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HI−TECH AND TELECOM IN FINANCIAL DISTRESS ROUNDTABLE

MS. BALL: Why don't we start. We are very lucky to have a panel of experts to talk about high−tech companies in Chapter 11. [1]

We have Bill Weintraub who primarily practices at the Pachulski firm on the West Coast, in this instance in Silicon Valley and the San Jose Bankruptcy Court. We have the Honorable James Grube who has been sitting as a U.S. judge in San Jose for the past 12 years, and witnessed a tremendous evolution in the high−tech industry, its financing and its experience in Chapter 11.

We are also very fortunate to have Bill Coats of Howrey & Simon in its Menlo Park office. Bill's practice consists of intellectual property issues, high−tech investors and his relationship to the bankruptcy arena usually comes in the form of representing a developer, a sponsor or a lender to a high−tech company in financial distress.

We now have witnessed a serge in Chapter 11s in the Valley, against a backdrop of wealth and new lifestyles. We understand that you have new case management orders as well. I thought you might tell us how you see the development of the whole high−tech company, in terms of its being a business that has a capital structure and debt financing and seeks relief in the bankruptcy arena.

JUDGE GRUBE:

I've been part of the Silicon Valley for the last twenty−five or thirty years and the technology aspects of Chapter 11 have been going on there for almost that long. [2]

And as I've talked with other places in the country, it emphasized to me how different I think the Silicon Valley may be.

I used to always think of it as an economy within an economy. The Bay Area has the normal business infrastructure, but when you talk to the high−tech people directly, it's kind of a different world. Maybe it's helpful to just look at some of those differences.

From a business perspective, I think traditionally, there has been absolutely no penalty for failure. It is a true entrepreneurial place. If something fails, generally nobody gets very angry about it. They're sad. There are not a lot of lawsuits, not a lot of accusations of fraud. People move on to the next start−up.

You used to talk to venture capitalists [3] and they would say "a start−up failed, and that's unfortunate, but let me tell you about the two new ones I'm involved with." That's an important aspect of how people look at things.

It's also very different in terms of the job market. There used to be a saying I heard in Silicon Valley, "that if you didn't change jobs three times last year they assumed you had no talent". People stole employees from one another right and left. Most high−tech employees can walk out the door and get three jobs tomorrow morning at nine o'clock, very different than the rest of the country.

The Valley is unbelievably financially strong. There are incredible amounts of money being made and everybody wants to be part of the technology gold rush.. My co−panelists probably can bear witness to what has happened to office rents here.

MS. BALL:

When we talk about this whole new group, VCs and no penalty for failure. [4] When I was growing up, "VCs" had a very distinct meaning in the Asia−based news of '60s and '70s. Is that the presence of the VCs the reason why there's so much money, is it the venture capital industry?

JUDGE GRUBE:

Bill, you might want to comment on this. I think they make so much money when they hit, it's almost a numbers game.

MR. COATS:

Yes. The success in the market of the venture capital firms sometimes just boggles the mind.

One example, is eBay, [5] the online auction house concept. Certainly this is peculiar to the Internet and to high technology law. The idea of having an auction house that allows anybody to auction some of the most bizarre and unusual things imaginable online over the Internet is something you would not think about.

It all started as a Pez auction, they auctioned souvenir Pez containers. That's how eBay started. A venture capital firm called Benchmark Capital invested three million dollars in this concept. That investment of six million dollars is worth seven billion dollars today and still growing. eBay continues to grow and prosper on the Internet. When you have –

MS. BALL:

Benchmark would still be a part of eBay, or would they have turned it over in the IPO for cash? [6]

MR. COATS:

They've ridden the waves as did most of their investors and it has been an incredibly successful wave. Remember they have to hold their stock for a minimum of six months, usually a year after the IPO. They do have a holding period risk, [7] but while they're well past it, most of the venture people in that particular firm, have held on to their stock anyway. They are, by the way, the only venture capital firm that invested in eBay.

JUDGE GRUBE:

When you look at those kinds of returns, you can say I only have to hit one out of ten, the other nine can fail. I don't know which one it is going to be but I can afford nine loses for one winner.

MS. BALL:

People don't want to spend a lot of time looking at what went wrong.

JUDGE GRUBE:

They just move on to the next venture. This is a very different attitude from the traditional lender.

MR. WEINTRAUB:

That's one of the reasons why I think a lot of these companies, start−up companies are ill−prepared for financial reversals. [8]

MS. BALL:

As the reversal, has change in access to the capital market driven a new way of looking at this?

MR. WEINTRAUB:

This is Bill Weintraub. I think very much so. There is no penalty for failure and ordinarily, what happens when these companies run short of cash is they just do another round of equity financing. [9] And a lot of the companies I've seen have not just common stock but preferred rounds. For example, A, B, C, D, E, F and G. They only come to my office when they don't get H.

And the problem you see in a lot of these cases is that because the day of reckoning is postponed for such a long period of time, they often wake up to realize they can't meet payroll on Friday because they didn't get the H round on Tuesday. And that's when you get the phone call.

MS. BALL:

Bill, do you get someone who has basically been operating a business on a bottomless checking account?

MR. WEINTRAUB:

That's basically right. It's the old joke. I didn't know I was out of money because I wasn't out of checks yet. That's very much the case.

MS. BALL:

What are the demographics of the people that run these businesses? Do they fall into any type? Are they young? Are they mostly natives of the Valley, or does it cut across all lines?

MR. WEINTRAUB:

I think they cut across all lines. I think that you really need to start with a definition of what a high−tech company is. And very much in my mind it's a company whose principal assets are intellectual property and people. It's a company with highly engineered products with short life cycles. It's a company with large investments in research and development. It's a company whose management is led by engineers or technologists, a company whose capital structure is mostly equity.

Those kinds of companies tend to attract young, creative people who are very much focused on the technology for technology sake, and not necessarily cash flow management.

JUDGE GRUBE:

When you talk about that, there are some interesting thoughts that come to my mind about the way these people think. I think they approach life a little differently than I certainly did when I was a "twenty something."

And it reminds me of the survey by the New York Times that asked "where is the most difficult place in the country for a young woman to meet a young man?" And it's Santa Clara County. Because they are all working seven days a week, eighteen, nineteen hours a day. They work for companies that provide rest areas, gymnasiums, showers, almost no reason to go home or have an apartment.

And their attitude, and I've heard people say this, they're twenty−five and they say something like, I'd like to get the money thing behind me by the time I'm thirty. That means they would like to hit an IPO and be financially fixed for life.

And the San Jose Mercury, San Jose's main paper, just ran an article that between fifty and sixty−four millionaires a day are made in the Silicon Valley.

So, you have a lot of young people that are approaching life in a heck of a hurry, figuring that they're going to be finished financially by the time they're thirty or thirty−five. I think that plays a part in these companies in terms of how they think and how they approach problems, don't you, Bill?

MR. WEINTRAUB:

Very much so. There's certainly a team mentality at these companies. They're all in it together, all in it for the greater good. It changes somewhat the traditional model of how you approach a workout.

Someone without high tech experience may take a look at where he or she could cut costs and stop paying for people's dinners, not realizing it's a social thing and if you give people pizza at the office, they will work another six hours taking them into the wee hours of the morning. If you don't give them pizza, they will go out, have dinner and go home. You need to understand the mindset of the companies if you want to try to work them out of a distress situation.

MS. BALL:

Bill Coats described his clients which are really the financial backbone of these high−tech protagonists. Who are the money players? Where does it come from?

MR. COATS:

Money comes from angels, very wealthy people who have already done two or three companies of their own and do it for fun because after all, they have to do something with their time.

Money comes from venture capital firms. It used to be that venture capital firms were more interested in very early round companies. They tend to be a little more conservative, if that can be applied to a venture firm.

They like to see companies with an idea and concept that is running first before they invest money. Running means you have one or two employees and have some idea of what you're going to do, not what running might be in any kind of traditional circumstance and you probably – would not have a product yet to sell, just have a concept you're going to implement and some idea who is going to implement it for you and then they say, okay, here's three to five to ten million dollars.

The situation is such there's so much money in venture capital firms they really can not invest less than about five million dollars in a company because they have a limited group of people to manage the money. From their point of view, you can manage about ten investments max. And so, some of these firms, the biggest firms have maybe twenty partners. Most firms have eight to ten.

They will have one hundred million or two hundred fifty million dollars, sometimes a billion dollars to invest with just a small number of people. They have to make big investments because they have no time to look at small investments.

Maybe it is forced upon them by the fact that everybody wants to give them money. They don't like to turn money away, but, people have billion dollar funds they take when they only wanted three hundred million dollars. As a consequence they end up allowing people to invest up to a billion dollars. That just happened to friend of mine who has a relatively small venture firm in San Francisco and they did not want to say no to anybody. They have eight people that have to manage a billion dollars. That's a very difficult task.

MR. WEINTRAUB:

Don't you think that's part of the reason why you don't see a lot of fiscal responsibility in these start−up companies? Because there's not time for the professional money managers, [10] or the venture capitalists to really monitor what is going on? If there's too much money chasing too few deals, the easier way to deal with a problem is throw more money at it.

MR. COATS:

That's very true. They don't want to do money management. Instead they do concept management, worry about marketing and product development, but their view of money is that there is a lot more of it to be had as long as there is a good concept and the company is going forward. It almost doesn't make any difference how much they spend because you can always get more. The problems happen when a concept falters or it gets behind schedule, because that is when you can't get another round of financing.

JUDGE GRUBE:

I think it's hard for people outside the Silicon Valley to really comprehend how much money there is and how quickly it flows. One way to relate it to my golf club story, which is something everybody is familiar with.

The golf and country club of choice in the Silicon Valley is Los Altos Golf and Country Club. The price of a membership kept rising and a year or so ago it reached three hundred thousand dollars, and it was written up in Fortune Magazine. This past April, the last membership sold for two hundred ninety thousand dollars. The first one in May sold for three hundred forty thousand dollars, the second one in May sold for three hundred sixty thousand dollars, the third one sold for three hundred ninety thousand dollars.

They didn't sell a fourth one because they didn't have a fourth one for sale. But still eight people are still on the waiting list.

The price is still in the high three hundred thousands, and I am told they sold thirty eight memberships so far this year.

MS. BALL:

Is this place a gathering ground for your angels?

JUDGE GRUBE:

There is a group also written up in Fortune called the Band of Angels. [11] They meet once a month for dinner at Los Altos Country Club and have a presentation for some small start−ups that they are proposing to fund. That's been going on for several years on a monthly basis.

MR. WEINTRAUB:

What is going on in venture capital has had a ripple effect throughout the economy in the Bay Area. One of the things that Jim mentioned earlier was what has been happening to office rents. What we have seen is an influx of dot coms and start−ups into the San Francisco office market and as a result we have seen rents go from twenty to twenty−five dollars a square foot, then to forty to fifty dollars, and now to ninety to one hundred ten dollars a square foot. This is driven largely by start−ups that don't have a lot of fiscal responsibility but are willing to spend that kind of money on rent.

The other –

MR. WEINTRAUB:

The other thing I've seen happening is landlords are becoming more and more suspicious of start−up companies and are beginning to look at financial statements. They don't see cash flow and don't see operating income. [12] So, they are now requiring large letters of credit to guarantee the entire term of the lease. [13] I have a landlord client that just contacted me the other day with respect to a 50,000 square foot office building right off Union Square.

MS. BALL:

Are all these associates hearing about how they should be suspicious of dot coms? Isn't that another problem?

MR. WEINTRAUB:

I'm trying to scare them into leaving Bill Coats' firm because they at least have regular income.

JUDGE GRUBE:

Your rent is cheap. The last survey I saw a week ago covered the northern part of Santa Clara County. For prime office space it's twelve dollars a foot or one hundred forty four dollars a year. Somebody said it is now running second only to Tokyo. And people are being forced out. Law firms are being forced out. I know a twelve person law firm, a bankruptcy boutique that moved from Palo Alto to Cupertino, and one of the partners told me the difference was $50,000 a month. Just for rent.

MS. BALL:

Getting back –

JUDGE GRUBE:

I should add that even with those rent rates , the vacancy rate is seven percent.

MS. BALL:

What is the construction rate?

JUDGE GRUBE:

Less than one percent.

MR. WEINTRAUB:

I'll tell you, it's going to have a ripple effect and you're going to see it in the bankruptcy court. As other law firms' leases come up and they have to move because the rents double, you are going to see hourly rates creep up and become consistent with rates in Los Angeles and New York.

