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ARE PHYSICIAN PRACTICE MANAGEMENT AGREEMENTS ASSUMABLE UNDER SECTION 365 OF THE BANKRUPTCY CODE?

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I. Introduction

Over the past decade, the medical landscape in the United States has changed dramatically. Managed care has grown rapidly and, as a result, the healthcare industry has become increasingly integrated. [1] While physicians have lagged behind in this process, [2] consolidation is on the rise as physicians in solo and small group practices affiliate with organizations that can provide negotiating leverage and a sophisticated infrastructure. [3] These doctors endeavor to reduce office management costs through economies of scale in purchasing, or through the installation of efficient information systems. They seek to increase the practice revenue pool by developing office based ancillary services to capture revenue formerly destined to hospitals. Finally, they seek access to capital necessary to expand existing practices by recruiting new physicians, adding new practice sites, funding capital investments, or developing sophisticated administrative systems and financial risk management capabilities. [4]

An increasing number of doctors are affiliating with physician practice management companies ("PPMs"). [5] The PPM normally acquires a practice's hard assets and signs the physician to a long−term management contract, commonly known as a Physician Practice Management Agreement ("Practice Management Agreement"). The PPM provides managerial and administrative services to the practice in return for a percentage of its operating income. The selling physician usually receives a combination of cash and stock in the PPM and, in consideration, executes a non−compete agreement. [6]

While consolidation in the healthcare industry may be inevitable, the new corporate phenomenon of PPMs may not remain a market force in the industry. Organizations that own or manage physician practices have found it to be more difficult than expected to achieve profitability in an environment of reduced reimbursement. In short, many PPMs are experiencing major financial and operational setbacks and, with increasing frequency, are filing petitions for relief under chapter 11 of the Bankruptcy Code. [7]

PPMs, however, might not be viable chapter 11 candidates. To reorganize, the PPM must be able to assume the Practice Management Agreements which anchor their organization. However, without the consent of the practice affected, these Practice Management Agreements may not be assumable. In attempting to determine whether Practice Management Agreements are assumable and/or assignable, an analysis of section 365 of the Bankruptcy Code [8] is required. This article will focus on the uncertain language contained in subsections 365(c) and (f) of the Bankruptcy Code which restrict a debtor’s ability to assume and/or assign an executory contract when "applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession." [9] The issue is whether a PPM, as debtor in possession, is barred under section 365(c) from assuming a Practice Management Agreement, without the consent of the affected Practice. Resolution of this issue first requires a brief analysis of the structure of a typical Practice Management Agreement, and second, a detailed review of section 365(c).

II. A Typical Practice Management Agreement

One of the benefits of joining a PPM is the enhanced efficiencies which arise when the practice is professionally managed, while the physicians concentrate on providing medical service to patients. The typical Practice Management Agreement delegates all management responsibilities to the PPM. [10] For example, the PPM, in consultation with the Practice, is in charge of developing a strategic practice plan and goals. This is usually achieved through the mechanism of a budget which on an annual basis projects anticipated revenues, expenses, sources and uses of capital, personnel staffing, support services arrangements and anticipated ancillary services.

Under the typical Practice Management Agreement, the PPM assists in evaluating and negotiating managed care and other third−party payor contracts. The PPM recommends fees, charges or premiums due in connection with services and goods provided by the Practice, and assesses business activity by developing systems which track revenue, expenses, physician productivity and patient satisfaction.

From an operational prospective, the typical Practice Management Agreement delegates to the PPM the responsibility of employing and providing all personnel necessary to provide medical services, including (i) a practice manager to manage and administer the Practice's business functions and (ii) clerical, secretarial, bookkeeping and collection personnel. [11] The PPM also facilitates the recruitment, retention and otherwise employs professional personnel for the Practice. [12] The PPM will lease or sublease the Practice's medical offices. In conjunction with this lease, the PPM is normally responsible for managing and maintaining the offices in good condition and repair, including the provision of routine janitorial and maintenance services. The PPM is also normally responsible for all repairs and maintenance of existing furniture, fixtures and equipment. [13]

Under the typical Practice Management Agreement, the PPM provides bookkeeping, billing and collection, accounts receivable and accounts payable services necessary for the management of the Practice. The PPM often is in charge of billing patients, insurance companies, managed care payors, governmental entities and other third−party payors and collects the professional and ancillary fees for medical services rendered by the Practice. [14] The PPM also typically orders and purchases medical and office supplies required in the day−to−day operation of the Practice and provides access to management information systems services.

The PPM will maintain files and records relating to the operation of the Practice, prepare Practice profit, loss and income statements and, typically, provide audits of monthly and annual year−end statements. Finally, the PPM purports to arrange for or render business and financial management consultation and advice reasonably requested by and directly related to the operation of the Practice.

The Practice, on the other hand, has complete and absolute control over the method by which the Practice or its professionals practice medicine and/or render the professional services for which they are licensed. [15] Practice providers are required to comply with applicable ethical standards, laws and regulations. The Practice shall also, with the assistance of the PPM, resolve any utilization review and quality assurance issues which may arise. In short, the Practice is required to cooperate with the PPM in the development and operation of an integrated healthcare delivery system and managed care arrangement.

The typical Practice Management Agreement creates a Steering Committee composed of members of the Practice and PPM. The Steering Committee considers, reviews, and approves: the annual business plan and budget, employment and recruitment of all practice providers and professional personnel, long−term strategic planning, operational and capital expenditures, establishment and maintenance of relationships with healthcare providers and payors, and the fee schedule for services and items provided by the Practice. If a deadlock of the Steering Committee develops, the Practice Management Agreement frequently provides for resolution of the dispute through binding arbitration.

III. The Analysis

A. Construction and Application of 11 U.S.C. § 365(c)(1)

Whether a Practice Management Agreement is assumable or, for that matter, assignable, is governed by section 365 of the Bankruptcy Code. [16] Subject to the limitations imposed by subsections (b), (c) and (d) thereof, section 365(a) vests in the trustee the authority to assume favorable executory contracts that benefit the debtor's estate, [17] and reject

improvident contracts that impose burdensome liabilities upon the estate. [18] In a chapter 11 case where no trustee has been appointed, a debtor, as debtor in possession, has the rights and performs the functions and duties of a trustee. [19] Therefore, pursuant to section 365(a), it is the debtor in possession who retains the option of assuming or rejecting an executory contract. [20]

With certain qualifications, section 365(f) of the Bankruptcy Code authorizes a trustee to assign an executory contract that has been assumed, stating:

(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or an applicable law that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection. [21]

Section 365(f), therefore, nullifies both contract provisions which prohibit, restrict or condition the assignment of contracts and nonbankruptcy laws which do the same. In doing so, it advances a debtor's rehabilitation by entitling it to market valuable contract rights.

