

LAW FIRM DISSOLUTIONS: WHEN THE MUSIC STOPS, DOES ANYONE NEED TO ACCOUNT FOR ANY UNFINISHED BUSINESS?

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It is a fact. Some law firms fail. The dissolution and resulting bankruptcy of Dewey & Leboeuf LLP in 2012 is only the latest of several large law firm failures to occur in the last decade.¹ The prolonged and generationally unprecedented global economic challenges of the “Great Recession” faced by all manner of businesses in recent years has spawned even more intense than normal competition among law firms. Legal commentators and pundits have predicted additional law firm failures in coming years.²

Law firm dissolutions and their related bankruptcies present many interesting academic and practical issues for judges and practitioners. But perhaps no law firm dissolution/bankruptcy issue has garnered more recent attention in legal circles than the unfinished business doctrine. Broadly speaking, the unfinished business doctrine provides for post-dissolution profits arising from the work of former partners at new firms on matters that began at the dissolved firm to be deemed property of the old firm’s estate and to be available to pay creditors of the old firm.³ Application of the unfinished business doctrine carries real consequences for the dissolved law firms and their bankruptcy estates; for the recoveries obtained by secured and unsecured creditors; for the former partners of the failed law firms who thought they had moved their books of business to their new firms; and for the new firms that find themselves (perhaps years later) addressing demands for payment relating to the business that came with their new partners.⁴

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1. See, e.g., Brobeck, Phleger & Harrison LLP (2003); Altheimer & Gray (2003); Coudert Brothers LLP (2005); Heller Ehrman LLP (2008); Thelen LLP (2008); Thacher Proffitt & Wood LLP (2008); Wolf Block LLP (2009); Howrey LLP (2011); and Yoss LLP (2011).

2. See, e.g., STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* (2013); Debra Cassens Weiss, *Law Firm Consultant Predicts ‘Absolutely’ More Layoffs and as Many as Five BigLaw Dissolutions*, ABA JOURNAL, Sept. 6, 2012, at http://www.abajournal.com/news/article/consultant_predicts_absolutely_more_layoffs_and_as_many_as_five_biglaw_diss/; Jay Adkisson, *Howrey: When the Sinking Ship Seeks the Cheese Back From the Fleeing Rats*, FORBES, Aug. 1, 2012, at <http://www.forbes.com/sites/jayadkisson/2012/08/01/howrey-when-the-sinking-ship-seeks-the-cheese-back-from-the-fleeing-rats/>.

3. Application of the unfinished business doctrine is not limited to law firm failures. The doctrine has been applied in other types of partnership failures. See, e.g., *King v. Leighton*, 3 N.E. 594, 598 (N.Y. 1885) (construction firm); *Stem v. Warren*, 125 N.E. 811, 813 (N.Y. 1920) (architecture firm); *Rhein v. Peeso*, 185 N.Y.S. 150 (N.Y. App. Div. 1920) (dental firm).

4. Several significant settlements of unfinished business claims have been inked in recent law firm bankruptcy cases. See, e.g., *Order Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019(a) Approving the Settlement Agreement among the Debtor, Paul Hastings LLP and Certain Former Partners, In re Dewey & Leboeuf*, No. 12-12321 (Bankr. S.D. N.Y. Apr. 1, 2013) (approving a settlement that provided, in part, for (i) payments to the estate in the aggregate amount of \$1.586 million on account of unfinished business claims and (ii) releases of over \$41 million in claims against the estate); *Order Granting Motion by Liquidating Debtor for (1) Approval of Settlement of Claims against Covington & Burling LLP and IP Shareholder Defendants under Bankruptcy Rule 9019; (2) for a Finding of Good Faith Settlement under Cal. Code Civ. P. § 877; and (3) Leave to File Second Amended Complaint, In re Heller Ehrman LLP*, No. 08-32514 (Bankr. N.D. Cal. Aug. 15, 2011) (approving a settlement that provided, in part, for payments to the estate in the aggregate amount of \$4.996 million on account of unfinished business claims); *Order Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure Authorizing and Approving a Settlement Agreement Between*

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This article delves into the unfinished business doctrine as applied in law firm dissolutions, including a detailed discussion of recent competing decisions issued in 2012 by two district court judges in the Southern District of New York.⁵ Those courts reached opposite conclusions on whether the unfinished business doctrine applies under New York law to hourly fee matters pending upon the dissolution of a law firm.

I. THE UNFINISHED BUSINESS DOCTRINE UNDER APPLICABLE STATE PARTNERSHIP LAW

Questions concerning application of the unfinished business doctrine in law firm dissolutions arise under a familiar fact pattern. A departing partner of a dissolved law firm joins a new firm. The departing partner asks a client he had been performing work for at the dissolved firm whether the client wishes to move its pending matter to the partner's new firm. The client agrees and the new firm then enters into an agreement with the client to handle the pending matter (i.e. the unfinished business). The new firm and its new partner provide services to complete the pending matter and receive payment for those services from the client. Thereafter, the dissolved former firm (or its bankruptcy estate) and/or former partners at the dissolved firm demand that the new firm and the departed partner turnover at least the profits received from the completion of the unfinished business.

"Unfinished business" has been defined as "executory contracts to perform services, begun but not fully performed by the partnership on the date of its dissolution."⁶ Unfinished business is not to be confused with "finished business" or "new business", neither of which falls under application of the unfinished business doctrine.⁷ According to at least one court, "[u]nfinished business exists until it is finished, and therefore the [t]rustee, if entitled, can recover any realized [u]nfinished [b]usiness profits no matter when such business was or is concluded."⁸ The unfinished business doctrine

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the Plan Administrator and Baker & McKenzie LLP, Dev. Specialists, Inc., in its capacity as Plan Administrator for Coudert Brothers LLP v. Baker & McKenzie LLP, No. 09-1150 (Bankr. S.D. N.Y. Aug. 20, 2010) (approving a settlement that provided, in part, for (i) payments to the estate in the aggregate amount of \$6.65 million on account of unfinished business claims and (ii) an agreement to share approximately \$17 million in contingent fees).

5. Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (In re Coudert Bros. LLP), 480 B.R. 145 (S.D. N.Y. 2012) (hereafter, "*Coudert Bros.*"); Geron v. Robinson & Cole LLP (In re Thelen LLP), 476 B.R. 732 (S.D. N.Y. 2012) (hereafter, "*Thelen*").

6. *Coudert Bros.*, 480 B.R. at 161. See Greenspan v. Orrick, Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 333 (Bankr. N.D. Cal. 2009) (hereafter, "*Brobeck*") ("Under California law, the unfinished business of a law partnership is any business covered by retainer agreements between the firm and its clients for the performance of partnership services that existed at the time of dissolution.")

7. "Finished business" is "business that has been completed prior to dissolution (the merger done and documented; the lawsuit tried to verdict or settled)." *Coudert Bros.*, 480 B.R. at 160. "New business" is an entirely new engagement entered into with a dissolved firm's former client that followed a former partner to the new firm. *Id.* at 160-61; see also *Brobeck*, 408 B.R. at 333 ("However, a critical distinction exists between 'unfinished business,' which remains a partnership asset and for which each partner has a fiduciary duty to complete, and 'new' business which is not a partnership asset and may follow the individual partner.")

8. *Brobeck*, 408 B.R. at 332 n.15 (rejecting time period limit on recovery as argued by the defendant firms and attorneys); compare Official Comm. of Unsecured Creditors v. Ashdale (In re Labrum & Doak, LLP), 227 B.R. 391, 396 (Bankr. E.D. Pa. 1998) (hereafter, "*Labrum & Doak*") (creditors' committee voluntarily limited unfinished business claims to fees collected by former partners and their new firms on unfinished business in the one year period following dissolution of debtor law firm).

rests on the legal principle that, absent an enforceable agreement stating otherwise, a departing partner owes a fiduciary duty to the dissolved firm and her former partners to account for benefits obtained from use of partnership property in winding up the business of the partnership.⁹

Well-drafted partnership agreements generally address (i) whether unfinished business constitutes a partnership asset and (ii) whether, upon dissolution, partners owe a duty to account for unfinished business. The partnership agreement should govern resolution of the issues, provided the provisions themselves are not subject to attack under laws such as applicable state or federal fraudulent transfer statutes. But, in the absence of controlling partnership agreement provisions, the questions of whether (i) unfinished business constitutes property of the partnership's bankruptcy estate and, if so, (ii) former partners owe a fiduciary duty to account to their dissolved firm and former partners for profits relating to unfinished business, are largely controlled by applicable state law, particularly applicable state partnership statutes.

A discussion of applicable state law begins with the Uniform Partnership Act of 1914 ("UPA"). The UPA has been adopted by every state, except Louisiana.¹⁰ Subsequent revisions to the UPA, commonly referred to as "RUPA" or the Revised Uniform Partnership Act, have been adopted by thirty-seven states, including Delaware and California, but excluding New York and Pennsylvania.¹¹

According to the states' codifications of UPA or RUPA, partnership property refers to all property, whether real, personal or mixed, tangible or intangible, or any interest held therein, that is owned by the partnership.¹² Under the laws of most states, *in the absence of an express provision to the contrary in the applicable partnership agreement*, a partner owes a fiduciary duty of loyalty to account to the partnership and her former partners with respect to any property, profit or benefit obtained in the conduct or winding up of partnership business.¹³

Importantly, application of the unfinished business doctrine to law firms has not been limited to firms formed under state *partnership* laws. The doctrine has been applied in dissolutions of law firms formed as professional corporations,

9. The unfinished business doctrine has been applied in the context of law firm dissolutions. It does not appear to have been applied in a situation where a partner simply leaves her solvent operating law firm, joins a new firm while her old firm continues operating, and then clients of the old firm engage her at the new firm to continue working on the client's pending matters. *See, e.g., Coudert Bros.*, 480 B.R. at 151, n.1; *Heller Ehrman LLP v. Jones Day (In re Heller Ehrman LLP)*, No. 10-3221, 2013 Bankr. LEXIS 889, at *12-15 (Bankr. N.D. Cal. Mar. 11, 2013) (hereafter, "*Heller 2013*").

Unfinished business claims in the context of a law firm's dissolution are not the only possible claims against departing partners. *See, e.g., Trustee's Motion, Pursuant to Bankruptcy Rule 9019, for an Order (A) Approving Settlement Agreements with Certain Former Partners of the Debtor; (B) Finding that Such Settlements are in Good Faith; and (C) Barring Certain Claims against Settling Partners, In re Thelen, LLP*, No. 09-15631 (Bankr. S.D. N.Y. Sept. 28, 2011) (describing claims against former partners, including claims related to alleged overcompensation received by the partners in violation of the relevant partnership agreements, unpaid capital contribution requirements, and unpaid loans or other advances made by the debtor law firm on behalf of the partners for a variety of reasons, including payment of health insurance and other personal expenses).

10. *See* Uniformlaws.org, Legislative Fact Sheet – Partnership Act, at <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Partnership Act> (last visited Apr. 18, 2013).

11. *Id.*; *see also* Delaware Revised Uniform Partnership Act, DEL. CODE ANN. tit. 6, ch. 15 (2005 and Supp. 2012) ("DRUPA"); California Revised Uniform Partnership Act of 1994, Cal. Corp. Code §§ 16100-16962 (2006 and Supp. 2013) ("CRUPA").

12. *See, e.g.,* DRUPA § 15-101(17); CRUPA § 16101(15).

13. *See, e.g.,* DRUPA § 15-404(b)(1) ("A partner's duty of loyalty to the partnership and the other partners is limited to the following: (1) to account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct or winding up of the partnership business or affairs or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;..."); CRUPA § 16404(b)(1) (substantially similar).

limited liability companies, and even in a case involving a “hybrid” limited liability partnership.¹⁴ Moreover, “dissolution” does not equate to “termination”.¹⁵ A dissolved law firm continues in existence until its affairs are “wound up.”¹⁶

II. CASE LAW DEVELOPMENT OF THE UNFINISHED BUSINESS DOCTRINE

It is well-settled in many states that, absent contrary provisions in a partnership agreement, the unfinished business doctrine applies to *contingency fee* matters pending upon dissolution of a law firm.¹⁷ Absent an agreement to the contrary, partners who take with them to their new places of employment contingency fee cases they were handling at the time of their old firm’s dissolution likely will have a duty to account to the old firm for at least a portion of the fees received from those contingency cases.¹⁸

Several courts recently have wrestled with the question of whether, in the absence of an enforceable agreement among the former partners, the unfinished business doctrine applies to *hourly fee* matters pending with the dissolved firm at the time of its dissolution. These hourly fee matters typically get moved by the clients to a new firm in conjunction with the new firm’s hiring of the responsible partner. The new firm receives fees as a result of work performed on the hourly fee matters. Then the questions become whether the former partner or new firm must account for the fees received and if so, whether reasonable compensation for the “efforts, skill and diligence” utilized to obtain such fees may be deducted to reduce the amount owed to the dissolved firm. State and federal courts across the country have been asked to decide these questions in the context of law firm dissolutions. They are not all reaching the same conclusions.

