AN UNWORKABLE RESULT: EXAMINING THE APPLICATION OF THE UNFINISHED BUSINESS DOCTRINE TO LAW FIRM BANKRUPTCIES

ABSTRACT

The disastrous effect of the 2008 global financial crisis on the American legal industry is still evident. Some of America's largest, most prestigious law firms, firms thought to be insulated from such a crisis, succumbed to the economic aftershocks. As failed firms and their creditors attempt to pick up the pieces, jurisdictions across America have grappled with determining who owns the right to revenue from client business that was still pending at the time of bankruptcy.

When a law firm dissolves, the legal issues underlying unfinished client business do not cease to exist—nor does a former partner's desire to continue practicing law. Unfinished business claims are the result of the partners of a bankrupt firm finding new employment and taking their old clients with them. Arguing that fees derived from work started at the bankrupt firm is property of that firm's bankruptcy estate, trustees bring unfinished business claims to recover this revenue. In many cases, the trustees have succeeded.

Recent debate has centered on whether pending hourly fee arrangements should be included in the bankruptcy estate. The underlying basis for these unfinished business claims is based on antiquated law that does not apply to the modern legal industry. This Comment will demonstrate that extending unfinished business claims to hourly fee arrangements not only violates public policy but also creates unworkable results in a bankruptcy setting.

INTRODUCTION

The 2007 merger of Dewey Ballantine and LeBoeuf, Lamb, Greene & MacRae, two esteemed New York firms with roots running back nearly a century, instantly created a global force in the legal industry.[1] At its peak, Dewey and LeBoeuf ("Dewey") employed nearly 1400 attorneys in twenty-six offices.[2] Despite Dewey's penchant for high-profile transactions and its "enviable roster of corporate clients,"[3] the firm was not immune to the economic aftershocks of the 2008 financial crisis.[4] In 2012, in what the New York Times called "the largest law-firm collapse in United States history," Dewey filed for chapter 11 bankruptcy.[5]

While the factors leading to Dewey's collapse may involve more than a stagnant economy,[6] the firm's fate underscores changing dynamics in the legal industry.[7] In the years following the financial crisis, some of America's largest and most prestigious law firms have struggled to stay afloat as they attempt to navigate a changing industry in a slowly recovering economy.[8]

So, what happens when a firm like Dewey fails? For one, partners of the failed firm need to find a landing spot. Competing firms are more than happy

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[1] Allan D. Frank, *The End of an Era: Why Dewey & LeBoeuf Went Under*, FORTUNE (May 29, 2012 2:32 PM), http://fortune.com/2012/05/29/the-end-of-an-era-why-dewey-leboeuf-went-under/.

[2] Peter Lattman, *Dewey & LeBoeuf Files for Bankruptcy*, N.Y. TIMES: DEALBOOK (May 28, 2012, 10:21 AM), http://dealbook.nytimes.com/2012/05/28/dewey-leboeuf-files-for-bankruptcy/.

[3] James B. Stewart, *The Collapse: How a Top Legal Firm Destroyed Itself*, THE NEW YORKER, Oct. 14, 2013, at 60, http://www.newyorker.com/magazine/2013/10/14/the-collapse-2.

[4] *See* James B. Stewart, *Dewey's Fall Underscores Law Firm's New Reality*, N.Y. TIMES (May 4, 2012), http://www.nytimes.com/2012/05/05/business/deweys-collapse-underscores-a-new-reality-for-law-firms-common-sense.html?pagewanted=all.

[5] *In re* Dewey & LeBoeuf, Ch. 11 Case No. 12-12321, Adv. No. 12-01672 (S.D.N.Y. May 28, 2012); *see also* Stewart, *The Collapse*, *supra* note 3.

[6] Megan Leonhardt, *Dewey Partners Press DA to Bring Charges Against Firm Head*, LAW360 (Apr. 26, 2012), http://www.law360.com/articles/334828/dewey-partners-press-da-to-bring-charges-against-firm-head:

> A group of Dewey & LeBoeuf LLP partners has asked the New York district attorney to bring criminal charges against the chairman of the tottering firm, which could close its doors as early as next week, a source familiar with the matter said Thursday. The source told Law360 that an undisclosed number of partners from Dewey asked the New York County district attorney to charge Chairman Steven H. Davis with embezzlement, wire fraud, mail fraud and other criminal activity.

[7] Stewart, *Dewey's Fall*, *supra* note 4.

[8] *See* Lattman, *supra* note 2; *see also* Stewart, *Dewey's Fall*, *supra* note 4 ("Recent years have seen the demise of once-respected names like Howrey & Simon; Coudert Brothers; Brobeck, Phleger & Harrison; and Heller Ehrman.").

to welcome talented attorneys, and their books of business, with open arms.[9] In a growing source of litigation, trustees of bankrupt firms want to ensure that the displaced partners are not taking more than they should to their new firms.[10]

Unfinished business claims provide 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."[11] In plainer terms, trustees argue that any post-dissolution work derived from client business started at the bankrupt firm is property of the bankrupt firm's estate.[12] The underlying rationale for unfinished business claims has roots in state partnership laws, which provide that partners of a dissolved firm have a fiduciary duty to wind-up any pending business.[13]

Unfinished business claims have played a role in nearly every major law firm bankruptcy in the past ten years.[14] As major law firm bankruptcies become more prevalent, scholarly debate has centered on whether unfinished business qualifies as property of the estate.[15] In June and July of 2014, two separate decisions, *In re Thelen LLP* in New York and *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP* in the Northern District of California, held that client cases pending at the time of bankruptcy are not property of the bankrupt law firm's estate.[16] Though many in the legal community felt that these

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[9] Rachel M. Arnett, Comment, *Current Developments 2012-2013: Ripping the Jackson Pollock off the Wall: Reconciling Jewel v. Boxer with the Modern Law Firm*, 26 GEO. J. LEGAL ETHICS 557, 569 (2013).

[10] Pamela Phillips, *Beware "Jewel" Risks in Lateral Partner Hiring*, LAW360 (Apr. 15, 2014, 9:26 PM), http://www.law360.com/articles/527683/beware-jewel-risks-in-lateral-partner-hiring; *see* Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 331 (Bankr. N.D. Cal. 2009) (addressing whether partners of a dissolved law firm fraudulently transferred unfinished business to their new firms).

[11] *See* Michael D. DeBaecke & Victoria A. Guilfoyle, *Law Firm Dissolutions: When the Music Stops, Does Anyone Need to Account for Any Unfinished Business?*, 14 DEL. L. REV. 41, 42 (2013).

[12] *Id.*

[13] *See* Mark I. Weinstein, *The Revised Uniform Partnership Act: An Analysis of Its Impact on the Relationship of Law Firm Dissolution, Contingent Fee Cases and the No Compensation Rule*, 33 DUQ. L. REV. 857, 862 (1995).

[14] Phillips, *supra* note 10.

[15] *See, e.g.*, Julie Triedman, *Ground Shifts Under Howrey's Unfinished Business Claims*, AMERICAN LAWYER (July 28, 2014), http://www.americanlawyer.com/id=1202664908745/Ground-Shifts-Under-Howreys-Unfinished-Business-Claims?slreturn=20140919163431. *See generally* DeBaecke & Guilfoyle, *supra* note 11, at 41; Ashley Worrell, Comment, *Covering Your Assets: The Unfinished Business Rule and Bankrupt Law Firms*, 30 GA. ST. U. L. REV. 825 (2014).

[16] *In re* Thelen LLP, 20 N.E.3d 264, 273–74 (N.Y. 2014); Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP, 527 B.R. 24, 33 (N.D. Cal. 2014).

decisions would put an end to unfinished business claims nationwide,[17] the current state of unfinished business claims is unresolved.[18]

A clear and uniform understanding of how the law views unfinished business claims is imperative for firms as legal industry consultants predict that more large law firms will fail in the coming years.[19] Thus, the purpose of this Comment is two-fold. First, this Comment will demonstrate that despite recent judicial decisions, unfinished business claims still pose a threat to firms and their partners. Second, this Comment will rebut the extension of the unfinished business doctrine to hourly fee arrangements.

This Comment will begin by discussing the history of unfinished business claims while also providing context on how these claims relate to state partnership and federal bankruptcy law. Next, this Comment will analyze the statutory and public policy concerns unfinished business claims create. Finally, this Comment will provide practical solutions for law firms operating in jurisdictions where the law of unfinished business claims remains unresolved.

I. BACKGROUND

The prevalence of unfinished business claims is a product of changes in the nature of the American legal industry.[20] Historically, it was uncommon for an attorney to make numerous lateral movements during the course of his or her career.[21] This type of mobility is now assumed.[22] Market volatility resulting in an increased number of law firm break-ups has only contributed to this trend.[23] While lateral hiring is not a new phenomenon, its role in the long-term

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17 *See generally* Bob Eisenbach, *Rejecting Jewel v. Boxer: The District Court's Heller Decision Is a Potential Knock-Out Punch Against Unfinished Business Claims by Insolvent Law Firms*, IN THE RED: THE BUSINESS BANKRUPTCY BLOG (June 17, 2014), http://bankruptcy.cooley.com/2014/06/articles/uncategorized/the-jewel-no-longer-sparkles-district-court-decision-in-heller-case-is-a-potential-knock-out-for-claims-against-law-firms/; Triedman, *supra* note 15 ("For lawyers in New York, the issue's gone.").

18 Andrew Scurria, *Unfinished Business Suits Live on Despite NY Drubbing*, LAW360 (Sept. 22, 2014, 3:13 PM), http://www.law360.com/articles/579073/unfinished-business-suits-live-on-despite-ny-drubbing ("New York's highest court dealt unfinished-business litigation a body blow this summer, but subsequent decisions demonstrate that trustees of bankrupt law firms still have viable avenues for capturing profits . . . .").

19 DeBaecke & Guilfoyle, *supra* note 11, at 41 ("Legal commentators and pundits have predicted additional law firm failures in coming years.").

20 *See* Christopher C. Wang, Comment, *Breaking Up Is Hard to Do: Allocating Fees From the Unfinished Business of a Professional Corporation*, 64 U. CHI. L. REV. 1367 (1997).