Section 365 (c) contains the exception to this general power, providing:

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor−in−possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

A. Such party does not consent to such assumption or assignment.

Section 365(c)(1), on its face, appears to contradict section 365(f). On one hand, the plain language of subsection (c)(1) bars the assumption of an executory contract (absent consent) whenever "applicable law" excuses the nonconsenting nondebtor party from accepting performance from an entity other than the debtor or the debtor in possession. [22] On the other hand, subsection (f)(1) recognizes the trustee's authority to assign an executory contract, notwithstanding contrary provisions in "applicable law" that prohibit or restrict such assignments. What section 365(f) appears to give, section 365(c) seems to take away. [23]

Reconciliation of these conflicting provisions is achieved by recognizing that section 365(f) contains the broad rule, while section 365(c) contains a narrowly crafted exception to that rule made necessary by general principals of common law. [24] The First Circuit in *In re Pioneer Ford Sales, Inc* [25] distinguished these subsections, stating that section 365(c)(1) prevents the trustee from assigning (over objection) contracts of the sort that contract law ordinarily makes nonassignable, i.e., a contract that cannot be assigned when that contract itself is silent about assignment. [26] Conversely, section 365(f)(1) broadly prevents parties from using contractual language to prevent the trustee from assigning contracts that (when the contract is silent) contract law typically makes assignable. [27]

The Sixth Circuit reconciled subsections (f)(1) and (c)(1) stating that each recognized an "applicable law" of markedly different scope. In *In re Magness,* [28] the Court pronounced that:

Subsection (f) states that although the contract or applicable law prohibits assignment, these provisions do not diminish the broad power to assume and assign executory contracts granted the trustee by section 365(a). In other words, a general prohibition against the assignment of executory contracts, i.e., by contract or "applicable law," is ineffective against the trustee.

However, subsection (f), by specific reference to subsection (c), allows one specific circumstance in which the power of the trustee may be diminished. Subsection (c) states that if the attempted assignment by the trustee will impact upon the rights of a non−debtor third party, then any applicable law protecting the rights of such party to refuse to accept from or render performance to an assignee will prohibit assignment by the trustee. [29]

Subsection(c)(1), therefore, is an exception which acts to protect the rights of third parties who contracted with the debtor and whose rights may be prejudiced by having the contract or lease performed by an entity with which they did not contract. [30] Where applicable law does not merely recite a general prohibition against an assignment, but instead more specifically "excuses a party…from accepting performance from an entity" different than the one with which it originally contracted, the applicable law prevails over subsection (f)(1). [31] Stated another way, section 365(c)(1) invokes laws that are concerned with both the assignment of rights *and* delegation of duties.

Citing *In re Taylor Mfg., Inc*., [32] some have interpreted this exception or prohibition as applying solely to personal service contracts. [33] However, in a well reasoned decision, the Fifth Circuit challenged this conclusion stating that nothing in section 365(c) "belies any limitation to personal service contracts." [34] In *In re Braniff Airways, Inc*., the court explained that:

It may well be that the impetus for Congress' enactment of section 365(c) was to preserve the pre−Code rule that "applicable law" precluding assignment of personal service contracts is operative in bankruptcy. . . . However, the drafters actually codified a much broader principle. Surely if Congress had intended to limit section 365(c) specifically to personal service contracts, its members could have conceived of a more precise term than "applicable law" to convey that meaning. [35]

Therefore, while personal service contracts clearly fall within the perimeters of section 365(c)(1), the better reasoned interpretation of this subsection does not limit it to personal service contracts. [36]

So what contracts fall within the scope of section 365(c)(1)? Outside of the classic personal service contracts—e.g., contracts to paint a picture, contracts between an author and his publisher, and agreements to sing, there is no easy answer. In *In re Compass Van & Storage Corp*., [37] the court stated that the analysis "points on close distinctions, e.g., the nature and subject matter of the conduct, the circumstances of the care placed in juxtaposition with the intention of the parties." [38] Ultimately, however, the focus must be on the nature of the duties sought to be delegated. Reference is made to duties arising out of a "special personal relationship," "special knowledge," or "unique skill or talent." [39] In *In re Antonelli*, [40] the court queried whether the identity of the debtor was a material condition of a contract when considered in context of the obligations which remain to be performed. [41] In the context of a partnership agreement, the court analyzed the issue as follows:

Application of the rule … calls for a particularized, practical approach rather than a conceptual one to the assignment question. Thus, the question of whether or not management power in a partnership is assignable turns not upon the status which "applicable law" generally accords to partnership agreements but upon the materiality of the identity of the partners to the performance of the obligations remaining to be performed under the partnership in question. [42]

Antonelli

offered a concrete example of its inquiry:

In certain circumstances, the identity of a general partner will be critical to the limited partners and to the prospect of a successful investment. Examples of such circumstances include: (1) a real estate development partnership on which the general partner must administer the planning, construction and leasing of a building; (2) an investment partnership in which the general partner is to identify and evaluate investments of the partnership; and (3) any partnership in which the general partner is required to contribute additional capital to the partnership and, indeed, may have control over the issuance of capital calls to all.

* * * *

On the other hand, partnerships exist in which the identity of a general partner is less significant. These may include (1) real estate partnerships owning matured projects that require only routine management and leasing functions and (2) certain large syndication operations that administer a network of separate partnerships. In these cases, it is arguable that another organization with sufficient resources could take over the work of the original general partner without material detriment to the limited partner investors…. [43]

Applying this method of analysis to the model Practice Management Agreement produces mixed results. Certain of the duties delegated to the PPM are mundane tasks that at first glance do not require special skills, knowledge, or judgment. Such tasks include the PPM's responsibility to: manage and maintain Practice offices in good condition and repair (including the provision of routine janitorial and maintenance services), provide utilities and pay other related expenses, repair and maintain all existing FF&E, and maintain files and records relating to the operation of the practice. [44]

Other tasks delegated to the PPM are far from routine and require unique skills and talents. These tasks include the PPM's responsibility to (1) prepare a Business Plan and Budget projecting anticipated revenues, expenses, sources and uses of capital, personnel staffing as well as anticipated ancillary services; (2) evaluate and negotiate managed care and third party payor contracts; (3) recommend fees, charges, or premiums for services or goods provided; (4) track revenue, expenses, utilization, physician productivity and patient satisfaction; (5) facilitate the recruitment and retention of Professional Personnel; and (6) render business and financial management consultation and advice. [45] Additionally, the PPM is allocated a significant, if not a controlling position on the Steering Committee created by the Practice Management Agreement. Through this position, the PPM is involved in developing the long−term strategic plan for the practice. One would expect that these responsibilities arise only in the context of a relationship of "trust" and "confidence." The degree of skill by which these tasks are performed will be critical to the success or failure of the practice.