14. See, e.g., *Santalucia v. Sebright Transp., Inc.*, 232 F.3d 293, 299 (2d Cir. 2000) (hereafter, “*Santalucia*”) (applying unfinished business doctrine to law firm practicing as professional corporation formed under New York law) (citations omitted); *Sufrin v. Hosier*, 896 F. Supp. 766 (N.D. Ill. 1995) (applying unfinished business doctrine to law firm practicing as professional corporation formed under Illinois law); *Heller Ehrman LLP v. Arnold & Porter LLP* (In re Heller Ehrman LLP), No. 10-3203, 2011 Bankr. LEXIS 1497, at *6-12 (Bankr. N.D. Cal. Apr. 22, 2011) (hereafter, “*Heller 2011*”) (applying unfinished business doctrine where debtor law firm was a California limited liability partnership, managing general partner was a California professional corporation, remaining partners consisted of several other professional corporations incorporated in California and other states, and the individual attorney partners were members of the various professional corporations); *id.* at *7 (“Even though the court agrees that RUPA is inapplicable, it disagrees with Defendant’s contention that – absent the Jewel waiver – the Shareholders had no duty to account for profits from unfinished business.”); *Rothman v. Dolin*, 24 Cal. Rptr. 2d 571, 572 n.3 (Cal. Ct. App. 1993) (unfinished business doctrine applies to professional law corporations formed under California law); *Fox v. Abrams*, 210 Cal. Rptr. 260, 265 (Cal. Ct. App. 1985) (same).

15. *Coudert Bros.*, 480 B.R. at 155 (“Dissolution is not termination.”) (quoting *Scholastic, Inc. v. Harris*, 259 F.3d 73, 85 (2d Cir. 2001) (citing New York Partnership Law §§ 60, 61)).

16. *Coudert Bros.*, 480 B.R. at 155-56 (“Instead, the partnership ‘continues’ in existence until the ‘winding up’ of its affairs is completed.”)

17. *Id.* at 163-64 (collecting cases).

18. See, e.g., *Santalucia*, 232 F.3d at 298 (applying New York law) (“Thus, in a case where a lawyer departs from a dissolved partnership and takes with him a contingent fee case which he then litigates to settlement, the dissolved firm is entitled only to the value of the case at the date of dissolution, with interest.... Stated conversely, the lawyer must remit to his former firm the settlement value, less that amount attributable to the lawyer’s efforts after the firm’s dissolution.”) (citations omitted).

A. *Jewel v. Boxer*

Now to the case law. *Jewel v. Boxer*¹⁹ is the seminal unfinished business doctrine case dealing with law firms. In *Jewel*, a four-partner California law firm dissolved in 1977. Two of the partners (Messrs. Jewel and Leary) formed one new firm, and the other two partners (Messrs. Boxer and Elkind) formed another new firm. At their dissolved firm, the former partners had no written partnership agreement and no agreement allocating fees from active cases upon dissolution.²⁰ At the time of dissolution, the old firm was handling various types of cases, apparently with an emphasis on personal injury and workers compensation cases.²¹ When the new firms were formed, the respective partners at the new firms were hired by the clients whose cases were handled by such partners at the old firm.²²

Several years later, a dispute arose as to the proper allocation of attorneys' fees received by the new firms from completion of the old firm's cases that remained open at the time of dissolution. Following a bench trial, the court allocated post-dissolution income to the old and new firms on a *quantum meruit* basis.²³ In a somewhat Byzantine process, the court first determined the former partners' respective partnership interests in income of the old firm: 30% for Jewel, 27% for Boxer, 27% for Elkind, and 16% for Leary. The court then allocated the disputed fees between the old firm and new firms according to three factors: "the time spent by each firm in the handling of each case, the source of each case (always the old firm), and, in the personal injury contingency fee cases, the result achieved by the new firm."²⁴ The trial judge assigned values to each of the three factors, with the values depending on items such as when a case settled or if it was tried, and the amount of time expended on the case before and after dissolution.²⁵ The court found that Messrs. Boxer and Elkind owed the old firm more than double what Messrs. Jewel and Leary owed the old firm. Notwithstanding, Messrs. Jewel and Leary appealed to challenge the trial court's allocation of post-dissolution fees.

The appellate court reversed. In so doing it applied California partnership law²⁶ to hold that (a) a dissolved partnership continues until unfinished partnership business is wound up, and (b) absent a contrary agreement, any income generated through the winding up of unfinished business is allocated to the former partners according to their respective

19. *Jewel v. Boxer*, 203 Cal. Rptr. 13 (Cal. Ct. App. 1984).

20. *Id.* at 15.

21. The *Jewel* opinion is somewhat unclear whether the old firm at the time of dissolution handled all contingency fee matters, or a mix of some contingent fee matters and some hourly fee matters. The opinion appears to suggest that at least most of the old firm's matters were of the contingent fee variety. *See id.* at 15-16; see also *Rothman v. Dolin*, 24 Cal. Rptr. 2d 571, 572-73 (Cal. Ct. App. 1993) (noting lack of clarity from the *Jewel* and *Fox* opinions as to the kinds of client matters pending at the time of respective dissolutions, but concluding that unfinished business consisted of all types of matters in progress at time of dissolution).

22. *Jewel*, 203 Cal. Rptr. at 16.

23. "Quantum meruit" is Latin for "as much as he deserved." *Black's Law Dictionary* 1276 (8th ed. 2004).

24. *Jewel*, 203 Cal. Rptr. at 16.

25. *Id.*

26. When the *Jewel* decision issued in 1984, California had adopted the UPA. *See* Cal. Corp. Code §§ 15001-15058 (1995). California subsequently adopted revisions to the UPA. As of January 1, 1999, CRUPA governed all California partnerships, thus replacing the former UPA in its entirety. *See Brobeck*, 408 B.R. 318, 325, n.2 (Bankr. N.D. Cal. 2009) (citing CRUPA §16111).

interests in the dissolved partnership at the time of dissolution.²⁷ Further, the appellate court ruled that this manner of allocation should be utilized regardless of which former partner and new firm provided the actual legal services subsequent to the dissolution.²⁸ The *quantum meruit* approach adopted by the trial court was rejected based upon the plain language of the UPA and the decisions of several other courts interpreting the relevant UPA provisions.²⁹

Importantly, the *Jewel* court relied upon the UPA and case law to hold that “no partner (except a surviving partner) is entitled to extra compensation for services rendered in completing unfinished business.”³⁰ The court found the UPA contained no special exception for law firms and lawyers from the “no extra compensation” rule set forth in the UPA.³¹ And in invoking the “no extra compensation” rule, the *Jewel* court explained the “sound policy reasons” supporting application of the rule to law partnerships.³² The “no extra compensation” rule, however, does not mean that a new firm bears all of the expenses incurred in generation of the post-dissolution revenue on unfinished matters.³³ Rather, “[u]nder the provisions of the Uniform Partnership Act, the former partners will be entitled to reimbursement for reasonable overhead expenses

27. *Jewel*, 203 Cal. Rptr. at 19.

28. *Id.* at 15-17.

29. *Id.* at 17 (citing *Resnick v. Kaplan*, 434 A.2d 582, 587 (Md. 1981); *Frates v. Nichols*, 167 So.2d 77, 81 (Fla. Dist. Ct. App. 1964); *Kreutzer v. Wallace*, 342 So.2d 981, 982-83 (Fla. Dist. Ct. App. 1977)).

30. *Jewel*, 203 Cal. Rptr. at 16 (citing Cal. Corp. Code, § 15018(f) (1995)). Section 15018(f) under the California UPA stated as follows: “No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.”

In footnote 2 of its opinion, the *Jewel* court defined “extra compensation” as “receipt by a former partner of the dissolved partnership of an amount of compensation which is greater than would have been received as the former partner’s share of the dissolved partnership.” This has changed in California. Under CRUPA, a departing partner became entitled to deduct overhead expenses and reasonable compensation from the fees generated from winding up the unfinished business of the partnership. CRUPA §16401(h) (2006). See *Brobeck*, 408 B.R. at 327, n.4 (CRUPA has changed the *Jewel* “no extra compensation” rule for post-dissolution windup activities; now, partners are allowed “reasonable compensation” for services rendered in winding up partnership business); see also *id.* at 333 (“What constitutes unfinished business must be determined on the date of dissolution of the partnership, not based on events occurring thereafter.... Absent an agreement to the contrary, partnership assets include attorneys fees received by the partnership for cases in progress at dissolution, and such fees, *minus overhead and reasonable compensation*, must be shared among all partners in accordance with the ownership interest of each, regardless of which partner performs the services for winding up purposes.”) (emphasis added) .

31. *Jewel*, 203 Cal. Rptr. at 17 (“[t]he definition of ‘business’ in the Uniform Partnership Act as including ‘every trade, occupation, or profession’ (Corp. Code, §15002) precludes an exception for law partnerships”); *Coudert Bros.*, 480 B.R. 145, 158 (S.D. N.Y. 2012) (the New York Partnership Law applies to partnerships engaged in any business or profession).

32. *Jewel*, 203 Cal. Rptr. at 18:

The rule prevents partners from competing for the most remunerative cases during the life of the partnership in anticipation that they might retain those cases should the partnership dissolve. It also discourages former partners from scrambling to take physical possession of files and seeking personal gain by soliciting a firm’s existing clients upon dissolution.... On balance, the allocation of fees according to each partner’s interest in the former partnership should not work an undue hardship as to any partner where each partner completes work on the partnership’s cases which are active upon its dissolution.

33. *Id.* at 19-20 (“A reimbursement of reasonable and necessary overhead expenses attributable to the winding up of partnership business is certainly an equitable result.”). But this does not mean that gross income from the subject matters gets reduced by partners’ compensation, which is not included as part of the overhead expenses. *Id.* at 19.

(excluding partners' salaries) attributable to the production of postdissolution partnership income; in other words, it is *net* postdissolution income, not gross income, that is to be allocated to the former partners."³⁴

The *Jewel* court also discussed whether the results that flowed from its rulings would be unjust or would somehow cause undue hardship for some former partners. It concluded that application of the "no extra compensation" rule would not lead to unjust results, primarily because of "two basic fiduciary duties owed between the former partners: First, each former partner has a duty to wind up and complete the unfinished business of the dissolved partnership Second, no former partner may take any action with respect to unfinished business which leads to purely personal gain."³⁵

On an issue addressed in many cases decided after *Jewel*, the *Jewel* court distinguished between a client's absolute right to choice of counsel on the one hand, and the rights and duties owed by former partners to each other with respect to income from unfinished business on the other hand. The court held that these two rights were independent and distinct, and a client's right to counsel of her choice should have no impact on allocation of fees collected on the client's matter among the former partners of a dissolved firm.³⁶

Finally, perhaps in its most practical takeaway advice, the *Jewel* court noted that all of the uncertainty surrounding application of the UPA to the dissolution of the old firm could have been avoided by a written partnership agreement containing provisions addressing with specificity the completion and allocation of unfinished business upon dissolution.³⁷

Courts in California and from around the country have followed *Jewel*, particularly in cases involving contingent fee matters, but also in some cases involving hourly fee matters.³⁸ It must be noted, however, that at least one court has questioned whether the reasoning of *Jewel* remains fully intact given California's subsequent adoption of CRUPA.³⁹

34. *Id.* (italics in original) (citing Cal. Corp. Code §15015(b) (1995)).

35. *Id.*

36. *Id.* at 17; see also *Coudert Bros.*, 480 B.R. at 168-69. *But see Thelen*, 476 B.R. 732, 742-43 (Bankr. S.D. N.Y. 2012); *Welman v. Parker*, 328 S.W.3d 451, 457 (Mo. Ct. App. 2010) (in case involving disputed contingent fee, court held that dissolved firm was entitled only to recover the reasonable value of services provided prior to the dissolution; court reasoned that client's absolute right to choose counsel, including right to be represented by withdrawing partner at her new firm, would be impermissibly and adversely impacted by a conclusion that the contingent fee remained the property of the dissolved partnership). The reasoning utilized in *Welman* has its critics. See *LaFond v. Sweeney*, No. 10CA2005, 2012 Colo. App. LEXIS 242 (Colo. Ct. App. Feb. 16, 2012); *Huber v. Etkin*, 58 A.3d 772 (Pa. Super. Ct. 2012).