21 *Id.* ("Today, lawyer mobility is the norm rather than the exception.").

22 *Id.*

23 *Id.*

business strategies of large law firms has changed.[24] Attracting key talent is important for firms as is attracting the talent's clients.[25] The break-up of a large firm creates an immediate opportunity for other firms to grow by hiring the failed firm's former partners, and thus, acquiring the partner's business.[26] This is the scenario that leads to unfinished business claims.[27]

The factors underlying unfinished business claims balance the attorney-client relationship against a partner's fiduciary duty to the partner's old firm.[28] Placing these claims in the context of bankruptcy creates an extra layer of complexity because the rights of the failed firm's creditors also come into play.[29] This section will provide an overview of how courts have addressed unfinished business claims. First, this section will discuss the state partnership law concepts that serve as the foundation for unfinished business claims. Next, this section will highlight the intersection of partnership law and bankruptcy law, as well as the development of bankruptcy law's role in deciding unfinished business claim cases.

A. Jewel v. Boxer—*The Birth of the Unfinished Business Doctrine*

Often referred to as "the seminal unfinished business doctrine case dealing with law firms," *Jewel v. Boxer* serves as the foundation for modern unfinished business claims.[30] In 1977, the four-partner law firm of Jewel, Boxer & Elkind ("JBE") voted to dissolve.[31] The four former partners paired off to create two new firms, one named Jewel & Leary, the other Boxer & Elkind.[32] At the time of JBE's dissolution, the firm was handling a number of active cases.[33] JBE's partners, hoping that their existing clients would follow them to their new firms, sent letters to their book of clients.[34] The letters announced JBE's dissolution, served as notice of the creation of the two new firms, and provided

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24 *See* Arnett, *supra* note 9; Stewart, *The Collapse*, *supra* note 3.

25 *See* Arnett, *supra* note 9; Stewart, *The Collapse*, *supra* note 3.

26 Marc Galanter & William D. Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1895 (2008).

27 Phillips, *supra* note 10.

28 *See* Wang, *supra* note 20, at 1368; Worrell, *supra* note 15, at 851–53.

29 *See* Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 333 (Bankr. N.D. Cal. 2009).

30 DeBaecke & Guilfoyle, *supra* note 11, at 44; 156 Cal. App. 3d 171 (Cal. Ct. App. 1984).

31 *Jewel*, 156 Cal. App. 3d at 174.

32 *Id*.

33 *Id*.

34 *Id*.

each client with a substitution of attorney form.[35] Many of JBE's former clients followed the partners to their new firms where the partners provided legal services under fee arrangements established at JBE.[36]

More than five years later, Jewel & Leary filed a complaint against Boxer & Elkind for "an accounting of [the fees from unfinished cases], contending they were assets of the dissolved partnership."[37] Characterizing the fees as property of the dissolved partnership, Jewel & Leary argued that it was entitled to some of the profits derived from the JBE cases that the partners at Boxer & Elkind continued at their new firm.[38] In a nonjury trial, the lower court allocated the disputed fees to the former partners on a *quantum meruit* basis, guided by the following three factors: (1) the time each firm spent handling the cases, (2) the source of each case, and (3) the result of any contingency cases.[39] Not satisfied with the results of the *quantum meruit* approach, Jewel & Leary appealed the lower court's decision.[40]

While the First Circuit expressed its "admiration for the laudable efforts of the learned trial judge who masterfully developed a formula geared to achieving a just and equitable result for each party," it ultimately reversed the decision.[41] As JBE lacked both a partnership agreement and an allocation of fees agreement, the court indicated that state partnership law, the Uniform Partnership Act ("UPA"), should be used to resolve the dispute.[42] The court threw out the *quantum meruit* calculations, holding that UPA required that the profits from the unfinished business be returned to the partnership and distributed according to each partner's equity interest.[43] The court relied heavily on a UPA provision that bars partners from receiving extra compensation for "services rendered in completing unfinished business."[44] This provision is sometimes referred to as the "No Compensation Rule."[45]

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 175 ("Jewel and Leary was determined to owe $115,041.16 to the old firm, and Boxer and Elkind was determined to owe $291,718.60 to the old firm.").
[41] *Id.* at 176.
[42] *Id.* (noting the firms lack of a written partnership agreement).
[43] *Id.*
[44] *Id.*
[45] Mark H. Epstein & Brandon Wisoff, *Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice*, 73 CAL. L. REV. 1597, 1609–10 (1985).

B. The No Compensation Rule

Understanding how the *Jewel* court arrived at its decision requires an examination of the No Compensation Rule.[46] In fact, unpacking the No Compensation Rule is critical, as the rule serves as the statutory and policy basis for the application of the unfinished business doctrine.[47] The No Compensation Rule provides that "partners are not entitled to compensation for the winding up of the dissolved partnership beyond their partnership interests for services rendered."[48] Thus, a partner is not entitled to take home an amount greater than what his or her partnership share in the dissolved firm would have allowed.[49] The No Compensation Rule was originally codified in § 18(f) of the UPA[50] and in subsequent revisions and amendments of § 401 of the UPA.[51]

When a partnership dissolves, a two-step process takes place.[52] First, there is the actual dissolution of the firm.[53] Second, there is the winding-up period, where the partners "complete the business of the partnership, liquidate assets, settle liabilities, and distribute profits, if any, among the partners."[54] Even after dissolution, the partnership technically continues until this winding-up process is complete.[55] Therefore, under the No Compensation Rule, it follows that pre-existing client work finished up after the dissolution of the partnership must be pulled back to the partnership estate.[56]

The dispute in *Jewel* centered on the application of the No Compensation Rule.[57] The *Jewel* court found that the unfinished work the partners brought to their new firms belonged to JBE because the work was considered part of the winding up process.[58] Because the unfinished client business completed during

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46 *See Jewel*, 156 Cal. App. 3d at 174.
47 *See id*.
48 Weinstein, *supra* note 13.
49 *See id*.
50 UNIF. P'SHIP ACT § 18(f) (1914) ("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.").
51 UNIF. P'SHIP ACT § 401(j) (amended 2013) ("A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.").
52 Weinstein, *supra* note 13, at 860–61.
53 *Id*.
54 *Id.* at 862.
55 *See* Jewel v. Boxer, 156 Cal. App. 3d 171, 174 (Cal. Ct. App. 1984).
56 *See id*.
57 *See id*.
58 *Id*.

the winding up process was property of the partnership, the profits from the unfinished business would be returned to the partnership and distributed according to each partner's equity interest in JBE.[59]

C. The Impact on Partnership Agreements: "The Jewel *Waiver"*

In *Jewel,* the court held that when a dissolved firm lacks a partnership agreement, any profits from unfinished business must be returned to the partnership and distributed to each partner based on his or her equity interest.[60] After reaching this decision, the court added that the partners could have contracted around the requirements of UPA with a written partnership agreement.[61] *Jewel* "not only [allows] contrary agreements, [it also encourages] partners to enter into such agreements, which can only aid in the timely and organized winding up of the partnership's affairs."[62]

Thus, *Jewel*'s legacy is one that stresses freedom of contract.[63] The court in *Jewel* advocated for the inclusion of "precise rules for completion of unfinished business" in partnership agreements.[64] These provisions are commonly referred to as *Jewel* waivers.[65] *Jewel* created an incentive for firms to amend their partnership agreements and waive any duty to account for profits from unfinished business.[66] By adding a *Jewel* waiver to a partnership agreement, "partners no longer have any financial obligation to the partnership with regard to fees collected as part of the winding-up process."[67]

While a *Jewel* waiver is an effective tool to mitigate risk, it does not extinguish all risk.[68] Creative claims advanced by bankruptcy trustees have shown that *Jewel* waivers are not a panacea.[69]

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59 *Id.*
60 *Id.*
61 *Id.* at 179–80.
62 Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 333 (Bankr. N.D. Cal. 2009).
63 *See Jewel*, 156 Cal. App. 3d 171.
64 *Brobeck, Phleger & Harrison*, 408 B.R. at 331 ("Of course, the parties were free to enter into an agreement providing for the allocation of fees relating to unfinished business in any manner they wished.") (internal quotation marks omitted) (citing Rothman v. Dolin, 20 Cal. App. 4th 755, 759 (Cal. Ct. App. 1993)).
65 *See id*.
66 *See id*.
67 *See* Arnett, *supra* note 9.
68 *See Brobeck, Phleger & Harrison*, 408 B.R. at 331 (analyzing whether a *Jewel* waiver added at the eleventh hour constitutes a fraudulent transfer of property).
69 *See id*.

D. In re Brobeck*: Applying* Jewel *in a Bankruptcy Setting*

Despite its impact in the bankruptcy field, *Jewel* itself was not a bankruptcy case.[70] In fact, it was not until recently that a court first examined the application of unfinished business claims during the course of a bankruptcy proceeding.[71] In *In re Brobeck*, the court applied the unfinished business rule in a bankruptcy setting, while also discussing the limitations of *Jewel* waivers.[72]

The law firm of Brobeck, Phleger & Harrison ("Brobeck") operated for nearly a century.[73] Like many firms, a strong technology practice helped Brobeck enjoy rapid growth during the end of the twentieth century.[74] To facilitate this growth, Brobeck took on a great deal of debt and eventually found itself in financial trouble.[75] After attempts to restructure its debt and a failed merger, Brobeck decided to dissolve in early 2003.[76] Recognizing that the firm's partnership agreement did not contain a *Jewel* waiver, the partners added one in February 2003.[77] The day after the *Jewel* waiver was approved, Brobeck dissolved.[78] Creditors filed for Brobeck's involuntary bankruptcy later that year.[79]

Many of Brobeck's partners moved on to new firms following dissolution.[80] Brobeck's trustee sought to recover profits from the unfinished business that former partners took to their new firms.[81] Even though Brobeck had a *Jewel* waiver, the trustee claimed that (1) the "eleventh hour amendment[] to Brobeck's partnership agreement" was invalid and (2) the profits from the unfinished business were fraudulently transferred from the firm.[82]

While the court affirmed that Brobeck's "eleventh hour amendment" was valid, it did find that the timing of the amendment amounted to a fraudulent