When compared to the various partnerships cited to in *Antonelli*, the PPM's role is closely aligned with those actively involved in the development of a business, such as the real estate development partnership or investment partnership. The PPM's responsibilities involve more than ministerial or mechanical tasks, and in today's highly charged health care industry, do not approximate those responsibilities associated with the maintenance of a static investment. Rather, the PPM is delegated substantial discretion, which if not properly exercised, will affect the success of the practice. Such duties, which require special knowledge and unique skills, normally are not assignable. These facts strongly suggest that the Practice Management Agreement falls within the exception of section 365(c)(1)(A). [46]

However, other facts militate against this conclusion. One is the corporate structure of the PPM. It has been argued that corporations cannot be parties to contracts, which fall within the section 365(c)(1) exception, based on the precept that the duties of a corporation are always assignable because a corporation, by its very nature can only perform by delegation of duties to individuals. [47] However, in *In re Rooster, Inc.*, [48] the court responded to this argument by noting "it is possible for a corporation to contract where the basis of the bargain is the personal performance of individuals within that company, the delegation of which would be ineffective." [49]

In the typical Practice Management Agreement, such bargained for personal performance infrequently exists. These agreements seldom dictate the employment of a particular individual, or reflect that the Practice expected and bargained for the personal service of any particular employee. It is, for example, the PPM's responsibility to select and provide, generically, a "practice manager." No particular individual is identified. Similarly, PPM employs the clerical, secretarial, and bookkeeping personnel. The Practice has little to say in this selection process. Further, the Practice Management Agreement rarely specifies who the PPM will place on the Steering Committee, or otherwise precludes the PPM from changing its designated committee members.

Further, the Practice can not dictate who the PPM's retains as officers, or who its shareholders elect as directors. It is rare to see a provision that entitles the Practice to terminate the agreement if a certain officer resigns, or the PPM's board of directors change. If the continued employment of certain individuals were an essential element of the bargain, one would expect a contractual reference to their retention. The fact that these agreements are missing such clauses, suggests that their responsibilities are delegable and, hence, do not fall within the exception of section 365(c)(1)(A). [50]

Another method of approaching this issue involves a comparison of section 365(c)(1) with section 365(b)(1). Section 365(b) provides, "if there has been a default in an executory contract… the trustee may not assume…" the same unless s/he among other things, "(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;" and "(B) compensates or provides adequate assurance of future performance." [51] The court is the final arbiter of whether the conditions have been met. As such, the court must be capable of evaluating performance from an

objective perspective. Whether a party has performed, or is capable of performance must fall within the realm of sensible experience independent of individual thought, i.e., it must be perceivable by all observers.

When, on the other hand, performance is not subject to independent observation, but rather is subjective in nature, the court will not be capable of evaluating whether a default has been cured or whether a party is capable of future performance. With no measurable criteria to guide the court, the matter is best left to the discretion of the parties.

Using this objective − subjective dichotomy, one can only come to the conclusion that the Practice Management Agreement falls within the exception of section 365(c)(1). Again, the PPM in conjunction with the Steering Committee, is responsible for the preparation of the Practice's business plan and budget. Whether the PPM has satisfactorily performed this task, or an assignee of the PPM is capable of performing this task in the future, requires proof of more than the mere physical creation of a budget or plan. A properly prepared budget and plan for a Practice requires expertise in utilization management, familiarity with global capitation contracts and capital markets. Where performance demands expertise and contacts possibly beyond the understanding of the court, how can such performance be evaluated as required by section 365(b)(1)? As with lawyers, accountants and other professionals, whether these duties can be delegated should be left to the sound discretion of the parties to the contract.

B. 11 U.S.C. § 365(c)(1)*: A Hypothetical Or An Actual Test.*

Before concluding, a final and related issue will be briefly touched upon. Assume, for purposes of argument, that the typical Practice Management Agreement is not delegable, therefore, falling within the exception of section 365(c)(1) − are such contracts, assumable? This issue deals with the "hypothetical" versus "actual" test dispute. Again, the focus of this conflict centers on the language of section 365(c)(1), which once more provides that:

(c) The trustee may not assume or assign an executory contract or unexpired lease of the debtor … if −

(1)(A) applicable law excuses a party, other than the debtor to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or debtor−on−possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment.

The Third Circuit has interpreted this language as describing a "hypothetical test." [52] Under this theory, section 365(c)(1) poses a hypothetical question: Does applicable nonbankruptcy law excuse the non−debtor party from performance vis−a−vis any entity other than the party with whom it originally contracted? If so, then assumption is barred, without regard as to who is assuming the contract. [53] In other words, if non−bankruptcy law precludes assignment to a third party, section 365(c) operates to preclude assumption by the debtor, even though the debtor is not seeking to assign the contract to a third party. [54]

Courts adopting this test follow a strict construction of section 365(c)(1). [55] They note that the operative clause in its preamble, i.e., "the trustee may not assume or assign," is phrased in the disjunctive, which "ineluctably leads to the conclusion that a debtor may not assume an executory contract if applicable law bars its assignment. [56] They argue that any other interpretation of (c)(1) would rewrite the statute to say "the [debtor in possession] may assume but not assign." and conclude that "it is not the court's duty to legislate, but to apply the statute as written." [57] If the unfortunate result of this policy is to hinder reorganization efforts that ought to succeed, "the appropriate forum in which to raise those concerns is the halls of Congress." [58]

Aside from the literal reading of the statute, the "hypothetical test" has also been justified on the distinction between a debtor and a debtor in possession. In *In re Catron*, [59] which dealt with the attempted assumption of a partnership agreement, the court noted the divergent legal obligations that exist between a pre−petition debtor and post−petition debtor in possession. [60] The *Catron* court noted that before a general partner files for bankruptcy, his fiduciary obligations run to his partners. Once he files, his fiduciary obligations shifts to his creditors.

Consequently, the court disagrees with appellant, who maintains that "[h]is role, responsibility and identity after the filing of his Chapter 11 petition [we]re virtually unaltered." To conclude that *Catron* as a prepetition debtor and *Catron* as a postpetition debtor in possession are the same person overlooks this fundamental transformation. [61]

The alternative interpretation of section 365(c)(1) describes what is known as the "actual test." Under this interpretation of section 365(c)(1), the prohibition against transfer is not triggered so long as it is basically the same entity performing the contract. This approach has been espoused in *In re Hartec Enterprises, Inc.*, [62] which stated:

Section 365(c)(1) bars assumption if the law excuses accepting or rendering performance relative to an entity "other than the debtor or debtor in possession". The addition of the phrase "debtor in possession" after the words "other than the debtor" is consistent with an interpretation that a debtor in possession not be construed to be an entity other than the debtor when a court is deciding whether to permit assumption in the force of a given anti−assignment law. [63]

While the hypothetical test focuses on the phrase "an entity", (i.e., any entity), the actual test focuses on the phrase "other than the debtor or debtor in possession, for example, a "debtor in possession" is not "an entity other than the debtor or debtor in possession."

