AMERICAN BANKRUPTCY INSTITUTE

2020 Alexander L. Paskay Memorial Bankruptcy Seminar

PLENARY SESSION

# ABI Talks: Impact on Bankruptcy Practice of Five Recent Supreme Court Decisions or Pending Decisions


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2020

# ABI TALKS:

IMPACT ON BANKRUPTCY PRACTICE OF FIVE RECENT SUPREME COURT DECISIONS OR PENDING DECISIONS BASED ON THE INCREDIBLY POPULAR "TED TALKS" FORMAT, THESE ABI TALKS WILL ADDRESS THE IMPACT THAT FIVE RECENT SUPREME COURT DECISIONS (IN SOME CASES, PENDING DECISIONS) HAVE OR WILL HAVE ON BANKRUPTCY PRACTICE

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# TAGGART V. LORENZEN

587 US _ (2019)

# SANCTION (COMMON USAGE):

- To officially authorize, approve or allow.
- To ratify or confirm.
- Authoritative permission or approval that makes a course of action valid.
- Support or encouragement, as from public opinion or established custom.
- A consideration, influence, or principle that dictates an ethical choice.
- The act of making sacred; the act of rendering authoritative as law; the act of decreeing or ratifying; the act of making binding, as by an oath.
- The conferring of authority upon an opinion, practice, or sentiment; confirmation or support derived from public approval, from exalted testimony, or from the countenance of a person or body commanding respect

## SANCTION (LAWYER USAGE):

- To penalize or punish, as for violating a moral principle or international law.
- Penalty for disobedience.
- Penalty for noncompliance with a law or legal order, specified or in the form of moral pressure, that acts to ensure compliance with a social standard or norm.
- The detriment, loss of reward, or coercive intervention annexed to a violation of a law as a means of enforcing the law.
- Mechanism of social control for enforcing a society's standards.

Wessler, Charles B., Brad Krevoy, Steven Stabler, Peter Farrelly, Bennett Yellin, Bobby Farrelly, Jim Carrey, Jeff Daniels, Lauren Holly, aKaren Duffy. 2005. *Dumb and dumber*. [United States]: Alliance Atlantis.

## Adolphe Quetelet (1796-1874)

**Astronomer, mathematician, statistician and sociologist**

**Founder of the idea of l'homme moyen" – the average man.**

## *Vaughan v. Menlove*
## *132 ER 490 (CP) (1837)*

- ***Defense: his client's "misfortune of not possessing the highest order of intelligence."***

***Ruling "whether the Defendant had acted honestly and bona fide to the best of his own judgment . . . would leave so vague a line as to afford no rule at all... [Because the judgments of individuals are...] as variable as the length of the foot of each... we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."***

LARA ROESKE FERNANDEZ

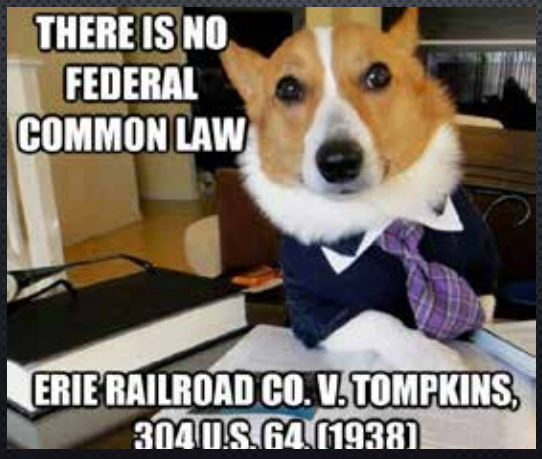
TAMPA

TRENAM LAW

## RODRIGUEZ V. FDIC

***CITATION PENDING***

# EXERCISE OF FEDERAL COMMON LAW– ONLY IN FEW RESTRICTED INSTANCES




# WHO OWNS THE REFUND?

# THE CONFLICT
## STATE LAW V. FEDERAL COMMON LAW

TIFFANY PAYNE GEYER
BAKERHOSTETLER; ORLANDO

# *MISSION PRODUCT HOLDINGS, INC. V. TEMPNOLOGY, LLC, NKA OLD COLD LLC*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ARGUED FEBRUARY 20, 2019—DECIDED MAY 20, 2019