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70 *See* Jewel v. Boxer, 156 Cal. App. 3d 171, 174 (Cal. Ct. App. 1984).
71 *Brobeck, Phleger & Harrison*, 408 B.R. 318.
72 *Id.* at 326.
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.* at 327.
78 *Id.*
79 *Id.* at 330.
80 *Id.* at 329–30.
81 *Id.* at 330.
82 *Id.* at 325.

transfer under the Bankruptcy Code (the "Code").[83] In arriving at this decision, the court first determined that the profits from Brobeck's unfinished business were property of the dissolved firm,[84] making them subject to the Code's rules against fraudulent transfers.[85]

Section 548 of the Code incorporates the law of fraudulent transfers into a bankruptcy proceeding.[86] This provision is in place to prevent debtors from "placing property beyond the reach of their creditors when those assets should legitimately be made available to satisfy creditor demands."[87]

The court held that a constructive fraudulent transfer occurred because (1) Brobeck had an interest in its unfinished business; (2) a transfer of that interest occurred within one year of the filing of the bankruptcy petition; (3) Brobeck was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) Brobeck received "less than a reasonably equivalent value in exchange for" the *Jewel* waiver.[88]

E. The End of Unfinished Business Claims?

Following *Brobeck*, the focus in unfinished business claim bankruptcy proceedings has been on whether unfinished business is property of the client or the dissolved firm's estate.[89] The property definition of unfinished business is significant because it dictates the legal recourse available to the bankruptcy trustee.[90] It is generally accepted that pending legal issues billed on a fixed-fee or contingency basis are property of the dissolved firm's bankruptcy estate.[91] However, the proper categorization for pending legal issues billed on an hourly basis is still disputed.[92]

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83 *Id.* at 348; *see* 11 U.S.C. § 548(a)(1)(B) (2012).

84 *Brobeck, Phleger & Harrison*, 408 B.R. at 337–38.

85 *Id.* at 337–39 (Bankr. N.D. Cal. 2009); *see* 11 U.S.C.§ 548.

86 5 COLLIER ON BANKRUPTCY ¶ 548.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012).

87 *Brobeck, Phleger & Harrison*, 408 B.R. at 326.

88 *Id.* at 340–41.

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

90 *See* 11 U.S.C. § 548.

91 Worrell, *supra* note 15, at 835.

92 *Compare Thelen*, 476 B.R. at 734 (holding that a dissolved law firm's pending hourly fee matters are not partnership assets), *with Coudert Bros.*, 480 B.R. at 159 (holding that a dissolved law firm's pending hourly fee matters are property of the estate).

In 2012, two courts in the Southern District of New York reached different outcomes as to whether hourly fees should be defined as property of a bankrupt law firm's estate.[93] In *In re Coudert Bros.*, Justice McMahon held that hourly fee matters pending at the time of dissolution were assets of the dissolved partnership.[94] In contrast, Judge Pauley, writing the opinion in *In re Thelen*, held that pending hourly fee matters were not property of the dissolved law firm's bankruptcy estate.[95] Judge Pauley's holding relied heavily on the view that classifying unfinished business as property of the estate "collide[d] with the essence of the attorney-client relationship."[96] Following the split, the Second Circuit accepted interlocutory appeals of both decisions.[97]

In the summer of 2014, the New York Court of Appeals held that pending hourly client cases are not the property of the bankrupt law firm's estate.[98] The New York Court of Appeals holding was supported by a similar outcome reached by the bankruptcy court for the Northern District of California in *Heller Ehrman*.[99] Many in the legal community felt that these decisions signaled the end of unfinished business claims nationwide.[100]

F. Unfinished Business Claims Have Not Been "Knocked Out"

Despite the recent decisions in New York and California, it appears the courts have left the door open for bankruptcy trustees to continue asserting unfinished business claims in some jurisdictions.[101] In August 2014, the United States Bankruptcy Court for the Northern District of California issued an opinion arising out of the *Howrey* bankruptcy proceeding.[102] Most of the facts in *Howrey* are similar to the recent cases in New York and California.[103]

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93 *Compare Thelen*, 476 B.R. at 734 (holding that a dissolved law firm's pending hourly fee matters are not partnership assets), *with Coudert Bros.*, 480 B.R. at 159 (holding that a dissolved law firm's pending hourly fee matters are property of the estate).

94 480 B.R. at 158.

95 DeBaecke & Guilfoyle, *supra* note 11, at 57 (citing Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 743 (S.D.N.Y. 2012)).

96 *Id*.

97 *See* Scurria, *supra* note 18.

98 *In re* Thelen LLP, 20 N.E.3d 264, 266 (N.Y. 2014).

99 Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP, 527 B.R. 24 (N.D. Cal. 2014).

100 *See generally* Eisenbach, *supra* note 17 (discussing *Heller Ehrman* and its impact on future unfinished business claim litigation).

101 *See* Scurria, *supra* note 18.

102 *In re* Howrey LLP, No. 13-02700, 2014 U.S. Dist. LEXIS 110067 (N.D. Cal. Aug. 8, 2014).

103 *Id.* at *5.

Howrey's trustee sought to recover the profits from unfinished hourly fee client matters former partners brought to their new firms.[104] Riding the optimism resulting from recent decisions in New York and California, the defendant law firms in *Howrey* sought for the court to reconsider its prior denial of motions to dismiss in light of the recent authority from previous cases.[105] The *Howrey* court, however, declined to extend the views of New York and California, and upheld the bankruptcy court's decision.[106] The court also allowed the bankruptcy trustee to proceed with a claim of unjust enrichment against the former partners.[107]

The *Howrey* decision was the first unfinished business case following the string of decisions in New York and California.[108] The *Howrey* court's failure to follow the views of the New York and California courts has tempered the optimism of many in the legal community.[109] The *Howrey* decision makes it clear that bankruptcy trustees may still successfully assert unfinished business claims in some jurisdictions.[110]

II. ANALYSIS

This Comment will advocate for the end of unfinished business claims by demonstrating that unfinished business claims are at odds with the Code,[111] no longer apply to the modern law firm,[112] and violate public policy.[113] This Comment will then provide practical guidance for contracting around unfinished business claims.

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[104] *See id.*

[105] Dylan G. Trache, *Different in the District—Howrey Judge Relies on D.C. Law to Keep Unfinished Business Claims Alive*, NELSON MULLINS ON BANKRUPTCY (Jan. 2, 2015), http://www.nelsonmullins.com/newsletters/different-in-the-district-howrey-judge-relies-on-dc-law-to-keep-unfinished-business-claims-alive; *see Howrey*, 2014 U.S. Dist. LEXIS 110067, at *9–10.

[106] *Howrey*, 2014 U.S. Dist. LEXIS 110067, at *15–16; *see* Trache, *supra* note 105.

[107] Trache, *supra* note 105.

[108] *See id.*; *Howrey*, 2014 U.S. Dist. LEXIS 110067.

[109] *See generally* Trache, *supra* note 105.

[110] *Id.* (explaining that "[t]he *Howrey* opinion demonstrates the importance of choice of law in unfinished business cases. While courts in New York and California have seemingly rendered a death blow to the unfinished business doctrine in those jurisdictions, partnerships in other states and the District of Columbia remain at risk of unfinished business suits.").

[111] *See* Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 741 (Bankr. S.D.N.Y. 2012).

[112] *See* Arnett, *supra* note 9, at 570.

[113] *See generally* Worrell, *supra* note 15, at 848.

A. Unfinished Business Claims are Inconsistent with the Code

The dissolution of a law firm, particularly one in the midst of a bankruptcy proceeding, creates a host of unique issues.[114] One challenge involves reconciling unfinished business claims with the Code.[115] This section will demonstrate that unfinished business claims are inconsistent with the Code for the following reasons: (1) pending client matters should not be considered property of the estate; (2) treating pending client matters as property of the estate leads to a conflict between the client's right to counsel and the automatic stay; and (3) treating pending client matters as property of the estate leads to unintended consequences regarding the use, sale, or lease of property.

1. Unfinished Hourly Business Is Not Property Under § 541

In *Brobeck*, the bankruptcy trustee successfully argued that Brobeck's former partners committed a constructive fraudulent transfer under § 548(a)(1)(B) of the Code.[116] Judge Montali explained that this section of the Code "prevents debtors from placing property beyond the reach of their creditors when those assets should legitimately be made available to satisfy creditor demands."[117] He wrote that the partner's inclusion of an eleventh hour *Jewel* waiver cut against the purpose of the statute.[118] Thus, the court in *Brobeck* held that the unfinished business the partners took to their new firm was property of the estate.[119]

The *Brobeck* decision sets forth an analytical hierarchy for bankruptcy trustees who wish to recover profits derived from the work former partners earn at their new firms.[120] The success of a fraudulent transfer claim, or any other claim under the Code, is entirely contingent on whether the unfinished business is property of the estate.[121] Thus, the threshold question in any bankruptcy-related unfinished business case is whether the unfinished business in question can be classified as the property of the debtor law firm.[122]

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[114] *See* Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 338–39 (Bankr. N.D. Cal. 2009).

[115] *Thelen*, 476 B.R. at 741.

[116] *See Brobeck, Phleger & Harrison*, 408 B.R. at 340–41.

[117] *Id.* at 337.

[118] *See id.* at 339–40.

[119] *Id.* at 337; *see* 11 U.S.C. §§ 541, 548 (2012).

[120] *See Brobeck, Phleger & Harrison*, 408 B.R. at 337.

[121] *See id*.

[122] *See* 11 U.S.C. §§ 541, 548; *Brobeck, Phleger & Harrison*, 408 B.R. at 337.

a. Overview of Legal Billing Methods

As a starting point, it is valuable to provide a brief overview of the most common billing methods utilized by law firms.[123] They fall into the following categories: (1) contingency fee, (2) flat-fee, (3) retainer fee, and (4) hourly fee based agreements.[124] In a contingency fee case, the attorney is "paid a portion of any recovery on a legal matter that he or she realizes for the benefit of the client."[125] In a flat-fee arrangement, an attorney may charge a fixed fee for completing specific types of services.[126] Retainer agreements generally require an up-front, sometimes non-refundable, fee to be paid to the attorney.[127] Hourly fees are the most commonly utilized billing form.[128] In this setting, an attorney sets an hourly fee and bills the client on a rolling basis.[129]

As courts have grappled over whether to classify unfinished business as property of a debtor firm's bankruptcy estate, a key distinction relates to the different billing methods.[130] The nature and timing of these different methods is dispositive.[131] As will be discussed later in this Comment, contingency fee, retainer fee, and flat fee contracts are generally accepted to be part of the bankruptcy estate.[132] Recent debate has focused primarily on whether this view should be extended to hourly fee agreements.[133]

b. What Constitutes Property in Bankruptcy?