Legislative history provides some support for this latter approach. The legislative history relating to the amendment of section 365(c)(1)(A) in the Bankruptcy Amendments and Federal Judgeship Act of 1984, [64] which substituted the phrase "an entity other than the debtor or the debtor in possession" for the words "the trustee," provides:

This amendment makes it clear that the prohibition against a trustee’s power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition has been filed because of the personal service nature of the contract. [65]

In *In re Fastrax, Inc.*, [66] the court noted:

The proposition that the debtor−in−possession is a different legal entity from the debtor is a nonsequitor in the context of § 365. While it is true that for certain purposes the debtor−in−possession is a legally distinct entity from the debtor, it is clearly a successor of interest of a debtor, and a debtor−in−possession is not required to obtain an assignment from the debtor in order to acquire all rights under an unexpired executory contract. [67]

Numerous courts have adopted the "actual test." [68]

IV. Conclusion

Whether a Practice Management Agreement is assumable and/or assignable is an issue not easily resolved. The nature and the subject of the duties sought to be assumed or delegated must be carefully reviewed in juxtaposition with the intent of the parties. Does the contract arise out of a special personal relationship? Does performance require some special knowledge, unique skills or novel talents? Is the relationship between the debtor and non−debtor one based on trust and confidence? These issues need to be resolved on a case−by−case basis, or more appropriately, contract−by−contract basis.

The typical Practice Management Agreement falls within a gray area. Many of the duties created are mundane, requiring no unique skills or knowledge. However, others demand a special expertise of the healthcare industry. Moreover, each PPM retains different strengths and weaknesses. Each PPM has its own separate corporate identify and culture. Seeking negotiating leverage, management efficiency, and access to capital, one can only assume that each Practice carefully investigated the PPM which would manage their business. These facts suggest the duties which are not delegable and a contract which falls within the exception of section 365(c)(1).

Finally, even if the Practice Management Agreements are not assignable falling within the confines of section 365(c)(1), the issue remains as to whether these contracts, at the very least, are assumable. In this regard, the hypothetical vs. actual test provides the answer. Given the split in jurisdictions, counsel need to carefully review the case law within their respective circuits.

FOOTNOTES:

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[1] *See* Robert H. Miller, *Health System Integration: A Means to an End*, Health Affairs, Summer 1996 (discussing various types of integration activities and stating "[i]ntegration is a central component of health system change"); James C. Robinson, *The Dynamics and Limits of Corporate Growth in Health Care*, Health Affairs, Summer 1996 (stating that increased integration of organizations in healthcare promises better coordination of clinical services, decrease in excess capacity and continuous improvements in quality and cost−effectiveness). *See generally Managed Care Trends Detailed in New Managed Care Yearbook*, Health Care Strategic Mgmt., June 1, 1998 (noting that managed care is seeing "explosive growth"). Back To Text

[2] Physicians in the United States have tended, traditionally, to practice independently or in small group practices. Of the more than 500,000 physicians in private practice in the United States, seventy−five percent (75%) are in solo practices or single−specialty groups of fewer than 10 physicians. The expansion of managed care, however, places the solo practitioner and small group practices in an unenviable situation of survival. *See* Palma Formica & Jacque J. Sokolov, *Will MD Solo Practice Survive? Pro and Con*, Hosps. & Health Networks, June 5, 1994, at 10 (stressing how it may be difficult for solo practitioners to survive while managed care expands and suggesting increased consolidation of physicians and hospitals will occur as integrated delivery systems grow); *see also* Miller, *supra* note 1 (finding in study conducted that solo or small group practices with weak management and information systems struggle to coexist with physicians in larger, more integrated medical groups). Back To Text

[3] *See* Formica & Sokolov, *supra* note 2, at 10 (observing that solo practitioners are joining organizations in order to get access to HMO contracts); *see also* Irene Fraser et al. *The Pursuit of Quality by Business Coalitions: A National Survey; Business Coalitions Have the Means to Affect the Quality of Care in Their Members' Health Coverage, New Survey Data Reveal*, Health Affairs, Nov. 1999 – Dec. 1999 (remarking that business coalitions provide mechanisms to increase leverage in health care market and that most have infrastructures in place ready to be used); Paul K. Halverson et al., *Managed Care and the Public Health Challenge of TB*, Public Health Rep. 1997, Jan. 1997 – Feb. 1997, at 112 (stating that managed care organizations have significant leverage in negotiating agreements). Back To Text

[4] *See* Formica & Sokolov, *supra* note 2, at 10 (recognizing factors, like paperwork, administrative costs, and "the hassle factor" of insurance and fiduciary intermediaries, may be ill−suited for solo practitioners); Randy Franz, *Continued Expansion Forecast in Healthcare Informatics*, Med. Industry Today, Dec. 10, 1997 (stating that "organizations that find ways to connect with consumers via information systems are at the forefront of a revolution in healthcare that will continue to mushroom"); Roy L. Simpson, *Changing World, Changing Systems: Why Managed Health Care Demands Information Technology*, Nursing Admin. Quarterly, Jan. 1, 1999, at 86 (stating how managed care has allowed information technology to change significantly in health care industry). Back To Text

[5] *See* Tim Dupell, *Practice Management Companies Improve Practices' Financial Position; Cover Story*, Healthcare Fin. Mgmt., Nov. 1, 1997, at 56 (recognizing physician practice management companies as effective strategy for improving business practices and gaining access to capital markets without adversely affecting physicians' earnings). If properly structured, physician practice management companies open the door to financial benefits, such as access to capital, that might not have been accessible to individual doctors or small physician groups. *Id; see also* Robert M. Goldberg, *Budget Bills and Medicare Policy: The Politics of the BBA; Slowing the Engines of Spending Now Can Buy Time until Medicare's Inevitable Financial Crisis. What Can Past Budget Battles Teach Future Policymakers?*, Health Affairs, Jan. 1999 – Feb. 1999 (stating that doctors and hospitals are consolidating into physician practice management companies to combat HMOs and large insurers, who are shifting financial risk to doctors and hospitals); Michael S. Thomas, *The Future of Physician Practice Management Companies*, Healthcare Fin. Mgmt., August 1997, at 71 (indicating that physician practice management companies are growing and that PPM's are able to induce physicians to join by "promot[ing] their ability to provide participating physicians with economies of scale, national purchasing discounts, administrative support, information technology, and capital resources"); *Docs in Physician Practice Firms to Double by 2000*, Med. Indus. Today, Nov. 13, 1997 (finding that competition in health care industry

is resulting in more doctors joining physician practice management firms). In addition to physician practice management companies, other medical group capital alternatives include physician hospital organizations, integrated delivery systems, and health plans. *Id.* Back To Text

