements for the sale of automobiles are an example. In *In re Pioneer Ford Sales, Inc.*,[59] the First Circuit specifically refuted case law holding that § 365(c)(1) applied only to personal service contracts and went on to apply the section of Rhode Island law prohibiting the assignment of an automobile dealership agreement without the consent of the automobile manufacturer.[60] Other courts have agreed with this interpretation regarding automobile dealership agreements,[61] as well as with other state and federal laws prohibiting assignment.[62] A franchisor should therefore closely analyze laws applicable to its specific industry to determine whether it can argue that a particular law prohibiting assignment qualifies as applicable law under § 365(c)(1).

Conclusion

Practically speaking, most cases involving the attempted assignment of a franchise agreement by a bankrupt franchisee

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are decided based on the particular court's interpretation of § 365(c)(1). If the court interprets the section narrowly to apply only to personal service contracts, the franchisee likely will prevail. If the court interprets the section broadly to apply to trademark or other types of law, the franchisor likely will prevail.

As discussed in this article, there are several different arguments that each party can make in an attempt to obtain a court order allowing or prohibiting the assignment. Depending, as in any case, on the economics at issue and the weight of case law in a particular jurisdiction, franchisees and franchisors should consider taking up the fight, even in the face of case law appearing to proscribe an advantageous application of § 365(c)(1).

Endnotes

1. *See* Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436.1(h) (2007) (defining *franchise*); *see also* FUNDAMENTALS OF FRANCHISING xvii–xviii (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

2. *See* WILLISTON ON CONTRACTS § 74:22 (4th ed. 2012) ("Contract provisions prohibiting the assignment of rights under the contract will ordinarily be upheld.").

3. In fact, it has filled a book. *See* BRETT ANDERS ET AL., THE DEVIL'S DICTIONARY OF BANKRUPTCY TERMS FOR COMMERCIAL LENDERS (2d ed. 2012).

4. 11 U.S.C. § 365.

5. *Id.* § 365(b)(1)(A). This requirement is discussed in more detail below.

6. *In re* Audra-John Corp., 140 B.R. 752, 757 (Bankr. D. Minn. 1992) (analyzing the rejection of a Petland franchise agreement and noting that agreements are rejected in their entirety); *In re* Klein, 218 B.R. 787, 790–91 (Bankr. W.D. Pa. 1998) (noting that "executory contracts must be assumed or rejected in their entirety" in the context of determining the effect of a rejected Kwik-Kopy franchise agreement); *In re* Rovine Corp., 6 B.R. 661, 666 (Bankr. W.D. Tenn. 1980) (holding that a Burger King franchise agreement was rejected in its entirety and that therefore the covenant not to compete in the agreement was no longer enforceable).

7. *See* Sir Speedy, Inc. v. Morse, 256 B.R. 657, 659 (D. Mass. 2000) (citing case law and stating that "[c]ourts have generally accepted the proposition that franchise agreements that have not been terminated as of the commencement of the bankruptcy case are executory contracts under the Bankruptcy Code"). Franchisors may be aware of a recent case in the U.S. Court of Appeals for the Third Circuit holding that a trademark license was not executory. *See In re* Exide Techs., 607 F.3d 957 (3d Cir. 2010). The *Exide* case, however, involved a trademark license agreement that was "perpetual, exclusive [and] royalty-free." *Id*. at 961. The *Exide* court relied on this fact to conclude that the license was not executory because the licensee had no meaningful continuing obligations. In contrast, a franchisee clearly has ongoing obligations under any franchise agreement. Moreover, any reliance on the logic expressed in *Exide* (or in other opinions specifically discussing a trademark license) would require the franchisee to establish that the trademark license is a separate agreement from the franchise agreement. Given the central importance of the trademark license to the franchise relationship, such a severance would not be possible.

8. 11 U.S.C. § 365(f)(1).

9. *Id*.

10. *See In re* Shangra-La, Inc., 167 F.3d 843, 849 (4th Cir. 1999) ("[T]he power to assume and/or assign the lease gives the trustee significant flexibility in managing the estate. A leasehold interest often proves to be the most valuable asset in a small business bankruptcy.").

11. 11 U.S.C. § 365(c).

