Professor Kenneth N. Klee and Whitman L. Holt on

Supreme Court's Holding in *Mission Product Holdings, Inc. v. Tempnology, LLC*, 2019 U.S. LEXIS 3544 (May 20, 2019)

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I. Summary of Holding and Lessons to Be Learned

In an 8–1 decision authored by Justice Kagan, the Supreme Court of the United States holds that a debtor-licensor's rejection of a trademark licensing agreement pursuant to Bankruptcy Code section 365 does not necessarily deprive the trademark licensee of its rights to use the mark. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 2019 U.S. LEXIS 3544, at *4-5 (May 20, 2019). In reaching this conclusion, the Court articulates a general principle applicable to all executory contracts and unexpired leases: "A rejection breaches a contract but does not rescind it," which means that "all the rights that would ordinarily survive a contract breach" by the debtor outside of the bankruptcy context will "remain in place." *Id.* at *5.

The *Tempnology* decision is significant for several reasons. First, the opinion clarifies a foundational question about the effects of contract rejection that caused confusion among some courts and commentators for more than three decades. Second, the rule endorsed by the Court will provide valuable protections in a bankruptcy scenario for licensees, lessees, and other counterparties to contracts that included a prepetition grant or conveyance of possessory or other rights by the debtor. Unfortunately, as the Court openly admits, in some cases those protections may impede or destroy the ability of certain debtors to reorganize their businesses in chapter 11. Third, the opinion suggests a Court that may be inclined to pull back on the reach of "mootness" doctrines in the bankruptcy context. Finally, during the process of developing the analysis supporting its ultimate holding, the Court reaffirms several principles of bankruptcy law and statutory interpretation that will be relevant in various other contexts.

II. Legal Background

The modern Bankruptcy Code codifies a longstanding principle of insolvency law[1] by allowing an estate representative to "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Retaining valuable agreements while shedding burdensome agreements helps to maximize the value of the estate and facilitate a reorganization or fresh start. *See, e.g.*, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (discussing how "the authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization").

1 *See, e.g.*, *Sunflower Oil Co. v. Wilson*, 142 U.S. 313, 322-23 (1892) (allowing railway receiver the choice between assumption and rejection of contracts). Indeed, various other statutory insolvency processes include powers similar to those given to an estate representative by Bankruptcy Code section 365. *See, e.g.*, 12 U.S.C. § 1821(e) (enabling the FDIC as conservator or receiver to disaffirm or repudiate contracts); 12 U.S.C. § 5390(c) (enabling receiver for a "covered financial company" to disaffirm or repudiate contracts); N.Y. Banking Law § 618-a (allowing regulatory superintendent to assume or repudiate contracts of a banking organization).

The statute does not precisely delineate all of the potential consequences of rejection. As a general matter, "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease . . . immediately before the date of the filing of the petition." *See* 11 U.S.C. § 365(g)(1). Such a deemed breach will give the contract counterparty the ability to assert a "claim" against the bankruptcy estate "the same as if such claim had arisen before the date of the filing of the petition." *See id.* § 502(g)(1). But the statute is not precise in terms of the consequences of rejection on vested rights or remedies the counterparty might have had outside of bankruptcy when those remedies are not cleanly conceptualized as bankruptcy "claims."

Application of section 365 can produce difficult problems when the contract at issue is not straightforward or involves multiple components. A particularly troublesome subject has been the legal consequences flowing from rejection of license agreements under which the debtor is a licensor. In *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), the appellate court concluded that rejection would deprive the licensee counterparty of "all rights" regarding licensed technology and thereby leave the licensee with only a prepetition rejection damages claim. *See id.* at 1048.