Section 541 sets the rules for determining what should be included in the bankruptcy estate.[134] Section 541(a)(1) states that the estate is entitled to "all

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123 Martindale-Hubbell, *Guide to Legal Services Billing Rates*, LAWYERS.COM, http://research.lawyers.com/guide-to-legal-services-billing-rates.html.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *See* Worrell, *supra* note 15, at 829–30; *see also* Arthur J. Ciampi, *Claims for Unfinished Business Should be Avoided*, N.Y. L.J., (July 27, 2012), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202564502246&thepage=1 (noting that the unfinished business rule has frequently applied to contingent fee cases).

131 *See* Worrell, *supra* note 15, at 842–43.

132 *Id.* at 829–30.

133 *Compare* Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 743 (Bankr. S.D.N.Y. 2012) (holding that a dissolved law firm's pending hourly fee matters are not partnership assets), *with* Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (*In re* Coudert Bros.), 480 B.R. 145, 159–60 (Bankr. S.D.N.Y. 2012) (holding that a dissolved law firm's pending hourly fee matters are property of the estate).

134 11 U.S.C. § 541 (2012).

legal or equitable interests of the debtor in property as of the commencement of the case."[135] However, the Code stops short of defining what qualifies as a "legal or equitable interest of the debtor."[136] Collier on Bankruptcy explains that "[e]ven though Section 541 provides the framework for determining the scope of the debtor's estate and what property will be included in the estate, it does not provide any rules for determining whether the debtor has an interest in property in the first place."[137] Therefore, courts must defer to state law when determining the extent of the debtor's interest in property.[138]

While the language of § 541 is meant to be interpreted broadly,[139] the extent of what property interests should be included in the estate is not absolute.[140] Section 541 also lays out a number of exceptions.[141] Thus, an analysis of whether unfinished business is the property of a bankrupt firm's estate is two-pronged.[142] First, the court must determine whether the unfinished business is indeed a property interest under applicable state law.[143] Second, the court must determine whether the property is included in the broad definition of § 541(a)(1).[144]

c. Applying the Property Analysis to Unfinished Business Claims

So, how does a court determine what qualifies as a "legal or equitable" property interest in an unfinished business case? In *Brobeck*, Justice Montali begins by noting that Black's Law Dictionary defines "property" as "[t]he right

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[135] *Id.*

[136] *See id.*

[137] 5 COLLIER ON BANKRUPTCY, *supra* note 86, at ¶ 541.03.

[138] Butner v. United States, 440 U.S. 48, 54–55 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law . . . . Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

[139] 5 COLLIER ON BANKRUPTCY, *supra* note 86, at ¶ 541.01 ("Congress's intent to define property of the estate in the broadest possible sense is evident from the language of the statute, which initially defines the scope of estate property to be all legal or equitable interests of the debtor in property as of the commencement of the case.").

[140] *See id.* at ¶ 541.02.

[141] 11 U.S.C. § 541(a)(1) (2012).

[142] *See* Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 333 (Bankr. N.D. Cal. 2009).

[143] Parks v. FIA Card Servs., N.A. (*In re* Marshall), 550 F.3d 1251, 1255 (10th Cir. 2008) ("For purposes of most bankruptcy proceedings, property interests are created and defined by state law. Once that state law determination is made, however, we must still look to federal bankruptcy law to resolve the extent to which that interest is property of the estate.") (quotation marks omitted).

[144] *See id.*

to possess, use, and enjoy a determinate thing."[145] A more colloquial definition comes from the Merriam-Webster dictionary, which defines "property" as "something that is owned by a person, business, etc."[146]

In contrast to the holding in *Brobeck*, a literal interpretation does not support the view that hourly-fee unfinished business should be deemed property of the bankruptcy estate.[147] This conclusion also finds support in a recent opinion stemming from the Heller Ehrman bankruptcy.[148] The court in *Heller Ehrman* explains that not only is future business not "determinate," there is no practical way for a law firm to "use or enjoy" an asset that has not materialized.[149]

To arrive at *Heller Ehrman*'s conclusion, one must distinguish between ownership of revenue derived from a legal issue and the legal issue itself.[150] A bankruptcy trustee's focus is on the revenue derived from unfinished business. For example, assume a firm provided services pre-bankruptcy and is still waiting to be paid for those services. In this scenario, including the firm's accounts receivable in the bankruptcy estate falls under a literal definition of a property interest.[151] The debtor firm is legally entitled to payment and can "use and enjoy" the accounts receivable in a variety of ways.[152]

A complication arises when the trustee attempts to claim an interest in revenue from speculative services that have yet to be provided.[153] As the trustee attempts to follow the unfinished case to a new firm, the scope of the trustee's property claim appears to shift to the underlying legal issue. However, the debtor law firm does not own the underlying legal issue because the legal issue is the client's property.[154] In an hourly fee setting, the attorney bills a client based on work that has been completed.[155] An attorney cannot bill a

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[145] *Brobeck, Phleger & Harrison*, 408 B.R. 337.

[146] *Property,* MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/property (2015).

[147] *See id.*; *Property*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[148] Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP, 527 B.R. 24, 25–26 (N.D. Cal. 2014).

[149] *Id*.

[150] *See id*.

[151] *See* MERRIAM-WEBSTER DICTIONARY, *supra* note 147; BLACK'S LAW DICTIONARY, *supra* note 148.

[152] *See generally* Simona Covel, *Getting Your Due*, WALL ST. J., http://www.wsj.com/articles/SB1000142405297020447500457412684266546640 8 (last updated May 11, 2009, 12:01 AM) (discussing how firms can borrow against accounts receivable).

[153] *See In re* Thelen LLP, 20 N.E.3d 264, 270–71 (N.Y. 2014).

[154] *Id*.

[155] *Id.* at 270.

client for future services as the agreement is completed on an at-will basis.[156] The prospect of any future work lies solely in the hands of the client.[157] Thus, it is difficult to arrive at a conclusion where the ownership and control of the legal issue and its potential revenues lies with a law firm and not the client.[158]

In the bankruptcy setting, what constitutes property of the estate can expand beyond general definitions of property.[159] Even in this context, classifying unfinished hourly business as property of the debtor firm is unwarranted.[160] As courts have grappled over whether to classify unfinished business as property of a debtor firm's bankruptcy estate, the billing method used by the firm has emerged as a determining factor.[161]

In the context of bankrupt law firms, contingency fee and retainer fee contracts are generally accepted to be part of the bankruptcy estate.[162] The court system's treatment of contingency fee agreements has been used as support for and against the inclusion of hourly fee unfinished business in the estate.[163] While the rationale for treating contingent fees as part of the bankruptcy estate is valid, this analysis should not be extended to hourly fee matters.[164]

In recent years, the majority rule has been for courts to include all forms of unfinished business as property of the debtor firm's bankruptcy estate.[165] For jurisdictions applying the unfinished business doctrine, many of the opinions have relied on the premise that hourly fee and contingent fee agreements should not be treated differently.[166] The arguments for this view relate to

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156 *Id.*

157 *See* Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP, 527 B.R. 24, 29 (N.D. Cal. 2014); *Thelen*, 20 N.E.3d at 270.

158 *See Heller Ehrman*, 527 B.R. at 29; *Thelen*, 20 N.E.3d at 270.

159 *See* 5 COLLIER ON BANKRUPTCY, *supra* note 86, at ¶ 541.01.

160 *See Heller Ehrman*, 527 B.R. at 29; *Thelen*, 20 N.E.3d at 270.

161 *See* Worrell, *supra* note 15, at 835; Ciampi, *supra* note 131 (noting that the unfinished business rule has frequently applied to contingent fee cases).

162 Worrell, *supra* note 15, at 827–28.

163 *Compare* Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP, 477 B.R. 318, 344 (S.D.N.Y. 2012) (applying same analysis to contingent fees and hourly fees), *with* Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 741 (S.D.N.Y. 2012) (applying different analysis to contingent fees and hourly fees).

164 Worrell, *supra* note 15, at 849; *Thelen*, 20 N.E.3d at 270–71.

165 *See generally Dev. Specialists*, 477 B.R. at 344.

166 *See* Worrell, *supra* note 15, at 848.

(1) the nature of the contracts with clients,[167] (2) the lack of a distinction between contract types in *Jewel*,[168] (3) the relative value of client matters to a firm,[169] and (4) the structure and purpose of a partnership.[170]

Courts applying the unfinished business doctrine argue that the billing method to which a client and attorney agree does not change the nature of their relationship.[171] In *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, the court held that "[t]he 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 partner must honor towards another."[172] Proponents view the billing method as nothing more than an administrative decision to facilitate the attorney-client relationship.[173]

In *Rothman*, the court decided to include hourly fee unfinished business in the bankruptcy estate.[174] Relying on *Jewel*, the court explained that because *Jewel* made no distinction between contingent and hourly fees, the *Jewel* court meant for unfinished business to encompass "all matters in progress which have not been completed at the time the firm is dissolved."[175]

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[167] *Dev. Specialists*, 477 B.R. at 344 (explaining that 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 partner must honor towards another. They remain the same regardless of how an attorney agrees to be compensated by his clients."); Labrum & Doak v. Ashdale (*In re* Labrum & Doak), 227 B.R. 391, 408 (Bankr. E.D. Pa. 1998) ("Unfinished business simply consists of all matters in progress which have not been completed at the time the [law] firm is dissolved. That one matter is to be compensated at an hourly rate and another on a contingency basis is of no consequence in determining whether a matter is unfinished business.").

[168] Rothman v. Dolin, 20 Cal. App. 4th 755, 758 (Cal. Ct. App. 1993) (explaining that because *Jewel* made no distinction between contingent and hourly fees, the *Jewel* court meant for unfinished business to encompass "all matters in progress which have not been completed at the time the firm is dissolved").