12. *In re* Quantegy, Inc., 326 B.R. 467, 470 (Bankr. M.D. Ala. 2005); *see also In re* Allentown Ambassadors, Inc., 361 B.R. 422, 446–47 (Bankr. E.D. Pa. 2007) (noting the confusing use of the term *applicable law* in subsections 365(c) and 365(f) and also noting the contradictory lines of case law attempting to reconcile the two).

13. *See In re* ANC Rental Corp., Inc., 278 B.R. 714, 721 (Bankr. D. Del. 2002) ("[W]e follow the majority of courts addressing this issue and conclude that, for § 365(c)(1) to apply, the applicable law must specifically state that the contracting party is excused from accepting performance from a third party under circumstances where it is clear from the statute that the identity of the contracting party is crucial to the contract or public safety is at issue.").

14. This example is in the context of a personal service contract with an individual. This should not be interpreted to mean that a contract must be with an individual to be enforceable as a personal service contract. As discussed below in this article, many of the bankruptcy court decisions analyzing personal service contracts are contracts with business entity debtors.

15. 327 F.3d 537 (7th Cir. 2003).

16. Precision pointed to Bankruptcy Code § 365(h) as providing protection of its leasehold interest. Section 365(h) provides that when the debtor is the landlord under a real property lease and rejects the lease in its bankruptcy case, the nondebtor tenant is entitled either to treat the rejection as a termination of the lease or to remain in possession of the premises for the remainder of the lease while offsetting rent payments against obligations that the debtor landlord no longer performs after the rejection.

17. The Seventh Circuit reconciled § 365(h) and § 363(f) as follows: If the property had not been sold and the lease had been rejected, Precision would have been entitled to protection under § 365(h), upon request made by Precision. In the case of a sale under § 363(f), § 363(e) protects Precision by giving it the right to demand "adequate protection" of its interest. However, Precision failed to request such § 363(e) protection. *Precision Indus., Inc.*, 327 F.3d at 548.

18. *See In re* Alltech Plastics, Inc., 71 B.R. 686, 688 (Bankr. W.D. Tenn. 1987) (citing several cases that "among others, stand for the proposition that only contracts dependent upon a special relationship, special knowledge, or unique skill or talent fall within the purview of § 365(c)"); *In re* Taylor Mfg., Inc., 6 B.R. 370, 372 (Bankr. N.D. Ga. 1980) ("The Court finds that the exception to the general rule of the assignability of contracts was intended by Congress to be applied narrowly and to such circumstances as contracts for the performance of nondelegable duties."); *see also In re* Quantegy, Inc., 326 B.R. 467, 470–71 (Bankr. M.D. Ala. 2005) (holding that the § 365(c) exception to § 365(f) should be narrowly construed).

19. 20 B.R. 139 (Bankr. S.D.N.Y. 1982).

20. *Id.* at 143.

21. *Id*.

22. *See also In re* Sunrise Rests., Inc., 135 B.R. 149, 153 (Bankr.

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M.D. Fla. 1991) (allowing the assignment of a Burger King franchise agreement by a bankrupt franchisee after finding that the agreement was not a personal service contract on the grounds that operating a Burger King "does not require a special knowledge in a conventional sense, that is special judgment, taste or ability"); *In re* Tom-Stimus Chrysler-Plymouth, Inc., 134 B.R. 676, 679 (Bankr. M.D. Fla. 1991) (authorizing the assumption and assignment of a Chrysler franchise agreement on the grounds that the agreement was not based on any special trust or confidence and therefore was not a personal service contract).

23. 16 B.R. 634 (Bankr. M.D. Fla. 1981).

24. *Id.* at 638.

25. *In re* Sunterra Corp, 361 F.3d 257 (4th Cir. 2004); *In re* Catapult Enter., Inc., 165 F.3d 747 (9th Cir. 1999); *In re* James Cable Partners, L.P., 27 F.3d 534 (11th Cir. 1994); *In re* W. Elecs. Inc., 852 F.2d 79 (3d Cir. 1998).

26. *In re* Mirant Corp., 440 F.3d 238 (5th Cir. 2006); Institut Pasteur v. Cambridge Bibtech Corp., 104 F.3d 489 (1st Cir. 1997); *In re* Footstar, 323 B.R. 566 (Bankr. S.D.N.Y. 2005).