Congress reacted to *Lubrizol* by amending the Bankruptcy Code in 1988 to add section 365(n) and thereby "make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to Section 365 in the event of the licensor's bankruptcy." S. Rep. No. 100-505, at 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3200. Section 365(n) provides several special rights for the licensee that is party to a rejected contract under which the debtor licenses "a right to intellectual property," including a right for the licensee to retain its IP rights pursuant to the contractual terms. *See* 11 U.S.C. § 365(n).[2] Critically, however, section 365(n)'s scope is limited by the Bankruptcy Code's definition of "intellectual property," which definition includes trade secrets, patents, copyrights, mask work, and other items, but ***excludes*** trademarks. *See id.* § 101(35A).

The exclusion of trademarks from the reach of section 365(n) leaves open a question of what result obtains when a trademark license agreement is rejected in bankruptcy, which in turn reduces to a broader question whether *Lubrizol* was correctly decided. The Court of Appeals for the Seventh Circuit confronted this issue directly in *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012). In a brief opinion authored by Circuit Judge Frank Easterbrook, the *Sunbeam* court concluded that *Lubrizol* was "mistaken" and because, "[o]utside of bankruptcy, a licensor's breach does not terminate a licensee's right to use intellectual property," rejection of a trademark license does not divest the licensee of its right to use the trademark. *See id.* at 376-77. Despite the fact that *Sunbeam* unquestionably and openly "create[d] a conflict among the circuits" through its categorical rejection of *Lubrizol*, *see id.* at 378, the Supreme Court denied a petition for writ of certiorari. *See Sunbeam Prods., Inc. v. Chi. Am. Mfg., LLC*, 568 U.S. 1076 (2012). It would not be long, however, before the central issue would recur.

2 Section 365(n) is similar to several other subsections of section 365 that grant special rights to certain categories of counterparties, including for lessees of real property in section 365(h) and for purchasers of real property or timeshare interests in section 365(i)-(j).

III. Facts and Proceedings Below

Mission Product Holdings, Inc. ("Mission") licensed various trademark, distribution, and other rights from Tempnology, LLC ("Tempnology") as part of a co-marketing contract the parties executed in November 2012. *In re Tempnology, LLC*, 541 B.R. 1, 2-3 (Bankr. D.N.H. 2015). Prior to any bankruptcy filing, Mission exercised certain provisions of the agreement that entitled it to retain distribution and trademark rights until July 1, 2016, and certain other nonexclusive intellectual property rights in perpetuity. *Id.* at 3-4.

On September 1, 2015, Tempnology filed a chapter 11 bankruptcy petition in the Bankruptcy Court for the District of New Hampshire. *Id.* at 4. The following day, Tempnology moved to reject numerous contracts, including its agreement with Mission. *Id.* Mission objected to the rejection motion and asserted the ability to preserve rights under Bankruptcy Code section 365(n), but after further briefing the bankruptcy court held that section 365(n) did not apply and hence "Mission does not retain rights to the Debtor's trademarks and logos post-rejection." *See id.* at 4, 8.

Mission appealed this decision to the Bankruptcy Appellate Panel for the First Circuit (the "BAP"). The BAP agreed with the bankruptcy court "that § 365(n) incorporates the definition of intellectual property set forth in § 101, and that the definition does not encompass trademarks and logos," but disagreed with the bankruptcy court about "the *effect* the Debtor's rejection of the Agreement had on Mission's licensee rights in the Debtor's trademark and logo." *See Mission Prod. Holdings, Inc. v. Tempnology LLC (In re Tempnology LLC)*, 559 B.R. 809, 821-22 (B.A.P. 1st Cir. 2016). With regard to the "effect" question, the BAP framed the issue as a dispute between the decisions in *Lubrizol* and *Sunbeam*, adopted "*Sunbeam*'s interpretation of the effect of rejection of an executory contract under § 365 involving a trademark license," and thus held that the bankruptcy court "erred in ruling that Mission's rights in the Debtor's trademark and logo as set forth in the Agreement terminated upon the Debtor's rejection of the Agreement." *See id.* at 822-23.