MR. COATS:

I think we are already seeing this, actually, because it costs you an arm and a leg for space and, of course, we love paying associates, but –

MS. BALL:

You're setting the pace for the nation.

MR. COATS:

Yes, and they're happy about that.

JUDGE GRUBE:

They haven't stopped, Bill, did you tell your associates about the car allowance?

MR. COATS:

No.

JUDGE GRUBE:

Shearman and Sterling in Menlo Park is giving associates an eight hundred dollar car allowance.

MR. WEINTRAUB:

Whether or not they have a car.

MS. BALL:

Where do I sign?

What is an incubator, Bill? Is that different from a VC firm or angel?

MR. COATS:

Yes. An incubator is sort of an angel who has built a structure to develop companies, usually in specific areas. There are a few, Foundry, Garage.com and also several other prominent ones here. Foundry does medical devices and garage.com does software and Internet type companies, but it starts off with – provides office space, a little management assistance, a little money and that sets you up so you can get venture money.

They may have ten or twenty companies at once. Foundry does about ten companies. Garage.com does more than that. They may do –

MS. BALL:

Any other sponsors besides incubators? Are there companies that want software where they will give it to a start−up to develop a project? Are there other big players that –

MR. COATS:

Yes. That's very common for all companies. Intel has a whole division now, not just a venture capital division, but a venture capital company. They also have a new business company and that new business company is looking for people who use Intel products in a potential start−up they think is of interest. They give them money so they have enough cash to create products. This makes people want to buy Intel chips of one sort or another. This is common. Lots of cash flowing into new businesses. Those companies tend to have better management than –

MS. BALL:

Bill Weintraub, why do they come to you and who sends them? The angel, incubator or the VC when they can't make payroll?

MR. WEINTRAUB:

It's all of the above. Ordinarily they find their way to me as a last resort. Nobody wants to come to a bankruptcy attorney. Hope springs eternal from the breast of debtors, as we all know.

I think there's a widely held belief that high technology companies are not reorganizable. They tend to try and keep away from bankruptcy counsel or crisis management as long as possible, and it becomes a self−fulfilling proposition because reality does not set in until the company is completely out of cash. They are completely out of options by the time they come to your doorstep.

MS. BALL:

Is this the usual debtor denial to an exponential degree or is there some truth to the view that there is nothing to reorganize so why bother?

MR. WEINTRAUB:

A little bit of both. When we did this program back in April, I think I was more in the camp of believing that these companies tended to wait too long. I've seen any number of companies that literally come in and can't meet payroll and ask me what to do. There's nothing to do because they have no cash coming in and are frustrated because the investor didn't make the investment or the round didn't go or more often than not they've been told by their investment banker they're not ready to do the IPO.

I'd say more recently what I'm seeing, are companies that have no assets and nothing to reorganize. [14] That's becoming more and more prevalent. I think, as the VCs realize this they begin to walk away from these things. The focus, at least in my practice, tends to be that the board is very interested in knowing whether or not they're going to get sued.

JUDGE GRUBE:

Let me ask you this. I heard the VCs have walked away from all the dot coms. They were funding them like crazy in 1999 but they've stopped. [15]

MR. WEINTRAUB:

I think that's what I'm saying. I'm seeing more and more of that come up on my doorstep. We are not willing to take these cases because they can not pay a retainer. They also cannot meet payroll. Very often they say "we have payroll on Friday, today is Wednesday, we have a possibility of a sale to one or two people. Do you know what we should do?" I say the first thing you should do is if you can't make payroll is that you have to tell your employees you are out of money, and whoever wants to volunteer to stay, should. Whoever needs to leave, should leave.

I also warn them they shouldn't be contracting for goods and services they can't pay for. Writing bad checks could be a low grade felony. These are the kinds of issues that are discussed. All potential liability issues. For example, I will ask the company, "Are you current on your sales tax, what are you doing with your withholding?" This tends to be the focus of the conversation.

I would say nine out of ten of those calls go nowhere because the company can't make even the smallest retainer payment.

MS. BALL:

You must be getting the software development companies who just aren't ready for their IPO yet.

MR. WEINTRAUB:

Yes.

MS. BALL:

Are there a group of people you can work with as debtor's counsel?

MR. WEINTRAUB:

Absolutely. We worked with one a few months ago. Which given the vagaries of the stock market makes it an interesting cautionary tale. It was a company that I would say was a quasi Internet company.

They had technology that enabled you, through use of their servers, to zoom in on an image on your screen. The image was not compiled of pixels. Therefore, you would not lose the integrity of the image. You could zoom in and examine the merchandise very carefully. This was supposed to be the great next thing in e−commerce.

The company just couldn't quite get its act together and the technology was going in a number of different directions with different applications and products. The investment banker finally told them their IPO wasn't ready.

We were able to find a buyer for this company and actually thought we would have a spirited auction in the bankruptcy court. We had twenty or thirty expressions of interest.

It turned out to be a one−horse race, and that horse was willing to pay either all cash, all stock or combination of the two. The buyer was a publicly traded company on the Toronto Stock Exchange.

The board decided to take a combination of cash and stock to hedge their bets. At the time we closed the transaction, the stock of the acquirer was trading on the Toronto Stock Exchange [16] about $3.24 a share.

I would say within the next six months, it rocketed up to forty dollars a share and the case became solvent, and there was actually a return to equity going down several levels of the preferred.

So I'm sitting there as debtor's counsel watching this, and thinking, oh, my God, what happens if the stock goes down and I'm sitting here doing nothing.

So we aggressively did our homework and looked into the marketplace to find out whether or not we could buy a collar for the stock or a prepaid forward contract which would basically lock in the current market price but limit your upside. We made our motion to the bankruptcy court and of course, by this time, an Equity Committee [17] had formed and they got greedy. "Why do we want to limit the upside? We want to make sure we get as much money as possible." They opposed the motion. We ended up selling some of the stock under a stipulation, but even there the Equity Committee handcuffed our efforts to sell the stock. We did not purchase the forward contract..

Long story short, the stock is trading in the teens and equity is out of the money. Me as debtor's counsel looks pretty smart.

MS. BALL:

We knew that before.

MR. WEINTRAUB:

Sometimes it's better to be lucky than good.

MS. BALL:

You keep mentioning sale. Putting aside for the moment the dot coms have nothing to sell, can you get them debtor in possession financing to meet payroll? What other models are there and why do you keep talking about sale? Are we doing Chapter 11 to reorganize?

MR. WEINTRAUB:

I've done one. In fact one in front of Judge Grube, a pre−pack. One that was successful that did spawn the *Catapult* case. That was a successful case, several months in the making before we filed it. I represented the acquirer and another attorney represented the debtor. That was successful.

And I think that those –

MS. BALL:

Is that a sale under a plan or a third party acquiring a controlling interest under a plan?

MR. WEINTRAUB:

That was really a sale under a plan, done in the form of a reverse triangular merger [18] but I would liken it to a sale. It was not a stand−alone reorganization. [19]

JUDGE GRUBE:

Let me ask you this. On that same point, I used to see over the last few years a lot of pre−packs. [20] You brought up that case as a pre−pack in which the goal tended to be a sale or a merger. But it wasn't a last minute deal.

The company probably had a creditor's meeting and negotiated a moratorium. They created a creditor's committee. The committee got competent bankruptcy counsel and they worked between four, six, eight months before they filed, negotiating, putting it together and at filing it was a pre−pack.

Are you seeing any of that now or has everybody abandoned that thought?

MR. WEINTRAUB:

I'm not seeing that. A little bit of knowledge can be dangerous. What I do hear are clients who come in and say we would like to do a pre−pack, can we get it done in two weeks. They don't understand what they are really doing in a pre−pack is taking the time period that ordinarily starts with the petition and moves forward for four to six months and attempting to do the four to six months worth of work on the front end. People don't understand what a pre−pack is and when they use the word pre−pack what they really mean is pre−negotiated. Can we have –

MS. BALL:

How many parties are involved? When you are trying to create the forum to do a pre−pack, do you need a courtroom to create the forum or is it usually a controllable group, enabling quick negotiation?

MR. COATS:

I think we should explain what we mean by pre−packs because as I go around – I have cases around the country and I notice that that is very much a Silicon Valley structure used to resolve bankruptcies and maybe that should be explained because there may be people who don't do pre−packs in their local jurisdictions.

JUDGE GRUBE:

What used to happen was the prospective debtor [21] with a financial problem and would bring in an experienced bankruptcy lawyer. They would then talk to the secured creditors [22] and the three or four largest unsecured creditors [23] and see if there room to talk and negotiate. If they did, they would then call a general creditors' meeting. A letter would go out to creditors and at the meeting the company's problems would be explained. They would then ask for a moratorium on collection actions by all.

In the course of the meeting the banks involved would get up and give a little pitch and say, yes, we support this and we are prepared to go along.

The two or three largest unsecured creditors would get up and give a simple pitch and say they're going to go along and we are going to form a creditors' committee to protect everybody's rights. And often that was successful.

The moratorium allowed the company to work with the committee and their lenders to try and put something together, i.e., a Chapter 11 reorganization plan.

And once it was altogether, they would marched down to the bankruptcy court with a petition, plan, ballots, a disclosure statement and tried to run it through the bankruptcy court and confirm in thirty, forty, sixty, or seventy days. That's what I'm talking about historically as a pre−pack, what we used to see a lot of this in the Silicon Valley.

MR. WEINTRAUB:

More recently I'm seeing the inability to do that because there is no cash to sustain the business for the periods of time you need to sustain it to do the pre−pack. I believe, even under the best of circumstances, a pre−pack is a two−month process. If you're going to do it right before you file you need to get your documentation and balloting done to give people an opportunity to read the disclosure documents and then vote over a reasonable period of time. It is going to make the Court nervous when it's done in a rush.

MR. COATS:

In my past experience I represented creditors or manufacturers who were selling a board or chip or something to these companies. Those companies then would make that chip into something else. Isn't there a different kind of company now that's going down because they don't make anything? This is where the revenue problems come from.

If you can see there's going to be a potential upside for the creditors, then there's a reason to forebear because your product is in use. In Internet start−ups, as opposed to what there is in the past bankruptcies, is no upside.

JUDGE GRUBE:

I think you need to draw a distinction between the dot com kinds of companies and what we used to refer to as the high technology kinds of companies that had a plant, facilities, employees and assets.

MS. BALL:

Some intellectual property. [24]

JUDGE GRUBE:

They had intellectual property, patents, software licenses, they developed something, maybe it was a second or third generation product developed from something else, but they actually had some assets they had to work with.

MR. WEINTRAUB:

But I think they had something else. Maybe this is a gross generalization, but what they had, ordinarily, were revolving credit lenders. These revolving credit lenders know how to do a workout. They get involved early and try to take control of the situation, and most importantly, they are willing to continue to fund the debtor. When you've got a dot com funded by a venture capitalist that has not been watching the cash and decides to shut off the spigot, you hit that hard stop. This leaves you with very little to do.

JUDGE GRUBE:

There is a lot of truth in that.

MS. BALL:

I'm hearing two things as the key parameters for you in working with a classic high−tech company: What kind of cash does it have which would push you in one direction or another; and the second, is the need for the people. In terms of what you have to do in the Chapter 11 arena, are the steps you take dependent on cash and the need to retain people?

MR. WEINTRAUB:

Certainly, it's true your assets go home at night in a high−tech company and you hope they come back in the morning. When the company is in the kind of distress it is in when it comes to me, the stock options are not really in play anymore. Although, what people are hopeful of is that the company can be sold to someone else who will give comparable stock options [25] to the employees, enticing them to remain.

One of the things we have to do in these cases, and hopefully there is a source of funding for this, is put together some kind of severance plan [26] along with some kind of pay to stay bonus plan [27] and get it approved by the bankruptcy court up front.

And if you're in a court like San Jose where the judges are familiar with these kinds of things –

MS. BALL:

Are you talking about millions of dollars in retention plans, in the first ten days?

MR. WEINTRAUB:

Yes, could be, depending on the size of the company.

JUDGE GRUBE:

Bill, you brought up two points: the lending side and people side.

On the people side, I guess one of the things I hear all the time is the concern over the ability to keep your employees long enough to even get the assets sold. They are very worried – I mentioned earlier that these people can walk out and get three jobs tomorrow morning at 9:00 a.m. and that's true. And so, as the employees see the ship starting to sink, they're all likely to bail. So everybody is trying to resolve the problem quickly, trying to find ways to hold the employees in place while they patch it together.