[6] *See* Thomas Bodenheimer, *The American Health Care System – Physicians and the Changing Medical Marketplace*, New Eng. J. Med. 1999, at 340, 584−88 (explaining that "Physicians and medical groups can sell their assets to physician−practice−management companies for cash or stock or can contract with them to obtain HMO contracts and management services"); Sandra A. Golze, *Put Your Money in Doctors Physician Practice Management Demands Savvy Investors*, Legal Times, March 10, 1997 (noting that PPMs attract physicians with vast range of services and try to include physicians, from contracting medical groups, as shareholders); *Doc Practice Management Set to Explode; with HMOs, Hospitals Facing Difficulties Organizing Physicians, Independent Firms See a Huge Opportunity*, Mod. Healthcare, August 14, 1995, at 26 (stating that PPMs provide capital, information systems, managed−care expertise and economies of scale in consideration for either revenue percentages or management fees). *See generally* Stanley G. Andeel, *Unwinding the Sale of the Medical Practice to a PPM*, SD53 ALI−ABA 1107, 1118−19 (1999) (outlining sale of physician practices to PPM's and giving reasons physicians have for joining PPMs); Andrew J. Demetriou, *Physician Practice Management Companies: Structures and Strategies*, 741 PLI/Comm 605, 613, 644−46 (1996) (illustrating use of covenant not to compete as part of asset purchase agreements for practice acquisitions). Back To Text

[7] *See* Nancy A. Peterman & Joshua W. Dobin, *State Regulators Order Financially Distressed Health Care Businesses to Cease and Desist!*, Am. Bankr. L.J., June 1999, *available in* 1999 LEXIS 83, at * 1 (observing that many physician practice management companies have been facing financial difficulties and are either restructuring their operations or filing for bankruptcy). *See, e.g.*, Elizabeth Thompson, *Dallas PPM Company Files for Chapter 11*, Mod. Healthcare, Feb. 7, 2000, at 12 (reporting that Dallas−based PPM filed bankruptcy reflecting assets and liabilities of about $135 million); Milt Freudenheim, *FPA Medical Files for Protection Under Bankruptcy Laws*, N.Y. Times, July 21, 1998, at D5 (noting that publicly traded PPM company had filed under chapter 11 because it "grew too fast" and "lost track of costs and could not pay doctors for their work"). Back To Text

[8] *See* 11 U.S.C. § 365 (1994) (addressing when bankruptcy trustee may assume or assign executory contract); *see also* Nizny v. Nizny (In re Nizny), 174 B.R. 934, 936−37 (Bankr. S.D. Ohio 1994) (determining that under § 365 of Bankruptcy Code there are certain executory contracts that cannot be assumed); Brett W. King, *Assuming and Assigning Executory Contracts: A History of Indeterminate "Applicable Law,"* 70 Am. Bankr. L.J. 95, 96 (1996) (beginning analysis of rights and responsibilities of bankruptcy trustees with regard to executory contracts with § 365). Back To Text

[9] 11 U.S.C. § 365(c)(1). *See generally* King, supra note 8 (discussing ambiguity of § 365 and difficulty, as consequence of ambiguity, in determining when executory contract is assignable). Back To Text

[10] *See* Phymatrix Management Co. v. Voltarel (In re Voltarel), 236 B.R. 464, 465−66 (Bankr. M.D. Fla. 1999) (reviewing Practice Management Agreement whereby physician practice management company would generally manage physicians' practices in return for operations fee, general management fee, and performance fee based on percentage of annual net income of practice); *see also*; Noel Holton, *Doctors, Analysts Question Track Record of Physician Management Groups*, The Roanoke Times, Jan. 24, 2000 (pointing out that PPM acquires physicians' assets and percentage of future earnings in return for capital and management support); Debra S. Wood, Risky Business: Lending to Health Maintenance Organizations and Physician Practice Management Companies, 1 N.C. Banking Inst. 322, 339−341 (1997) (observing that PPMs have agreements with physicians pursuant to which PPM provides assets for operation as well as furnishes management functions). Back To Text

[11] *See* Francis J. Serbaroli, *Arrangements for Physician Practice Management*, 217 N.Y. L.J. 3, 3 (Jan. 31, 1997) (asserting that PPM provides physicians with records and billing clerks, accountants, and office manager among other personnel); *see also* Paul R. DeMuro, *Cutting Edge Transactions I−Physician Management Companies*, 1045 PLI/Corp 25, 38−39 (1998) (reviewing sample management services agreement for PPM and focusing on manager's obligation to provide financial management services and billing and collection services); Wood, supra note 10, at 340−41 (claiming that PPMs arrange for billing and collection services, administrative services, and nonprofessional

personnel for physicians in practice management group). Back To Text

[12] *See* Serbaroli, *supra* note 11, at 3 (listing physician recruitment and assessment of credentials and performance of professional employees among responsibilities of PPM); *see also* Mark J. Waxman, *Practice Management Agreements: The Core of the MSO−Group Practice Alliance;* Management Service Organizations, 50 Healthcare Fin. Mgmt. 65 (1996) (noting that practice management agreement typically specifies services that PPM will provide, including management and hiring services). Back To Text

[13] *See* Mary Chris Jaklevic, *PPM Percentages Hit*, Mod. Healthcare, October 27, 1997, at 28 (noting that typical Practice Management Agreement includes operational services such as maintenance of facilities and equipment). Back To Text

[14] *See* id. (noting bookkeeping services are standard in management contracts); *see also* Leign Ann Roman, *The Management Side of Healthcare*, Memphis Bus. J., September 10, 1999 at 19 (listing billing and collection services as part and parcel of physician practice management); Gary Shepard, *Columbia's New Physician Management System Offers Core Administrative Services*, Orlando Bus. J., March 14, 1997 at A3 (describing "accounting, billing, collection, purchasing and payroll" as "basic" PPM services). Back To Text

[15] *See* Roman, supra note 14, at 19 (observing growth in popularity of PPMs attributable to trend of physicians sticking to "their core competency," medical treatment, "while outsourcing the administrative operations of their practices"); *see also In the Game* (CNNfn Cable Programming radio broadcast, December 25, 1997) (reporting that PPMs boost practice efficiency, which frees doctors to worry about healthcare). Back To Text