[169] *See Dev. Specialists*, 477 B.R. at 344 (explaining the value of client relationships by stating that "[a] departing partner is not free to walk out of his firm's office carrying a Jackson Pollack painting he ripped off the wall").

[170] Worrell, *supra* note 15, at 840 n.89 (explaining "that the business belongs to the firm, as opposed to an individual attorney, because the business would no longer be carried out by 'co-owners' but rather a group of attorneys out for themselves, sharing nothing but their office space") (citing Dev. Specialists, 477 B.R. at 331–32).

[171] *Dev. Specialists*, 477 B.R. at 336.

[172] *Id*.

[173] *See id.* at 336–37.

[174] 20 Cal. App. 4th 755, 758 (Cal. Ct. App. 1993).

[175] *Id.* at 759.

Some courts also highlight the relative value of client business to a firm.[176] In one of the more notable quotes regarding unfinished business claims, the court in *Dev. Specialists* equated former partners taking key clients to new firms to ripping a Jackson Pollock[177] off the wall.[178] Unlike other industries, a law firm's client base is often its most valuable asset at the time of bankruptcy.[179]

Finally, many courts have also noted that allowing partners of firms to carve out different segments of clients, whom the partners essentially own, changes the nature of the partnership.[180] The court in *Dev. Specialists* explained, "It is a general principle of partnership law that partners are expected to devote their efforts to the partnership business, not to individual endeavors. Thus, the presumption must be that the firm's business belongs to the firm, and not to any individual partner."[181] Therefore, according to *Dev. Specialists*, application of the unfinished business rule to hourly fees is necessary to keep the spirit of the partnership intact.[182]

In contrast, there is strong authority justifying the exclusion of hourly fees from the debtor firm's estate.[183] This is supported by (1) the time at which the attorney renders services, (2) the client's freedom to terminate services, (3) the speculative nature of hourly fees, and (4) the creation of an unjust windfall for the bankruptcy estate.

First, in *Thelen*, Judge Pauley noted the importance of the timing of legal services when he held that New York law "does not recognize a debtor law firm's property interest in pending hourly fee matters."[184] Judge Pauley distinguished hourly fees, stating, "unlike a contingency fee case, all post-

176 *Dev. Specialists*, 477 B.R. at 329.

177 Paul Jackson Pollock (1912-1956) was an influential abstract artist, known for his "drip painting" technique. His work is heavily sought, often fetching eight-figure sums at auction. *See Jackson Pollock Auction Records*, ASKART, http://www.askart.com/auction_record/Jackson_Pollock/30090/Jackson_Pollock.aspx.

178 *Dev. Specialists*, 477 B.R. at 329.

179 *See id*.

180 *See* Arnett, *supra* note 9, at 558. *See generally Dev. Specialists*, 477 B.R. at 331–32.

181 *Dev. Specialists*, 477 B.R. at 331.

182 *See id*.

183 Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP, 527 B.R. 24, 33 (N.D. Cal. 2014); *In re* Thelen LLP, 20 N.E.3d 264 (N.Y. 2014).

184 DeBaecke & Guilfoyle, *supra* note 11, at 59.

dissolution fees that a lawyer earns are due to a lawyer's post-dissolution efforts, skill and diligence."[185]

Second, opponents of the majority rule have also cited the impact on the attorney-client relationship as one of the primary reasons for rejecting a definition of property that includes unfinished business in the property of the estate.[186] Specifically, the client's right to terminate proves that the legal or equitable interest in unfinished business belongs to the client and not the law firm.[187] This ownership is clear because a client may fire counsel at any time.[188] When a client fires counsel, the client owes fees only for services performed prior to the date of discharge.[189] Judge Pauley explained that "[a]lthough property is often described as a 'bundle of rights,' or 'sticks,' with relational aspects . . . the ability to terminate the relationship at any time without penalty . . . cannot support a finding that a transferrable property right existed."[190] Thus it is the client, and not the attorney, that owns the matters requiring legal services.[191]

Courts following the majority rule have attempted to reconcile the apparent conflict between the attorney-client relationship and the inclusion of hourly fee based unfinished business in the bankruptcy estate.[192] The court in *In re Labrum & Doak* rejected the argument that inclusion of unfinished business in the estate would have "disastrous public policy" implications.[193] The court reasoned that the estate did not intend to "overtak[e] cases without client consent, but rather only permit[] claiming a portion of the proceeds from that work."[194]

While taking possession over the management of client cases without the client's consent would obviously have far reaching ethical and policy concerns, this type of action is not required for there to be a negative impact on a client's right to choose counsel.[195] If a partner moves to a new firm and wishes to

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185 Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 741 (Bankr. S.D.N.Y. 2012).

186 *See* Worrell, *supra* note 15, at 851–53.

187 *Heller Ehrman*, 527 B.R. at 31.

188 *Id.*

189 *Id.* at 25.

190 *In re* Thelen LLP, 20 N.E.3d 264, 270 (N.Y. 2014) (quoting Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 990 N.E.2d 121 (N.Y. 2013)).

191 *Heller Ehrman*, 527 B.R. at 30.

192 Labrum & Doak v. Ashdale (*In re* Labrum & Doak), 227 B.R. 391, 408 (Bankr. E.D. Pa. 1998).

193 *Id.* at 409.

194 Worrell, *supra* note 15, at 839 (citing *Labrum & Doak*, 227 B.R. at 410–11).

195 *See id.*

continue rendering legal services for an existing client, the partner runs the risk of having to pay a portion of his or her resulting fees to the estate.[196] Thus, the attorney's obligation to the debtor firm's estate could have a chilling effect on the client's right to choose counsel.[197]

In *Sheresky v. Sheresky Aronson Mayefsky & Sloan LLP,* the court refused to extend the unfinished business doctrine to hourly fees.[198] In doing so, the *Sheresky* court explained some of the challenges a contrary result would create for former partners.[199] If the attorney continues to represent his or her former client at a new firm, but is obligated to pay back a portion of his profits to the debtor firm, he or she runs the risk of under compensation.[200] The opportunity cost of representing a less profitable client provides a disincentive for the attorney to continue representing that client.[201] The attorney may also attempt to offset the costs due to the debtor firm by charging the client more for services, possibly restricting the client's ability to afford the attorney.[202] In either scenario, the detriment to the attorney or the client can restrict the client's access to an attorney of his or her choosing.[203]

Third, the very nature of hourly fee arrangements is incompatible with a definition classifying hourly fees as property of a failed firm's bankruptcy estate.[204] As opposed to other billing arrangements, hourly fees are structured so that a client pays as work on a case is completed on an at-will basis.[205] While all forms of billing must honor a client's right to counsel, the impact on a firm's bottom line differs.[206] For example, retainer agreements may require an up-front non-refundable deposit in order to retain the services of an

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196 *See generally* Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 338 (Bankr. N.D. Cal. 2009).

197 Welman v. Parker, 328 S.W.3d 451, 457 (Mo. Ct. App. 2010) ("Similarly, the trial court's limited view of the limited compensation available to the withdrawing partner for services rendered to client after withdrawal, should the client choose to have the withdrawing partner continue to represent him or her, would unduly impinge upon the client's perceived freedom to change attorneys without cause and could have a 'chilling effect' upon the choice of that option by the client.").

198 35 Misc. 3d 1201(A), 1201A (N.Y. Sup. Ct. 2011).

199 *See id*.

200 *See id*.

201 *See id*.

202 *See id*.

203 *See id*.

204 Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP, 527 B.R. 24, 33 (N.D. Cal. 2014); *In re* Thelen LLP, 20 N.E.3d 264, 274 (N.Y. 2014).

205 Martindale-Hubbell, *supra* note 124.

206 *Id*.

employee.[207] While a firm is probably always hopeful that clients will continue to bring business, different arrangements offer different levels of confidence and transparency into future earnings.[208] This difference impacts how courts have classified different billing models.[209] In general, the bankruptcy estate will inherit "all of the rights and obligations of the debtor under contracts as of the commencement of the bankruptcy case . . . ."[210] A retainer fee agreement, as an active agreement, would fall under this definition.[211]

Contingency fee agreements are also generally viewed as property of the debtor firm.[212] A contingent interest is viewed as property because of the value it provides.[213] This value exists notwithstanding the fact that the holder may never actually realize his or her interest in the future.[214] The court in *In re Greer* noted that "unlike a mere expectancy interest, a contingent interest in property confers upon its holder a true interest in that item of property."[215] Thus, a contingent interest does have value equal to the probability of the event, no matter how unlikely the event is to occur.[216] Regardless of the probability of the contingency, there is still a clear interest in the unfinished business, whether it is through the possibility of a court award or from a flat fee agreement.[217]

A bankruptcy court in Ohio applied the reasoning in *Greer* to conclude that speculative hourly fees do not have the same property implications as other billing models.[218] The court stated that the reason for this lack of value is that the hourly fees are a "mere expectancy."[219] In an hourly fee arrangement, the debtor's ability to realize revenue from new work is completely based on

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207 *Id.*
208 *Id.*
209 Douglas J. Lipke & Michael M. Eidelman, *Section 541: Property of the Estate*, *in* BUSINESS BANKRUPTCY PRACTICE 6 (Ill. Inst. CLE 2006) (citing *In re* Holywell Corp. 913 F.2d 873, 881 (11th Cir. 1990)).
210 *Id.*
211 *Id.* at 8.
212 Worrell, *supra* note 15, at 835.
213 *In re* Greer, 242 B.R. 389, 399 (Bankr. N.D. Ohio 1999) ("However, unlike a mere expectancy interest, a contingent interest in property confers upon its holder a true interest in that item of property. Therefore, a contingent interest in property has value, no matter how improbable the contingency . . . .").
214 *Id.*
215 *Id.*
216 *Id.*
217 *See id.*
218 *See In re* Booth, 266 B.R. 105, 110–11 (Bankr. N.D. Ohio 2000).
219 *See id.* at 111.

whether the client wants to continue employing the firm.[220] The fact that the firm has completed prior work for a client is not "an agreement to agree" that will be formalized at a later date.[221] The debtor law firm would have no enforceable claim for additional business at the time of the bankruptcy filing.[222] Thus, the debtor's "expectation of any continued or future" business is nothing but speculation and not a present or future property interest.[223]

Finally, classifying unfinished business as property also runs the risk of creating an unjust windfall for the bankruptcy estate.[224] In *Butner v. United States*, the court stressed that "[u]niform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a 'windfall merely by reason of the happenstance of bankruptcy.'"[225] The court in *Thelen* shared this view, stating that "[b]y allowing former partners of a dissolved firm to profit from work they do not perform, all at the expense of a former partner and his new firm, the trustee's approach creates an unjust windfall."[226]

Further, the language of § 541 should bar unfinished business from being included in the bankruptcy estate. Section 541(a)(6) creates a key exception for proceeds that an individual debtor receives as compensation for services performed post-petition.[227] The rationale is that a "professional's skills, training, and license do not constitute property of the estate because they are uniquely personal and cannot be transferred."[228] When a former partner provides legal services to a client either at a new firm or in a solo practice, he is rendering post-petition legal services.[229]

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220 Zachary McClellan, *Hourly Rate v. Contingency Fee*, LAW STREET JOURNAL (June 9, 2013), http://www.thelawstreetjournal.com/3l/hourly-rate-vs.-contingency-fee/ (last visited June 28, 2015).