That's the people side. Then I want to offer one comment that we passed over on the lending side that Bill Weintraub brought up.

When you had bank lending to the company, and you do have some bank lending in some of these deals or used to in the technology field, the bank would take a look at it and say, God, if I just get a pile of junk with the door locked I'm not going to have any recovery at all. The bank would get behind the debtor and work with them, support them, maybe give them more money to at least see if they can't put it into an Chapter 11 and see if they could get the going concern value or the technology value of it. That was common with the traditional bank lenders.

Conversely, with the VC lenders the attitude seems to be more that "if this business doesn't look like it's going to work, I just want to go home because I have a lot more money that I don't know what to do with, and I have to find a place to put it." This sort of workout or recovery mentality is not the type of thing we see in a traditional bank setting.

MR. WEINTRAUB:

The bank is going to look – the banks want the intellectual property, no doubt about it. But the banks I've seen are really looking to get out with the receivables and the inventory, assuming you have a company that has a business where they create inventory and turn it into receivables.

I had lunch with one of the bankers in Silicon Valley and I asked him, "You know, these esoteric intellectual property packages, how do you value them? How do you determine what you're going to lend to a company that's basically intellectual property and does not have a lot of soft types of collateral that revolving credit lenders take?"

MS. BALL:

Like not a lot of collateral?

MR. WEINTRAUB:

That's right. The answer was that "We do so many deals with venture capitalists, we rely upon them not to let us get hurt."

MR. COATS:

Venture capitalists, since they always have another deal, or are always trading deals. To them it's not worth their time to work on a failure because there's not enough upside, not enough recovery to ever make it worth their while to deal with it. They will have ten deals next week and trade them to make everybody happy. That's the essence of how the Valley works.

I actually have a very good friend who is a venture capitalist because he doesn't like to run companies. He looks for companies to be run by somebody who has already failed at least once. That's his philosophy. That person has been through the failure situation and therefore is alert to the signs that it may fail again.

JUDGE GRUBE:

Before I ever did high−tech cases when I was a lawyer, I had several clients tell me they learned more about running their own business in Chapter 11 than they learned in the years before. They learned where all the problem areas were, how to spot them, watch them and how to stay on top of them.

MR. WEINTRAUB:

It's very interesting. I did a transaction, a front end transaction negotiating a joint development and manufacturing agreement on behalf of a non−bankruptcy client with a high−tech company that was going to basically use my client to manufacture their product.

I was working with one of the well known Silicon Valley law firms that just does front end deals. We spent days wrangling over the provisions. They said to me, "the stuff you're focused on, Bill, nobody ever talks about this stuff. These provisions are taken for granted." My response was, "I'm basically a bankruptcy lawyer. I know these are the provisions that have to work right in the event this venture is not going to be successful."

MS. BALL:

I'm listening to everybody. You are saying time is of the essence. Nobody has the time to work a down scenario. Yes, there may be players on Bill Coats' client list who have investments in one of these high−tech companies, who you want to work with, but overall you're saying you see a trend toward a section 363(b) sale [28] as opposed to spending the time and money on Chapter 11.

MR. WEINTRAUB:

Yes, very much so. Not that we don't want to spend the time and we certainly would like to spend the money, if the client had the money. We don't have the time or the money because the client can't afford it. That has led to us to a number of section 363(b) sales. I'm a big believer that a liquidating Chapter 11 [29] is still a successful Chapter 11, if you can maximize the value of the assets for the parties in economic interest which are very often the secured and unsecured creditors.

MS. BALL:

When do they have – who is arranging these sales for them?

MR. WEINTRAUB:

Let me finish. I think that a liquidating 11 is a successful 11, where you maximize the value of the assets for the parties in economic interest which are the creditors. I think it's also successful when you preserve jobs for the employees. There may not be a return to equity, but it's a lot better than a free fall liquidation.

Then, Corinne, you were asking where you find buyers.

MS. BALL:

How do the sales come about? How do you get comfort and provide the judge comfort that this really is the right thing to do and the best way to recognize the most value for the company?

JUDGE GRUBE:

That's a really good question. I would like Bill to answer it with my perspective in mind.

When I used to see pre−packs, I felt very comfortable because there was a creditors' committee and the six months before bankruptcy they did what you normally do in the sixth months after filing.

In those cases pre−packs were confirming in about seventy−five days. Then it crept down to sixty and fifty and forty and thirty−five. Then a couple years ago, the lawyers seemed to stop using plans and pre−packs. They started just filing motions to sell all the assets. With section 363 sales we were at forty days and then thirty−five and thirty, and then with orders shortening time we got down to ten days to sell all the assets.

Now, Corinne's question, how do you feel comfortable about presenting that to the Court?

MR. WEINTRAUB:

I try to come in with my tie askew, my hair ruffled, sweating and breathless saying "Judge, it's an emergency. If we don't sell these assets today, all the employees are going to leave and we will have nothing to sell."

But seriously, what we try to do if at all possible, and if we have the time, is to have the schedules and statements done early so that there is credible financial information [30] to present before the court.

We try to organize the creditors into an informal committee and help them get committee counsel [31] so that the adversarial process is triggered before we go into court. This is preferable because the court will then have the comfort of knowing the unsecured creditors have been part of the process. It's not just the debtor's counsel saying this is a real emergency and not just the bank saying this is a real emergency because –

JUDGE GRUBE:

It is interesting. You walk into the courtroom for this sale and there's six or eight lawyers there representing all the major players and they're all arm−in−arm saying Judge, you got to do it today.

And the United States Trustee [32] is standing there saying, but we haven't had the section 341 creditors' meeting [33] yet, we haven't done our debtor interview yet, we don't know anything about this company, we don't know anything about the buyer, and we don't know anything about anything.

And there you are all the lawyers linking arms and saying the world ends tomorrow morning.

MR. COATS:

It does. That's why creditors go along with this. There's a variety of circumstances where that's exactly what you're worried about. The employees we've already talked about. If all the employees leave, there's a number of companies who may depend on those employees and want them – they may be developing software for a larger company, may be creating a product that larger company wants to buy. We're just as worried as the debtor is. Whatever we need, we get out of it and we know it has to happen quickly.

I don't know what the unemployment rate is around here for engineers but it has to be less than one percent. It's too easy to find jobs. If we lose them we get damaged far worse than the money. It's rarely the money that's important to the creditors in this situation. It is either the continuity of product or the product development or whatever they consider important. It obviously varies from case−to−case, but it's the continuity that's the overall and overriding fear of the technology creditors involved.

MS. BALL:

Hearing Bill speak for his clients who are the financial stakeholder, must urge you to go on with the sale, seeing the creditors are all organized.

JUDGE GRUBE:

Well, I've gone along with it and I've heard the spiel enough times now to believe it. There are a lot of things that still cause you some concern. I was doing some other program and somebody said "don't you have trouble with the lack of a disclosure statement?" [34] If you remember some cases in the 1980’s, you couldn't sell all the assets without a disclosure statement.

There are things that you don't know. Who is this buyer? How did they come together? What sort of negotiations did they have? How did the price get set? How many of these people are going to work for the buyer after the sale closes? On what kinds of terms and conditions? Are people getting sweetheart deals? Are the people who made the decision to sell, are they getting something down the road? Those are the kinds of things that you don't know in this quick sale atmosphere we're all stuck with now.

MS. BALL:

You're bringing in an order of application to sell. Is there usually a purchase agreement or an assumption and assignment of key contracts under section 365? [35]

MR. WEINTRAUB:

Well, it's all of the above. But certainly, I think the key document is the declaration or are the declarations in support of the sale. [36] I know our judges well enough to know the kinds of good questions they're going to ask me, and I try to anticipate them. Was this an arm's length transaction? [37] How actively was it shopped? What is the nature of the emergency? What is happening to the employees? Is there any consideration that's not being disclosed?

We try to address all of that.

We tend not to go in – I tell buyers I won't go in on a letter of intent because I've been burned too many times and I think the courts have been burned too many times on that and don't like to see those kinds of half−baked transactions.

We customarily insist on having an executed asset purchase agreement [38] before we waste the Court's time with a motion.

JUDGE GRUBE:

I've seen the sale motion rolling towards the hearing and the parties are trying to get the agreement done and signed and their target is to have the agreement signed the morning of the hearing.

MR. WEINTRAUB:

That's my Exhibit A. Which is an agreement that will be executed substantially in the form of Exhibit A.

MR. COATS:

There's a lot of handshake deals in the Valley. Especially between people who used to deal with each other. Their handshake was all you really needed. That's hard to translate into bankruptcy terms and the necessary paper work.

JUDGE GRUBE:

That's a good point. A lot of the people in the Silicon Valley do one, two, three, five, ten deals and keep running into each other. They can't afford to burn each other because a year from now, they're going to connect in another company.

So there's a lot of trust amongst themselves. I don't know about judges, but amongst themselves there's a lot of trust.

MR. COATS:

A huge amount of the people that you know you can trust. You know the people you can't trust and there have been people in the past who have liked to buy companies that were not very trustworthy, though, but you get burned that first time, unfortunately there's that first time. And so, there's some risks involved in all of that.

MS. BALL:

Are companies running into trouble due to litigation over rights to the software or is that really not a cause, it's financial trouble?

MR. WEINTRAUB:

In my experience, most of them have been financial. I've been consulted recently on some that are facing overwhelming litigation that forces them into considering filing for bankruptcy. But most of the ones I see are in financial distress.

MS. BALL:

Judge, I take it you were so impressed with Mr. Weintraub's declaration, you just did a list and low and behold we have new sales guidelines in your district.

JUDGE GRUBE:

We have sale guidelines [39] but they don't say what you can or cannot do. In these sales that are fifteen days, ten days and twenty days into the case the goal was to try and put some information before the Court for sales.

So all the guidelines do is ask that declarations be filed covering a variety of points such as the ones I mentioned.

How did you set the price? How did you shop this? Who is going to work for the buyer? What kinds of terms and conditions are there?

All the kinds of things you would know if you were selling the business four or six months after the filing.

It is just an attempt to give the Court and the U.S. Trustee enough information to make an informed decision.

MS. BALL:

Does the declarant generally testify at the sales hearing?

JUDGE GRUBE:

No. The sales are not opposed. [40] There is no opposition to it, just six lawyers urging you to do it. And the U.S. Trustee felt kind of funny as did I sitting here saying, "yes, but I don't know anything about this." Yet I've approved most all of them.

You either trust the lawyers or don't, but you have not got much of a record if one of those things ever blows up. You are going to look like an idiot because you don't have much information in the file.

MR. WEINTRAUB:

One of the challenges I have as a debtor's lawyer is accumulating information in these cases. I want to talk about that for a second.

More so than other troubled companies, I see massive disarray within the client's files. That's always a challenge for us in putting together the list of executory contracts, which is important in high tech cases. We have to try to understand, who do we have contracts with? Do we have signed copies of contracts? This document says draft. Is this operative? This is not signed, is this operative?

In many cases you can't figure out what is leased or owned or who has what when dealing with companies that have a lot of leased equipment. That's always frightening. I just did a transaction which was not necessarily a high−tech company, but it was a roll−up [41] and we are finding, much to our chagrin and horror, that we sold a lot of equipment we didn't own and trying to unscramble that omelette as we speak. It's very important to get in there and try and get a hold of the information in these companies.

MS. BALL:

Bill, on the sales, do you have a parallel application to assume and assign licenses or other contracts?

MR. WEINTRAUB:

Yes, absolutely. That's always part of the negotiation as to which licenses and which contracts are key and if we don't get all of them to you, you're still obligated to close if we can get you eighty percent of them. And I want a list of the absolutely critical ones. That's one issue. The other issue is the developing case law. Unfortunately I would say it is developed case law in the Ninth Circuit [42] on licensing that Bill was going to talk about.

MR. COATS:

That's, of course, the *Catapult* decision and the *Catapult* decision is an insightful Ninth Circuit case providing more money for licensors than they can actually get out of these licenses and a rather harsh result and I do admit it. [43] The Ninth Circuit has decided that nonexclusive patent licenses do not go to the debtor in possession, he loses them. Therefore, he has to go back and get them again which destroys any possibility of reorganizing, because in those situations where they have serious patent licenses they can't make any products without them. This is a result that the

Ninth Circuit says is the right result. [44]

There is a difference. The First Circuit has come up with a different result in the *Institut Pasteur* case. [45]

MR. WEINTRAUB:

We like to say the correct result.