Mission pursued a further appeal to the Court of Appeals for the First Circuit. The First Circuit panel agreed with both the bankruptcy court and the BAP "that section 365(n) does not apply to Mission's right to be the exclusive distributor of Debtor's products, or to its trademark license." *Mission Prod. Holdings, Inc. v. Tempnology, LLC (In re Tempnology, LLC)*, 879 F.3d 389, 395 (1st Cir. 2018). By a 2–1 vote, however, the panel disagreed with the BAP about the effects of rejection and concluded that rejection of a trademark license eliminates the licensee's right to use the trademark. *See id.* at 401-04. The panel's analysis was express in framing the dispute as one in which the First Circuit had to decide whether to join the Fourth Circuit (in *Lubrizol*) or the Seventh Circuit (in *Sunbeam*) regarding an issue about which the circuits are split; the panel ultimately decided that *Lubrizol* provided the better approach. *Id.* Dissenting Circuit Judge Torruella came to the opposite conclusion and "would follow the Seventh Circuit and the BAP in finding that Mission's rights to use Debtor's trademark did not vaporize as a result of Debtor's rejection of the executory contract." *See id.* at 405-07 (Torruello, J., dissenting).

Mission then petitioned for a writ of certiorari, seeking review of two questions—the first relating to the basic split between *Lubrizol* and *Sunbeam* and the second regarding whether "an exclusive right to sell certain products practicing a patent in a particular geographic territory is a 'right to intellectual

property' within the meaning of § 365(n) of the Bankruptcy Code." The Supreme Court granted Mission's petition on October 26, 2018, but limited the grant to only the first question presented. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 397, 202 L. Ed. 2d 309 (2018). Several *amicus* briefs were filed in support of Mission's position on the merits, including by the Office of the Solicitor General, multiple trade and bar organizations, and a group of law professors. No party filed an *amicus* brief in support of Tempnology or in defense of *Lubrizol*. The case was argued on February 20, 2019, with the Solicitor General participating in oral argument as *amicus curiae* supporting Mission.

IV. Analysis

A. The Court's Primary Opinion

After a short summary of the question before the Court and its ultimate holding, Justice Kagan's majority opinion begins by summarizing the facts and procedural history of the dispute between Tempnology and Mission and its percolation to a firm "division between the First and Seventh Circuits." *See* 2019 U.S. LEXIS 3544, at *5-10.

The Court then turns "to consider Tempnology's claim that this case is moot" (a contention with which Justice Gorsuch agrees in his dissent). *Id.* at *11. In what is essentially an issue of "constitutional" or Article III mootness, the Court concludes that its "demanding standard" for dismissal is not met, because "[i]f there is any chance of money changing hands, Mission's suit remains live" and in the case before the Court, Mission indicated that it may "seek the unwinding of prior distributions to get its fair share of the estate," which is sufficient to leave a live controversy for the Court to resolve. *See id.* at *11-13. The Court does note that it is not resolving whether Mission can ***in fact*** obtain any recovery from Tempnology. *See id.* at *13 (observing that "whether Tempnology did anything to Mission amounting to a legal wrong is a prototypical merits question, which no court has addressed and which has no obvious answer"). The Court's inclination to find a sufficiently robust controversy for Article III purposes to allow consideration on the merits is consistent with its approach in *Czyzewski v. Jevic Holding Corp.*, in which the Court concluded that the petitioners had Article III standing even though their possibility of an eventual recovery was uncertain. *See* 137 S. Ct. 973, 982-83 (2017). Although not analyzed in the context of the "equitable mootness" doctrine that is often raised in the bankruptcy context, it is possible that the *Tempnology* Court's mootness analysis may nevertheless be extended to oppose efforts to dismiss appeals as "equitably moot" in circumstances when "there is any chance of money changing hands," even if that chance is "uncertain or even unlikely for any number of reasons." *See* 2019 U.S. LEXIS 3544, at *11.