221 Parks v. Dittmar (*In re* Dittmar), 618 F.3d 1199, 1205–06 (10th Cir. 2010).

222 Sharp v. Dery, 253 B.R. 204, 206 (E.D. Mich. 2000).

223 *See In re* Thelen LLP, 20 N.E.3d 264, 270 (N.Y. 2014) ("[E]xpectation of any continued or future business is too contingent in nature and speculative to create a present or future property interest.").

224 440 U.S. 48, 55 (1979) (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)).

225 Charles J. Tabb Ralph Brubaker, Bankruptcy Law: Principles, Policies, and Practice 165 (3d ed. 2010) (quoting *Lewis*, 364 U.S. at 609).

226 *Thelen*, 20 N.E.3d at 273.

227 Lipke & Eidelman, *supra* note at 9.

228 *Id*.

229 *See In re* Prince, 85 F.3d 314, 322 (7th Cir. 1996).

2. Thelen*: Bizarre Consequences and Unworkable Results*

In *Thelen*, Judge Pauley noted that applying the unfinished business doctrine to hourly claims might have “bizarre consequences” in the context of a law firm bankruptcy proceeding.[230] Specifically, Judge Pauley questioned the “workability” of some of the Code’s administrative powers, namely §§ 362 and 363.[231] This section will demonstrate that Judge Pauley’s concerns are not only valid, but they support the view that unfinished business claims are inconsistent with the Code.[232]

a. The Conflict Between § 362 and a Client’s Right to Counsel

The first issue that Judge Pauley raises in *Thelen* relates to a perceived conflict between § 362 and a client’s right to counsel.[233] Evaluating the potential for unworkable results under § 362 is critical, as the automatic stay is arguably the most fundamental protection provided by the Code.[234] Not only does the automatic stay offer the debtor breathing room,[235] it advances one of bankruptcy’s key policy goals by creating an even playing field for creditors.[236]

Immediately after a bankruptcy petition is filed, “an estate is automatically created that comprises essentially all of the property owned by the debtor.”[237] The purpose of the automatic stay provision is to prevent interference with a debtor’s property.[238] The court in *General Motors Acceptance Corp. v. Yates Motor Co.* discussed the breadth of the stay, explaining that it “applies in almost any type of action against the debtor or the property of the estate. It

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230 476 B.R. 732, 741 (S.D.N.Y. 2012).

231 *Id.*

232 *See id.*; DeBaecke & Guilfoyle, *supra* note 11, at 60.

233 *Thelen*, 476 B.R. at 741 (explaining that “it is unclear whether client who discharges a debtor law firm and transfers his case to a new firm violates the automatic stay”).

234 124 CONG. REC. H11,092–93 (daily ed. Sept. 28, 1978) .

235 Delpit v. C.I.R., 18 F.3d 768, 771 (9th Cir. 1994) (“Congress intended to give debtors ‘a breathing spell’ from their creditors and to stop ‘all collection efforts, all harassment, and all foreclosure actions.’ The automatic stay allows debtors, during the period of the stay, ‘to be relieved of financial pressures that drove [them] into bankruptcy.’”) (alteration in original) (quoting H.R. REP. NO. 95-595, at 54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840).

236 *See* 5 COLLIER ON BANKRUPTCY, *supra* note 86, at ¶ 541.01.

237 *In re* Howrey LLP, No. 13-02700, 2014 U.S. Dist. LEXIS 110067, at *10 (N.D. Cal. Aug, 8. 2014).

238 Bishop v. Geno Designs, 631 S.W.2d 581, 582 n.1 (Tex. Ct. App. 1982) (explaining that “[t]he purpose of the automatic stay provision is to prevent interference with the debtor’s property during involuntary bankruptcy proceeding”).

stays collection efforts, harassment, and interference with the debtor's assets."[239]

Treating unfinished hourly business claims as property of the estate creates an irreconcilable rift between the automatic stay and a client's right to choose counsel.[240] A client's right to counsel, along with his or her choice of counsel, is one of the basic elements of the American judicial system.[241] A client may terminate his or her relationship with a specific attorney or law firm at any time.[242]

Classifying unfinished business as property of the estate creates a number of scenarios that potentially violate a client's right to counsel.[243] Assume a court orders that the unfinished business of a client be included in the bankruptcy estate of the debtor law firm.[244] As is common in bankruptcy, the debtor firm dissolves.[245] After dissolution, the firm no longer has the resources to provide legal services to the client.[246] Thus, the client has two options. The client can follow a displaced partner, who knows his or her case, to that partner's new firm, or the client can hire new counsel.

A potential complication arises when the client transfers his or her case to a new firm.[247] Because the client's unfinished business is property of the debtor firm's estate, the client's transfer could be viewed as "an exercise of control over property of the estate."[248] Thus, by exercising his or her right to counsel, the client may be violating the automatic stay[249] and could theoretically be penalized with contempt of court.[250]

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[239] 159 Ga. App. 215, 217 (Ga. Ct. App. 1981).

[240] *See* Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 741 (S.D.N.Y. 2012); 11 U.S.C.§ 362 (2012).

[241] Demov, Morris, Levin & Shein v. Glantz, 428 N.E.2d 387, 389 (N.Y. 1981) ("[It is] well rooted in our jurisprudence that a client may at any time, with or without cause, discharge an attorney.").

[242] *Thelen*, 476 B.R. at 741.

[243] *Id*.

[244] *See generally* Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318 (Bankr. N.D. Cal. 2009).

[245] *See generally id*.

[246] *See generally id*.

[247] *Thelen*, 476 B.R. at 741.

[248] *See id*.

[249] *See id*.

[250] 3 COLLIER ON BANKRUPTCY ¶ 362.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012); *see Thelen*, 476 B.R. at 741.

Further, the underlying purpose of the automatic stay also appears to be at odds with the inclusion of unfinished business in the bankruptcy estate.[251] The legislative history of the Code supports the view that it was Congress's "intent that the automatic stay be broadly enforced so as to preserve the status quo as of petition date . . . ."[252]

Locking a client's unfinished business into the bankruptcy estate does not preserve the status quo. Instead, it changes the nature of the firm's relationship with the client. Prior to bankruptcy, a firm's interest in future hourly-fee work is entirely speculative.[253] Providing the law firm with a right to future profits creates an actual interest.[254] The fact that the estate may now be the beneficiary of unjust enrichment does not support the rationale that the status quo has been preserved.[255]

b. Unanticipated Consequences Under § 363

The second issue Judge Pauley raises relates to § 363, which controls the trustee's ability to sell and transfer property of the estate.[256] Judge Pauley questions whether including unfinished business claims in the property of an estate would "empower a debtor law firm to sell its pending hourly fee matters to the highest bidder."[257]

Section 363(b)(1) of the Code authorizes the trustee to use, sell, or lease property of the estate other than in the ordinary course of business, provided that the trustee provides notice and an opportunity for a hearing.[258] According to Collier on Bankruptcy,

> [t]he authorization to use, sell or lease property other than in the ordinary course of business applies both when the business is not authorized to be operated, for example because the debtor is being

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[251] *See* 5 COLLIER ON BANKRUPTCY, *supra* note 86, at ¶ 541.01; *Thelen*, 476 B.R. 732, 741.

[252] Pension Benefit Guar. Co. v. LTV Corp. (*In re* Chateaugay Corp.), 87 B.R. 779, 793 (Bankr. S.D.N.Y. 1988).

[253] *See In re* Thelen LLP, 20 N.E.3d 264, 270 (N.Y. 2014).

[254] *See* United States v. Sayres, 43 B.R. 437, 439 (W.D.N.Y. 1984) ("The purpose of the automatic stay provision of section 362 is to preserve what remains of the debtor's solvent estate and to provide for systematic and equitable liquidation procedure for all creditors. Its intended effect is to preserve status quo as of date of commencement of the bankruptcy proceedings.") (citations omitted).

[255] *See id.*; *Thelen*, 20 N.E.3d at 273.

[256] *See* 11 U.S.C. § 363(b) (2012).

[257] Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 740–41 (S.D.N.Y. 2012).

[258] 3 COLLIER ON BANKRUPTCY, *supra* note 251, at ¶ 363.01.

> liquidated, and when the business is authorized to be operated and the proposed action is not in the ordinary course of business.[259]

The trustee sells the assets of the estate to generate revenue and pay off any creditors.[260]

Allowing a trustee to sell client business runs afoul of the view that clients are not "merchandise" and lawyers are not "tradesmen."[261] The court in *Cohen* addressed the transfer of clients, explaining that "[a]n attempt . . . to barter in clients, would appear to be inconsistent with the best concepts of our professional status."[262] A debtor law firm's ability to auction off unfinished business may lead to peculiar results that impede a client's right to counsel, violate attorney-client privilege, and place undue control of the unfinished business in the hands of the debtor law firm.[263]

The creation of a secondary market for the sale or transfer of speculative client matters is at odds with a client's right "at any time, with or without cause, [to] discharge an attorney."[264] The sale of a client's unfinished business takes the client's choice of counsel out of the hands of the client and places it in the hands of the trustee of the debtor firm.[265]

The sale of unfinished client business also raises a number of ethical issues.[266] The American Bar Association ("ABA") Model Rule 1.6 Comment [2] states: "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship."[267] By selling a client's legal

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259 *Id.* at ¶ 363.02.