MR. COATS:

Depends what side you're on. From the licensor's point of view you want to be out in the Ninth Circuit. [46] If they want to reorganize or continue in business they have to redo their license and maybe you get more money or a second license fee. Many of these licenses are lump sum payments and you can get a second lump sum from whoever wants to continue on the debtor's business. It's a good deal for the licensor, terrible deal for the licensee.

I mean I am used to representing the licensor, but I have to say in a totally dispassionate way, it doesn't make a lot of sense to preclude companies from continuing to do business. They need this intellectual property license to operate and now all of a sudden its gone because they have to file Chapter 11.

MS. BALL:

Catapult has the harsh result that the debtor can't assume these nonexclusive patent contracts. [47]

MR. COATS:

Can't assume, period.

MR. WEINTRAUB:

I would say that doesn't mean that you necessarily lose the license. It only means you can't assume the license, because the underpinning of *Catapult* is based upon federal common law at least insofar as nonexclusive patent licenses are concerned. A non−exclusive patent license is considered to be a personal right as opposed to a property right. [48] Therefore, it cannot be assigned to a third party over the objection of a licensor based upon, in my view, an error in drafting in the Bankruptcy Code.

MS. BALL:

A language point.

MR. WEINTRAUB

: The language says the debtor cannot assume *or* assign the license. Some clever lawyers have come up with an argument that has been adopted by a number of courts if you can't assign the license to a third party, you cannot even assume it; that means you cannot even assume your own license. The courts have come up with this so−called hypothetical test that says if there's anybody in the world to whom you can't assign the license, that means you can't assume your own license. [49]

That doesn't mean you can't take the position that the license can ride through the case by neither assuming – attempting to assume it nor resign it, just retain it and exit bankruptcy with the license intact.

MR. COATS:

The licensors aren't going to be cooperative.

MR. WEINTRAUB:

They don't need to be. I just need the gentleman to my right to be cooperative.

MS. BALL:

Bill's comment that rather than face the Ninth Circuit law by bringing on an application to assume a nonexclusive patent license, he is beginning to see people just *soto voce*, let it run through and try to deal with the licensor later. I assume, Bill Weintraub, that if the licensor doesn't object, you're going to keep using the patent and the burden is going to flip to the licensor to see where we go post Chapter 11. Is that what you mean –

MR. WEINTRAUB:

That's right. I would say that nothing – the bankruptcy itself is not going to terminate the license. What I'm going to do with the license during the bankruptcy is if I have a financial obligation I'm going to keep paying it. If Bill Coats won't take it, I'm going to put the money in a bank account someplace and take the position that I'm current on the license.

I'm going to put the burden on Bill Coats to come into the bankruptcy court and say the Court should to make me terminate the license because there's nothing I can do it with it in the bankruptcy. The position I'm going to take is I don't need to do anything with the license because here is your money, I'm willing to exit bankruptcy and fight with you post bankruptcy as to whether or not you can terminate me.

JUDGE GRUBE:

That's the only position you have left.

MS. BALL:

What do you do if your client is the licensor and here is this big sale and nowhere is your license mentioned?

MR. COATS:

In a sale situation, the issue needs to be immediately raised, and if the debtor can't – then he has to deal with it. I think what Bill is speaking of, as does happen sometimes, is the debtor is plugging along and says I'm not going to assume or assign it as part of my plan. Therefore I have to bring a motion if I want to make an issue about it. [50]

Some licensors do not care to make an issue of it because they will wait and see what happens to the licensee. They gave a license to that company because they thought they could be successful and many reasons why people end up in chapter 11 nowadays is not necessarily because of poor management. There may be possibilities of salvaging the situation and by representing a licensor, I may say "Okay, we will give you some time and see what happens."

Other licensors want it back because they can get more money for it or somebody else can take it. You will find that frequently, the license – whatever that license technology is, was flawed in some fashion or the market has changed on it This makes it not as useful as it was. So sometimes your license isn't worth that much and you're happy to leave it. [51]

JUDGE GRUBE:

I think we need to distinguish between assigning the license and assuming it because I haven't heard that many people quibbling with the decisions as far as assigning it to a third party. [52]

It is the assuming language in *Catapult* [53] that's driving everybody nuts. I think it has a much broader application than patents. That's where we came into contact with the problem, that's where *Catapult* came from. But it also has to do with limited partnership agreements in some states. [54]

There's an old case out of Ohio, Cardinal Industries, 116 B.R. 964. *Cardinal Industries* was the general partner in hundreds of limited partnerships. The fight was over whether or not they could assume the partnership agreements. [55]

They were not trying to transfer them to somebody else, just trying to assume them.

It also comes up, Corinne, in your neck of the woods in defense contracts. It is my understanding that there is a federal statute that prohibits the assignment of defense contracts. [56] If you are a debtor and have defense contracts, you have the same problem. If you can't assume those contracts, where are you? Have you destroyed the availability of Chapter 11 for whole categories of potential debtors by saying you can't assume these executory contracts? [57]

MR. WEINTRAUB:

I've always been troubled by the notion of the need to assume the partnership agreement as an intellectual exercise. A partnership is a form of business. A corporation doesn't assume or make a determination to continue to be a corporation. The problem with the partnership agreement is it has so much in it. In addition to just the selection of the form of business, that I think lawyers feel they need to assume those agreements.

MS. BALL:

Bill, *Cardinal* was very financially motivated. It was not only the partnership, it was the fact these partnership agreements had a "flip" built into them, such that as long as the debtor was GP, there was a management and income stream that came to the debtor and that income−producing management role was the fundamental reason why the debtor was in this business. And the partnership agreement provided, among other things upon bankruptcy, the income−producing management role of general partnership interest would "flip" into a passive limited partnership interest, [58] depriving the debtor of income and key management rights. You have two different issues. If the debtor did not move to assume, did the general partner become a limited partner that was no longer entitled to all the economic interest that so then as a general partner honoring the deal would have ended the *Cardinal* case? Alternatively, can a debtor go on and deal with the technical partnership later on? [59] I think we're seeing a split in the cases and it's being driven by real estate developer and, believe or not, the related health care development projects in assisted living, which are multiple projects having investors and a health care company as the operator and common general partner.

JUDGE GRUBE:

One of the interesting things about *Cardinal* is the decision about how the problem came about. Out of that case comes the notion that the debtor's ability to assume the contract is absolutely dead bang clear in the legislative history if you know how to look at it.

The problem was after they passed the Code in 1978, in 1979 they had to do a technical amendments bill to make all the non−controversial corrections. That's where they were going to change the section 365(c)(1) language from trustee to debtor in possession. [60] That bill didn't get passed, but it got introduced in '80, '81, '82, '83. Yet, it didn't get passed until 1984 when they cleaned it up the *Marathon* and *Bildisco* problems. [61]

The bill passed in '84 but didn't get put the legislative history back in. That is back in '79 and '80 where it very clear what Congress' intent was.

I think that's what *Cardinal* tries to point out. In *Catapult* the Court says 'we're not convinced, that the legislative history was four years ago, and we're not going to pay any attention to it.'

I think the legislative history is very persuasive. When you look at it and say what do you mean, why shouldn't a debtor be able to assume this, it is the same person, you are getting the performance from the same entity, what is the difference?

MR. WEINTRAUB:

This has an impact in another provision of section 365, which provides that ipso facto clauses ordinarily are not enforceable. But they are enforceable in situations when using the analysis of *Catapult*, and where the contract cannot be assumed by the debtor. [62]

So –

MS. BALL:

The Ninth Circuit took the lead, in *Madison Associates*. [63] In the context of professional service organizations, *i.e.*, law firms and particularly accounting firms, versus the situation you're describing where the partnership is running an operating business. We got some very mixed case law on the ipso facto question and on the exact status of the various partnerships.

You may recall there is also proposed legislation to have a separate section for partnerships.

JUDGE GRUBE:

Yes.

MS. BALL:

That proposal has been endorsed by the ABA. It has not gone anywhere, but if you were to read the proposed provision it follows the Uniform Partnership Act which favors dissolution and *ipso facto*, termination, but it was really motivated, at least as I recall, by all the law firm partnership cases, where the personal service aspect was paramount. [64]

Automatic dissolution of law firms, in regard to the limitations imposed by state law on service contracts seemed like a much more applicable concept in the real estate and assisted living concepts.

But Bill, getting back , do you like *Catapult* in high−tech? Do you like it in anything else?

MR. COATS:

The problem is the Ninth Circuit wrote a rather broad decision in *Catapult*. You could argue it goes beyond patents because they really reject *Cardinal*. I have it sitting in front of me and they think *Cardinal* is obscure. I looked at *Cardinal* and it is relying on obscure legislative history. It seems there is no clear indication to the contrary in the legislative history to support *Cardinal*.

This is really a strongly worded harsh decision. It would have been simpler to deal with it in a way that is more appropriate because patent law has its own, shall we say, strange rules, much like bankruptcy law. Which has built up its own independent set of rules because of necessity for it. Patent law has its own obscure and separate set of rules. [65]

Patent law has for as long as there has been a patent law states that patents are personal and are strictly interpreted to not give any extra rights to the licensee. The patent holder has all the rights unless explicitly set forth otherwise. All those traditional rules of analyzing them would make the outcome of *Catapult* not that unreasonably harsh, and not that unreasonable. This is so because patent law has been protective of patent holders. [66]

My bigger problem with *Catapult* is the breadth of their approach to it where they could have said patents are an odd duck and they have special rules. They could have reached the same outcome by focusing on the patent common law, which has lots of harsh rules.

JUDGE GRUBE:

They also had a reason to go in that direction if they thought about it, because it was a reverse triangular merger that was going to bring in a new party.

Albeit indirectly, sort of behind the scenes, the licensor may not want to do business. So they could have limited the scope of it, fairly easy if they had just taken that approach as opposed to using this broad language.

MR. WEINTRAUB:

They could have denied the assignment based upon a *CFLC* analysis, which involves an assignment to a third party. [67] The thing that bothers me about the decision is the total lack of regard for the bankruptcy statutes. There's a lot of talk about patent policy and almost no talk about bankruptcy policy or the policy of maximizing asset values and facilitating reorganizations. [68]

I think if the Court had spent a few minutes and gone through a balancing approach and weighed the impact on the debtor versus the impact on the licensor we may have gotten a different result.

MS. BALL:

You know, what's interesting, we mentioned *Institut Pasteur* [69] and being from the east, I love the First Circuit's view of this issue which is somewhat different. Why do you think their reasoning is incorrect?

As I understood that case, it was harsh to the licensor. In essence you have a fact pattern where a debtor has a license and a competitor of the licensor bought up the creditor paper of the debtor and took over the debtor through a chapter 11 plan which was in theory a stand−alone plan with debt converting to equity. But low and behold, the creditor turned equity holder turned out to be a competitor of the licensor and the licensor races in and says, "no you can't have my patent move from the person I licensed it to, an entity (although legally still the same legal entity) now controlled by somebody else, you can not do that because the change in control of the debtor makes the debtor a different person."

At least as I read it and the First Circuit basically said, when you wrote your license, you should have put in a provision that the license terminated upon a change of control. You didn't. You prohibited sale, assignment, but didn't talk about a change of control of your licensee as being a terminating event. [70]

What is it about patents that they shouldn't have to write contracts like everybody else?

MR. COATS:

Because patent lawyers don't know anything about bankruptcy and it never occurred to them to be in that type situation.

MS. BALL:

It's not policy at all. It's primarily contract analysis.

MR. COATS:

Their analysis, though, I'm going to digress. Bankruptcy court is the world's most pragmatic court and has to be because of the nature of the beast. Patent law has some of the most bizarre results you can imagine. As a traditional part of it, the standing rules sometimes produce some of the most peculiar results imaginable.

It never occurred to patent lawyers that somebody would interpret a patent license as anything but in the most strictest fashion as to not give any extra rights to the licensee. So, when the patent lawyers write things they know that its fundamental, so they don't bother with the precision.

MS. BALL:

Same for the licensee. I mean a client goes opposite *Catapult*, the licensee hasn't changed.

MR. COATS:

Completely opposite *Catapult*.

In fact, it would be hard to – you couldn't reconcile the two because their total approach is completely different.

But who is right and who is wrong, I assume at some point the Supreme Court is going to have to try and resolve this.

I tell you, it behooves licensors to get bankruptcies filed in the Ninth Circuit and if you're the licensee and you want to sell things to somebody, I would hop over to the First Circuit and think of some excuse to get jurisdiction if only to open an office.