27. *See In re* C.W. Mining Co., 422 B.R. 746, 754 (B.A.P. 10th Cir. 2010) (noting that "[w]hether or not a contract is a personal services contract within the purview of § 365(c)(1) is a question of fact" determined by state law); *In re* Headquarters Dodge, Inc., 13 F.3d 647 (3d Cir. 1994) (remanding the case for a determination of whether the franchise agreement was a personal service contract under Michigan law); *In re* Pioneer Ford Sales, Inc., 729 F.2d 27, 28 (1st Cir. 1984) (noting that "[s]tate laws typically make contracts for personal services [un]assignable").

28. Act of July 5, 1946, Pub. L. No. 110-243, 60 Stat. 427.

29. In *In re N.C.P. Marketing Group, Inc.*, 337 B.R. 230 (D. Nev. 2005), *aff'd*, 279 F. App'x 561 (9th Cir. 2008), the district court affirmed a bankruptcy court's decision that a bankrupt licensee of the Tae Bo trademark could not assume and assign the license over the objection of the licensor. The court cited to the provision of the Lanham Act at 15 U.S.C. § 1060, providing that goodwill is assignable along with a trademark and that therefore a trademark owner has the duty to control the mark, including controlling the identity of licensees. *Id.* at 236; *see also In re* Travelot Co., 286 B.R. 447, 454–55 (Bankr. S.D. Ga. 2002) (holding that federal trademark law, as set forth in the Lanham Act, qualifies as applicable law under § 365(c)(1)).

30. *See* Miller v. Glenn Miller Prods., 318 F. Supp. 2d 923, 933 (C.D. Cal. 2004) (citing to "well established" patent and copyright law to determine that trademark licenses are not assignable over the objection of the licensor); *In re Travelot*, 286 B.R. at 455 (citing *In re Golden Books*, 269 B.R. 300, 310 (Bankr. D. Del. 2001) (addressing patent licenses), in further support of its holding that the debtor was not permitted to assign the trademark license).

31. *See, e.g.*, *In re* Jacobsen, 465 B.R. 102, 105 (Bankr. N.D. Miss. 2011) ("[F]ederal common law prohibits the assignment of license agreements which involve trademarks."); Tap Publ'g, Inc. v. Chinese Yellow Pages (N.Y.) Inc., 925 F. Supp. 213, 218 (S.D.N.Y. 1996) (citing to commentaries and to the "general rule" that trademark licenses are unassignable).

32. *See* 15 U.S.C. § 1060.

33. *Miller*, 318 F. Supp. 2d at 933, *aff'd*, 454 F.3d 975 (9th Cir. 2006) (citing, among other cases, Gardner v. Nike, Inc., 279 F.3d 774 (9th Cir. 2002)); *see also* Warren Agin, *Assuming Intellectual Property Licenses*, 13-FEB Am. Bankr. Inst. J. 46 (2012) (discussing the federal common law of copyrights and patents in the context of § 365(c)(1)).

34. *Miller*, 318 F. Supp. 2d at 938 ("For example, while basic policies underlying copyright and patent protection are to encourage creative authorship and invention, the purposes of trademark protection are to protect the public's expectations regarding the source and quality of goods."); *see also* 1 McCarthy on Trademarks and Unfair Competition § 6:3 (2012) (providing that trademark law, "[u]nlike patent law, . . . is [designed] to prevent customer confusion and protect the value of identifying symbols [rather than] encourag[ing] invention by providing a period of exclusive rights").

35. *Miller*, 318 F. Supp. 2d at 933 (quoting McCarthy, *supra* note 34, § 25:33).

36. *See* Judge Richard Posner's citation to the unassignability "default rule" as discussed below in *In re XMH Corp.*, 647 F.3d 690 (7th Cir. 2011); *see also* the case law cited *infra*, note 58. Although it may be difficult for franchisees to mount a challenge to the trademark law unassignability rule in those particular courts, franchisees should also note that very few courts have addressed the assignability of trademarks in the context of a bankruptcy case.

37. *See, e.g.*, *In re* Alltech Plastics, Inc., 71 B.R. 686, 689 (Bankr. W.D. Tenn. 1987) (noting the "century old common law" rule that patent licenses are unassignable); *see also In re* CFLC, Inc., 174 B.R. 119 (N.D. Cal. 1994) (conducting a detailed historical analysis of the common law of patents in the context of whether such common law qualifies as applicable law under § 365(c)(1)).