37. *Jewel*, 203 Cal. Rptr. at 19 ("The former partners must bear the consequences of their failure to provide for dissolution in a partnership agreement.")

38. *Labrum & Doak*, 227 B.R. 391, 408-09 (Bankr. E.D. Pa. 1998) (applying Pennsylvania UPA to hold that post-dissolution income received on hourly fee cases pending at time of dissolution constituted property of the estate; court found that partnership agreement did not address allocation of fees and costs in the event of dissolution) (collecting cases); *Huber v. Etkin*, 58 A.3d at 780 (holding that under Pennsylvania UPA, contingency fees from cases pending at time of dissolution but not realized until after dissolution are assets of dissolved firm)(collecting state cases); *Rothman v. Dolin*, 24 Cal. Rptr. 2d 571, 573 (Cal. Ct. App. 1993) (holding under California law that unfinished business consists of contingent and hourly fee matters not yet completed at time of dissolution); *Brobeck*, 408 B.R. 318, 333 (Bankr. N.D. Cal. 2009) (unfinished business of law firm includes all matters in progress when firm dissolves, regardless of whether hourly fee or contingency fee matters); *id.* at 333, n.20 (expressly rejecting Defendants' argument that hourly rate matters are not included within CRUPA definition of unfinished business); *Sufrin v. Hosier*, 896 F. Supp. 766, 769 (N.D. Ill. 1995) (holding under Illinois law that dissolved firm's contingent fee matters in progress at time of dissolution constituted firm assets that must be shared according to formula agreed to by former partners, notwithstanding fact that only one of the two partners worked to complete client matters after dissolution); *LaFond v. Sweeney*, 2012 Colo. App. LEXIS 242 at *7 (holding under Colorado law that because two lawyers agreed to share firm's profits equally, each was entitled to equal share of contingent fee obtained by one of them after dissolution; pursuant to Colorado LLC Act, attorney who obtained fee was not entitled to extra compensation for winding up case).

39. *Thelen*, 476 B.R. 732, 739 (S.D. N.Y. 2012) (noting that the *Jewel* court's adoption of the "no extra compensation"

B. The Southern District Of New York Split On Whether Hourly Fee Matters Constitute Unfinished Business Of A Dissolved Partnership

In 2012, two district court judges in the Southern District of New York addressed head-on whether hourly fee matters pending upon a law firm's dissolution constitute property of the partnership (and its estate)⁴⁰ and therefore, constitute unfinished business subject to an accounting by the former partners and their new firms, absent a contrary and enforceable agreement.

Judge Colleen McMahon addressed the issue under New York law in the Coudert Brothers LLP ("Coudert Brothers") bankruptcy case. Judge William H. Pauley III, in turn, addressed the issue under New York and California law in the Thelen LLP bankruptcy case. The two judges reached conflicting decisions under New York law, and the Second Circuit has accepted interlocutory appeals of both decisions under New York law. A detailed discussion of the two district court decisions follows.

1. *Coudert Bros.*

After more than 150 years of providing legal services, Coudert Brothers dissolved in August 2005. In September 2006 Coudert Brothers filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York.

The plan administrator (the "Plan Administrator") appointed pursuant to the Coudert Brothers' confirmed Chapter 11 plan filed thirteen separate adversary proceedings against ten law firms (the "Defendant Firms") premised, at least in part, on the unfinished business doctrine. The complaints asserted claims based on New York and federal bankruptcy law for an accounting, turnover, unjust enrichment, and conversion.⁴¹

Following a withdrawal of the reference of the adversary proceedings, the Defendant Firms filed motions for summary judgment. The Plan Administrator filed a cross-motion seeking a declaration that Coudert Brothers' unfinished

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rule was based on a since-repealed statute). As stated above, CRUPA changed the "no extra compensation" rule found in the California UPA. *See infra* note 30.

40. 11 U.S.C. §541(a) (under the Bankruptcy Code, property of the estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case"). Whether a debtor has any legal or equitable interest in property is determined by applicable state law. *Butner v. United States*, 440 U.S. 48, 55 (1979).

41. In response to the complaints, the Defendant Firms initially filed motions to dismiss. *See Coudert Bros.*, 480 B.R. at 153 (reciting procedural history). They argued, inter alia, that the unfinished business doctrine did not apply to non-contingency fee matters. The motions to dismiss were denied in a bench ruling by Judge Drain of the United States Bankruptcy Court for the Southern District of New York. *Id.* The Bankruptcy Court acknowledged that New York's highest court had not yet addressed the issue of whether the unfinished business doctrine applied to non-contingency matters. *Id.* The Bankruptcy Court concluded that, if the New York Court of Appeals was faced with this issue, it would find that the unfinished business doctrine applied to both contingency fee and non-contingency fee matters. *Id.*

After an amended bench ruling by the Bankruptcy Court, the Defendant Firms moved for direct certification to the Second Circuit Court of Appeals. Those motions were denied by the Bankruptcy Court. *Id.* The Defendant Firms then moved for leave to appeal the orders denying the motions to dismiss. Those motions were denied by the United States District Court for the Southern District of New York. *Id.* (citing *In re Coudert Bros. LLP Law Firm Adversary Proceedings*, 447 B.R. 706 (S.D. N.Y. 2011) (Marrero, J.)). The Defendant Firms were, however, successful in having the reference of the adversary proceedings withdrawn to the United States District Court for the Southern District of New York. *See Coudert Bros.*, 480 B.R. at 153, citing *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (In re Coudert Bros.)*, 462 B.R. 457 (S.D. N.Y. 2011) (McMahon, J.).

client matters constituted partnership assets on the date of dissolution.⁴² In a lengthy decision, Judge McMahon addressed two primary issues.

First, Judge McMahon considered whether hourly fee matters pending at the time of dissolution constituted assets of the dissolved law firm under New York law (hereafter, “Issue No. 1”). Her answer, for the reasons discussed more fully below, was an unequivocal “Yes”.⁴³

Second, assuming arguendo that the hourly fee matters constituted partnership assets on the dissolution date, Judge McMahon addressed whether the Defendant Firms were entitled to summary judgment because the unfinished hourly fee matters had no value (hereafter, “Issue No. 2”). More specifically, the issue was whether the value of the post-dissolution efforts at the Defendant Firms to complete the hourly fee matters equaled the fees paid by the clients to the Defendant Firms for such matters, and therefore the hourly fee matters would not have generated any profit for distribution in accordance with the Coudert Brothers’ partnership agreement. Judge McMahon held that the answer on Issue No. 2 required factual resolutions not appropriate for decision on summary judgment.⁴⁴

The court, however, found that the Defendant Firms were entitled to summary judgment on the Plan Administrator’s claims for turnover, unjust enrichment and conversion, thereby leaving a cause of action for an accounting, which is “the traditional remedy for resolving monetary disputes among former partners.”⁴⁵

a. The New York Partnership Law

As an initial matter, Judge McMahon discussed various sections of the New York Partnership Law (the “NYPL”). The NYPL is a codification of the UPA. The NYPL sets forth default rules that operate in the absence of a controlling provision in a partnership agreement.⁴⁶ Unlike the law firm in *Jewel*, Coudert Brothers had a written partnership agreement. And that agreement expressly incorporated the default rules of the NYPL.⁴⁷

Judge McMahon explained that, pursuant to section 43 of the NYPL, “[p]artners owe one another, and the partnership, fiduciary duties, including the duty to account for any benefit a partner derives from his use of partnership property.”⁴⁸ The NYPL also provides that, although a partnership may dissolve, the partnership continues until the

42. *Coudert Bros.*, 480 B.R. at 151.

43. *Id.* at 154.

44. *Id.* at 155.

45. *Id.*

46. *Id.*

47. *Id.* at 155-56.

48. *Id.* at 156. Section 43(1) of the NYPL states:

Every partner must account to the partnership for any benefit, and hold as trustee, for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

See also Coudert Bros., 480 B.R. at 156 (quoting *Denver v. Roane*, 99 U.S. 355 (1878) (“Having jointly undertaken the business intrusted to the partnership, *all the parties* were under obligation to conduct it *to the end*. This duty they owed to the clients and to each other. *And as to the unfinished business remaining with the firm on [the date of dissolution], the duty continued,*”) (emphasis added in *Coudert Bros.* opinion)). This duty described in *Roane* is codified in NYPL §43(1). *Coudert Bros.*, 480 B.R. at 156.

partnership's business is wound up.⁴⁹ Judge McMahon focused on partners' duties during the "winding up" phase. She found that partners owe fiduciary duties to one another while winding up partnership business, regardless of whether the partners remain with the dissolving firm during the windup or leave the dissolving firm and wind up the business at other firms.⁵⁰

The court also discussed section 73 of the NYPL, which section is part of the Article of the NYPL that addresses dissolution. Section 73 provides that, if winding up partners do not immediately settle accounts with a partner who dies or withdraws from the partnership upon dissolution, the winding up partners have a duty to account for the departing partner's interest in the partnership as of the date of dissolution. It further provides that a partner who departs from a dissolving partnership is entitled to interest on his share of partnership property accruing from the date of dissolution, or, "in lieu of interest, the profits attributable to the use [by the winding up partner] of [the departing partner's] right in the property of the dissolved partnership"⁵¹

Judge McMahon concluded that these NYPL provisions, read together, require a former partner to account for any post-dissolution use of partnership property.⁵²

The *Coudert Bros.* court also reviewed the NYPL relating to the question of whether "the partner is entitled to deduct from the net profits 'reasonable compensation' for her post-dissolution efforts before remitting the balance to her former partners for division."⁵³ Judge McMahon noted that Section 40(6) of the NYPL codified the "no compensation" rule established under New York common law: "No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."⁵⁴

Judge McMahon further noted that while "[t]he New York Court of Appeals has never considered whether what I will call the 'Kirsch rule' runs afoul of the 'no compensation' rule codified in Partnership Law §40(6)," the Second Circuit (in *Santalucia*) and several New York intermediate courts have ameliorated this rule, at least in the contingent fee context, by allowing a former partner to reduce the profits for which he must account "by an amount that reflects the value of his post-dissolution 'efforts, skill and diligence.'"⁵⁵ The *Coudert Bros.* court openly questioned whether the New York Court of Appeals would agree with the "reasonable compensation" approach adopted by these other courts.⁵⁶

49. *Id.*

50. *Id.*

51. *Id.* (quoting NYPL § 73). Judge McMahon noted the Second Circuit's view that "Section 73 is not the source of the duty of a lawyer to account to his former partners. The source of the duty is the fiduciary relationship of trust and confidence that partners have from time immemorial shared with one another." *Id.* at 157 (quoting *Santalucia*, 232 F.3d 293, 300 (2d Cir. 2000) (emphasis in original)).

52. *Id.*

53. *Id.* at 158.

54. *Id.* at 158 (quoting NYPL § 40(6)). The "surviving partner" exception was not applicable because Coudert Brothers was not dissolved due to the death of any of its partners.

55. *Id.* at 159, 175-77; see, e.g. *Santalucia*, 232 F.3d at 298; *Kirsch v. Leventhal*, 586 N.Y.S.2d 330, 333 (N.Y. App. Div. 1992) (hereafter, "*Kirsch*") (court rejected quantum meruit approach to valuing former partner's share in contingent fee recovery relating to case pending at time of prior firm's dissolution; the *Kirsch* court held a quantum meruit approach was "inconsistent with the fiduciary duty of the partner in possession of the partnership business after dissolution [here, the defendant] to wind up the partnership's affairs and complete performance of any partnership service contracts for the benefit of all partners"; the *Kirsch* court found an issue of fact

b. Issue No. 1 — Under New York Law, Hourly Fee Matters Constitute Assets Of A Dissolved Law Firm

Following its discussion of the NYPL, the *Coudert Bros.* court turned to analysis of Issue No. 1, i.e. whether under New York law pending hourly fee matters constituted partnership assets as of the date of dissolution. Judge McMahon reasoned that, due to the fundamental nature of a partnership, there is a presumption that a firm's business belongs to the firm and not to its individual partners.⁵⁷ Judge McMahon recited the general rule as holding that unfinished business (in the form of an executory contract) of a partnership on the date of dissolution is a partnership asset unless the parties indicate a contrary intent.⁵⁸

In support of this "partnership asset" rule, the *Coudert Bros.* court relied on *Stem v. Warren*⁵⁹, a 1920 decision from the New York Court of Appeals. *Stem* involved two architecture firms, Reed and Stem ("RS") and Warren and Wetmore ("WW"). They formed a partnership ("RS & WW") to oversee the construction of Grand Central Station. RS & WW entered into a construction contract with the regional railroad company. That contract was terminable at will by the railroad but it included a provision requiring payment for completed work. After years of construction, one of the partners (Reed of RS) died and RS & WW dissolved. Wetmore negotiated with the railroad for his firm WW to complete the project. The railroad terminated the RS & WW contract and entered into a new contract with WW. The railroad paid RS & WW for all of the work it completed up to its dissolution.