*JUSTICE KAGAN DELIVERED THE OPINION OF THE COURT,*
*JUSTICE SOTOMAYOR FILED A CONCURRENCE, AND JUSTICE GORSUCH DISSENTED.*

## CERTIORARI, CASE FACTS AND POSTURE

### Why Certiorari?

Certiorari granted to resolve the division between the First and Seventh Circuits on effects of "rejection" under 11 U.S.C. § 365(g) in the context of a trademark licensing agreement.

### Case Background Facts

Tempnology manufactured clothing and accessories designed to stay cool when used during exercise. Mission Products entered into a contract with Tempnology which gave Mission a license to use Tempnology's trademarks in the distribution of certain clothing and accessories. Tempnology filed for Chapter 11 and sought to reject its agreement with Mission.

### Procedural Posture

The Bankruptcy Court approved Tempnology's rejection of the contract with Mission, and terminated Mission's rights to use Tempnology's trademarks. The Bankruptcy Appellate Panel for the First Circuit reversed, relying heavily on a 2012 decision of the Court of Appeals for the Seventh Circuit.

The First Circuit rejected the view of the BAP and the Seventh Circuit, and reinstated the Bankruptcy Court's decision terminating Mission's trademark license.

After the Bankruptcy Court ruled that rejection terminated Mission's right to use the trademarks, Mission, in compliance with the ruling, did not distribute products with the Tempnology mark. Before the case arrived at the Supreme Court, Mission's trademark license with Tempnology expired by its own terms.

## IS THE CASE MOOT ON ARRIVAL TO THE SUPREME COURT?

### WHEN IS A CASE MOOT?

WHEN "IT IS IMPOSSIBLE FOR A COURT TO GRANT ANY EFFECTUAL RELIEF WHATEVER." *CHAFIN V. CHAFIN,* 568 U. S. 165, 172 (2013) .

TEMPNOLOGY ARGUED THE CASE WAS MOOT BECAUSE MISSION NEVER USED THE TRADEMARKS DURING AFTER TEMPNOLOGY REJECTED THE TRADEMARK LICENSE AGREEMENT, AND THE LICENSE HAD EXPIRED ON ITS OWN TERMS BEFORE THE CASE ARRIVED AT THE SUPREME COURT. THE SUPREME COURT SAID THAT GETS THINGS BACKWARD. MISSION'S NONUSE OF THE MARKS DURING THAT TIME IS PRECISELY WHAT GAVE RISE TO ITS DAMAGES CLAIM; HAD IT USED THE MARKS, IT WOULD NOT HAVE LOST ANY PROFITS. THE FACT THAT THE LICENSE EXPIRED BEFORE THE CASE ARRIVED ON THE SUPREME COURT'S DOORSTEP WAS OF NO MOMENT.

TEMPNOLOGY ALSO ARGUED THAT MISSION'S NON-USE WAS ITS OWN "CHOICE," FOR WHICH DAMAGES CANNOT LIE. THE SUPREME COURT DISAGREED WITH THIS AS WELL. ("[C]OMPLIANCE [WITH A JUDICIAL DECISION] DOES NOT MOOT [A CASE] IF IT REMAINS POSSIBLE TO UNDO THE EFFECTS OF COMPLIANCE," AS THROUGH COMPENSATION). CF. 13B WRIGHT & MILLER §3533.2.2, AT 852.