260 *Id.* at ¶ 363.01; *In re* Dant & Russell, Inc., 67 B.R. 360, 363 (D. Or. 1986) ("The purpose behind 11 U.S.C. § 363 is to allow businesses to continue daily operations without incurring the burden of obtaining court approval or notifying creditors for minor transactions, while protecting secured creditors and others from the dissipation of the estate's assets.").

261 *Thelen*, 476 B.R. at 742 (quoting Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989)).

262 550 N.E.2d at 411 (quotation marks omitted).

263 *Thelen*, 476 B.R. at 740–41; DeBaecke & Guilfoyle, *supra* note 11, at 61.

264 *Thelen*, 476 B.R. at 741; Demov, Morris, Levin & Shein v. Glantz, 428 N.E.2d 387, 389 (N.Y. 1981).

265 Hechinger Inv. Co. of Del., Inc. v. Allfirst Bank (*In re* Hechinger Inv. Co. of Del., Inc.), 282 B.R. 149, 161 (Bankr. D. Del. 2002) ("[T]he proceeds from a letter of credit do not constitute property of the estate under § 541. Therefore, such proceeds . . . are not subject to turnover under § 542 as property that the Debtor 'may use . . . under § 363.'") (dismissing the debtor's claim against the drawee bank for turnover of property of the estate).

266 *See Thelen*, 476 B.R. at 741; Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (*In re* Coudert Bros.), 480 B.R. 145, 169 (Bankr. S.D.N.Y. 2012).

267 MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 2 (AM. BAR. ASS'N 2015).

issues as a commodity, the debtor firm is inherently revealing information relating to the representation.[268] The Model Rules also encourage attorneys to work with clients until the completion of their legal matter.[269] Creating a disincentive for attorneys to continue representing their clients is in conflict with this rule.[270]

B. Unfinished Business Claims Violate Public Policy

Notwithstanding the statutory justification discussed in the previous section, calls to abolish the unfinished business doctrine find support in a number of public policy considerations. This section will demonstrate that (1) the *Jewel* doctrine is no longer applicable to modern firms,[271] (2) unfinished business claims undermine the attorney-client relationship,[272] and (3) unfinished business claims have a negative impact on the recovery of the legal industry.[273]

1. The Jewel *Doctrine No Longer Applies to Modern Firm Bankruptcies*

In her prescient 2013 article, *Ripping the Jackson Pollock Off the Wall: Reconciling Jewel v. Boxer with the Modern Law Firm,* Ms. Rachel Arnett highlights the complexities associated with applying the unfinished business doctrine to the modern law firm.[274] Ms. Arnett explains that, "[a]pplying *Jewel* to the complex, dynamic and perhaps already unsustainable 'Big Law' model at the very least strains reality, and likely perpetuates an approach to the law that no longer fits the profession."[275] Many law firms, particularly global law firms that have found themselves at the center of unfinished business claims, are unrecognizable when compared to *Jewel*.[276] The advent of different

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[268] *See id.* at r. 1.6.

[269] *Can My Attorney Quit?*, LAWINFO, http://resources.lawinfo.com/civil-litigation/can-my-attorney-quit.html (last visited Jan. 3, 2016).

[270] *See id*.

[271] *See generally* Arnett, *supra* note 9, at 557.

[272] Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 735 (S.D.N.Y. 2012) (stating that "[t]his concept of law firm property collides with the essence of the attorney-client relationship") (quotation marks omitted).

[273] Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP, 527 B.R. 24, 33 (N.D. Cal. 2014); *see also* Worrell, *supra* note 15, at 875.

[274] *See* Arnett, *supra* note 9, at 558.

[275] *Id.* at 566.

[276] *Id*.

incorporation and operating methods for law firms has limited the applicability of the *Jewel* doctrine in bankruptcy cases.[277]

The Northern District of California's recent decision in *Heller* echoes the argument that the *Jewel* doctrine is no longer applicable to modern law firm bankruptcies.[278] The court's reasoning highlights many of the common factors in the recent wave of law firm bankruptcies, factors that were not present in *Jewel*.[279] *Heller* distinguishes *Jewel*, undermining the basis of recent claims brought by many bankruptcy trustees.[280]

In addition to public policy considerations, the court in *Heller* highlighted the fact that (1) Heller's bankruptcy was forced; (2) Heller's clients signed new agreements with the new firms; (3) the Heller partners joined already existing firms; (4) there were no contingency matters; and (5) the case involved the Revised Uniform Partnership Act and not the Uniform Partnership Act.[281] Factors one, two, and three are common to many recent law firm bankruptcies and reflect how modern firms differ from those firms in *Jewel*.[282]

First, in *Jewel*, the partners sought to voluntarily dissolve their firm.[283] In other words, "the partners in *Jewel* could have, but chose not to, finish representing their clients on behalf of the old firm."[284] Many recent firm bankruptcies have been involuntary, resulting from a market crash and a stagnant economy.[285] The *Heller* court stressed that the context of a firm's dissolution is an important factor in determining whether the unfinished business doctrine should be applied.[286] The court explained that Heller, like other recently insolvent firms, "lacked the financial ability to continue providing legal services to its clients, leaving clients with ongoing matters no choice but to seek new counsel and Heller Shareholders no choice but to seek new employment."[287]

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277 *Id.* at 566–70.
278 *Heller Ehrman*, 527 B.R. at 29–30.
279 *Id.* at 29.
280 *Id*.
281 *Id*.
282 *See id.* at 24.
283 Jewel v. Boxer, 156 Cal. App. 3d 171, 174 (Cal. Ct. App. 1984).
284 *Heller Ehrman*, 527 B.R. at 29.
285 *Id.* at 24.
286 *Id.*
287 *Id.* at 29 (quotation marks omitted).

Second, Judge Breyer also noted that in *Jewel*, "[t]he new firms represented the clients under fee agreements entered into between the client and the old firm."[288] In *Heller*, the clients signed new agreements with the new firms.[289] The court in *Heller* found that the new agreements signed by Heller shareholders signified a departure from the matters of the old firm and created enough separation to transition the client matters away from unfinished business to new business.[290]

Finally, the court considered that the Heller shareholders joined already existing firms as opposed to creating new firms.[291] Judge Breyer distinguished *Jewel* by explaining that "[h]ere, Defendants are pre-existing third-party firms that provided substantively new representation, requiring significant resources, personnel, capital, and services well beyond the capacity of either Heller or its individual Shareholders."[292] Judge Breyer stressed "the third-party firms never owed any duty, fiduciary or otherwise, to the dissolved firm."[293]

2. *Unfinished Business Claims Undermine the Attorney-Client Relationship*

The inclusion of hourly-fee unfinished business in the property of the estate places a strain on both sides of the attorney-client relationship.[294] For the attorney, unfinished business claims create a financial disincentive to continue providing legal services for existing clients.[295] This disincentive also encroaches on a client's right to hire counsel.[296]

The impediment on the attorney-client relationship is due in part to how the relationship between attorneys and clients has evolved.[297] A client's loyalty often resides with the attorney with whom he or she has built a relationship, not with the firm.[298] The client is more likely to choose an attorney with whom

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288 *Heller Ehrman*, 527 B.R. at 29 (quoting *Jewel*, 156 Cal. App. 3d at 174).
289 *Id.* at 29.
290 *See* Eisenbach, *supra* note 17 (citing *Heller Ehrman*, 527 B.R. at 29).
291 *Heller Ehrman*, 527 B.R. at 29.
292 *Id*.
293 *Id*.
294 Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 735 (S.D.N.Y. 2012) (stating that "[t]his concept of law firm property collides with the essence of the attorney-client relationship") (quotation marks omitted).
295 Worrell, *supra* note 15, at 854–55.
296 *Id.* at 851–53.
297 *See generally* DeBaecke & Guilfoyle, *supra* note 11, at 47.
298 *See* Wang, *supra* note 20.

he or she is comfortable working, and when that attorney moves on to a new firm, the client will bring his or her matters as well.[299]

Using the *Heller* bankruptcy as an example, allowing unfinished client matters to be treated as property of the estate "would all but force former Heller clients to retain new counsel with no connection to Heller or their matters."[300] Firms that are conscious of risk would either be discouraged from hiring attorneys from dissolved firms or be discouraged from accepting new clients associated with a firm in the midst of a bankruptcy case.[301]

The public policy reasoning against unfinished business claims also finds support in the ABA Model Rules of Professional Conduct.[302] Two ABA rules that appear to be at odds with the unfinished business doctrine are Rule 1.5, Fees, and Rule 5.6, Restriction on Rights to Practice.[303]

First, Rule 1.5(e) states:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.[304]

When a bankruptcy trustee pulls profits from unfinished business back into the estate, the trustee is essentially forcing the former partner to split his or her fees.[305] The situation becomes more complicated when the firm has dissolved.[306] The estate itself cannot perform proportional services or assume responsibility for the representation.[307]

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299 *See* Stewart, *The Collapse*, *supra* note 3.
300 Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP, 527 B.R. 24, 33 n.10 (N.D. Cal. 2014).
301 *Id.* at 33.
302 Worrell, *supra* note 15, at 855.
303 MODEL RULES OF PROF'L CONDUCT r. 1.5, 5.6 (AM. BAR ASS'N 2015).
304 *Id.* at r. 1.5.
305 *See id.*
306 *See id.*
307 *See id.*

Second, Rule 5.6 states:

> A lawyer shall not participate in offering or making:
>
> (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . . .[308]

As discussed above, the unfinished business doctrine creates a disincentive for former partners to continue representing clients associated with their dissolved firm.[309] This disincentive may in fact violate Rule 5.6(a) because it creates a barrier to an attorney's freedom to practice.[310]

3. *Unfinished Business Claims Have a Negative Impact on the Economic Recovery of the Legal Industry*

The application of the unfinished business doctrine has an economic impact reaching beyond the scope of a specific dissolution or bankruptcy proceeding. Concerned about their own liability, attorneys and firms are hesitant to take on matters associated with bankrupt firms.[311] This restriction on an attorney's ability to practice leads many firms to leave money on the table in a volatile market.