Notwithstanding that RS & WW's contract was terminable at will and that RS & WW had been paid in full for its pre-dissolution work, Reed's estate successfully sued WW for an accounting for all profits WW received under its new contract with the railroad. The New York Court of Appeals explained that the railroad contract was RS & WW's most valuable asset and WW was required to account for any profits received while winding up RS & WW's business.⁶⁰

Despite the fact that *Stem* did not involve a law partnership, the *Coudert Bros.* court viewed this decision as conclusive on the question presented (whether executory contracts to render legal services constituted partnership assets upon dissolution) because the NYPL does not treat law partnerships differently from other partnerships.⁶¹

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as to whether the contingency fee case at issue was a partnership asset; and, assuming the case constituted unfinished business of the dissolved firm, it needed to be "evaluated as of the date of dissolution in determining the value of plaintiff's partnership interest..."; finally, the *Kirsch* court quoted NYPL §73 (plaintiff entitled to "the value of his interest at the date of dissolution...with interest, or, at his option...in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership") and stated that "[T]o the extent that the ultimate successful settlement of the *Geddes* case was due, as defendant avers, to her postdissolution efforts, skill and diligence, the firm's fee in the *Geddes* case proportionately would not be "attributable to the use of [plaintiff's] right in the property of the dissolved partnership.")

56. *Coudert Bros.*, 480 B.R. at 175-77.

57. *Id.* at 159.

58. *Id.* at 161 (citing *King v. Leighton*, 3 N.E. 594, 600-01 (N.Y. 1885)); *Stem v. Warren*, 125 N.E. 811, 813 (N.Y. 1920); *Dawson v. White & Case*, 672 N.E. 2d 589, 592 (N.Y. 1996); *Rhein v. Peeso*, 185 N.Y.S. 150 (N.Y. App. Div. 1920); *Kirsch*, 586 N.Y.S.2d at 332.

59. *Stem v. Warren*, 125 N.E. 811 (N.Y. 1920).

60. *Coudert Bros.*, 480 B.R. at 162 (citing *Stem*, 125 N.E. at 811-13).

61. *Id.* at 162-63, 167.

Judge McMahon explained that the question of whether an executory contract constitutes a partnership asset is controlled by the parties' intent, as evidenced by their conduct, the partnership agreement, the agreement with the client, the firm's accounting entries, etc.⁶² Judge McMahon noted that none of the cited cases distinguished between hourly fee matters and contingent fee matters and ultimately concluded that the Defendant Firms had not suggested a "meaningful difference between legal business that is billed by the hour versus handled on contingency..."⁶³ Simply stated, she did not view the payment arrangement between the client and the firm as altering the general rule that executory contracts to provide legal services are partnership assets subject to distribution upon dissolution, absent a contrary intent of the parties.⁶⁴

The *Coudert Bros.* court noted that prior New York intermediate appellate court decisions addressing whether executory contracts to provide legal services were partnership assets subject to distribution upon dissolution, had done so in the law firm context only with respect to contingent fee matters.⁶⁵ These courts had concluded that under New York law, contingent fee matters constituted property of the partnership subject to distribution upon dissolution. Courts in other UPA jurisdictions had reached the same conclusion under the applicable state law.⁶⁶ Furthermore, when partners do not specify whether a contingent matter is a firm asset subject to distribution upon dissolution, such silence has been construed to signify an intention it is a partnership asset.⁶⁷

Due to (i) the absence of New York cases addressing Issue No. 1 in the context of billable hour representations, and (ii) the NYPL statutory requirement that New York courts harmonize their rulings with those of other UPA jurisdictions⁶⁸, the *Coudert Bros.* court examined decisions from other jurisdictions that had addressed Issue No. 1 with respect to hourly fee matters. It cited to several decisions concluding that hourly fee matters were partnership assets absent an express intention to the contrary.⁶⁹ One case cited by Judge McMahon explained as follows:

The nature of the underlying contractual relationship between the dissolved partnership and its client does not alter the legal status of a dissolved partnership nor does it change the fiduciary duties each

62. *Id.* at 163 (citing *Sriraman v. Patel*, 761 F. Supp.2d 7, 18 (E.D.N.Y. 2011)).

63. *Coudert Bros.*, 480 B.R. at 163, 165.

64. *Id.* at 166, 172-73.

65. *Kirsch*, 586 N.Y.S.2d 330, 332-33 (N.Y. App. Div. 1992); *Shandell v. Katz*, 629 N.Y.S.2d 437, 439 (N.Y. App. Div. 1993) (hereafter, "*Shandell*") (court rejected quantum meruit approach and held that contingent fee cases pending at time of dissolution are partnership assets subject to distribution); *DelCasino v. Koepfel*, 615 N.Y.S.2d 454 (N.Y. App. Div. 1994) (in dispute under shareholders' agreement, court held that "pending contingency fee cases constituted partnership assets subject to distribution upon dissolution"); see also *Santalucia*, 232 F.3d 293, 297-298 (2d Cir. 2000) (collecting New York intermediate appellate court decisions).

66. *Coudert Bros.*, 480 B.R. at 163-64 (collecting cases).

67. *Id.* at 164 (citations omitted).

68. *Id.* ("The fact that New York courts must harmonize their rulings with those of other UPA jurisdictions by statute, Partnership Law § 4(4), is powerful reason to conclude that the New York Court of Appeals would reach the same result."). Section 4(4) of the NYPL explains that "[T]his chapter shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it."

69. See, e.g., *Coudert Bros.*, 480 B.R. at 164 (quoting *Labrum & Doak*, 227 B.R. 391, 408 (Bankr. E.D. Pa. 1998), which cites cases from California, Pennsylvania, and the District of Columbia).

partner must honor towards another. They remain the same regardless of how an attorney agrees to be compensated by his clients.⁷⁰

Another case cited by the *Coudert Bros.* court set forth the policy rationale behind such a rule. “[A]ccording different treatment to hourly rate and contingency fee cases would lead to the prospect of attorneys shunning contingency fee cases in anticipation of a possible dissolution of the law firm, and scrambling to get the hourly rate cases rather than the contingency fee cases upon dissolution.”⁷¹ Judge McMahon concluded that the New York Court of Appeals would follow this policy rationale and reach the same result as the courts in the other UPA jurisdictions: hourly fee matters pending upon dissolution constituted partnership assets under New York law.⁷²

With respect to Issue No. 1, the *Coudert Bros.* court was not convinced by the arguments raised by the Defendant Firms. First, the Defendant Firms argued that real differences existed between billable hour cases and contingency fee cases. For billable hour matters, the Defendant Firms argued that a dissolved partnership should only expect to be compensated for the services rendered prior to dissolution because the law firm receives periodic payments for work performed. Therefore, the argument goes, “unfinished business” becomes “finished business” after each periodic invoice is issued.⁷³

Judge McMahon remained unpersuaded. She reasoned that the Defendant Firms were conflating two issues – a law firm’s rights against its clients and the rights of former partners among themselves – and were taking a position that was contrary to the teachings of *Stem*. She concluded that a law firm’s ability to collect from its clients had no bearing on every partner’s duty to account to her former partners for profits realized from a partnership asset upon dissolution.⁷⁴

Judge McMahon next addressed the Defendant Firms’ argument, which she stated was their strongest, centered around New York’s strong public policy in favor of a client’s right to select counsel of its choosing.⁷⁵ Judge McMahon noted that New York courts have refused to uphold provisions in partnership agreements that created financial disincentives for a departing partner to continue representing clients of his old firm. In *Cohen v. Lord, Day & Lord*,⁷⁶ the New York Court of Appeals voided a partnership agreement provision providing for forfeiture of a withdrawing partner’s post-withdrawal entitlement if that withdrawing partner competed with his old firm. New York’s highest court found such provision to be contrary to the public policy of ensuring a client’s unfettered right to choose counsel. The provision also ran afoul of the professional ethics rules prohibiting restraints on the practice of law.⁷⁷

70. *Coudert Bros.*, 480 B.R. at 165 (quoting *Robinson v. Nussbaum*, 11 F. Supp.2d 1, 6 (D.D.C. 1997)).

71. *Coudert Bros.*, 480 B.R. at 164-65 (quoting *Rothman v. Dolin*, 24 Cal. Rptr. 571 (Cal. Ct. App. 1993)).

72. *Coudert Bros.*, 480 B.R. at 164.

73. *Id.* at 165-66.

74. *Id.* at 166 (“every partner must account to her former partners for profits realized from the use of what was, on the date of dissolution, a partnership asset”) (citing NYPL, §43). Although the United States Supreme Court implied in *Consaul v. Cummings*, 222 U.S. 262 (1911) that a partner’s duty to her former partnership may differ when that partner winds up a contingency fee matter as opposed to a billable hour matter, the *Coudert Bros.* court noted that New York’s legislature declined to make that distinction when it subsequently adopted the NYPL. *Coudert Bros.*, 480 B.R. at 168.

75. *Id.*

76. See, e.g., *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411-12 (N.Y. 1989) (hereafter, “*Cohen*”) (New York Court of Appeals held unenforceable as violative of public policy and New York’s Disciplinary Rules a partnership agreement provision providing for forfeiture of compensation if departing partner competed with former firm after departure).

77. *Id.* at 411 (“the significant monetary penalty it exacts, if the withdrawing partner practices competitively with the

The Defendant Firms argued that applying the unfinished business doctrine to billable hour representations similarly would impede client choice because a partner will be dissuaded from continuing to represent a client if that partner will have to share with his former partners a large percentage of the profit earned from work completed at his new firm. This, according to the Defendant Firms, would create the same sort of “financial disincentive” for the former partners to continue representing their former clients, as was rejected in *Cohen*.

Judge McMahon disagreed⁷⁸, and in doing so discussed at length but ultimately distinguished on several grounds a case she expressly noted was not cited by the Defendant Firms – *Denburg v. Parker Chapin Flattau & Klimpl*.⁷⁹ She observed that *Denburg* (as well as *Cohen*) were not law firm dissolution cases; rather, they involved one partner withdrawing from a partnership that continued to do business.⁸⁰ The statutes governing partnership dissolutions are not applicable in the context of a partner’s withdrawal from an ongoing partnership. Judge McMahon also pointed out that elements of competition need not be considered in *Coudert Bros.* because, unlike the former firms in *Cohen* and *Denburg*, the Coudert Brothers law firm had ceased doing business.⁸¹ And finally, the *Coudert Bros.* court noted that neither *Denburg* nor *Cohen* addressed the unfinished business doctrine.⁸²

The *Coudert Bros.* court also relied upon an examination of the Coudert Brothers Partnership Agreement and Special Authorization to refute Issue No. 1 arguments raised by the Defendant Firms. The court concluded the Partnership Agreement lacked language providing that billable hour representations should be excluded from partnership assets. In fact, it contained express language stating that all property of the firm belonged to the partnership, not to the individual partners.⁸³ Judge McMahon also found that the Special Authorization, which was adopted by Coudert Brothers in con-

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former firm, constitutes an impermissible restriction on the practice of law. The forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client’s choice of counsel.”); *see also Coudert Bros.*, 480 B.R. at 169, n.7 (quoting N.Y. Prof. Cond. R. 5.6) (“A lawyer shall not participate in offering or making...a partnership...agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.”). This rule is designed to protect a client’s unfettered right to choose counsel. *Coudert Bros.*, 480 B.R. at 169-70.

78. Importantly, Judge McMahon in *Coudert Bros.* and Judge Pauley in *Thelen* reached opposite conclusions on this argument. Judge McMahon was not persuaded that a client’s unrestricted right to choose counsel would be adversely impacted by application of the unfinished business doctrine to hourly fee matters pending at the time of a firm’s dissolution. Judge Pauley viewed it very differently.