38. *In re* Jacobsen, 465 B.R. 102, 107 (Bankr. N.D. Miss. 2011); *see also In re* Chi. Invs., LLC, 470 B.R. 32, 98 (Bankr. D. Mass. 2012) (allowing the assumption and assignment of a health club franchise agreement and refusing to accept the franchisor's arguments that the assignee was incapable of providing adequate assurance of future performance); *In re Alltech Plastics*, 71 B.R. at 689–90 (holding that the common law of patents precluded assignment in a Chapter 7 bankruptcy but using language suggesting that the "equities of a case" might dictate a different result in a Chapter 11 reorganization).

39. *In re* Compass Van & Storage Corp., 65 B.R. 1007, 1012 (Bankr. E.D.N.Y. 1986) (allowing the assignment of an Allied Van Lines "agency agreement" over the objection of Allied Van Lines, an objection that the court found unreasonable given the fact that an investigation by Allied Van Lines found the assignee to be financially sound).

40. *In re* Coast Cities Truck Sales, Inc., 147 B.R. 674, 677 (D.N.J. 1992) (holding that a dealership agreement terminated prepetition could not be assumed because of the "well-recognized principle . . . that executory contracts validly terminated prior to the commencement of bankruptcy proceedings are not resurrected by the filing of the petition in bankruptcy, and cannot be included among the debtor's assets" (internal quotation marks deleted)); *see also In re* Making the Dough, Inc., 2009 WL 975170, at *3 (Bankr. M.D. Pa. Mar. 27, 1990); *In re* Tirenational Corp., 47 B.R. 647, 652–53 (Bankr. N.D. Ohio 1985).

41. *In re* Gainesville, P-H Props., Inc., 77 B.R. 285, 295 (Bankr. M.D. Fla. 1987); *see also* Moody v. Amoco Oil Co., 734 F.2d 1200, 1214 (7th Cir. 1984) ("Where a contract has been terminated prebankruptcy, the debtors' rights to continued performance under the contract have expired. The filing of a petition under chapter 11 cannot resuscitate those rights.").

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42. *In re Gainesville*, 77 B.R. at 296 (noting that equitable issues such as whether the franchisee will be able to reorganize without the franchise agreement are not relevant to the issue of whether the agreement was terminated prior to the bankruptcy).

43. *In re* Tudor Lodge Assocs., Ltd., 102 B.R. 936, 948–49 (Bankr. D.N.J. 1989); *see also In re* Tornado Pizza, LLC, 431 B.R. 503, 515 (Bankr. D. Kan. 2010) ("If the franchise agreement expires by its own terms or by the mere passage of time after a debtor commences its bankruptcy case, the Bankruptcy Code does not somehow preserve the agreement." (quoting 6 Norton Bankruptcy Law and Practice ¶ 121:3 (3d ed. rev. 2012)); *Moody*, 734 F.2d at 1213 ("The automatic stay does not toll the mere running of time under a contract, and thus does not prevent automatic termination of the contract.").

44. *In re Tudor Lodge Assocs.*, 102 B.R. at 950 (quoting *In re* ERA Cent. Reg'l Serv., Inc., 39 B.R. 738, 741 (Bankr. C.D. Ill. 1984)).

45. *See In re* C.W. Mining Co., 422 B.R. 746, 758–59 (B.A.P. 10th Cir. 2010) (holding that § 365 governs the timing of assumption and rejection of an agreement that was not terminated prior to the bankruptcy filing); *Moody*, 734 F.2d at 1212–15 (analyzing the issue at length and concluding that § 365, rather than a tolling period set forth in § 108(b), governs the time for curing defaults in executory contracts that were not terminated prior to the bankruptcy filing).

46. 162 B.R. 719 (Bankr. E.D. Pa. 1993).

47. *Id.* at 727.

48. *Id.* at 725 (citing *In re* Braniff, 118 B.R. 819 (Bankr. M.D. Fla. 1989)).

49. *See In re* Maxwell, 40 B.R. 231 (N.D. Ill. 1984).