MR. WEINTRAUB:

Open an office in Boston.

JUDGE GRUBE:

And file next week because you have jurisdiction. It's a challenge.

MR. WEINTRAUB:

One of the things that has bothered me quite a bit about *Catapult* is that the unfairness of the result can really be highlighted if you look at the exact same parties, but the licensor is the party in bankruptcy rather than licensee. *Catapult* involved a licensee debtor who held a "license in" from a licensor who was not in bankruptcy. [71]

Under the Ninth Circuit interpretation of section 365 as a licensee debtor, your license is dead, you can't use it, you can't assume it, you can't assign it, so you could be put out of business because you filed for bankruptcy. [72]

If you changed the facts and the licensor is the bankrupt, the licensee is the non−bankrupt and the licensor wants to get out of that license and give it to somebody else and terminate the licensee under section 365(n), [73] you can't do that. As the debtor licensor, you can reject the license, but you cannot deprive the licensee of the ability to use that license so long as the licensee pays for it. The exact same parties, the only difference is now the licensor is in bankruptcy. It makes no sense. In one situation the licensee is protected when it's not in bankruptcy and in the other it's completely unprotected when it needs protection in bankruptcy.

JUDGE GRUBE:

That's a good point. Maybe it takes a congressional fix. Section 365(n) was a response to a Fourth Circuit case *Lubrizol* [74] which allowed the licensor to reject and put an innocent third party company out of business. Congress passed section 365(n) to say you can't do that.

MS. BALL:

I mean typically we see liens on inventory and equipment but a lot of this high−tech equipment, you need software licenses to operate it.

MR. COATS:

That's correct. All of which are potential – but those are usually copyright licenses. [75] So far, I haven't seen it applied to a copyright license, just a patent license, but we'll see how that plays out.

MR. WEINTRAUB:

I don't want to give you any more ammunition than you already have but there's a case from the Ninth Circuit called *Harris v. EMI Records* that talks about copyright licenses and it specifically says that the law of copyright and patent are pretty close when there's no – when there's no law under the copyright laws, you could take a look at what courts do in the patent cases. [76]

MS. BALL:

On the one hand I'm going to have the agreement on the other the licensor. We get a license that says hey, look, when we foreclose on the equipment we have a license that we can pass on to the purchaser of the equipment of foreclosure.

MR. COATS:

That court misunderstands both patent and copyright law. In fact, they are completely different and the rules are so completely different that the language has boggled my mind. But what can you do, because the writers knew neither copyright nor patent law. It's easy to generalize like that.

They are so different and that causes such confusion when people say things like that. You get others confused – other courts have to look at that decision and figure out, if it's not true. But how are you supposed to deal with it, because it's sitting out there.

JUDGE GRUBE:

Why don't I shift the focus with a couple of comments on the copyright aspect of this and how it intersects. This is not really an ownership interest, rather it is a lender issue.

I just want to mention briefly two cases. The *Peregrine* case in which the Court basically held that the U.S. Copyright Act preempted Article 9, and held that a bank that had perfected under Article 9 became unperfected. [77]

And then along came *Avalon Software*, which talked about the copyright and how it had to be registered. The creditor either had to file with the copyright office or he would not have a perfected interest. [78] The difference that struck here is in *Peregrine*. That was a case about a film, a Hollywood film in a can. Everybody was happy with the concept of finishing the film and putting it in the can, and then all go down to and file and register. Lending in Hollywood is project based.

Avalon Software

switched this concept over to software, where the lending is not project based, but entity based. And when the software is being changed three or four times a day, nobody wants to register and disclose anything, even what they're working on. It potentially creates a nightmare, but Bill, you said you were not sure that was really going to happen.

MR. COATS:

Yeah, because I think the way the two industries work are sufficiently different that it's not going to produce that many problems.

In the film industry, everybody records – registers copyrights for even the tiniest element released, the trailers get copyrighted separately. If people do promotional pictures, they copyright each picture.

A typical movie like *Lost World Jurassic Park* might have 700 copyrights because every little aspect has a separate copyright.

As a practical matter the software industry can't do that you don't copyright things until the work is completed and so, as a practical matter, you don't do little bits and pieces. When the work is done, you register and have the ninety day relation back period [79] and that protects the developer of the product.

It's a little rough on the collateral financers [80] because there aren't any intermediate copyrights to file. You wouldn't know what to file because you have to file the first ten and last ten pages of the software, until you're done, you don't – you don't have that and there are secrecy issues and everything else that precludes that.

I think by and large, that's less of a problem than it would be in the film industry. But there, people routinely register their copyrights. It's expected in that business. It's not expected in the software business.

MR. WEINTRAUB:

Avalon dealt with an unregistered copyright. Essentially, the judge said, you have no way to perfect your interest in a non−registered copyright. [81] What you need to do as a lender is require your borrower to register the copyright and to do your copyright office filing. [82]

We have a recent decision from the Northern District, Judge Tchaikovsky, *World Auxiliary Supply*, that says an unregistered copyright must be a general intangible, because there is no way to record an interest in an unregistered copyright. [83] So there is no preemption under the Copyright Act; therefore the UCC must apply. [84] I think that is still an open question because it's two bankruptcy court decisions with no appellate guidance.

MR. COATS:

Judge Tchaikovsky is wrong, even though it's not registered you can file a security interest with the copyright office.

MR. WEINTRAUB:

Can you locate it? How can you – how is that constructive notice to somebody looking in the records?

MR. COATS:

That would be a challenge, but then again it's hard to find anything in those records. They're not set up in any kind of linear fashion if that's helpful.

There's then a notice problem. Technically he is wrong, you can in fact register your security interest before the copyright itself is registered but you can't register your copyright until the work is completed.

JUDGE GRUBE:

That means you ought to file in both places.

MR. COATS:

File everywhere. That's what I tell everybody.

MR. WEINTRAUB:

Technically it may be what the Judge said was that you cannot register your security interest in a way that would trump a hypothetical judgment lien creditor so there is no way to perfect it because there is no constructive notice.

MR. COATS:

That's what the argument is. Let's move on at this point, to telecoms [85] and their own particular and peculiar problems.

MS. BALL:

Telecoms have a lot of the same problems meaning that there is so much cash, so much money chasing such a small competitive arena, that it has a lot of the same problems we've already been talking about. But in addition to that, it has a deregulation component, a high−tech component and a people component.

Put them altogether and we really have a very interesting marketplace. I mean why are we talking about telecoms in distress when all of us are looking at the giants in the industry that provide services, incredible consolidations such as World Corn, Sprint, AT&T, Vodafung, Deutsche Telekom. In addition there is an entirely separate group coming from the tech side, consisting of the providers of the technology and equipment or major players in telecom.

Motorola, Lucent, Nortel, Ericsson. It's not just the providers and services, but it all began in 1996, with the Telecom Act, [86] when the existing or incumbent carriers were forced to unbundle the services they offered into various component parts so that start−ups could have access to existing infrastructure for a reasonable fee.

This has given birth to an industry that has acronyms much like those we already talked about. We now have ILECs, [87] which are the incumbent local exchange carriers, now have CLECs, [88] which are competitive local exchange carriers. We also have various delivery products from fiber, cable, wireless, which are your PCS or personal communication systems, as well as satellite telephony.

We also have, and it's driven more by the players in the Valley than anywhere else with Cisco being in the lead, a multiplicity of services, voice, data, voice over IP data, and this technology is in telecoms.

Telecoms have an insatiable appetite for two things: Capital and technology. When the intersection of the telecoms, capital, and operating structures with the bankruptcy law have created some very unique problems that we are just beginning to understand. There have been bankruptcies in all telecom sectors. We have watched the PCS provider hopefuls, such as Pocket Communications, General Wireless, and Next Wave go into chapter 11 and struggle with the regulators.

We've also had paging companies such as Mobile Media and Page Net seek insolvency relief. We had satellite telephony companies like ICO Global and Iridium commence chapter 11 cases.

We have had resellers and prepaid phone cards come and go. We are now beginning to see the era of the integrated communication providers or ICPs and the CLECs, falling prey to capital costs outstripping revenues in a very competitive marketplace. One of the biggest cases is GST. Meanwhile there are out−of−court restructurings such as ICG, all watching other struggle to avoid a free−fall filing.

Perhaps we ought to spend a moment on GST which had over $1.4 billion debt. Its debt included the usual players such as public bonds, bank debt, and included the financial provided by the high−tech companies such as Motorola, Lucent, Nortel, Ericsson, who provided the high−tech equipment and licenses to run the telecom service. The technology providers are a major components of the telecom capital structure.

It is because the telecom companies are borrowing a page from Judge Grube's book, saying they do not have time and cannot survive the Chapter 11 process but must instead pursue an expeditious asset sale. So we have GST filing for relief under chapter 11 with its affiliates, some fifteen debtors together with an application for all fifteen debtors, to sell all of their assets within thirty days to Time Warner.

Ultimately, the sales took a little longer, and there was an auction process. Still incredible issues were imbedded in having fifteen different debtors, each with their own unique set of creditors, secured and unsecured, attempting to compute an asset sale with absolutely no allocation of the proceeds as among the debtors or among the collateral.

Because there was no allocation of proceeds as among the debtors, there was no allocation among the creditors. Yet the sale went forward.

MR. WEINTRAUB:

Corinne, I assume it was the same bankruptcy lawyer for all fifteen companies.

MS. BALL:

There was one firm and for that reason the case presented a real multiple debtor nightmare.

MR. WEINTRAUB:

Were any of the ethical issues raised in the case?

MS. BALL:

Yes, but most of them were resolved by dealing with – I will be quite blunt, by dealing with the squeaky wheel creditors. Although much like your high−tech companies, the telecoms have an insatiable appetite for capital but unlike many other high−tech companies, telecoms can point to infrastructure−type assets, such as long haul lines, fiber cable lines, switches to explain where all this capital has gone.

You will have one member of an affiliated group become the public vehicle to raise bond money. That entity in turn loans the proceeds of the public bond to another affiliate in exchange for getting an intercompany lien on the equipment purchased by the affiliate with the bond proceeds.

Frequently, more than one affiliate is used to purchase equipment. Some focus on "metro loops," while others focus on long haul assets. Switches may be financed directly through another affiliate getting equipment financing from the vendors such as Lucent or Cisco.

In turn, the affiliate owner of the equipment will then lease the telephone line equipment, the switching equipment and cable lines to another set of operating affiliates.

So you have simple three−part structure, borrower, purchaser/owner and operator, as an over−simplistic statement about how a lot of the ISPs and CLECs are organized. Thus, there are not only intercompany secured loans, but also intercompany leases. There are likely to be a special set of SPVs created to buy the technology from Sienna, Lucent, Alteon, who in turn license and/or lease the various technology and switching equipment to the same operating companies that are already the lessees of the long haul lines from another affiliate. It gets interesting when all these entities file for relief under chapter 11 and only worry about centralized cash management.

You do have a single enterprise in the classic sense, but you have this enterprise coming to court with fifteen different debtors and saying "the world is going to end," "we will have no going concern value," "we will lose all of our people," we're going to lose all of our customers if there's even a hint that we're not going to survive and continue on, so we have to go forward with a quick sale.".

Amazingly, the bulk of the creditors did not object. They supported an expeditious sale, but wanted assurance that the enterprise had been fully and fairly marketed, so instead of a sale by all debtors of all their assets 20 days after filing, the sale happened about ninety days after the filing. Obviously, such a sale raised issues. There were motions by the secured creditors and lessors regarding the particular debtor entities that were their borrower or lessor. This is the context of the fiduciary issue. Bill, there was a motion filed by the secured lenders on the switching equipment subsidiary, which had in turn leases all of its equipment to the operating debtors. The motion sought the equipment owner/debtor which was the moving creditor's borrower to enforce the lease rights that are protected by section 365 (d)(10) means that every debtor must pay for leases of equipment sixty following the petition. [89]

So we had that fiduciary motion pending saying if that particular debtor did not enforce its leases it was not discharging its duties to its creditors. [90] Moreover, there was a building against the operating debtors which suggested that the lessor should pursue a motion to compel assumption of rejection by the operating debtor. How could one firm provide advice on these competing interests? The practical answer dominated – maximize the value available to all and worry about relocation later.