79. *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 997-1002 (N.Y. 1993) (hereafter, “*Denburg*”) (New York Court of Appeals rejected as an illegitimate “financial disincentive” to the practice of law, a partnership agreement provision requiring a departing partner who competed against her former firm to pay the former firm the greater of (i) 12.5% of the firm’s profits allocated to the partner over the two previous years or (ii) 12.5% of the annual bills issued by the new firm to clients of the former firm over the next two years). *See Coudert Bros.*, 480 B.R. at 170-72.

80. *Coudert Bros.*, 480 B.R. at 171.

81. *Id.*

82. *Id.* at 171-72 (distinguishing *Denburg* as involving partnership agreement provision requiring departing partner to share profits earned on completely new business from former clients of the old firm). Judge McMahon also noted that neither *Cohen* nor *Denburg* were mentioned in *Santalucia*, which “adopted the Appellate Division rule that contingency fee cases pending on the date of dissolution are partnership assets subject to distribution in the absence of a contrary agreement.” *Id.* at 173.

83. *Id.* Article 8(i) of the Coudert Brothers Partnership Agreement stated as follows:

The property of the Partnership belongs to the Partnership, and not to the Partners, and a Partner has no individual property rights in any specific assets of the Partnership. Rather, each Partner’s interest in the Partnership property

nection with dissolution, emphasized the partners' understanding that pending client matters constituted firm property that must be transitioned to new firms in order to protect clients and to maximize the value of Coudert Brothers' assets and business.⁸⁴ And, the Partnership Agreement explicitly incorporated the NYPL's default rules governing dissolution, which rules included a partner's fiduciary duty to account for profits earned on use of partnership property (i.e. unfinished business).⁸⁵ Accordingly, Judge McMahon concluded that the former partners owed a duty to account for profits attributable to any unfinished business that was completed at the Defendant Firms.

Based upon all of the above, as to Issue No. 1, the *Coudert Bros.* court held in favor of the Plan Administrator that under New York law, pending hourly fee matters were firm assets on the dissolution date, subject to the former partners' duty to account.⁸⁶

c. Issue No. 2 — Does The Value Of Post-Dissolution Efforts To Complete Hourly Fee Matters Factor In To Calculation Of Amounts Due To The Dissolved Firm?

After its analysis and conclusion on Issue No. 1, the *Coudert Bros.* court then tackled Issue No. 2. The Defendant Firms argued that even if the hourly fee matters were partnership assets, they remained entitled to summary judgment because those matters generated no profits at the Defendant Firms. The Defendant Firms argued that after deduction of the value attributable to their post-dissolution "efforts, skills and diligence", no profits were left for which to account.

As discussed above, some intermediate New York courts, as well as the Second Circuit in *Santalucia*, appear to have ameliorated the NYPL's "no extra compensation" rule.⁸⁷ Those courts have permitted former partners to include the

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is his or her share in the surplus after the Partnership debts are paid and the Partnership accounts are settled and the rights of the Partners are adjusted between themselves.

84. *Id.* The Special Authorization stated, in part, as follows:

The Equity Partners ... hereby authorize the Executive Board ... to take such actions as it may deem necessary and appropriate, including, without limitation, the granting of waivers, notwithstanding any provisions to the contrary in the Partnership Agreement ..., in order to:

- a. ... sell all or substantially all of the assets of ... the Firm to other firms or service providers, in order to maximize the value of the Firm's assets and business;
- b. Wind down the business of the Firm with a view to continuing the provision of legal services to clients and the orderly transition of client matters to other firms or service providers, in order to maximize the value of the Firm's assets and business to the extent possible

(emphasis added).

85. *Id.* at 174. Article 10(a) of the Coudert Brothers Partnership Agreement stated as follows:

Dissolution. The Partnership may only be dissolved and wound up by an affirmative vote of a Super Majority of the Executive Board ... and an affirmative vote of the Equity Partners Such dissolution and winding up, and the rights of the Partners in connection therewith, shall be governed by the provisions of the [New York Partnership Law].

(emphasis added). *See also Coudert Bros.*, 480 B.R. at 155-159 (discussing several sections of the NYPL).

86. *Id.* at 175.

87. Section 40(6) of the NYPL states: "No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."; *but see, e.g., Santalucia*, 232 F.3d 293, 298 (2d Cir. 2000) ("Thus, in a case where a lawyer departs from a dissolved partnership and takes

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value of their post-dissolution “efforts, skills and diligence” as an expense that may be deducted from gross fees collected. The New York Court of Appeals, however, has not addressed this issue. Judge McMahon expressed reluctance to conclude (in fact, she openly questioned) that the New York Court of Appeals would follow intermediate appellate court and Second Circuit precedent to permit former partners and their new firms to deduct the value of post-dissolution efforts and overhead expenses from the fees earned by completing unfinished business.⁸⁸ Nevertheless, Judge McMahon acknowledged that as a district court judge in the Southern District of New York, she was bound to follow the Second Circuit precedent in *Santalucia*, which permitted deduction for the value of post-dissolution “efforts, skills and diligence.”⁸⁹

Adhering to that precedent, however, did not obviate the need for a trial. The court noted that a number of issues, such as the value of the matters on the dissolution date, what constituted overhead expenses, and the value of the former partners’ post-dissolution “efforts, skills and diligence”, involved disputed facts. Judge McMahon welcomed “the thorny task” of resolving these factual issues.⁹⁰

In accordance with a briefing schedule set by the court in its original decision on the pending summary judgment motions, the Defendant Firms filed motions for certification of an interlocutory appeal. On July 18, 2012, Judge McMahon amended her prior decision and order on the summary judgment motions to provide that her decision “involves controlling questions of law, as to which there exist substantial grounds for difference of opinion, and that an immediate appeal would materially advance the ultimate termination of these proceedings.”⁹¹ As such, the *Coudert Bros.* court certified its amended summary judgment order for interlocutory appeal pursuant to 28 U.S.C. §1292(b). By order dated December 18, 2012, the Second Circuit accepted the appeals and a cross-appeal.

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with him a contingent fee case which he then litigates to settlement, the dissolved firm is entitled only to the value of the case at the date of dissolution, with interest ... Stated conversely, the lawyer must remit to his former firm the settlement value, less that amount attributable to the lawyer’s efforts after the firm’s dissolution.”).

88. *Coudert Bros.*, 480 B.R. at 175-77 (recapping *Kirsch* line of authority as standing for proposition that a partner’s “effort, skill and diligence” can be treated as an expense so as to increase the deduction for overhead, thereby reducing the profits generated from finishing a client’s matter at the new firm; Judge McMahon opined that *Kirsch* “rests on a misapplication or misunderstanding of [NYPL] § 40(6)”). The *Kirsch* court did not expressly cite to or discuss section 40(6) of the NYPL. The *Kirsch* court primarily relied upon section 73 of the NYPL. Judge McMahon took issue with cases like *Kirsch* and *Shandell* because she believed that they “eviscerated” the “no compensation” rule set forth in NYPL §40(6). See *Coudert Bros.*, 480 B.R. at 176-77.

89. *Id.* at 177 (“Thus, while I doubt whether the New York Court of Appeals would apply *Kirsch* in either context, I feel constrained to apply *Santalucia* to billable hours cases as well. The situation needs sorting out, but that is ultimately a job for the New York Court of Appeals.”) (emphasis in original). In *Santalucia*, the Second Circuit addressed an appeal challenging the apportionment of a contingent fee resulting from settlement of a wrongful death action. The United States District Court for the Northern District of New York awarded the dissolved law firm “a quantum meruit recovery – that is, a reasonable hourly fee multiplied by the number of hours it had devoted to the matter” before dissolution. *Santalucia*, 232 F.3d at 294. This resulted in a rather modest award for the dissolved firm, as compared to the amount awarded to the former partner based on his post-dissolution work. The Second Circuit, in vacating and remanding the case for further factual findings, concluded that under New York law, “absent an agreement to the contrary, a dissolving law firm is entitled to the value of the contingent fee at the time of dissolution.” *Id.* at 294, 297-98 (emphasis added). The Second Circuit noted that while the New York Court of Appeals had not yet addressed the issue, its holding was consistent with several New York Appellate Division cases. *Id.* at 297-98 (citing and discussing, among others, *Shandell*, 629 N.Y.S.2d 437, 439 (N.Y. App. Div. 1995)).

90. *Id.* at 178.

91. *Id.* at 179.

2. *Thelen LLP*

Thelen LLP, a California limited liability partnership, dissolved in October 2008 and in September 2009 filed a Chapter 7 bankruptcy case in the Bankruptcy Court for the Southern District of New York. At the time of and in connection with the 2008 dissolution of their law firm, Thelen's partners adopted a Fourth Amended and Restated Limited Liability Partnership Agreement (the "Fourth Partnership Agreement"). The Fourth Partnership Agreement included a so-called *Jewel* Waiver:

Neither the Partners nor the Partnership shall have any claim or entitlement to clients, cases or matters ongoing at the time of dissolution of the Partnership other than the entitlement for collection of amounts due for work performed by the Partners and other Partnership personnel prior to their departure from the Partnership. *The provisions of this [section] are intended to expressly waive, opt out of and be in lieu of any rights any Partner or the Partnership may have to "unfinished business" of the Partnership, as the term is defined in Jewel v. Boxer, 156 Cal. App. 3d 171 (Cal. App. 1 Dist. 1984), or as otherwise might be provided in the absence of this provision through the interpretation or application of the [California Uniform Partnership Act of 1994, as amended].*⁹²

The Fourth Partnership Agreement also contained a California choice of law provision.

In two separate lawsuits filed in September 2011, the Thelen chapter 7 trustee sued two law firms (Seyfarth Shaw LLP and Robinson & Cole LLP) and several former partners who had joined those firms. The complaints alleged that Thelen's adoption of the *Jewel* Waiver constituted a fraudulent transfer of property, specifically a fraudulent transfer of the unfinished business of Thelen LLP at the time of its dissolution. Under bankruptcy and applicable state law, the trustee sought to avoid the alleged fraudulent transfer and to require the defendants to account for and turn over profits generated from the unfinished business.⁹³

Seyfarth Shaw moved for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. Robinson & Cole moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).

For the reasons discussed below, the *Thelen* court found that hourly fee matters (i) were not property of a dissolved law firm under applicable New York law and (ii) were property of a dissolved law firm under applicable California law.

a. Choice Of Law Analysis — California Or New York Law?

At the outset, the *Thelen* court engaged in a choice of law analysis. First, the court held that the California choice of law provision in the Fourth Partnership Agreement was not binding or controlling because neither defendant was a party to that agreement.⁹⁴ In the absence of a binding contractual choice of law provision, the *Thelen* court applied New York choice of law rules to determine the governing state law.⁹⁵

92. *Thelen*, 476 B.R. 732, 736 (S.D. N.Y. 2012) (emphasis added).

93. *Id.* at 736-37.

94. The court also noted that a contractual choice of law provision only governs contract-based claims, not tort claims such as fraudulent transfer claims. *Id.* at 737-38 (citation omitted).

95. *Id.* at 738 (citing *In re Gaston & Snow*, 243 F.3d 599, 600-01, 607 (2d Cir. 2001)).

Under New York choice of law rules, Judge Pauley first examined whether a conflict existed between potentially applicable state substantive law (New York or California).⁹⁶ He concluded for the reasons expressed in his opinion that New York and California law conflicted as to the existence and scope of a dissolved law firm's property interest in pending hourly fee matters.⁹⁷ Because he found a conflict existed, Judge Pauley then conducted an "interest analysis," which led to application of the "law of the jurisdiction having the greatest interest in the litigation."⁹⁸ In ascertaining the state with the greatest interest, Judge Pauley undertook a "two-pronged inquiry, determining '(1) what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law [at issue] is to regulate conduct or allocate loss.'"⁹⁹

As to the action against Seyfarth Shaw (the "Seyfarth Shaw Action"), the *Thelen* court relied on several facts to conclude that the majority of significant contacts occurred in New York and therefore New York law applied to "define the property interest—if any—that Seyfarth Shaw received".¹⁰⁰ Most of the former partners that left Thelen to join Seyfarth Shaw were licensed to practice law in New York. Furthermore, the Thelen bankruptcy petition was filed in New York based upon Thelen having a domicile or a residence, principal place of business, or its principal assets in New York. Judge Pauley further relied on case law holding that where regulation of conduct is at issue, "the state where the alleged tort took place has the greater interest."¹⁰¹ Judge Pauley found without elaboration that the alleged tort (the alleged fraudulent transfer of firm property resulting from adoption of the *Jewel* Waiver) occurred in New York.¹⁰²

For its decision on the motion to dismiss filed in the action against Robinson & Cole (the "Robinson & Cole Action"), the *Thelen* court applied California law. The court simply noted that Robinson & Cole, a Connecticut based firm, and the plaintiff trustee agreed, at least for purposes of the motion to dismiss, that California law applied to the issue of whether Robinson & Cole received any "property interest" as a result of the Thelen LLP partners' adoption of the *Jewel* Waiver in the Fourth Partnership Agreement.¹⁰³

b. Seyfarth Shaw Action - Hourly Fee Matters Do Not Constitute Assets Of A Dissolved Firm Under Applicable New York Law

After completing its choice of law analysis, the primary issue addressed by the *Thelen* court with respect to the Seyfarth Shaw Action was whether, under New York law, hourly fee matters pending at the time of dissolution constituted

96. *Id.* at 738 (citing *Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC*, 842 F.Supp. 2d 661, 665 (S.D. N.Y. 2012)).