The Court moves to the merits by framing a very broad inquiry: "What is the effect of a debtor's (or trustee's) rejection of a contract under Section 365 of the Bankruptcy Code?" *Id.* at *13-14. To answer this question, the Court starts with the text of section 365, finding that the plain textual meaning "does much of the work." *Id.* at *14-15. More specifically, section 365(g) specifies that rejection of a contract creates a deemed breach of the contract immediately before the petition date; "[o]r said more pithily for current purposes, a rejection is a breach." *Id.* at *15. Because the word "breach" in section 365 "is neither a defined nor a specialized bankruptcy term," the word "means in the Code what it means in contract law outside bankruptcy" and requires that one analyze "non-bankruptcy

contract law, which can tell us the effects of breach" outside of bankruptcy. *See id.* In analyzing the effects of breach outside of bankruptcy, the Court posits a made-up example of a contract whereby a law firm leases a copier from a dealer that also agrees to service the copier. *Id.* at *15-16. Citing *Williston on Contracts* and describing the issue in a fashion that should be familiar to most first-year contracts students, the Court explains how a decision by the dealer to breach its servicing obligations would not allow it to unilaterally terminate the contract and repossess the copier, but instead would give the law firm a choice between termination or continued partial performance plus a damages action for breach of the servicing obligation. *See id.* This same analysis of the consequences of a "breach" flows into the bankruptcy context (with the "twist" that the damages claim is converted into a prepetition claim), and therefore "[a]s after a breach, so too after a rejection" can the contract counterparty elect to retain the rights it has obtained under the rejected contract. *See id.* at *16-17; *see also id.* at *18 ("The debtor can stop performing its remaining obligations under the agreement. But the debtor cannot rescind the license already conveyed. So the licensee can continue to do whatever the license authorizes.").

The Court expands on its textual analysis of section 365(g) by considering what it calls "core tenets of bankruptcy law." *Id.* at *20. More specifically, the Court explains that limiting the consequences of rejection to those that would follow from contract breach outside of bankruptcy "reflects a general bankruptcy rule" that the bankruptcy estate should usually track the interests in property that the debtor would have absent bankruptcy, which is a rule advanced by "prevent[ing] a debtor in bankruptcy from recapturing interests it had given up." *See id.* at *18-19 (citing various authorities for this general rule). Moreover, the Court explains how the statute has "stringent limits" on what it oddly calls "exceptional cases" of avoidance powers under chapter 5 (i.e., "far away from Section 365" in the statutory scheme), which means it is inappropriate to allow rejection to "become functionally equivalent to avoidance." *See id.* at *19-20. In essence, the Court adopts a longstanding view of many bankruptcy scholars that rejection is not an avoidance power.

The Court finally proceeds to address Tempnology's counterarguments. First, the Court directly rejects the "negative inference" argument that the special exceptions contained in subsections of 365 mean that the rule of rejection generally must be one necessitating the exceptions. *Id.* at *21-22. For the Court, "this mash-up of legislative interventions says nothing much of anything about the content of Section 365(g)'s general rule" and in fact suggests that Congress has consistently rejected Tempnology's approach. *See id.* As the Court amplifies in a footnote, these "provisions are therefore not redundant of Section 365(g)," because "[e]ach sets out a remedial scheme embellishing on or tweaking the general rejection-as-breach rule." *Id.* at *22 n.2. In sum, the Court views section 365(n)'s addition to the statute as "part of a pattern" in which "Congress whacked Tempnology's view of rejection wherever it raised its head" and therefore "no negative inference arises" in favor of *Lubrizol*'s flawed articulation of the general rule. *See id.* at *23-24.

Second, the Court rejects Tempnology's trademark-based arguments, finding no textual support in the statute for any trademark-specific rule and observing that these concerns "would allow the tail to wag the Doberman" insofar as Tempnology's legal construction "will govern not just trademark agreements, but pretty nearly every executory contract." *See id.* at *24-25.