The immediate sense from Delaware, in the form of oral statements, was that the judge would not be very receptive to interfering with the sale yet the judge was trouble by the Bankruptcy Code requirements under section 365(d)(10), the right of a secured creditor to credit bid at a sale under section 363. [91]

At the end of the day, if one subsidiary owns property, which is collateral consisting of a series of long haul lines which hook into another subsidiary's switches, in turn was to hook into a metro loop that belongs to an operating subsidiary, who also has layers of capital providers, it is quite complex and very difficult.

I think, telecoms are going to test your theory about liquidating chapter 11 cases being good things if they are the best way to get value.

Despite careful and considered capital structures and detailed documentation on leases and liens, the provides of capital realized that with only one major exception none of them could really foreclose on their collateral, and ultimately none of them really had any interest in bidding debt on their collateral under section 363(k). After all, what is a secured lender or what bond trustee is going to do with thousands of miles of fiber cable or satellites not quite in orbit? No one wanted to litigate value questions in the face of a favorable pending sale.

We witnessed that whole development. It's really interesting because the substantive consolidation issues were never decided but really, this situation should create some new law on the enterprise theory of substantive consolidation.

Telecom has another bankruptcy crossover that is very difficult and directly attributable to its complex capital structures. In order to be attractive to the capital markets, telecoms have avoided granting liens on their accounts receivable or cash. When you think about telecom, what is a telecom receivable? Can it possibly be proceeds of another form of collateral? That is somewhat untested water because in telecoms, there are very high−tech switches which calibrate and record to keep the volume, the quality, the quantity of the types of services provided and generate the billing records which give rise to the receivables. Are receivables proceeds of these switches?

For that reason, when it comes to the bankruptcy rule in section 552(b) that security interests in after acquired property do not extend to that post petition property, there is a question: does that mean in every telecom, the post petition receivables are automatically free and clear and an asset available for debtor−in−possession financing? Has section 552(b) [92] made a new inroad and created some new collateral in the telecom arena that might not otherwise exist? In many instances, the lenders have liens on tangible assets, such as the switches and/or line infrastructure, together with the related intellectual property, which is owned by affiliated entities who in turn lease the collateral to the operating entities, so that the receivables are in fact owned by a different entity than the entities that own the underlying property that generates the receivables? [93] This is a "structural" answer to an untested legal question. Hence the operating company has a lease obligation but its receivables are clear.

I think we're going to see some litigation over whether or not receivables can be proceeds of collateral in telecom.

MR. WEINTRAUB:

I don't know if this is a good analogy but aren't they almost analogous to gate receipts?

MS. BALL:

Yes. The whole thing they're saying is they're an independent asset created by a post petition delivery of services, not really related to the pre−petition equipment. By the same token, this equipment has tons of software and software licenses. Almost every lender that lends against the equipment, also has a lien on all these licenses to software and also gets all general intangibles, contract rights [94] and proceeds even though the intangible of its borrowers and "proceeds of the foregoing."

To avoid confusion by avoiding the issue, the pattern has been to move the receivables into a different entity. Ironically, that same enterprise is coming back to you after filing for bankruptcy and saying "forget the separate entity structure, we are really all one enterprise, we want to sell everything in thirty days, and we have to sell it altogether."

So, I think we haven't yet witnessed the allocation wars. I think this issue of de facto consolidation in a setting on intentionally complex structuring will be tested.

The third unique telecom problem is attributable to the fact that the most vicious competitors to the ailing telecom are the other telecoms. It's the one industry where there are multiple participants in a tight marketplace and concurrently these competitors have among themselves multiple contractual relationships. Consider that the services provided by one telecom "connect" with one or more other telecoms and "access" is often shared by contract. These are key contracts affecting the viability of a telecom. Yet in bankruptcy, we all know contracts with utilities such as a telephone company are special. What is a telecom? It is a utility under section 366. [95] So here you have a debtor whose primary creditor population consists of its other telephone companies as vendors, all of whom are coming in seeking relief under section 366, which was never intended to provide a general unsecured protection, demanding deposits and threatening to terminate their contractual relationship if they don't get deposits that were never contemplated prebankruptcy. The treatment of these contracts which appear to be more like a supplier's executory contract, is unclear.

There is a tremendous pressure upon distressed, cash stripped debtor telecoms from their competitors under section 366. When you layer on to that what the regulators are doing, particularly in the FCC [96] area with the PCs and wireless systems, we are getting into a fourth problem. Which is the conflict of jurisdiction between the regulator, notably the Federal Communications Commission and the bankruptcy courts.

That story is lodged in the Supreme Court in the *Next Wave* case. At the moment the decision in the Court of Appeals for the Second Circuit suggests in dicta that telecom licenses are not property of the estate protected by the automatic stay, but instead a privilege, [97] the jurisdiction over which is reserved exclusively to the FCC, and in exercising that jurisdiction the FCC is exempt from the automatic stay and the other operations of the Bankruptcy Code.

Frankly, I think we are going to see all of these telecom issues including regulatory and jurisdictional problems on a transnational basis. In telephony, the governmental interest is obvious. In satellite telephony this may be even interest due to the serious issues associated with launching, operating, tracking, and maintaining and deorbiting satellites. Secondly there is a global pool of providers of technology, equipment and capital.

We saw the American equipment providers such as Alteon suffer the filing in the UK of a telecom called Iaxis. It is unclear whether the Alteon equipment leases were going to be honored. These equipment leases by the way are worth hundreds of millions of dollars. In telecom, the venture capital is often provided by the equipment providers such as Nortel, Ericsson and Nokia. These sophisticated equipment providers provide equipment financing, as well as agenting or organizing syndicated credit lines for these entities to start up their businesses. For example, Ericsson was originally the agent on the $200 million credit agreement for Powertel.

It's a very interesting industry, with multiple vectors, but I think a lot of the problems are similar to those you've seen in terms of high tech, a capital intensive business that runs out of cash. The capital structure is frequently built upon expected future, as opposed to existing revenues. Like high tech telecoms suggest that the people are key. Not surprisingly, telecoms also have the classic bankruptcy problem of what will customers say if the telecom files and doesn't have a plan. Chapter 11 isn't perceived as a comfort zone for telecom operation..

MR. WEINTRAUB:

In both industries, everything is up in the air, too.

MS. BALL:

Pardon?

MR. WEINTRAUB:

In both industries, everything is up in the air, too.

MS. BALL:

Absolutely. I think the whole structure – structuring is, of course, a product of the capital markets. We will begin to see some real tests very soon as with the jurisdictional issues of the Supreme Court in *NextWave*. I think that's a chapter we will witness continuing to evolve and I don't know if they will be going to the Ninth Circuit.

Strange thing. By the way, in two motions filed, one by Nortel and one by Lucent, in each case asserting that the licenses to operate the switches were personal and could not be assumed, and, a fortiori and could not be assumed and assigned in connection with the sale of the telecom to a purchaser. [98] These high tech companies argued the theory of *Catapult*, urging the Delaware District Court to view the licenses of the technology to operate the critical switching equipment as personal and thus ineligible for assumption and assignment. [99] It was settled because these equipment providers filed motions, not to protect their interest in the intellectual property, but to get their equipment loans paid.

MR. COATS:

Or they did it to avoid having one of their competitors pick up their equipment. That's how they're building – I actually represent one small telecom and that's how Lucent did it. Lucent builds up its network by giving these out and yet if somebody bought my little client Mexico operations, Lucent might be in bed with one of its competitors if it doesn't want to be.

MS. BALL:

Interesting point — in the era of "M and A," which is what we're witnessing with telecoms in distress and buying the assets of the distressed telecom in place may provide a great market entry for a competitor. It is a competitor's nightmare because a competitor can buy the company with technology it could not otherwise obtain and for a cost that is far less than the cost to build it. Despite the clear tremors of distress among CLECs and LSPs there were still three major debt issues in the capital markets by major telecoms recently, Level 3, Williams Communications and Windstar.

The strategy of letting someone else spend the money to develop and build a telecom, waiting to pick up the key pieces a distressed sale is increasingly viable. Qwest has done that twice. I think we're going to see it a lot more. I think telecoms in distress, particularly global telecoms, are going to be dominated by an M and A transactional attitude as opposed to a stand−alone restructuring.

MR. WEINTRAUB:

That's because the dollars are so much bigger.

MS. BALL:

The dollars are so much bigger, the realization of revenues is so far down the road nobody cares and they are such giants in the market, such absolute giants in the market, consolidation may be inevitable.

MR. WEINTRAUB:

I would also think that claims trading is very active in the cases because of the dollars involved.

MS. BALL:

It's interesting. You look at the bond finance and bank finance, I think that's absolutely true. When you look at what Bill is talking about, those that are linked to the intellectual property and their loans, I haven't seen too much trading in that. Although in telecom, what you will witness is there's a start−up telecom, and, Bill, maybe your client has done this, it will go to an equipment sponsor, I don't know, say Ericsson, and Ericsson will say we'll give you a line of two, maybe two hundred seventy−five million dollars provided you use that just to buy Ericsson equipment.

MR. COATS:

That's a standard way of financing things. I've not – there are not numbers like that. That would have made them very happy, but give them forty or sixty million dollars to buy Lucent and another one from Ericsson for forty million dollars to buy. Each aspect of their infrastructure comes from a different supplier but they're also locked into that.

MS. BALL:

I have seen the VC funds investing in the start−up telecoms also turn out to be the lenders to whom the equipment loans are syndicated. If you look at a Powertel or others, and you say, gee, who was in that huge two hundred sixty−five million dollar equipment line. Who did Nortel, Ericsson syndicate it to? The frequent model, turns to see the basic investors in the start−up telecom, which will also end up taking a piece of the debt structure.

So while you say there's a lot of trading claims, I think that's true in the bond and classic commercial bank debt for a telecom that is fully operating. For a nascent a telecom which is a start up there is tremendous overlap between the people supplying the debt capital and people supplying the equity capital but frankly there's usually a catalyst or intermediary in the form of a high−tech or equipment vendor player in the middle.

MR. WEINTRAUB:

I think that's right, Corinne. I have not seen claims trading in my smaller high−tech cases. The only times I've seen claims trading was in the case I talked about earlier, where we took a bunch of stock and people could value that stock and hedge their bets on which way the market would go and the claims were fairly actively sold.

MS. BALL:

I think that's true. I think all the claims, once the asset is sold in a section 363, do you think there's going to be more or less claim trading? [100] I think it's truly a question whether or not people need liquidity.

MR. WEINTRAUB:

If people need liquidity and you get into your allocation issues and the vultures have to figure out where the value gets allocated and what claims to buy.

MS. BALL:

How do you have a valuation trial once the assets were sold and sold without an allocation of value? How would you work on an allocation litigation in that case?

JUDGE GRUBE:

Aren't those the kinds of problems that get resolved in a conference room somewhere?

MS. BALL:

That's what we're hoping, but I'll have to tell you, I have the privilege of being the one party that submitted a credit bid in that sale and briefed the whole issue you can't sell my collateral even under section 363(f) [101] without my consent, without giving me a right to bid it in. We were totally ready, willing and able to take back the switches which, of course, generated the billings to the telecom. It did lead to a very quick settlement, Judge, in the conference room.

JUDGE GRUBE:

The answer to your question is I don't know how you deal with that.

MS. BALL:

I have to tell you, there are two different issues of public bonds, each of which are secured. One is more involved in "long haul" assets, while the other was dedicated to "metro loop" infrastructure.

I think the judge is right, we're going to end up and claims trading will probably be the solution to the allocation problem because people hedging in terms of the bonds They ask, do I want to be in the long haul line issue or do I want to be in the metro loop issue?

Very interesting and as we see more CLECs, [102] we may see more of these trading and allocation issues rather than less.

At the moment it's a spectrum where there are start−ups like Bill talked about, where, the tech providers are the investors ranging up to huge, absolutely huge companies with billions of dollars in debt that are running out of cash. Consider GST, it only had thirty days of cash left and that's why they needed to sell GST in thirty days. This scenario sounds like the high tech case. .

With that, gentlemen, I don't know if anyone would like to add anything more. I can go on and on about satellites, but –

JUDGE GRUBE:

I have one closing thought that occurred to me. We've all sat here and struggled with the technology issues that we've been dealing with, particularly the last few years.

It struck me that the Bankruptcy Code is a little archaic in one sense. It's like a brick and mortar company that was built around contract law and the Uniform Commercial Code.

All the issues we have been dealing with in the last three, four, five years is licensing law and intellectual property law. And it's a bit like oil and water.