50. A willful violation of the automatic stay is punishable by contempt of court. *See* 3 Collier on Bankruptcy ¶ 362.12[2] (16th ed. rev. 2012) (citing case law). In addition, if the debtor is an individual, the Bankruptcy Code specifically provides for damages including costs, attorney fees, and ("in appropriate circumstances") punitive damages for a willful stay violation. *See* 11 U.S.C. § 362(k)(1). Note that a violation is willful if the creditor purposefully takes the action that violates the stay (e.g., purposefully terminates the franchise agreement). Specific intent to violate the stay is not required. *See In re* Johnson, 501 F.3d 1162, 1172 (10th Cir. 2007).

51. *In re* Headquarters Dodge, Inc., 13 F.3d 674, 682–83 (3d Cir. 1994) (internal quotation marks deleted).

52. *See also In re* ERA Cent. Reg'l Servs., Inc., 39 B.R. 738, 742 (Bankr. C.D. Ill. 1984) (holding that a franchise agreement was not a personal service contract because the franchisor had previously permitted the assignment of the agreement from a former franchisee to the current franchisee).

53. *In re Headquarters Dodge*, 13 F.3d at 682 ("'[C]lauses in the contract . . . attesting to a personal relationship will not be dispositive.'" (quoting 2 Collier on Bankruptcy § 365.05 (15th ed. 1992))); *see also In re* W. Elecs., Inc., 852 F.2d 79, 83 (3d Cir. 1988) ("[A]ttesting to a personal relationship will not be dispositive.").

54. *See In re* Adelphia Commc'ns Corp., 359 B.R. 65, 78 (Bankr. S.D.N.Y. 2007) (conducting a detailed analysis of § 365(c)(1) and concluding that it is not limited to personal service contracts); *In re W. Elecs.*, 852 F.2d at 83 (holding that the § 365(c) "provision limiting assumption of contracts is applicable to any contract subject to a legal prohibition against assignment"); *In re* Braniff Airways, Inc., 700 F.2d 935, 943 (5th Cir. 1983) ("Surely if Congress had intended to limit § 365(c) specifically to personal service contracts, its members could have conceived of a more precise term than 'applicable law' to convey that meaning."); *see also In re* James Cable Partners, L.P., 27 F.3d 534, 538 n.9 (11th Cir. 1994) (collecting cases to show the split in case law on whether § 365(c)(1) is limited to personal service contracts).

55. Susser v. Carvel Corp., 206 F. Supp. 636, 640 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964).

56. 647 F.3d 690 (7th Cir. 2011).

57. *Id.* at 695 (quoting Gorenstein Enters., Inc. v. Quality Care-USA, Inc., 874 F.2d 431, 435 (7th Cir. 1989)).

58. *In re* Kazi Foods of Mich., Inc., 2011 WL 8197410, at *2 (Bankr. E.D. Mich. Aug. 4, 2011) (noting other case law citing to trademark law to support the unassignability of franchise agreements in bankruptcy); *In re* Wellington Vision, Inc., 364 B.R. 129 (S.D. Fla. 2007); *In re* N.C.P. Mktg. Grp., Inc., 337 B.R. 230 (D. Nev. 2005), *aff'd*, 279 F. App'x 561 (9th Cir. 2008); *In re* Travelot Co., 206 B.R. 447 (Bankr. S.D. Ga. 2002).

59. 729 F.2d 27 (1st Cir. 1984).

60. *Id.* at 31 (noting that the result likely would have been the same under Michigan law as well).

61. *See, e.g.*, *In re* Van Ness Auto Plaza, Inc., 120 B.R. 545, 547–48 (Bankr. N.D. Cal. 1990).

62. *See In re* Adelphia Commc'ns Corp., 359 B.R. 65, 78 (Bankr. S.D.N.Y. 2007) (holding that certain local ordinances prohibiting the assignment of cable franchise agreements were within the scope of § 365(c)); *In re* W. Elecs., Inc., 852 F.2d 79, 83 (3d Cir. 1988) (holding that a federal law requiring the government's consent to the assignment of a contract for the production of military equipment was applicable law under § 365(c)(1)); *In re* Nitec Paper Corp., 43 B.R. 492, 498–99 (Bankr. S.D.N.Y. 1984) (holding that state and federal law dealing with the production of hydroelectric power qualified as applicable law); *see also In re* Allentown Ambassadors, Inc., 361 B.R. 422, 446–55 (Bankr. E.D. Pa. 2007) (conducting an extensive analysis of how various cases have interpreted the § 365(c) applicable law standard).

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