Third and finally, the Court rejects Tempnology's policy argument regarding reorganization of trademark licensors. The Court openly admits that its interpretation of section 365 "may indeed impede some reorganizations, of trademark licensors and others," but concludes this is the balance Congress struck in the statute, which "does not permit anything and everything that might advance" the goal of business reorganization. *See id.* at *26-27. Indeed, the Court underscores how section 365 is limited in other respects, including leaving the debtor to comply with whatever burdens generally applicable nonbankruptcy law imposes on property owners and "to make economic decisions about preserving the estate's value—such as whether to invest the resources needed to maintain a trademark." *Id.* at *26. In the process of making this point, the Court cites Judicial Code section 959(b) and its requirement that a bankruptcy trustee manage the estate in accordance with applicable law.

The opinion closes by reversing the First Circuit's judgment after reciting the Court's central holding "that under Section 365, a debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy," which means rejection "cannot rescind rights that the contract previously granted." *Id.* at *27.

B. Justice Sotomayor's Concurring Opinion

Justice Sotomayor writes a short concurring opinion in which she joins the primary opinion in full but writes "separately to highlight two potentially significant features of today's holding." *Id.* at *28 (Sotomayor, J., concurring).

First, Justice Sotomayor observes that the Court is not articulating a categorical rule whereby "every trademark licensee has the unfettered right to continue using licensed marks postrejection." *Id.* Instead, "the baseline inquiry remains whether the licensee's rights would survive a breach under applicable nonbankruptcy law," which means that "[s]pecial terms in a licensing contract or state law could bear on that question in individual cases." *Id.* In other words, the outcome in any given case will be driven by the nonbankruptcy rules and contractual provisions that are applicable to that particular case.

Second, Justice Sotomayor notes how "the Court's holding confirms that trademark licensees' postrejection rights and remedies are more expansive in some respects than those possessed by licensees of other types of intellectual property" as a result of the exclusion of trademarks from Bankruptcy Code section 365(n). *Id.* at *28-29. These differences do not support Tempnology's "negative inference" argument or warrant a different conclusion by the Supreme Court. *Id.* at *29. Rather, "[t]o the extent trademark licensees are treated differently from licensees of other forms of intellectual property, that outcome leaves Congress with the option to tailor a provision for trademark licenses, as it has repeatedly in other contexts." *Id.* at *29-30.

C. Justice Gorsuch's Dissenting Opinion

Justice Gorsuch briefly dissents to express his view that the Court should dismiss the petition as improvidently granted and not proceed to the merits of the case "no matter how interesting." *Id.* at *30 (Gorsuch, J., dissenting). More specifically, Justice Gorsuch believes the case is likely moot due to the combination of (i) the expiration of Mission's license by its own terms during the pendency of

the litigation and (ii) the apparent unavailability of damages for Mission under the principle that "petitioning a court normally isn't an actionable wrong that can give rise to a claim for damages," which means, absent malice, Tempnology cannot be liable for advancing legal arguments that succeeded before the bankruptcy court yet ultimately failed on appeal. *See id.* at *31-32.

Like the majority opinion, Justice Gorsuch's mootness discussion is presented in the context of whether a dispute is constitutionally moot so as to render the judiciary without jurisdiction under Article III. Nevertheless, it is possible that the analysis may have some bearing on the separate doctrine of equitable mootness.

V. Practice Tips

The central holding of *Tempnology* clarifies a profoundly important principle of bankruptcy law: rejection of an executory contract or unexpired lease is merely a breach, not a rescission, and absent a contrary directive elsewhere in the statute, rejection will have the consequences that would flow from a breach of contract outside of bankruptcy. This principle sets the starting point for analysis of numerous rejection disputes and the Supreme Court's clarification may help eliminate some confusion that has complicated this area of law for decades.