97. *Id.* at 738.

98. *Id.* at 738 (quoting *Istim, Inc. v. Chemical Bank*, 581 N.E.2d 1042, 1044 (N.Y. 1991)).

99. *Id.* at 738 (quoting *Padula v. Lilarn Props. Corp.*, 644 N.E.2d 1001, 1002 (N.Y. 1994)).

100. *Id.* at 738.

101. *Id.* at 738 (citing *GFL Advantage Fund, Ltd. v. Colkitt*, No. 03 Civ. 1256, 2003 WL 21459716, at *3 (S.D. N.Y. June 24, 2003), *Roselink Investors, L.L.C. v. Shinkman*, 386 F.Supp. 2d 209, 225 (S.D. N.Y. 2004)).

102. *Id.* at 738. Given the proliferation of law firms that have offices located around the country and in many cases, around the world, one can surmise that courts will wrestle with difficult choice of law issues in future unfinished business cases arising out of the dissolutions of large law firms.

103. *Id.* at 737, n.1 ("Because the parties agree that California law applies [to the "property interest" issue] and they did not brief applicable Connecticut law, this Court declines to consider whether Connecticut law applies.").

partnership assets, i.e. property of the estate. The answer was a resounding “No.” Judge Pauley unequivocally held that “New York law does not recognize a debtor law firm’s property interest in pending hourly fee matters.”¹⁰⁴

Judge Pauley began by noting that the New York Court of Appeals had not yet provided guidance on whether a law firm possessed a property interest in pending hourly fee matters.¹⁰⁵ Next, he discussed *Jewel v. Boxer*, the “seminal case” applying the unfinished business doctrine to law partnerships.¹⁰⁶

Judge Pauley stated that “[u]nder New York law, it is well settled that ‘absent an agreement to the contrary, pending contingent fee cases of a dissolved partnership are assets subject to distribution.’”¹⁰⁷ He further noted that New York courts had not extended the unfinished business doctrine to pending hourly fee matters, and that the only New York court to consider that issue declined to so extend the doctrine.¹⁰⁸ The *Thelen* court found the reasoning of *Sheresky* to be “persuasive.”¹⁰⁹

104. *Id.* at 741.

105. *Id.* at 739 (“Accordingly, without guidance from the state’s highest court, this Court must “predict how the New York Court of Appeals would resolve the question.”) (quoting *Amerex Group, Inc. v. Lexington Ins. Co.*, 678 F.3d 193, 200 (2d Cir. 2012)).

106. *Thelen* at 739; *see also id.* at 739, n.2 (observing that “[O]ver the last three decades, courts have cited *Jewel* reflexively and uncritically. Thus, from modest beginnings in a dispute involving a small Alameda County general practice firm, the *Jewel* doctrine has grown to ensnare some of the largest law firms in the United States.”)

107. *Id.* at 739 (quoting *Santalucia*, 232 F.3d 293, 297 (2d Cir. 2000)).

108. *Thelen*, 476 B.R. at 739-740 (discussing *Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP*, No. 150178/10, 2011 WL 7574999 (N.Y. Sup. Ct. Sept. 13, 2011)) (hereafter, “*Sheresky*”). In *Sheresky*, the plaintiff was a former founding partner of a dissolved matrimonial firm. He sued his three former partners and their new law firm. The New York Supreme Court (a trial level court in New York) addressed the defendants’ motion to dismiss all counts of the amended complaint, including a count for unfinished business.

The *Sheresky* court expressly addressed the issue of whether a cause of action for unfinished business relating to non-contingency fees was recognized under New York law. The *Sheresky* court concluded it was not, notwithstanding the Coudert Bros. bankruptcy court’s denial of motions to dismiss filed by the named defendants and notwithstanding District Court Judge Victor Marrero’s decision to “leave undisturbed” the Bankruptcy Court’s ruling. *Id.* at *6 (citing *In re Coudert Bros. LLP Law Firm Adversary Proceedings*, 447 B.R. 706 (S.D. NY 2011) (denying defendants’ motion for leave to file interlocutory appeal)).

The *Sheresky* court noted that prior New York decisions dealing with a claim for unfinished business all were in the contingent fee context and that the question of whether the unfinished business doctrine applied to hourly fee matters remained an open one in New York. And then the court reasoned:

[i]t is logical to distinguish between contingency fee arrangements and cases which are billed on the basis of hourly work. A fee collected in a contingency fee case initiated by the former law firm may well result in a fee much greater than the amount of work expended by the lawyer or lawyers handling the case. In contrast, to the extent that compensation for the case is based solely on the amount of hourly work performed post-dissolution, compensating a former partner out of that fee would reduce the compensation of the attorneys performing the work.

Id. The *Sheresky* court also relied on New York Disciplinary Rule 1.5(g) dealing with division of fees between lawyers in different firms, in support of its decision to dismiss “a cause of action for unfinished business for hourly fee cases which has, hitherto, not been recognized by the New York courts.” *Id.* at *6-7 (New York Disciplinary Rule 1.5(g) prohibits the sharing of fees among lawyers in different firms unless certain requirements are met. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0 (2012)).

The *Sheresky* court pointed out that New York Disciplinary Rule 1.5(h) authorized payments to a lawyer formerly associated with a firm if such payments were made pursuant to a separation or retirement agreement. But the court noted that no such agreement was involved under the facts presented. *Id.* at *6.

The *Thelen* court relied fairly heavily on *Sheresky* in reaching its decision in the Seyfarth Shaw Action. It is unclear why the *Sheresky* opinion was not cited or discussed in *Coudert Bros.*

109. *Thelen*, 476 B.R. at 740 (“applying the unfinished business doctrine to pending hourly fee matters would result in an unjust windfall for the Thelen estate, as ‘compensating a former partner out of that fee would reduce the compensation of the attorneys performing the work.’”) (quoting *Sheresky*, 2011 WL 7574999 at *6).

The *Thelen* court expressly found as its main holding that an expansion of the unfinished business doctrine to pending hourly fee matters would “violate New York’s public policy against restrictions on the practice of law.”¹¹⁰ It further found that such an expansion would “clash directly with New York’s Rules of Professional Conduct”, specifically Rule 1.5(g).¹¹¹

The *Thelen* court also reasoned that recognition of pending hourly fee matters as a property interest would “contravene” the treatment of post-dissolution contingency fee matters under New York law.¹¹² A dissolved law firm is “entitled only to the value of the [contingent fee] case at the date of dissolution, with interest.”¹¹³ Because in an hourly fee case, “all post-dissolution fees that a lawyer earns are due to that lawyer’s ‘post-dissolution efforts, skill and diligence,’”¹¹⁴ Judge Pauley reasoned that New York law “does not recognize a dissolved firm’s property interest in pending hourly fee matters.”¹¹⁵

Next, the *Thelen* court also noted what it described would be “bizarre consequences” and “unworkable results” as further support for its holding in the Seyfarth Shaw Action that pending hourly fee matters do not constitute property of a dissolved law firm under New York law. Judge Pauley observed that if pending hourly fee matters were recognized as property interests and therefore as property of the estate in a bankruptcy case, then a debtor law firm (or its appointed trustee) ought to be able to sell its pending hourly fee matters to a purchaser under section 363 of the Bankruptcy Code.¹¹⁶ But, a sale of such “property” would be inconsistent with a client’s unfettered right to choose counsel.¹¹⁷ Judge Pauley

110. *Thelen*, 476 B.R. at 740 (citing *Cohen*, 550 N.E.2d 410 (N.Y. 1989)).

111. *Thelen*, 476 B.R. at 740 (quoting N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0, Rule 1.5(g)). Rule 1.5(g) of New York’s Rules of Professional Conduct states as follows:

A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same firm unless: (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation; (2) the client agrees to the employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client’s agreement is confirmed in writing; and (3) the total fee is not excessive.

112. *Id.*

113. *Id.* at 741 (quoting *Santalucia*, 232 F.2d 293, 298 (2d Cir. 2000)).

114. *Id.* (quoting *Shandell*, 629 N.Y.S.2d 437, 439 (N.Y. App. Div. 1993)).

115. *Id.*

116. *Id.* Section 363(b) of the Bankruptcy Code provides that a trustee, after notice and a hearing, may “use, sell, or lease, other than in the ordinary course of business, property of the estate....”

117. *Id.* (citing *Demov, Morris, Levin & Shein v. Glantz*, 428 N.E.2d 387, 389 (N.Y. 1981)); *see also Thelen*, 476 B.R. at 742 (“Clients are not merchandise. Lawyers are not tradesmen.... An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status.”) (quoting *Cohen*, 550 N.E.2d at 411 (N.Y. 1989)).

Regarding the “sale of property of the estate” issue raised in *Thelen*, Ruden McClosky P.A., a law firm based in Fort Lauderdale, Florida, filed a Chapter 11 bankruptcy case in November 2011 with the intent to sell substantially all of its assets to the law firm Greenspoon Marder, P.A. pursuant to a “stalking horse” asset purchase agreement (the “APA”). *See Debtor’s Motion for Entry of Order (A) Approving Competitive Bidding and Sale Procedures; (B) Approving Form and Manner of Notices; (C) Approving Form of Asset Purchase Agreement; (D) Scheduling Dates to Conduct Auction and Hearing to Consider Final Approval of Sale, Including Treatment of Executory Contracts and Unexpired Leases; (E) Authorizing Sale of Substantially All the Debtor’s Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; and (F) Granting Related Relief*, In re Ruden McClosky P.A., No. 11-40603 (Bankr. S. D. Fla. Nov. 1, 2011) (hereafter, the “*Sale Motion*”). The APA, which was attached as Exhibit A to the *Sale Motion*, was subject to higher and better offers. A sale process established by the bankruptcy court did not yield any competing qualified offers and an order was entered approving the APA. Order (I) Authorizing the Sale of Substantially All of the Debtor’s Assets Free and Clear of

also questioned whether a client of a bankrupt dissolved firm that decided to exercise its unfettered right and transfer its hourly fee matter to another law firm would somehow be in violation of the automatic stay afforded debtors by section 362 of the Bankruptcy Code.¹¹⁸

Judge Pauley specifically addressed and distinguished the case of *Stem v. Warren*, a “hoary” case “heavily” relied upon by the plaintiff Thelen LLP trustee (and also a case that was heavily relied upon in the *Coudert Bros.* decision).¹¹⁹ Judge Pauley wrote that “under *Stem*, if an executory contract with a third party contemplates that it should survive dissolution, it remains a joint venture asset and the co-venturers have an obligation to perform with the concomitant right to its benefits.”¹²⁰ He contrasted that kind of contract with hourly fee matters serviced by law firms, reasoning that hourly fee matters cannot contemplate post-dissolution survival without infringing a client’s right to terminate counsel at will.¹²¹

Judge Pauley espoused the view that contracts for legal services simply are different from other types of commercial contracts, such as the architecture contracts at issue in *Stem*. He disagreed with Judge McMahon’s effort to analogize a contract for the provision of legal services to other “partnership property” such as a “Jackson Pollack” painting that might be removed from an office wall as a partner departs.¹²² In the *Thelen* court’s view, contracts for the provision of legal services and an attorney’s obligations thereunder are “categorically different”, “transcend those prevailing in the commercial market place...,” and have “peculiar and distinctive features.”¹²³ In essence, and directly contrary to the view espoused by Judge McMahon in *Coudert Bros.*, Judge Pauley viewed the attorney-client relationship as unique and believed that application of the unfinished business doctrine to hourly fee matters “would undermine it.”¹²⁴

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Liens, Claims, Encumbrances, and Other Interests; (II) Authorizing and Approving the Asset Purchase Agreement; (III) Approving Procedures and Rights Related to Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; And (IV) Granting Related Relief, In re Ruden McClosky P.A., No. 11-40603 (Bankr. S. D. Fla. Nov. 30, 2011). In relevant part, paragraph 28.2 of the APA provided as follows:

Buyer and Seller acknowledge and agree, that, notwithstanding any provision of this Agreement to the contrary, (i) nothing in this Agreement shall impair the rights of any existing or prior client of Seller to retain other counsel (other than Seller, Buyer or any attorney employed by Seller or Buyer), (ii) no client will be (or will be deemed to be) “assigned”, “conveyed” or “transferred” with, or in connection with, the conveyance of the Assets to Buyer at the Closing and (iii) no Asset will be conveyed to Buyer with respect to any client with respect to whom such conveyance may not be consummated in compliance with the Rules.