[16] *See* In re Beare Company, 177 B.R. 879, 882 (Bankr. W.D. Tenn. 1994) (noting that debtor in possession has ability to assume an executory contract under § 365(a) because of powers given to it by way of 11 U.S.C. §1107(a)); Pyramid Operating Auth., Inc. v. City of Memphis (In re Pyramid Operating Auth., Inc.), 144 B.R. 795, 808 (Bankr. W.D. Tenn. 1992) (asserting that 11 U.S.C.§ 365 gives trustee or debtor in possession authority to either assume or reject executory contract). *See generally* Theatre Holding Corp. v. Mauro, 681 F.2d 102, 103 (2d Cir. 1982) (stating that §365 governs assumption or rejection of executory contract). Back To Text

[17] *See* 11 U.S.C. § 365(b)−(d) (1999) (providing list of exceptions to general rule as stated under § 365(a) that, "the trustee, subject to the court's approval , may assume or reject any executory contract"); *see also* In re National Sugar Refining Co., 26 B.R. 762, 764 (S.D.N.Y. 1982) (claiming that executory contract can only be assumed if it benefits debtors bankruptcy estate); Vern Countryman, *Executory Contracts in* Bankruptcy, Part I, 57 Minn. L. Rev. 439, 460 (1973) (providing definition of executory contract as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.") The Bankruptcy Code itself does not define "executory contract." However, legislative and an overwhelming majority of courts addressing the issue have adopted the definition above. Back To Text

[18] *See* Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1098 (2d Cir. 1993) (asserting that purpose behind allowing assumption or rejection of executory contracts is to permit trustee or debtor−in−possession to use valuable property of estate and renounce title to and abandon burdensome property); In re Compass Van & Storage Corp., 65 B.R. 1007, 1010 (Bankr. E.D.N.Y. 1986) (claiming that legislative intent behind 11 U.S.C. §365(a) was to insulate trustee from contracts or leases that are overly burdensome upon the debtor's estate); *see also* Control Data Corp. v. Zelman (In re Minges), 602 F.2d 38, 41 (2d Cir. 1979) (recognizing that bankruptcy court may allow trustee or debtor in possession to reject executory contracts that are burdensome). Back To Text

[19] *See* 11 U.S.C. § 1107(a) (1994) (stating "… a debtor in possession shall have all the rights , other than the right to compensation under § 330 of this title, and powers, and shall perform all the functions and duties, except duties specified in § 1106(a)(2),(3), and (4) of this title, of a trustee"); *see also* Yellowhouse Machinery Co. v. Hughes Construction Co. (In re Hughes), 704 F.2d 820, 822 (5th Cir. 1983) (noting that debtor in possession can enjoy rights, yet fulfill duties of trustee); First State Bank of Lineville v. Deeb (In re Deeb), 47 B.R. 848, 850 (Bankr. N.D. Ala.

1985) (asserting that debtor may claim any imperfection in creditor's right, just as trustee would). Back To Text

[20] *See* 11 U.S.C § 365(a) (1994) (stating general rule that "the trustee subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor"). *See generally* City of Jamestown v. James Cable Partners (In re James Cable Partners) 27 F.3d 534, 537 (11th Cir. 1994) (claiming that as general rule, debtor may assume any executory contract from itself as debtor); United States v. TechDyn Sys. Corp. (In re TechDyn Sys. Corp.), 235 B.R. 857, 860 (Bankr. E.D. Va. 1999) (confirming that debtor in possession has option of assuming or rejecting executory contracts). Back To Text

[21] *See* 11 U.S.C. § 365(f)(1) (1994); *see also* Rieser v. Dayton Country Club Co. (In re Magness), 972 F.2d 689, 694 (6th Cir. 1992) (claiming that § 365 (a)(c) and (f) read together permits trustee to assume and to also assign contract, subject to specified limitations); In re Bricker Sys., Inc., 44 B.R. 952, 955 (Bankr. E.D. Wis. 1984) (noting that § 365(f)(1) states that before assumed contract can be assigned, assumption must first take place and adequate assurance must be given that there will be future performance of contract). Back To Text

[22] *See* Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC, Inc.), 89 F.3d 673, 679 (9th Cir. 1996) (holding that federal law makes patent license personal and nonassignable); In re Taylor Mfg., Inc., 6 B.R. 370, 372 (Bankr. N.D. Ga. 1980) (reasoning that § 365(c) should apply mainly to contracts for nondelegable duties which are nonassignable); *C.f.* In re James Cable Partners, L.P., 27 F.3d at 538 (declining to accept City Ordinance pursuant to which franchise was granted "applicable law" barring assignment of franchise). Back To Text

[23] In re Antonelli, 148 B.R. 443, 447 (D. Md. 1992) (allowing assignment of partnership interest where identity of partner not critical and partnership not analogous to personal contract). The Sixth Circuit has described this conflict as follows: "section 365(c), the recognized exception to section (f), appears at first to resuscitate in full the very anti−assignment 'applicable law' which § 365(f) nullifies." In re Magness, 972 F.2d at 698 (Guy, J., concurring). *See also* Perlman v. Catapult Entertainment, Inc. (In re Catapult Entertainment, Inc.), 165 F.3d 747, 751 (9th Cir. 1999) (calling *Magness* language possibly too pessimistic). Back To Text

[24] In re Magness, 972 F.2d at 695 (recognizing § 365(c) carve out and reasoning that contract made nonassignable by its terms would nonetheless be assignable under § 365(f) unless some applicable law rendered it nonassignable as per § 365(c)); In re Schick, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999) (noting that § 365(c) is not concerned with contractual restrictions placed on assignment but rather nature of contract where identity of party to it is essential); In re Catron, 158 B.R. 629, 637 (E.D. Va. 1993) (concluding that sections 365(c) and 365(f) "simply cannot be reconciled"). *Back To Text*

[25] 729 F.2d 27, 28−29 (1st Cir.1984). Back To Text

[26] *See, e.g.*, In re CFLC, Inc., 89 F.3d at 679 (noting that regardless of patent license's terms, federal law made it nonassignable); In re Mangess, 972 F.2d at 695−96 (denying assignment of country club membership because of personal nature of it); In re Taylor, 6 B.R. at 372 (providing example of inequity created in personal services contract by forcing promoter to accept performance from trustee assignee rather than opera singer with whom he contracted). Back To Text

[27] "[Subsection] (c)(1)(A) refers to state laws that prohibit assignment "whether or not" the contract is silent, while (f)(1) contains no such limitation. Apparently, (f)(1) includes state laws that prohibit assignment only when the contract is not silent about assignment; that is to say, state laws that enforce contract provisions prohibiting assignment." In re Pioneer Ford Sales, Inc., 729 F.2d 27, 29 (1st Cir.1984). *See, e.g.* In re Magness, 972 F.2d at 695−96 (acknowledging that terms of contract making it unassignable ineffective to prevent assignment by trustee); In re Boogaart of Fla., Inc., 17 B.R. 480, 486 (Bankr. S.D. Fla. 1981) (holding that terms of lease prohibiting transfer ineffective and § 365(c) exception inapplicable). Back To Text