Tempnology's clarification of the law will diminish the utility of rejection when there has been a prepetition conveyance of possessory or other rights to a contract counterparty, which could in turn significantly undermine the ability of a franchisor or equipment lessor to reorganize (a reality the Court acknowledges but ultimately finds unmoving). Although disputes about whether a given contract is "executory" will likely continue, the analysis instead may be better focused on the precise nature of the rights received and enforceable outside of bankruptcy after the debtor's breach. *See generally* *In re Hawker Beechcraft, Inc.*, 486 B.R. 264, 276 (Bankr. S.D.N.Y. 2013) ("The current dispute fulfills the prophecy, at least in the case of a rejection motion, that the time expended searching for executoriness can be spent more fruitfully doing almost anything else."). As Justice Sotomayor's concurrence highlights, this analysis will largely be driven by the fine details of the applicable nonbankruptcy law and agreements. In the case of rejection of agreements arising against a highly complex or technical legal or regulatory background, bankruptcy counsel would be well advised to consult with specialist counsel to ensure he or she has a comprehensive understanding of the results that would occur after breach outside of bankruptcy.

In the past, there have been some efforts by trademark industry groups to cause Congress to amend the Bankruptcy Code to include trademarks within section 365(n)'s reach. Because the *Tempnology* decision arguably leaves trademark licensees in a somewhat better position relative to licensees of "intellectual property" as defined in Bankruptcy Code section 101(35A), it seems likely that these efforts will be abandoned.

Beyond its specific holding about the effects of rejection on trademark licenses and its general rule that rejection is effectively breach, not rescission or avoidance, the *Tempnology* opinion contains principles of bankruptcy law and statutory interpretation that will be relevant in other contexts, including the following points:

- The Court makes clear that bankruptcy courts should adopt a light touch when evaluating the decision of a trustee or debtor in possession to assume or reject a given contract. *See* 2019 U.S. LEXIS 3544, at *6-7 ("The bankruptcy court will generally approve that choice, under the deferential 'business judgment' rule.").
- When interpreting words that are not defined in the Bankruptcy Code or ones imbued with historic meaning in the bankruptcy context (such as "fair and equitable" or "indubitable equivalent"), courts should give those words the meaning they would have outside of bankruptcy. *See id.* at *15 (citing *Field v. Mans*, 516 U.S. 59, 69 (1995)); *accord* Kenneth N. Klee & Whitman L. Holt, *Bankruptcy and the Supreme Court: 1801-2014* at 20 n.102 & accompanying text (West Academic 2015).
- As a general matter, the property of the bankruptcy estate should be defined by what the debtor would have outside of bankruptcy—no more, no less—absent a provision of the Bankruptcy Code expressly providing otherwise. *See* 2019 U.S. LEXIS 3544, at *18-19; *accord* *Butner v. United States*, 440 U.S. 48, 55 (1979).
- As the Court's favorable citation of the 95-year-old decision in *Board of Trade of Chicago v. Johnson*, 264 U.S. 1 (1924), indicates, the Supreme Court's bankruptcy jurisprudence from the 1800s and early 1900s retains vitality and remains an important source of study for bankruptcy judges, scholars, and practitioners. *See also, e.g.*, *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013) (repeatedly citing and relying on a 135-year-old precedent, *Neal v. Clark*, 95 U.S. (5 Otto) 704 (1878)).
- Based on the Court's juxtaposition of the avoiding powers in Bankruptcy Code sections 544–553 with the rejection provisions located "far away" in section 365, the Court may look to overall statutory architecture to ascertain the meaning of particular provisions. *See also, e.g.*, *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893, 200 L. Ed. 2d 183, 195 (2018) ("Although section headings cannot limit the plain meaning of a statutory text, they supply cues as to what Congress intended." (citations and internal quotation marks omitted)).
- In seeking to advance reorganizational or other fundamental bankruptcy goals, courts are ultimately limited by the provisions of the law that Congress has provided them, which "does not permit anything and everything that might advance" those goals. *See* 2019 U.S. LEXIS 3544, at *26. The Supreme Court has once again reiterated a now-common message that bankruptcy courts do not have powers, "equitable" or otherwise, to depart from the plain text of the Bankruptcy Code or to invent solutions to problems that cannot be grounded in the statute even when those solutions are readily justifiable on practical or policy grounds. *See also, e.g.*, *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 987, 197 L. Ed. 2d 398 (2017); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946-49, 195 L. Ed. 2d 298 (2016); *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169, 192 L. Ed. 2d 208 (2015); *Law v. Siegel*, 571 U.S. 415, 425-27 (2014); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012); *Hall v. United States*, 566 U.S. 506, 522-23 (2012).
- The Court generally is skeptical of an argument based around negative inferences from omission. This sort of backwards reasoning is sometimes observed by parties advancing a particular interpretation of an indenture provision or statutory section