“Rules” was defined in the APA as the Rules of Professional Conduct promulgated by the Florida Bar. Among other Rules, Rule 4-1.17, pertaining to the sale of a law practice, was specifically addressed in paragraph 28.1 of the APA.

118. *Thelen*, 476 B.R. at 741.

119. *Id.* at 741-42. *See infra* pp. 11-12.

120. *Id.* at 741 (quoting *Scholastic, Inc. v. Harris*, 259 F.3d 73, 89 (2d Cir. 2001)).

121. *Id.* at 741 (citing *Demov, Morris, Levin & Shein*, 428 N.E.2d at 389).

122. *Id.* at 742 (“Contrary to [*Coudert Bros.*], an hourly fee matter is not akin to ‘a Jackson Pollack [sic] painting’ that a departing attorney ‘rips off the wall of the reception area.’”) (quoting *Coudert Bros.*, 480 B.R. 145, 157 (S.D. N.Y. 2012)).

123. *Id.* at 742 (quoting *In re Cooperman*, 83 N.Y.2d 465, 472 (N.Y. 1994)).

124. *Id.* at 742 (“The client, not the attorney, moves a matter to a new firm. Thus, the attorney-client relationship is unique, and applying *Stem* to hourly fee legal service contracts would undermine it.”)

The opening paragraph of the *Thelen* decision introduced what the court viewed as the competing interests at play:

The *Thelen* court recognized that other courts had reached the opposite conclusion on the issue of whether pending hourly fee matters constitute partnership assets.¹²⁵ However, Judge Pauley “respectfully disagreed” with those courts and (perhaps unlike the *Coudert Bros.* court) did not feel constrained to rule under New York law as courts in other UPA jurisdictions have ruled under their own applicable law.¹²⁶ He found the NYPL (particularly section 4(4)) did not specify what property constituted property of a dissolved law firm, and it certainly did not specify that hourly fee matters constituted property of a dissolved law firm. Rather, what constituted partnership property under New York law remained an issue for the New York courts to decide.¹²⁷ Judge Pauley believed his ruling that pending hourly fee matters were not property of the dissolved law firm was consistent with New York’s “strong public policy in favor of client autonomy and attorney mobility.”¹²⁸

As a result of its holding that under New York law, a dissolved law firm’s pending hourly fee matters do not constitute partnership property, the *Thelen* court dismissed the Seyfarth Shaw Action. But the court gave plaintiff leave to amend his complaint to assert any claims against Seyfarth Shaw based upon pending contingency fee matters.¹²⁹

c. Robinson & Cole Action — Hourly Fee Matters Constitute Assets Of A Dissolved Firm Under Applicable California Law

In ruling on the motion to dismiss filed in the Robinson & Cole Action, the *Thelen* court applied California law to determine that pending hourly fee matters constituted partnership assets at the time of a law firm’s dissolution.

The court began by noting that California courts, including *Jewel*, have concluded a dissolved firm’s pending hourly fee matters are partnership assets under California law. However, Judge Pauley suggested that because the *Jewel* court in reaching its conclusion relied on the “no extra compensation” rule under an old UPA provision that had since been abolished under the CRUPA, this conclusion now comes with “an asterisk.”¹³⁰

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These actions arise from an alarming phenomenon—the bankruptcy of a major law firm. The pursuit of pending hourly fee matters as assets of the estate has become a recurring feature of such bankruptcies. But this concept of law firm “property” collides with the essence of the attorney-client relationship. That relationship springs from agency law, not property law. The client is the principal, the attorney is the agent, and the relationship is terminable at will. The question presented is whether a dissolved law firm’s pending hourly fee matters are nevertheless its property.

Id. at 735.

125. *Id.* at 742 (citations omitted).

126. *Id.*

127. *Id.* at 743.

128. *Id.* at 742-43 (“[R]ecognizing a property right in unfinished hourly fee matters conflicts with New York’s strong public policy in favor of client autonomy and attorney mobility.”) (citing *Cohen*, 550 N.E.2d 410, 411 (N.Y. 1989); *Denburg*, 624 N.E.2d 995, 999 (N.Y. 1993)). Although citing to *Denburg* in support of its decision, the *Thelen* court did not address the *Coudert Bros.* court’s substantial effort to distinguish *Denburg*.

129. *Id.* at 743 (the original complaint did not distinguish between hourly fee and contingent fee matters).

130. *Id.* at 745 (“In sum, RUPA’s ‘reasonable compensation’ rule undermines the *Jewel* doctrine, which applied the older ‘no compensation’ rule. Nevertheless, California law may still recognize a dissolving firm’s pending hourly fee matters as ‘assets.’ Specifically, to the extent that Robinson & Cole earned profits from former *Thelen* matters exceeding ‘reasonable compensation,’ California law dictates that those profits belong to *Thelen*...”); see also *id.* at 744 (“But [CRUPA] transformed the law on which *Jewel* relied and

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The Robinson & Cole motion to dismiss was denied in large part because the question of “reasonable compensation”, which in turn, would determine what profits, if any, were owed to the bankruptcy estate, was a fact-intensive one not subject to determination on a motion to dismiss.¹³¹ The issue of whether the former Thelen LLP partners received monies in excess of “reasonable compensation” would need to be addressed on a “more fully developed record.”¹³²

The court also addressed whether Thelen LLP’s adoption of the so-called *Jewel* Waiver shortly before dissolution constituted a fraudulent transfer of assets. Judge Pauley, after assuming arguendo that pending hourly fee matters were property of the partnership under California law, concluded that the law firm’s adoption of the *Jewel* Waiver on the eve of dissolution and without consideration constituted a fraudulent transfer of partnership assets.¹³³ Therefore, under section 550(a)(2) of the Bankruptcy Code, he held the plaintiff could pursue recovery from Robinson & Cole as an “immediate or mediate transferee” of those assets.¹³⁴

Sua sponte, the *Thelen* court certified its decision for an interlocutory appeal pursuant to 28 U.S.C. §1292(b). In doing so, Judge Pauley noted the *Coudert Bros.* court’s recent certification of its decision for interlocutory appeal, found that the issues “present substantial grounds for difference of opinion”, and posited that “certification of these questions to the New York Court of Appeals and the California Supreme Court may be warranted because those high courts have not ‘squarely addressed’ the issues, and the scope of the unfinished business doctrine is of great importance to both the legal profession and clients.”¹³⁵

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eroded the theoretical underpinnings of the *Jewel* doctrine. Because [CRUPA] entitles partners of a dissolving firm to “reasonable compensation for services rendered in winding up the business of the partnership,” Cal. Corp. Code § 16401(h), there is no basis to require Thelen’s former partners to remit all profits earned from former Thelen matters to the Thelen estate.”)

131. *Id.* at 744 (“Thus, Robinson & Cole’s liability turns on the extent to which the former Thelen partners received remuneration beyond ‘reasonable compensation.’”)

132. *Id.*

133. *Id.* at 743 (citing *Heller 2011*, No. 10-3203, 2011 Bankr. LEXIS 1497, at *15 (Bankr. N.D. Cal. Apr. 22, 2011)) (*Jewel* Waiver adopted in conjunction with plan of dissolution constituted a transfer of the firm’s unfinished business and therefore, a transfer of the firm’s property that may be subject to recovery)); *see also Brobeck*, 408 B.R. 318, 347 (Bankr. N.D. Cal. 2009) (same).

134. *Thelen*, 476 B.R. at 743; *see also Brobeck*, 408 B.R. at 339, n.31 (court rejected defendant firms’ argument that plaintiff’s claims must fail because there was no fiduciary or contractual relationship between the dissolved firm and the defendant firms; court found that while a fiduciary or contractual relationship may be necessary to succeed on an accounting or turnover claim, no such relationship was necessary for a successful fraudulent transfer claim; court found, without citing to any authority, that a trustee could recover from the defendant firms as immediate transferees of the former *Brobeck* partners, subject to any defenses available to the defendant firms under section 550(b)(1) of the Bankruptcy Code); *Heller 2011*, 2011 Bankr. LEXIS 1497 at *17 (same). The same bankruptcy judge (Judge Dennis Montali of the United States Bankruptcy Court for the Northern District of California) issued the *Brobeck* and two *Heller* opinions cited and discussed in this article. Judge Montali also presides over the pending *Howrey* LLP bankruptcy case.

135. *Thelen*, 476 B.R. at 745 (further commenting that certification to the highest courts in New York and California may be warranted because those courts have not “squarely addressed” the issues and suggesting that those high courts may not join with the “lower courts” that “have applied the *Jewel* doctrine expansively, with untoward consequences for the bar and clients.”)

3. Waiting For The Second Circuit To Weigh In

The Second Circuit granted certification of the interlocutory appeals in *Coudert Bros.*, but only granted certification of the interlocutory appeal of the *Thelen* decision rendered in the Seyfarth Shaw Action.¹³⁶ Briefing now appears complete in the *Thelen* appeal.¹³⁷ Additional briefing is due in July 2013 in the *Coudert Bros.* appeals. It remains to be seen if the Second Circuit will certify the question of whether hourly fee matters constitute assets of a dissolved law firm to the New York Court of Appeals for decision.

C. Has The Unfinished Business Doctrine Been Addressed By The Delaware Courts?

The Delaware Court of Chancery addressed whether a contingency fee received in 1985 by one of three former partners after dissolution of their law partnership constituted property of the dissolved law firm.¹³⁸ In *Wier*, the lead attorney (Mr. Wier) on a products liability suit against General Motors Corporation actually practiced with two law firms that dissolved prior to his receipt of the contingency fee at issue. Upon dissolution in 1982 of the law firm at which the contingency fee case originated, Mr. Wier formed a new law firm with two other partners and continued working on the case. That second law firm dissolved in 1983, without any written agreement regarding the apportionment of contingent fees relating to cases pending at the time of dissolution but not resolved until after dissolution.¹³⁹ Thereafter, Mr. Wier continued working on the case as a solo practitioner. The case settled in 1985 and a substantial attorney contingency fee was received by Mr. Wier.

There apparently was no dispute that the original dissolved law firm was entitled to a portion of the contingency fee based upon the terms of the agreement struck at the time of its dissolution by the former partners.¹⁴⁰ The issue addressed in *Wier* was whether the remaining portion of the contingency fee either constituted partnership property of the second dissolved law firm or the separate property of Mr. Wier.¹⁴¹ The Court of Chancery held that because the intent of the former partners “determines what property will be considered partnership property as distinguished from separate property,” a disputed question of fact required denial of the parties’ cross-motions for summary judgment in

136. By order dated January 16, 2013, the Second Circuit denied leave to appeal in the Robinson & Cole Action. The order merely stated: “Petitioner, through counsel, moves pursuant to 28 U.S.C. §1292(b) for leave to appeal an interlocutory order of the district court. Upon due consideration, it is hereby ORDERED that the motion is DENIED because an immediate appeal is unwarranted.” Order Denying Motion for Leave to Appeal, *Robinson & Cole LLP v. Yann Geron, as Chapter 7 Trustee of the Estate of Thelen LLP*, No. 12-3708 (2d Cir. Jan. 16, 2013).

137. The Association of the Bar of the City of New York has filed an amicus brief supporting affirmance in favor of Seyfarth Shaw in the *Thelen* appeal.

138. *Waserstein & Kreshtool v. Wier*, No. 8990, 1989 Del Ch. LEXIS 148 (Del. Ch. 1989).

139. *Id.* at *6.

140. *Id.* at *3, *8.