[28] 972 F.2d 689, 695 (6th Cir. 1992). Back To Text

[29] Id. at 695; *see also* Perlman v. Catapult Entertainment, Inc. (In re Catapult Entertainment, Inc.), 165 F.3d 747, 751−52 (9th Cir. 1999) (recognizing apparent conflict between § 365(f)(1) and (c)(1) and concluding that (c)(1) only prohibits assignment if contracting party's identity is material to agreement); Breeden v. Catron (In re Catron), 158 B.R. 629, 636−37 (E.D. Va. 1993) (addressing facial conflict of § 365(f)(1) and (c)(1) and ruling that "applicable law" language in (f)(1) must be ignored to reconcile apparent inconsistency). Back To Text

[30] *See* City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners, L.P.), 27 F.3d 534, 537 (11th Cir. 1994) (stating that § 365(c)(1) prohibits assignment if applicable law permits non−debtor contracting party to refuse performance from third parties); Gould v. Antonelli (*In re* Antonelli), No. 92−2541, 1993 U.S. App. LEXIS 21529, at *11 (4th Cir. July 13, 1993) (asserting that § 365(c)(1) protects contracting third parties by prohibiting assignment by trustee if applicable law permits third party to refuse performance to non−contracting party); In re Li'l Things, Inc., 220 B.R. 583, 590−91 (Bankr. N.D. Tex. 1998) (recognizing that § 365(c)(1) protects contracting parties from assignment to third parties where "identity of the . . . [debtor] is central to the obligation itself"). Back To Text

[31] *See*, 11 U.S.C. § 365(c)(1)(A) (1994) (dictating that trustees may not assume or assign executory contracts or debtor's unexpired leases if applicable law excuses contracting party from accepting performance from, or rendering performance to non−contracting third party); In re Magness, 972 F.2 at 695 (explaining that § 365(c)(1) prohibits assignment if applicable law permits non−debtor contracting party to accept performance from third parties); Turner v. Avery, 947 F.2d 772, 774 (5th Cir.1991) (recognizing that executory contracts are non−assignable if, under applicable law, parties other than debtor may decline to accept performance from trustee). Back To Text

[32] 6 B.R. 370, 372 (Bankr. N.D. Ga. 1980). Back To Text

[33] *See* In re Tom Stimus Chrysler−Plymouth, Inc., 134 B.R. 676, 679 (Bankr. M.D. Fla. 1991) (suggesting that § 365(c)(1) applies only to personal service contracts); Secretary of the Army v. Terrace Apartments, Ltd. (In re Terrace Apartments, Ltd.), 107 B.R. 382, 384 (Bankr. N.D. Ga. 1989) (holding in face of recognized contrary authority that § 365 (c)(1) applies only to non−delegable personal service contracts). *But see* Ford Motor Co. v. Claremont Acquisition Corp., (In re Claremont Acquisition Corp.,), 186 B.R. 977, 984 n.6 (C.D. Cal. 1995) (noting that several courts improperly conclude that § 365(c)(1) applies only to personal service contracts), aff'd, Worthington v. GMC (In re Claremont Acquisition Corp.), 113 F.3d 1029 (9th Cir 1997). Back To Text

[34] Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 943 (5th Cir.1983); *see* In re Claremont Acquisition Corp., 186 B.R. at 984 n.6 (recognizing that § 365(c)(1) is not limited to personal service contracts); In re Catron, 158 B.R. at 638 (concurring that § 365(c)(1) is not limited to personal service contracts). Back To Text

[35] In re Braniff Airways, Inc., 700 F.2d at 943. Back To Text

[36] *See* In re Pioneer Ford Sales, Inc., 729 F.2d 27, 29 (1st Cir. 1984) (holding § 365(c)(1) referred generally to all contracts that were not assignable under non−bankruptcy law, not only to personal service contracts); In re Grove Rich Realty Corp., 200 B.R. 502, 506 (Bankr. E.D.N.Y. 1996) (finding it well established that § 365(c)(1) did not apply solely to personal service contracts). In In re Beverage Int'l, Ltd., 61 B.R. 966, 974 (Bankr. D. Mass. 1986) the court stated:

In dealing with natural persons in matters of trust and confidence, personal character is or may be a dominant factor. In similar transactions with a corporation, a substitute for personal character is the charter of rights of the corporation, the limits placed on its power, especially to incur debt, and the statutory liability of its officers and stockholders.

See also In re Rooster, Inc., 100 B.R. 228, 233 (Bankr. E.D. Pa. 1989) (finding licensing agreement was not "personal services contract" which could not be assigned or sold). Back To Text

[37] 65 B.R. 1007, 1011 (Bankr. E.D.N.Y. 1986). Back To Text

[38] Id. at 1011; *see also* Quality Healthcare Equip., Inc. v. Lumex, Inc., No. 96 C 4847, 1996 WL 604059, at *3 (N.D. Ill. Oct. 18, 1996) (stating same); In re Taylor Mfg., 6 B.R. 370, 372 (Bankr. N.D. Ga. 1980) (stating same). Back To Text

[39] In re Compass Van & Storage Corp., 65 B.R. 1007, 1011 (Bankr. E.D.N.Y. 1986); *see also* In re Bronx−Westchester Mack Corp., 20 B.R. 139, 143 (Bankr. S.D.N.Y. 1982) (determining distributorship which did not depend upon special relationship between parties was not within reach of § 365(c)(1) exception); In re Varisco, 16 B.R. 634, 639 (Bankr. M.D. Fla. 1981) (finding franchise agreement was not personal service contract based on trust and confidence which would render it non−assumable under § 365(c)(1)(A)). Back To Text

[40] 148 B.R. 443, 448 (D. Md. 1992). Back To Text

[41] Id.; s*ee also* In re Lil' Things, Inc., 220 B.R. 583, 589 (Bankr. N.D. Tex. 1998) (discussing *In re Antonelli* when comparing and contrasting § 365(c) with § 365(f)); Broyhill v DeLuca (In re DeLuca), 194 B.R. 65, 76 (Bankr. E.D. Va. 1996) (relying upon *In re Antonelli* in concluding that nature of duties and responsibilities within operating agreement made contract one for personal services). Back To Text

[42] In re Antonelli, 148 B.R. at 448. *Back To Text*

[43] *Collier Real Estate Transactions and the Bankruptcy Code*, ¶ 4.07[1], at 4−72, 4−72.1 (1992). Back To Text