The provisions really are not designed to deal with these issues. When they drafted those provisions, nobody was thinking about these problems.

So, courts are struggling with how to apply the Code and you're getting all kinds of funny looking answers that don't always make a lot of sense. I think maybe that's why.

MS. BALL:

I think you're right. I think the financial community has come up with ways to finance a lot of these intangibles. The law hasn't caught up to the new issues. Think about the operation of section 366 in a telecom case. I don't think section 366 was ever intended to advantage a creditor group in a particular industry. It could bring a telecom case to a screeching halt.

JUDGE GRUBE:

Yes. I thought that was more of a consumer provision.

MR. WEINTRAUB:

Yes.

MR. COATS:

Sure.

JUDGE GRUBE

: That's what I thought it was for.

MR. WEINTRAUB:

That's what the tariffs –

MS. BALL:

I did not anticipate this kind of industry.

MR. WEINTRAUB:

Certainly the tariffs are to protect consumers from being shut off.

MS. BALL:

Right. In any event, I think we're all going to be watching this evolve some more and I really think the telecoms have really been mimicking what you guys have been doing out in the Valley, because a lot of those techniques are what has been exported. The factors, such as suddenly running out of cash, suddenly needing to sell, and needing key people are similar. Telecom start ups are an arena for VC firms and high tech companies; and very dependent on technology. There is a clear intersection between high−tech and telecom, there's going to be a convergence of the two – tremendous convergence at least in terms of the bankruptcy and the governing law.

MR. COATS:

I think that's a good wrap−up. What is going to happen is we will get a transcript that we get to edit here before we send it alone to our friends at the ABI.

MR. WEINTRAUB:

We are off the record.

MR. COATS:

Off the record.

FOOTNOTES:

[1] William P. Weintraub is a member of Pachulski, Stang, Ziehl, Young & Jones located in San Francisco, California. He earned his B.A., magna cum laude, from the State University of New York at Albany in 1975. He earned his J.D. from the University of Michigan in 1979. His practice areas include Business Workouts, Bankruptcy Reorganizations, Commercial Trial Practice and Litigation, Debtor Rights and Creditor Remedies. Judge James R. Grube is a

Bankruptcy Judge in the Northern District of California, 9th Circuit. He was appointed in 1988. He earned his B.A. from the University of Santa Clara in 1964, and his J.D. from the University of California (Boalt Hall) in 1967. Back To Text

[2] See Robert S. Gebhard, Dot−com Bankruptcies: A Preview from Silicon Valley?, 2000 ABI JNL. LEXIS 68 (noting chapter 11 filings for financially troubled dot−com companies "were at a 10−year low."). Back To Text

[3] See generally Ronald J Mann, 85 Cornell L. Rev. 134, 136 (1999) (explaining software development "rel[ies] on . . . venture capitalists to invest a substantial amount of equity in the business."). See, e.g., John M. Czarnetzky, 67 Fordham L. Rev. 2939, 2984 (1999) (quoting David A. Harper, Entreprenuership and the Market Process: An Inquiry Into the Growth of Knowledge 348 (1996)) (attributing venture capitalist's success to "evaluation procedures and the rigorous selection they employ"). Back To Text

[4] See generally Anya Schriffren, The Day the IPO Died, The Industry Standard, Oct. 2, 2000 (describing how failures of IPO's affect venture capitalists); Joelle Tessler, Priceline.com Warns of Lower Revenues Due to Decline in Airline Ticket Sales, San Jose Mercury News, Sept. 28, 2000 (stating "venture capitalists have grown increasingly disillusioned" with failing dot−com companies); Catherine Wheatley, US Matchmaking Websites Encourage Similar Services in Britain, Sunday Business, Oct. 8, 2000 (discussing growing need for matchmaking sites which introduce venture capitalists and start−up companies). Back To Text

[5] See Jennifer Chu, eBay Expands Business Services Site−Wide, Leveraging iPIX's PIXcast Network to Provide Imaging Hosting Services to Nearly 16 Million eBay Users; Sellers Can Easily Drag and Drop Images, PR Newswire, Oct. 4, 2000 (terming eBay "the world's largest online trading community"); Pat Dwight, Micro−General Named Fastest−Growing Orange County Company for Second Consecutive Year, PR Newswire, Oct. 3, 2000 (calling eBay "Internet industry giant"); Greg Kline, Dot−Com Business Opportunities Remain, But Gold Rush Is Over, Analyst Says, The News−Gazette, Sept. 26, 2000 (noting eBay's exceptional success among many failing e−businesses). Back To Text

[6] See generally Timothy J. Mullaney, Still the Benchmark to Bet on?, The Industry Standard, Aug. 7, 2000 (discussing Benchmark's success with eBay, noting "a jaw−dropping ninety – two fold increase" for Benchmarks' investment); Jonathon Rabinovitz, The New New Venture Capitalists, The Industry Standard, May 1, 2000 (justifying Benchmark's fame by Benchmark's $6.5 million eBay investment which grew substantially; worth more than $5 billion 2 years later); Michael Useem, Making Your Mark, The Industry Standard, Oct. 9, 2000 (tracing Benchmark CEO Whitman's business tactics before and after eBay's IPO). Back To Text

[7] See generally David A. Kessler, Note & Comment, Investor Casualties In the War for Market Efficiency, 9 Admin. L.J. Amu. 1307 n.138 (1996) (noting amended Rule 144(d) and (k) permitting restricted sale from 2 year to 1 year). Back To Text

[8] See, e.g., Sylvia Dennis, Dot.com 911 service Debuts For Net Firms in Trouble, Newsbytes, July 26, 2000 (addressing Sonicport.com's remedy for financially−troubled start−up companies); Alex Pham and Stephanie Stoughton, Dot−Coms Foster New Corporate Culture: Risk, Reward Are Key, Not Job Loyalty, Boston Globe, Aug. 6, 2000 (observing how frequent employee lay−offs from start−up companies have become extremely commonplace due to financial "risk−taking"). Back To Text

[9] See Steven Bonisteel, Corel's Derek Burney Takes Permanent Hold of CEO Title, Newsbytes, Oct.3, 2000 (explaining how CEO Burney "helped keep the company afloat by wrangling a complex financing deal and overseeing a dramatic cost−cutting deal."); Jim McGrath, TheCustomShop Secures $3 million line of Credit; New Line of Credit Goes to Store Renovations, Technological Infrastructure, PR Newswire, Sept. 9, 2000 (attributing TheCustomShop's financial turn−around to new management who "completed a $9 million series A equity round"); Vidikron Gets Credit Line, Consumer Electronics, Aug.16, 1999 at 16 (noting Vidikron Technologies applied for equity financing of $2 million "to fend off possible bankruptcy"). Back To Text

[10] See, e.g., Robert Hertzberg, Look Out Below!, Internet World, June 14, 1999 (stating "professional money managers, who, while not understanding the Internet a whit, have nevertheless added millions of dollars worth of Internet stock to their portfolios"); Glen Mathison, Separately Managed Investment Accounts on the Rise for High−Net−Worth Individuals, Industry Experts Advise Attendees at Schwab Impact 99 Conference; Tax Advantages and Customized Service are Keys to Growth of Separately Managed Accounts, PR Newswire, Nov. 2, 1999 (claiming professional money management services can be used for minimizing investment tax consequences); The Staff of Thestreet.com, CMGI's Heavy Wetherell, The Industry Standard, March 8, 1999 (observing "professional money managers – despite unimaginable resources, including the leverage of top−notch research and investment bank guidance – are often less creative than retail investors"). Back To Text

[11] See Erick Schonfeld, How Sendmail Got Adopted by the 'Band of Angels', Fortune, Oct. 12, 1998 at 222 (describing Band of Angels Investment Group and Sendmail). The Band has grown from 12 members in 1995 to about 120 today. Id. They normally raise no more than $600,000 for seed money except in the case of Sendmail, who received $4,000,000 from the Band. Id. Back To Text

[12] See Richard M. Cieri & Michelle M. Morgan, Licensing Intellectual Property and Technology from the Financially Troubled or Startup Company: Prebankruptcy Strategies to Minimize the Risk in a Licensee's Intellectual Property and Technology Investment, 55 Bus. Law. 1649, 1649 (2000) [hereinafter Cieri] (noting prevalence of financially troubled startup companies). The article further states that intellectual property is often owned by small businesses who are financially unstable as result of startup companies "[l]acking profits prior to the commercialization of its product." See also Peter Delevett, Valley landlord getting skittish on renting to start−ups (visited August 17, 2000) <www.mercurycenter.com /svtech/news/indepth/docs/ pd081800.htm> (noting that major venture capitalists seem "[n]ot to fully trust the industry . . ." and have become "[l]ess willing since the spring stock market downturn to rent to start−ups") (emphasis added). However, "Brad Smith, CEO of another large valley lender, Heritage bank, calls such fears unfounded" Id. Back To Text

[13] See Chiat/Day, Inc. Adv. v. Kalimian, 105 A.D. 2d 94,96−97 (1st Dept. 1984) (describing irrevocable letter of credit provided by tenant as security for its leasehold obligations); see also Tyler Maroney, Credit Denied: Dot−Coms Feel the Squeeze (visited July 24, 2000) <www.fortune.com/fortune/technology/ 2000/07/24/ eco3.html>:

Deadbeat dot−coms . . . have caused a backlash against their more solvent brethren. As more and more startups stumble−−and vendors are left holding the bag, to the tune of millions of dollars−−companies that do business with the Net newbies are loosing faith in their clients' financial stability. To protect themselves, many are taking strict precautions to ensure that they'll get their money. It's not enough anymore to have tons of venture capital and high powered strategic partners. Companies that sell to dot−coms are insisting that they sign letters of credit, agree to use escrow accounts and in some cases pay in advance. Landlords are tightening the noose around their new−economy tenants . . . .

Id. Back To Text

[14] See John Cook, High−flying Freeinternet.com crashes and burns (visited Oct. 13, 2000) <www.seattlepi.newsource.com> (observing recent trend that several dot−coms have gone under leaving no assets). Furthermore:

What took two years to build seemed to unravel in a week. On Oct. 2, word leaked out that the company had cut 90 of its 30 employees. The following day, it canceled a $172 million initial public offering. By last Friday, Freeinternet.com was barely hanging by a thread as it sold off its assets to one−time competitor **NetZero**, filed for bankruptcy protection in Seattle and eliminated most of the remaining staff.

Id. Back To Text

[15] See 11 U.S.C. § 365(n) (stating licensees elections, if trustee rejects executory contract under which debtor is licensor of right to intellectual property; see also Cieri, supra note 12, at 1650 (stating "An entity choosing to license intellectual property and technology from a financially−troubled or startup company faces the risk that the company

will file for bankruptcy, which may change, if not terminate, the parties' pre−bankruptcy license agreement"). Furthermore, even with the advent of § 365(n) of Bankruptcy Code which sets out to protect creditors of intellectual property, there are shortcomings which may deter entities from investing in dot−coms. Id. at 1685. "§ 365(n) of the Bankruptcy Code does not accomplish its goal of protecting and promoting the development of intellectual property because the section encourages certain types of rejection abuse, such as, the use of escrow agreements, third−party assignments, outright sales, and improvements. Id. Additionally, it arms a non−debtor party with the ability to override non−abusive rejections by a debtor." Id.; John Cook, Start−ups can have tendency to juggle business (visited June 2, 2000) <www.seattlepi.com> (stating "[w]ith stock market jitters and dot−com layoffs, Seattle venture capitalists are taking a much closer look at their investment portfolios."). "Investors are much more selective . . . ." Id. "Many of the angles have pulled back and they are having a tough time getting the checks ready." Id. Back To Text

[16] See CrossKeys Dyband Marks String of eCommerce Sales With US ISPs: CrossKeys Dyband Enables ISPs to Deliver Consistent QoS, Software Sales Over the Web Continue to Grow, Business Wire, Oct. 13, 2000 (discussing e−commerce corporation listed on Toronto Stock Exchange); see also <http://www.tse.com> (displaying website for Toronto Stock Exchange). Back To Text

[17] See generally In re Zenith Elecs. Corp., 241 B.R. 92, 99 (Bankr. D. Del. 1999) (stating "[t]he Equity Committee**,** as an official committee in this case, does have standing to appear and be heard on any issue in the case"). Back To Text

[18] See Boone v. Carlsbad Bancorporation, Inc., 972 F.2d 1545,1549 n.2 (10th Cir.1992).