141. *Id.* at *9 (citing several state court decisions, including *Jewel v. Boxer*, 203 Cal. Rptr. 13 (Cal. Ct. App. 1984) and *Resnick v. Kaplan*, 434 A.2d 582 (Md. 1981) for the proposition that “[I]f the Sellon case attorney fee, at the time of its receipt, was the property of [the dissolved firm], the plaintiffs would be entitled to share in the profits from the successful settlement of that litigation.”)

favor of a trial.¹⁴² The decision contained no discussion of whether Mr. Wier would be entitled to deduct the value of his post-dissolution “effort, skill, and diligence” should it be determined that the remaining portion of the contingency fee constituted property of the second dissolved firm.

The authors were unable to locate any Delaware court decisions addressing application of the unfinished business doctrine in a case involving hourly fee matters pending at the time of dissolution of a Delaware law firm.

III. THE TERMS OF THE APPLICABLE PARTNERSHIP AGREEMENT MATTER

In the absence of controlling partnership agreement provisions, the case law addressing application of the unfinished business doctrine in law firm dissolutions, particularly with respect to pending hourly fee matters, continues to develop. As a result, pure reliance on state court and federal court opinions in an effort to guide present decisions and predict future outcomes is less than optimal. Could a well-drafted partnership agreement governing the treatment of matters pending at the time of dissolution make a difference, assuming no fraudulent transfer issues? It appears the clear answer is “Yes” under any applicable state law, although the timing of adoption of the relevant partnership agreement provisions could prove significant. In *Jewel*, the court noted that the dispute between the former partners could have been avoided if they had executed a written agreement governing post-dissolution issues.¹⁴³ Numerous courts since *Jewel* have made similar observations.¹⁴⁴

A recent Third Circuit case upheld the general principle that fees collected subsequent to the dissolution of the law firm that originated the underlying cases were the property of the former partners of the dissolved firm, to be distributed in accordance with their partnership interests set forth in their partnership agreement.¹⁴⁵ In that case, two medical

142. *Wier*, 1989 Del. Ch. LEXIS 148 at *10-13 (quoting 59A Am.Jur.2d Partnership § 354). The court found that intent of the former partners may be evidenced

by their conduct, by the provisions of the copartnership agreement or agreement preliminary thereto, by the terms of written instruments, relative to the transfer of property to, or for the use of, the firm, by entries in the firm books, and by the use of the property in the firm business, although the mere fact that property is used in the firm business does not of itself show that it is firm property ordinarily, the question is one of fact depending on the particular circumstances involved in the case under consideration.

Id. at *10 (internal citation omitted).

143. *Jewel*, 203 Cal. Rptr. at 15 (“The absence of a written partnership agreement was an invitation to litigation upon a dissolution of the partnership.”).

144. See e.g. *Coudert Bros.*, 480 B.R. 145, 159 (S.D. N.Y. 2012) (explaining that if partners do not want to be subject to the default rules of the NYPL, they are free to agree to different rules explicitly set forth in their partnership agreement); *Id.* at 175 (same); *Labrum & Doak*, 227 B.R. 391, 412 (Bankr. E.D. Pa. 1998) (“the former partners must bear the consequences of their failure to provide for allocation of fees in their agreement” in event of dissolution); *Id.* at 415 (same); *Sberesky*, No. 150178/10, 2011 WL 7574999, *6 (N.Y. Sup. Ct. Sept. 13, 2011) (“Similarly, the partnership could have had a partnership agreement which established principles to be applied in case of dissolution; it did not.”); *Wier*, 1989 Del. Ch. LEXIS 148 at *12-13 (“This entire dispute could have been avoided, of course, if the parties had made a specific agreement regarding the Sellon case attorney fees when the Kreshtool, Wier & Wasserstein law firm was formed or when it was dissolved. Because they did not take that elementary precaution, the intent of the parties regarding the ownership of the Sellon case attorney fee is a disputed question of fact...”); compare *Dwyer v. Nicholson*, 602 N.Y.S.2d 144, 146-48 (N.Y. App. Div. 1993) (applying New York law, court found that because the partnership agreement provided only that “net income, cash and other deposits in partnership bank accounts, and accounts receivable” would be distributed among the partners upon dissolution, fees received on pending contingency cases would be excluded from post-dissolution distributions).

145. See *Haymond v. Lundy*, Nos. 03-3889, 04-1879, 2005 U.S. App. LEXIS 2223 (3d. Cir. Feb. 10, 2005).

malpractice cases were opened shortly before the dissolution of a medical malpractice and personal injury law firm (which had only two partners). Each partner started a separate firm post-dissolution, but ultimately only one of the new firms handled to conclusion both medical malpractice cases. The court held that, despite the fact that the other former partner did not perform additional work on either case, he remained entitled to share in the fees generated because the dissolved firm's partnership agreement explicitly provided for a 60/40 split of all such fees.¹⁴⁶ The terms of the applicable agreement clearly mattered.

In response to *Jewel* and to more recent court decisions emanating from several high profile law firm bankruptcy cases, presumably many law firms have undertaken a review of their own partnership agreements with respect to provisions applicable upon a dissolution of the firm.¹⁴⁷ While it must be acknowledged that one size will not fit all because no two law firms are exactly the same and the circumstances each face will almost certainly change over time, a thoughtful review and consideration of such provisions appears to be a prudent step.

Some firms, like the Thelen, Brobeck, and Heller Ehrman firms, have added so-called *Jewel* Waiver provisions to their partnership agreements expressly disclaiming any rights, claims, or entitlements to specified matters pending at the time of dissolution. The timing of the *Jewel* Waivers in those cases (added to the partnership agreements in connection with the agreed upon dissolutions), however, left them exposed to challenge under fraudulent transfer laws.¹⁴⁸

For example, on March 11, 2013, Judge Montali issued a lengthy opinion in the *Heller Ehrman* bankruptcy case.¹⁴⁹ The opinion addressed whether Heller Ehrman's September 2008 adoption of a *Jewel* Waiver in its written dissolution plan constituted a fraudulent transfer of property of the dissolved firm.¹⁵⁰ Judge Montali concluded on summary judgment motions that it did.¹⁵¹

146. *Id.*

147. See, e.g., Jay Adkisson, *Howrey: When the Sinking Ship Seeks the Cheese Back From the Fleeing Rats*, Forbes, Aug. 1, 2012, at <http://www.forbes.com/sites/jayadkisson/2012/08/01/howrey-when-the-sinking-ship-seeks-the-cheese-back-from-the-fleeing-rats/>.

148. *Thelen*, 476 B.R. 732, 743 (S.D. N.Y. 2012); *Brobeck*, 408 B.R. 318, 338-347 (Bankr. N.D. Cal. 2009) (adoption of Jewel Waiver in conjunction with dissolution held on partial summary judgment to constitute constructive fraudulent transfer of debtor's property (the law firm's interest in profits from unfinished business) under section 548(a)(1)(B) of the Bankruptcy Code and Cal. Civ. Code §3439.05).

149. See, e.g., *Heller 2013*, No. 10-3221, 2013 Bankr. LEXIS 889 (Bankr. N.D. Cal. Mar. 11, 2013). In *Heller 2013*, Judge Montali addressed motions and cross-motions for summary judgment in four pending adversary proceedings filed by the Heller Ehrman plan administrator against the law firms of Jones Day, Davis Wright Tremaine LLP, Foley & Lardner LLP, and Orrick, Herrington & Sutcliffe, LLP, respectively. These lawsuits asserted claims for the recovery of profits earned by the defendant firms (each a new firm joined by former Heller Ehrman partners) on matters constituting the asserted unfinished business of Heller Ehrman. Many similar suits filed against other defendant law firms have been settled by the Heller Ehrman plan administrator.

150. The Heller Ehrman Jewel Waiver stated:

As the Firm is no longer in a position to service its clients efficiently and as an inducement to encourage Shareholders to move their clients to other law firms and to move Associates and Staff with them, the effect of which will be to reduce expenses to the Firm-in-Dissolution, and to assure that client matters are attended to in the most efficient and effective manner possible, and to help ensure collection of existing accounts receivable and unbilled time with respect to such clients, the Firm-in-Dissolution will waive any rights and claims under the doctrine of *Jewel v. Boxer*, 156 Cal. App. 3d 171 (1984) [,] to seek payment of legal fees generated after the departure of any lawyer or group of lawyers with respect to non-contingency/non-success fee matters only and the Dissolution Committee is authorized to provide appropriate assurances to law firms that Shareholders may choose to join regarding this issue, provided, however, that the Firm-in-Dissolution reserves its right to seek indemnification from any such law firm with respect to actions taken after such matters are transferred to such law firms.

Heller 2013, 2013 Bankr. LEXIS 889 at *5-6 n. 3.

As seen from above, assuming no fraudulent transfer issues, it appears that having well-drafted partnership agreement provisions governing dissolution (and the treatment of unfinished business in connection therewith) is a step in the right direction for all law firms. It very well may help the law firms of today and the future avoid the protracted and expensive litigation that so many firms and lawyers have found themselves embroiled in following a law firm dissolution and resulting bankruptcy.

IV. CONCLUSION

Whether the unfinished business doctrine applies to a dissolved firm's pending hourly fee matters completed by departing partners at their new firms remains a hotly contested issue. Significant dollars for many different constituencies can hang in the balance, particularly in cases involving failures of large law firms such as Dewey & Leboeuf.

It remains to be seen how the questions swirling around application of the unfinished business doctrine will be dealt with on both a legal and practical level. On the one hand, law firms possess the ability to craft governing provisions in their partnership agreements to clearly state whether the unfinished business doctrine will apply in the event of a dissolution, and to what extent. And state legislatures can address the issue head-on through the passage of revised or new state partnership laws. But neither is a permanent fix, because law firms and legislatures are not static. Partnership and statutory provisions that appear to make sense and pass muster one year may be changed in future years by different sets of people working under different sets of circumstances.

On the other hand, different courts have taken different approaches in analyzing the legal and policy rationales underlying application of the unfinished business doctrine to pending hourly fee matters. Highly-trained and experienced lawyers and judges have raised thoughtful and reasonable arguments on all sides of these multi-layered and important issues. Perhaps the Second Circuit (or the New York Court of Appeals via certification) will take the opportunities presented in the *Coudert Bros.* and *Thelen* appeals to provide some welcome guidance and clarity to this otherwise murky and evolving area of the law.

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151. *Id.* at *57. Judge Montali had addressed fraudulent transfer issues in his earlier Brobeck and Heller decisions. *See Brobeck*, 408 B.R. at 347 (partial summary judgment in favor of plaintiff as to liability on fraudulent transfer claim relating to Jewel Waiver; court found that former partners gave no value in exchange for the Jewel Waiver; court further found that former partners' new law firms were immediate transferees who had not asserted any good faith defenses under section 550(b) of the Bankruptcy Code; parties settled before a trial on the amount of damages); *Heller 2011*, No. 10-3203, 2011 Bankr. LEXIS 1497, at *17 (Bankr. N.D. Cal. Apr. 22, 2011) (on motion to dismiss, court found that defendant law firm that had hired former partners of the Heller Ehrman firm could be the subject of a fraudulent transfer claim relating to Heller Ehrman's execution of its Jewel Waiver; the court cited to its own Brobeck opinion as authority). In *Heller 2013* Judge Montali found on summary judgment that the Jewel Waiver met each of the four elements of a constructive fraud claim under section 548(a)(1)(B) of the Bankruptcy Code (or under Cal. Civ. Code §3439.05). The Jewel Waiver was a constructively fraudulent transfer of the property (i.e. unfinished business) of the dissolved Heller Ehrman firm. *Heller 2013*, 2013 Bankr. LEXIS 889 at *12 ("the critical transfer here is that which occurs when the Shareholder, having been the immediate transferee of the Jewel Waiver, joins the defendant law firm and brings along the unfinished business free of the duty to account."); *Id.* at *28-31 (same). Among other things, the *Heller 2013* court found that the former partners (the initial transferees) did not provide reasonably equivalent value in exchange for the Jewel Waiver. *Id.* at *20 ("[T]here is no evidence that any Shareholder would have refused to execute the Dissolution Agreement absent the Jewel Waiver.")

He also addressed whether the defendant firms had made a sufficient showing on any of their various asserted defenses to the constructive fraud claims. He found the defendant firms (subsequent transferees of the fraudulently transferred property) had failed to show a defense to liability under the safe harbor defenses of section 550(b)(1) of the Bankruptcy Code or otherwise. *Id.* at *31 ("Defendants have not shown that they provided value for the unencumbered unfinished business that they received.")

Judge Montali concluded *Heller 2013* by stating: "What remains, therefore, is proof at trial of the extent of Heller's damages, namely the amount earned by Defendants as profit on the unfinished business." *Id.* at *39.