[44] *See* Paul R. DeMuro, *Corporate Structure Company Issues in M&A Transactions, and Special Issues for Physician Practice Management Companies*, 1111 PLI/Corp. 129, 204 – 206 (1999) (stating PPMC's shall furnish or obtain all telephones, paging devices, office and secretarial services, janitorial and maintenance services, and any other services of similar nature reasonably necessary in conjunction with day−to−day operations of group); Andrew J. Demetriou, *Physician Practice Management Companies: Structures and Strategies*, 741 PLI/Corp 605, 652 (April – May 1996) (noting manager of PPMC will be responsible for all maintenance and repair obligations for both practice site and office equipment along with payment of utilities and other related expenses); Bodenheimer, supra note 6, at 584 − 88 (noting physicians can contract with PPMC's for management services such as billing, purchasing of supplies and personnel management). Back To Text

[45] *See* Wood, supra note 10, at 322 (stating PPMC's provide increased access to investment capital necessary to maintain and grow practice and business and management expertise reducing administrative hassels for physicians); *see also* DeMuro, supra note 44 at 204 – 06 (noting PPMC's shall provide billing and collection services, financial management services, contracting services, and management of all other contracts executed on behalf of group participants business agreements); Demetriou, supra note 44, at 657 (noting manager of PPMC is responsible for establishment of fee schedule including maintenance of billing and internal accounting records in accordance with fee schedule). Back To Text

[46] *See* In re Fastrax, Inc., 129 B.R. 274, 277 (Bankr. M.D. Fla. 1991) (stating personal service contract is one which contemplates performance of contracted−for−duties involving the exercise of special knowledge, judgment, skill or ability and these services are not assignable by the party under the obligation to perform)*;* In re Compass Van & Storage Corp., 65 B.R. 1007, 1011 (Bankr. E.D.N.Y. 1986) (discussing when contract by its terms is not dependent upon any special knowledge or unique skill or talent is not personal service contract within contemplation of § 365(c)(1)); *see also* In re Stimus Chrysler−Plymouth, Inc., 134 B.R. 676, 679 (Bankr. M.D. Fla. 1991) (noting several courts have construed § 365(c)(1) to prohibit assignment of executory contract where contract is truly personal and based on special knowledge, skill or talent). Back To Text

[47] *See* New England Iron Co. v. Gilbert Elevated R.R. Co., 91 N.Y. 153, 167 (1883) (discussing fact that contract which involves corporation can only be rescinded by acts or ascent of both parties); Rosenthal Paper Co. v. Nat'l Folding Box & Paper Co., 226 N.Y. 313, 326 (1919) (stating same); *see also* In re Grove Rich Realty Corp., 200 B.R. 502, 507 (Bankr. E.D.N.Y. 1996) (noting assignability will be prohibited when there is material change in the identity of person or entity rendering performance where the identity of that person or entity is essential element of the contract). Back To Text

[48] 100 B.R. 228, 233 (Bankr. E.D. Pa. 1989). Back To Text

[49] Id. at n.12. Back To Text

[50] *See* U.C.C. § 2−210(2) (stating absent contrary agreement, obligor may delegate duty unless the other party has substantial interest in having his original promisor perform or control the acts required by the contract); *see also* In re Schick, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999) (observing duty is not delegable if obligee has relied on obligor's personality (i.e. his honesty, skill, character, wisdom, or ability) or the obligor has promised to act in good faith or use his best efforts); In re Bluman, 125 B.R. 359, 366 (Bankr. E.D.N.Y. 1990) (noting earnings for services performed by individual is equivalent to contract for personal services which is excluded under § 365(c)(1)). Back To Text

[51] 11 U.S.C. §365(b) (1994). Back To Text

[52] *See* In re West Elec., 852 F.2d 79, 83 (3d Cir. 1988) (stating that §365(c)(1) creates hypothetical test); In re Access Beyond Technologies, Inc., 237 B.R. 32, 48 (D. Del. 1999) (upholding hypothetical test and stating that majority of circuit courts also apply hypothetical test). Back To Text

[53] In re West Elec., 852 F.2d at 83. Back To Text

[54] *See* In re Catapult Entertainment, Inc., 165 F.3d 747, 750 (9th Cir.1999) (stating that §365 (c) (1) by it's terms "bars a debtor in possession from assuming an executory contract without the non debtors consent where applicable law precludes assignment of the contract to a third party"), In re Catron, 158 B.R. 629 (E.D. Va. 1992); In re Access Beyond Techs., Inc., 237 B.R. 32, 48 (D. Del. 1999) (stating, "a debtor in possession may not assume an executory contract over the non debtors objection if applicable law would bar assignment to a hypothetical third party…"). Back To Text

[55] *See* In re Catapult Entertainment Inc., 165 F.3d at 750 (looking at the plain language of § 365(c)(1) to uphold the hypothetical test); In re TechDyn Sys. Corp., 235 B.R. 857, 860 (Bankr. E.D. Va. 1999) (noting that a strict interpretation of the Bankruptcy Code is analogous to the hypothetical test). Back To Text

[56] In re TechDyn Systems Corp., 235 B.R. at 861. Back To Text

[57] Id. at 863. Back To Text

[58] Id. at 864; *see also* In re Catapult Entertainment, Inc., 165 F.3d at 754 (noting that bad policy does justify rewriting of Bankruptcy Code.) Back To Text

[59] 158 B.R. 629 (E.D. Va. 1992). Back To Text

[60] Id. at 637. *Back To Text*

[61] Id. at 637−38. *But see* In re Cajun Elec. Power Coop., Inc., 230 B.R. 693, 705 (Bankr. M.D. La. 1999) (noting "separate entity theory" has been challenged by those arguing that it extends §365(c) "beyond its fair meaning and intended purpose.") Back To Text

[62] 117 B.R. 865 (Bankr. W.D. Tex. 1990), vacated on other grounds, 130 B.R. 929 (W.D. Tex. 1991). Back To Text

[63] Id. at 872. Back To Text

[64] 98 Stat. 333 (1984). Back To Text

[65] H.R. Rep. No. 96−1199 at 27(b) (1980). Back To Text

[66] 129 B.R. 274 (Bankr. M.D. Fla. 1991). Back To Text

[67] Id. at 277. Back To Text

[68] *See* In re GP Express Airlines, Inc., 200 B.R. 222, 232 (Bankr. D. Neb. 1996) (permitting assumption of contract by debtor in possession, regardless of whether local law permits assumption or assignmnent); In re Hartec Enters., Inc., 117 B.R. 865, 872 (Bankr. W.D. Tex. 1990) (noting "actual test" is more favorable reading of the statute); *see also* In re Cajun Elec. Power Corp., 230 B.R. 693, 705 (Bankr. M.D. La. 1999) (rejecting "hypothetical test"); In re Am. Ship Bldg. Co., 164 B.R. 358, 363 (Bankr. M.D. Fla. 1994) (rejecting same); Texaco, Inc. v. Louisiana Land & Exploration Co., 136 B.R. 658, 671 (Bankr. M.D. La. 1992) (rejecting same). Back To Text