MISSION PRESENTED A CLAIM FOR MONEY DAMAGES— ESSENTIALLY LOST PROFITS—ARISING FROM ITS INABILITY TO USE THE "COOLCORE" TRADEMARKS BETWEEN THE TIME TEMPNOLOGY REJECTED THE LICENSING AGREEMENT AND ITS SCHEDULED EXPIRATION DATE. THESE CLAIMS, IF AT ALL PLAUSIBLE, ENSURED A LIVE CONTROVERSY. *MEMPHIS LIGHT, GAS & WATER DIV. V. CRAFT*, 436 U. S. 1, 8–9 (1978). THIS IS TRUE EVEN IF RECOVERY ON A CLAIM MAY BE UNCERTAIN OR EVEN UNLIKELY. IF THERE IS ANY CHANCE OF MONEY CHANGING HANDS, MISSION'S SUIT REMAINS LIVE.

THUS, MISSION PRESENTED A LIVE CASE AND CONTROVERSY FOR ADJUDICATION.

## THE SUPREME COURT RULING

SECTION 365(G) PROVIDES THAT REJECTION "CONSTITUTES A BREACH." AND "BREACH" IS NEITHER A DEFINED NOR A SPECIALIZED BANKRUPTCY TERM—IT MEANS IN THE CODE WHAT IT MEANS IN CONTRACT LAW OUTSIDE BANKRUPTCY. *FIELD V. MANS*, 516 U. S. 59, 69. OUTSIDE BANKRUPTCY, A LICENSOR'S BREACH CANNOT REVOKE CONTINUING RIGHTS GIVEN TO A COUNTERPARTY UNDER A CONTRACT (ASSUMING NO SPECIAL CONTRACT TERM OR STATE LAW). AND BECAUSE REJECTION "CONSTITUTES A BREACH," THE SAME RESULT MUST FOLLOW FROM REJECTION IN BANKRUPTCY. IN PRESERVING A COUNTERPARTY'S RIGHTS, SECTION 365 REFLECTS THE GENERAL BANKRUPTCY RULE THAT THE ESTATE CANNOT POSSESS ANYTHING MORE THAN THE DEBTOR DID OUTSIDE BANKRUPTCY.

SO, REJECTION IS NOT TANTAMOUNT TO RECESSION, AND DOES NOT YIELD INJUNCTIVE RELIEF.

## THE BANKRUPTCY CODE SECTIONS BEHIND THE RULING

11 U.S.C. § 541(a) - The filing of a petition creates a bankruptcy estate consisting of all the debtor's assets and rights.

11 U.S.C. § 365(a) - A "trustee [or debtor], subject to the court's approval, may assume or reject any executory contract." A contract is executory if "performance remains due to some extent on both sides." *NLRB v. Bildisco & Bildisco*, 465 U. S. 513, 522, n. 6 (1984)

11 U.S.C. § 365(g) – The rejection of an executory contract constitutes a breach of such contract. The debtor's breach is deemed to occur "immediately before the date of the filing of the bankruptcy petition rather than on the actual post-petition rejection date. §365(g)(1).

*The result of rejection? The breaching party (here, Tempnology) can stop performing under the contract. The counterparty (here, Mission) gets a prepetition claim against the estate for damages resulting from the debtor's nonperformance. This places the counterparty to a rejected contract in the same boat as the debtor's unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar.*

## TEMPNOLOGY'S "NEGATIVE INFERENCE"

Tempnology argued, based on a negative inference, that its rejection of the contract also terminated the rights it had granted Mission to use the Coolcore trademarks.

Certain provisions in Section 365 state that a counterparty to specific kinds of agreements may keep exercising contractual rights following rejection:

Section 365(h) provides that if a bankrupt landlord rejects a lease, the tenant need not move out; instead, she may stay and pay rent until the lease term expires.

Section 365(n) sets out a similar rule for some types of intellectual property licenses which do not include trademark licenses: If the debtor-licensor rejects the agreement, the licensee can continue to use the property (typically, a patent), so long as it makes whatever payments the contract demands.

*Tempnology's negative inference: Because neither Section 365(n) nor any similar provision covers trademark licenses, rejection under 365(g) must extinguish the rights that the agreement had conferred on the trademark licensee.*