(not necessarily the Bankruptcy Code as the same issue can arise in the context of the Internal Revenue Code or other dense statute with layers of exceptions and provisos) that contains a general principle and detailed exceptions, some of which exceptions arguably would be surplusage under certain constructions of the general principle. *Tempnology* shows that sometimes these sorts of arguments are too clever by half and underscores the wisdom of authorities discussing how "the negative-implication canon . . . must be applied with great caution, since its application depends so much on context." Antonin Scalia & Bryan A. Garner, *Reading Law* at 107 (Thomson/West 2012).

- The Court's citation of Judicial Code section 959(b) highlights an occasionally overlooked part of federal law that makes bankruptcy trustees (including debtors in possession) subject to background laws of general application during their management and operation of estate property. *Cf.* *Garvin v. Cook Invs. NW*, 2019 U.S. App. LEXIS 13235 (9th Cir. May 2, 2019) (concluding that Bankruptcy Code section 1129(a)(3) does not prevent confirmation of a plan with substantive provisions that depend on illegality and suggesting possible dismissal under Bankruptcy Code section 1112(b) as a check on "bankruptcy proceedings being used to facilitate legal violations," but not mentioning the separate function served by Judicial Code section 959(b)).

In conclusion, *Tempnology* is a significant opinion in which the Supreme Court resolves important issues of bankruptcy law. The opinion has immediate and apparent consequences not only for trademark licensees and other parties who received a prepetition conveyance of rights from the debtor, but also for parties to all executory contracts and unexpired leases generally. The decision brings needed clarity to an area that has been muddled at least since the 1985 decision in *Lubrizol*. The decision also squarely frames policy issues that Congress may wish to consider when evaluating whether the current statutory balance should be altered. Finally, the decision contains instructive guidance about how courts should approach questions of bankruptcy law and statutory interpretation generally.

About the Author(s). Kenneth N. Klee is a nationally recognized expert on bankruptcy law. He became a Professor of Law Emeritus at the UCLA School of Law in 2014 and is a founding partner of Klee, Tuchin, Bogdanoff & Stern LLP, specializing in corporate reorganization, insolvency, and bankruptcy law. From 1974 to 1977, Professor Klee served as associate counsel to the Committee on the Judiciary, U.S. House of Representatives, where he was one of the principal drafters of the 1978 Bankruptcy Code. He served as a consultant on bankruptcy legislation to the U.S. Department of Justice in 1983–1984. From 1992 to 2000, he served as a member of the Advisory Committee on Bankruptcy Rules to the Judicial Conference of the United States. From 2000 to 2003, and previously from 1988 to 1990, Professor Klee has served since 2017 as a board member of the Ninth Judicial Circuit Historical Society and served as a member of the Advisory Board for several years before that. He has served three times as a lawyer delegate to the Ninth Circuit Judicial Conference. Professor Klee served as member of the executive committee of the National Bankruptcy Conference from 1985 to 1988, 1992 to 1999, 2005 to 2008, and 2011 to 2014 and currently serves as Chair of its Membership Committee. He served from 2011 to 2014 as Chair of the NBC's Committee to Rethink Chapter 11 and also served as chair of its legislation committee from 1992 to 2000. Professor Klee is

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