The uncertainty surrounding unfinished business claims has a coercive impact on how law firms approach litigation. With no clear understanding of how damages are calculated, many law firms opt to settle with the bankruptcy estate.[312] In an amicus brief related to the Thelen bankruptcy, attorneys associated with the Heller, Howrey, and Dewey bankruptcies discussed the challenges that the unsettled nature of the doctrine creates for firms that want to defend themselves.[313] They argue that it is impossible for a partnership to "effectively manage itself during a crisis when some partners (in New York) believe that they are immune from the unfinished business rule while their

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308 *Id.* at r. 5.6.

309 *See id*.

310 *See id*.

311 Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP, 527 B.R. 24, 33 (N.D. Cal. 2014); *see also* Worrell, *supra* note 15, at 875.

312 Andrew Scurria, *Trustee Strikes $1.5M Deal With 31 Ex-Partners*, LAW360 (Sept. 22, 2014), http://www.law360.com/articles/579642/howrey-trustee-strikes-1-5m-deal-with-31-ex-partners.

313 Brief for Allan B. Diamond et al. as Amici Curiae Supporting Appellant, Geron v. Seyfarth Shaw LLP (*In re* Thelen LLP), 736 F.3d 213 (2d Cir. 2013).

fellow partners (in California, D.C., Illinois, and elsewhere) must account back to the firm."[314]

Leaving the law unsettled has a negative impact on firms in terms of opportunity cost and capital. The risk of litigation leads some firms to simply forego what would be an otherwise sound business opportunity. For firms that decide to hire partners from bankrupt firms, the uncertainty of litigation, and thus the pressure to settle, may increase the cost of acquiring new business.

C. Practical Solutions for Law Firms

Despite strong grounds for abolishing unfinished business claims in bankruptcy, the *Howrey* decision demonstrates that these claims are still tenable in some jurisdictions.[315] This section will review some contractual safeguards and best practices for firms hoping to mitigate the risk associated with hiring lateral partners from insolvent firms.[316]

1. The Timely Inclusion of a Jewel *Waiver*

First, a *Jewel* waiver should be added to partnership agreements that do not already contain one.[317] The timing of a *Jewel* waiver is material to the success of some claims brought by trustees of the debtor firms.[318] It is a best practice to immediately add a missing waiver to avoid any questions about insolvency, and as evidenced in *Brobeck*, open the door to a fraudulent transfer action.[319]

Drafting the provision does not need to be an arduous process.[320] In his article, *Claims for Unfinished Business Should be Avoided*, Arthur J. Ciampi offers this straightforward and effective example:

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[314] *Id.*

[315] *See* No. 13-02700, 2014 U.S. Dist. LEXIS 110067, at *10 (N.D. Cal. Aug. 8, 2014).

[316] *See* Phillips, *supra* note 10; Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 331 (Bankr. N.D. Cal. 2009) ("Of course, the parties were free to enter into an agreement providing for the allocation of fees relating to unfinished business in any manner they wished.") (citing Rothman v. Dolin, 20 Cal. App. 4th 755, 759 n.4 (Cal. Ct. App. 1993)); Lauren F. McKelvey & Dylan G. Trache, *Can Bankrupt Law Firms Claw Back 'Unfinished Biz' Profits?*, LAW360 (May 30, 2014), http://www.wileyrein.com/publications.cfm?sp=articles&id=9753.

[317] Jewel v. Boxer, 156 Cal. App. 3d 171, 174 (Cal. Ct. App. 1984); *Brobeck, Phleger & Harrison*, 408 B.R. at 334 ("Of course, the parties were free to enter into an agreement providing for the allocation of fees relating to unfinished business in any manner they wished.") (citing *Rothman*, 20 Cal. App. 4th at 759 n.4).

[318] *See Brobeck, Phleger & Harrison*, 408 B.R. at 331.

[319] Phillips, *supra* note 10; *see Brobeck, Phleger & Harrison*, 408 B.R. at 331 (addressing whether partners of a dissolved law firm fraudulently transferred unfinished business to their new firms).

[320] Ciampi, *supra* note 131.

> **Waiver Concerning Unfinished Business**. Neither the Partners nor any third parties shall have any claim or entitlement to any funds related to clients, cases or matters including, without limitation, those ongoing at the time of any bankruptcy, insolvency, dissolution or termination of the Partnership, other than the entitlement for collections of amounts due for work performed by the partners or other Partnership personnel on behalf of the Partnership prior to their departure from the Partnership or prior to, including, without limitation, any bankruptcy, insolvency, dissolution or termination of the Partnership. The provisions of this Paragraph are intended to and expressly waive, opt out of and are in lieu of any right any partner, the Partnership or a third-party may have to "unfinished business" of the Partnership.[321]

In conjunction with an unfinished business claim, trustees may bring claims for tortious interference, arguing "a hiring firm somehow contributed to a struggling firm's downfall."[322] This often has to do with other firms poaching partners from a struggling law firm.[323] Hiring firms may try to limit liability by requesting that lateral hires confirm that they will "have met and will meet all of their obligations to their former firm, including complying with any departure notice provisions in the partnership agreement . . . ."[324] The hiring firm may ask the lateral hire to indemnify the hiring firm for any violation or seek third-party counsel for advice on the transition.[325]

2. The Importance of Choice of Law Provisions

While some jurisdictions have put an end to unfinished business claims, other courts have not.[326] Therefore, in addition to the commonly accepted practices discussed above, law firms must also pay close attention to choice of law provisions in their partnership agreements,[327] ensuring that the provisions select jurisdictions where the law is clear.[328] For example, the *Howrey* court,

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321 *Id.*

322 Phillips, *supra* note 10.

323 *Id.*

324 *Id.*

325 *Id.*

326 Trache, *supra* note 105; *see In re* Howrey LLP, No. 13-02700, 2014 U.S. Dist. LEXIS 110067 (N.D. Cal. Aug. 8, 2014).

327 Trache, *supra* note 105; *see Howrey*, 2014 U.S. Dist. LEXIS 110067.

328 *See generally Howrey*, 2014 U.S. Dist. LEXIS 110067, at *4–5.

sitting in the Northern District of California, applied District of Columbia law and extended the unfinished business claim doctrine to hourly-fee agreements.[329]

Further, firms must be cognizant of timing and drafting issues when adding or amending choice of law provisions.[330] In the 2012 *Thelen* decision, the court applied New York law even though the debtor firm's partnership agreement contained a California choice of law provision.[331] The court found that the firm's fourth partnership agreement, which contained the choice of law provision in question, was a fraudulent transfer "because it was entered into while the firm was insolvent."[332] Because "a contractual choice of law provision governs only a cause of action sounding in contract, not one sounding in tort," the court found the California choice of law provision unenforceable.[333]

Firms can address the choice of law issues raised in *Thelen* rather easily.[334] First, it is important for firms to add the choice of law provision either at formation or while the firm is still financially healthy.[335] Thus, the firm will have a stronger defense against a fraudulent transfer claim.[336] Second, the firm should expressly state that the choice of law provision extends to matters sounding in tort. In *Drafting Contracts: How and Why Lawyers Do What They Do*, Tina L. Stark explains, "not covering torts one way or the other often leads to litigation."[337] As a solution, Ms. Stark offers the following example provision:

> **Governing Law**. The laws of [insert state name] (without giving effect to its conflicts of law principles) govern all matters arising under and relating to this Agreement, including torts.[338]

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329 *Id*.

330 Trache, *supra* note 105; *see* Jewel v. Boxer, 156 Cal. App. 3d 171, 174 (Cal. Ct. App. 1984).

331 476 B.R. 732, 737 (S.D.N.Y. 2012).

332 Worrell, *supra* note 15, at 845 n.115 (citing *Thelen*, 476 B.R. at 737–38).

333 *Thelen*, 476 B.R. at 737–38 (quoting Drenis v. Haligiannis, 452 F. Supp. 2d 418, 425–26 (S.D.N.Y. 2006)).

334 *See Thelen*, 20 N.E.3d 264 (N.Y. 2014).

335 *See id.* (citing Drenis, 452 F. Supp. 2d at 425–26).

336 *See* Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 333 (Bankr. N.D. Cal. 2009).

337 Tina L. Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 227 (Aspen 2d ed. 2013).

338 *Id.* at 226.

The risk mitigation strategies discussed above all highlight the importance of timing. Ideally, firms should parse out the plans for their dissolution at their formation.

CONCLUSION

Just as all signs pointed to the end of unfinished business claims in law firm bankruptcies, the *Howrey* decision tempered the optimism of many in the legal community. *Howrey* demonstrates that hourly fee unfinished business claims remain alive and well in some jurisdictions. Moving forward, courts should look to recent decisions in New York and California for guidance. Allowing trustees to include pending hourly client matters in a failed firm's bankruptcy estate conflicts with the Code and raises a number of public policy issues.

First, pending hourly fee matters are not property of the estate under § 541. Legal issues are property of the client, not the law firm. Law firms do not have a legal and equitable interest in speculative profits under state law. Even if state law were to find that a law firm has a legal and equitable interest in pending hourly matters, the post-petition services exception in § 541 should bar the matters from being included in the bankruptcy estate.

Second, unfinished business claims create potential conflicts with the Code. Including pending hourly fee matters in the bankruptcy estate creates a conflict between a client's right to counsel and the automatic stay. Additionally, the Code's rules governing a trustee's ability to sell and transfer assets of the estate may lead to a situation where client matters can be bought and sold to the highest bidder.

Finally, including hourly fee unfinished business in the bankruptcy estate raises a number of public policy issues. Unfinished business claims undermine the attorney-client relationship by creating a chilling effect for partners of bankrupt firms who wish to continue representing former clients. This chilling effect adversely impacts a client's right to counsel and places a restriction on an attorney's right to practice. Further, the costs associated with litigating and

settling these claims have a negative impact on the economic recovery of an industry still reeling from the financial crisis.

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