In a reverse triangular merger, the principals of an existing bank (original bank) establish a bank holding company (BHC). The principals then apply for authority to charter an interim bank which will be wholly owned by the BHC. The directors of the original bank and the interim bank then agree to merge the two banks after the the government regulatory approval. In a triangular merger the interim bank becomes the surviving bank; in a reverse triangular merger, the original bank is the survivor.

Id. See generally Perlman v. Catapult Entertainment Inc.(In re Catapult Entertainment Inc.), 165 F.3d 747, 748 (9th Cir. 1999) (depicting case involving reverse triangular merger); Lockheed Martin Corp. v. United States, 42 Fed. Cl. 485, 487 (1998) (describing case involving two reverse triangular mergers). Back To Text

[19] See generally Bank Of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership, 526 U.S. 434, 457 (1999) (noting in reorganization, presence of competing bidders tends to increase creditors dividends); In re M.J. Waterman & Assocs., No. 99−1446, 2000 U.S. App. LEXIS 23276, at *19 (6th Cir. Sept. 15, 2000) (stating "Fed. R. Bankr. P. 3018 provides that a creditor in a chapter 11 bankruptcy case must vote on proposed Reorganization Plans by submitting a ballot"); Groeper v. Joseph (In re Owen), No. 98−56876, 2000 U.S. App. LEXIS 15392, at *2 (9th Cir. June 22, 2000) (holding appeal is moot where reorganization plan has been substantially culminated). Back To Text

[20] See infra note 21. See generally In re Big Rivers Elec. Corp., 233 B.R. 726, 739 (Bankr. W.D. Ky. 1998) (observing the potential presence of a pre−pack plan). Back To Text

[21] See Nicholas P. Saggese & Alesia Ranney−Marinelli, A Practical Guide to Out−of−Court Restructurings and Prepackaged Plans of Reorganization § 4.01B, at 4−10 n.16 (2d ed. 1993) (citing Campbell v. Allegheny Corp., 75 F.2d 947 (4th Cir. 1935), cert. denied, 296 U.S. 581 (1935)) (noting pre−petition solicitation and voting on arrangement with creditors were available under Bankruptcy Act and have been used sporadically since at least 1930s); see also Duncan N. Darrow, et. al., Symposium−−The New Latin American Debt Regime−−Restructuring Strategies for Mexican Eurobond Debt, 16 J. Intl. L. Rev. 117, 120 (1995) (explaining pre−packs are intended to accelerate method of creating Plan of Reorganization). Pre−packs are legal documents that negotiate and resolve creditor claims to allow debtors the opportunity to avoid chapter 11 reorganization. Id. See generally Ralph E. Avery, Article III and Title 11: A Constitutional Collision, 12 Bankr. Dev. J. 397, 443 (1996) (asserting supporters of this method look to numerous sections of Code for permission to use pre−packaged plans). For instance, see the following provisions: (1) § 1102(b)(1), allowing for a pre−petition creditors' committee to work like committee in bankruptcy; (2) § 1121(a), permitting for restructuring plan to be filed with the petition; and (3) § 1126(b), permitting for pre−filing acceptance or rejection of a plan. See 4 Norton Bankruptcy Law And Practice 2d § 86:20, at 86−27

(William L. Norton, Jr., et al. eds. 1997) (asserting "pre−pack" enables debtor to get benefits of Workout and Code without excessive cost and delay); Cauri Coyal, Hybrids Emerging as New Wrinkle on Prepackaged Bankruptcies, Bondweek, May 13, 1991, at 1 (reporting predictions that "[f]inancially troubled companies that cannot file prepackaged bankruptcies will increasingly turn to hybrid or partial prepacks as a way of speeding up and cutting the costs of reorganizing under chapter 11"). Back To Text

[22] See Fleet Factors Corp. v. Bandolene Indus. Corp., 86 N.Y.2d 519, 528 (1995) (asserting Uniform Commercial Code impresses strong duty upon prospective secured creditors to know pertinent and proper corporate name of its prospective debtor); In re Chicago Lutheran Hosp. Ass'n, 89 B.R. 719, 731 (Bankr. N.D. Ill. 1988) (observing secured creditor concert action in reorganization effort is not equal to secured creditor's agreement to finance the costs of reorganization case); see also Darrow, supra note 21, at 117 (defining "secured creditors" and "creditors with lien" on assets of debtor); Karen Gross and Matthew S. Barr, The Sixth Annual Ernst C. Stiefel Symposium: Bankruptcy Solutions in the United States: An Overview, 17 N.Y.L. Sch. J. Int'l & Comp. L. 215, 245 (1997) (stating secured creditor can negotiate with debtor to construct its treatment under plan of restructuring). Back To Text

[23] See In re Chicago Lutheran Hosp. Ass'n, 89 B.R. at 727 (asserting general rule costs of administration of estate and attorney fees for services performed for debtor in possession are charged against estate; rule stems from assumption that trustee represents interests of unsecured creditors and not secured creditors). Back To Text

[24] See 11 U.S.C §§ 101 (56), (57) (citing S. Rep. 100−505, (1988), reprinted in 1988 U.S.C.C.A.N. 3200, 3205) (defining intellectual property broadly to cover "both the intangible legal rights associated with intellectual property and the tangible object or objects, such as books, blueprints and electronic media, in which such intellectual property may be fixed or recorded"); see also In re Comband Techs., 1995 U.S. App. LEXIS 31064, at *10 (stating often buyers can only measure intellectual property's value by analyzing how much income that property is currently creating for the business). Furthermore, the value of intellectual property can disappear completely if the business that owns property ceases in operation. Id.; Scott on Computer Law § 2.06 (Vol. 1, ch. 2 n.81, Aspen Publishers, Inc.) (2000) (noting intellectual property is widely defined to embody virtually all traditional intellectual property rights, including copyright, patent, trade secrets and mask work rights, excluding only trademarks and service marks). See generally Kim Taylor, Note, Patent Harmonization Treaty Negotiations on Hold: The "First To File" Debate Continues, 20 J. Contemp. L. 521, 523 (1994) (asserting in U.S., intellectual property rights in patents are prospectively valuable assets protected by law). This protection of intellectual property stems from our Constitution. Id. Back To Text

[25] See MacAleer v. MacAleer, 1999 Pa. Super. 35, 37 (P.A. 1999) (finding stock options to be analogous to pension benefits because they are also employee benefits given in lieu of higher salaries). See generally Austin v. RJR Nabisco, 1993 U.S. App. LEXIS 22544, at *21 (observing RJRN's Company policy of granting restricted stock to several senior executive officers). Back To Text

[26] See Austin, 1993 U.S. App. LEXIS, at *21 (discussing Austin's severance agreement with RJR Nabisco). Back To Text

[27] See Monfiletto v. John Hancock Healthplans, Inc., 1992 U.S. Dist. LEXIS 3626, at *1 (E.D. Pa. March 20, 1992) (noting plaintiffs sued to receive benefit from their 'pay−to−stay' plan). Back To Text

[28] See Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 303 (4th Cir.1987), cert. denied, 485 U.S. 962 (1988) (holding party had no power to pay certain creditors before consummation of plan of reorganization); Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1066 (2d Cir. 1983) (asserting equity committee opposed the sale, arguing that authorizing § 363(b) sale would in effect bypass chapter 11 reorganization process); see also John J. Hurley, Chapter 11 Alternative: Section 363 Sale of all of the Debtor's Assets Outside a Plan of Reorganization. 58 Am. Bankr. L.J. 233, 251 (1984) (describing 363(b) sale as "the debtor's estate is transformed from an operating entity into a 'pot of cash' with all liens and encumbrances transferring from the property to the cash"). Back To Text

[29] See In re Lionel Corp., 722 F.2d at 1066−67 (questioning whether § 363(b) properly could be used to effect sale of most of corporate assets of chapter 11 firm); In re Verrazzano Towers, Inc., 10 B.R. 387, 405 (Bankr. E.D.N.Y. 1981) (describing "liquidating 11" as seeking reorganization, or orderly liquidation under § 1123(b)(4)). The Court continued to state that:

As to the debtor operating at a break−even point with income of $ 1,000 a month, considering the fact that the two mortgages held by Flushing, which are hopelessly in arrears, total $ 1,325,000, it cannot be said that the debtor's total monthly income is sufficient to cover the monthly charges for interest, as it accrues, without taking into consideration the charges for real estate taxes as they come due on the property. The debtor's total monthly income of $ 1,000 is hardly 'a break−even figure.'

Id. Back To Text

[30] See Brian L. Becker, et. al., Warm with Sunny Skies: Disclosure Statement Forecasts, 73 Am. Bankr. L.J. 809, 821 (Fall, 1999) (noting that overoptimistic results may hinder courts capabilities in accessing true value); see also James M. Lukenda, CIRA. & Arthur Anderson LLP., Financial Statement Disclosures for Financially Troubled Enterprises, 1999 ABI JNL. LEXIS 121, at *1 (Sept. 1999) (noting that financial statements are accepted as generally accepted accounting principals); Grant W. Newton, Financial Statements: Reporting Requirements in Bankruptcy Cases, 1998 ABI JNL. LEXIS 235, at *1 (Oct. 1998) (asserting that when company declares bankruptcy, accountants are hired to prepare financial statements). Back To Text

[31] See Marcus v. Parker (In re Subpoenas Duces Tecum), 978 F.2d. 1159, 1161 n.2 (9th Cir. 1992) (stating that Bankruptcy Code requires that committee hires attorneys who are not involved in any aspect of case that could be adverse to interest); see also Marta G. Andrews, The Chapter 11 Creditors' Committee: Statutory Watchdog?, 2 Bankr. Dev. J. 247, 276 (1985) (noting that committee counsel can be held liable if claim is left off list of allowable claims). Back To Text

[32] See Bell v. Bell (In re Bell), No. 98−5047, 2000 U.S. App. LEXIS 23651, at *58 (2d Cir. Sept. 20, 2000) (noting that United States trustee convenes and presides at meeting of creditors); see also 1 Collier on Bankruptcy ¶ 6.01, at 6−14 to 6−15 (Matthew Bender & Co., 2000) (stating "The United States trustee is the administrative officer of the bankruptcy system."); Marjorie L. Girth, Rethinking Fairness in Bankruptcy Proceedings, 73 Am. Bankr. L.J. 449, 467 (Spring, 1999) (noting that power was allocated to trustees in 1986). Back To Text

[33] See Smith v. Kennedy (In re Smith), 221 F.3d 1101, 1103 (9th Cir.2000) (noting that claimants have 30 days after creditors' meeting to object to debtor's exceptions under § 341); see also In re Vilt, 56 B.R. 723, 724 (N.D. Ill. 1986) (discussing whether debtor must be present at 341meeting); Judge Randolph Baxter & Jaime B. Schneier, Claims & Opinions: Rule 2004: A useful Rule or an abusive Creditor's Weapon?, 10 Bankr. Dev. J. 451,452 (1994) (noting that Code requires debtor to appear and have examination under oath at § 341 creditors meeting). Back To Text

[34] See In re Bell, 2000 U.S. App. LEXIS 23651, at *6, (noting that debtor must file plan and disclosure statement); see also Black's Law Dictionary 320 (6th ed. 1991) (defining as statement requiring that finance charge and other credit terms be fully disclosed); Honorable A. Thomas Small, Small Business Bankruptcy Cases, 1 Am. Bankr. L. Rev. 305, 309 (1993) (claiming that disclosure statement in chapter 11 case is reviewed by bankruptcy judge and, if not defective, is voted on). Back To Text

[35] See 11 USCS § 365 (2000) (stating that "trustee, subject to court's approval, may assume or reject any executory contract or unexpired lease of the debtor"). Back To Text

[36] See Friend v. Talcott, 228 U.S. 27, 35 (1913) (noting that declaration of sales contains sales price which should be accurate); see also Ewell v. Diebert (In re Ewell), 958 F.2d. 276, 281 (9th Cir. 1992) (noting that declaration of sale contains fair market value of property); Wedgestone Fin. v. Pullman, No. 88−8963, 1991 U.S. Dist. LEXIS 18867, at *1 (E.D. Pa. Dec. 31, 1991) (asserting that defendant ask that fair market value be determined judicially and that declaration of sale should reflect valuation). Back To Text

[37] See St. Joe Paper Co. v. Atlantic C.L.R. Co., 347 U.S. 980, 982 (1954) (noting that arm's−length transaction could be negotiated in § 77 reorganization); see also New Nat'l Gypsum Co. v. National Gypsum Settlement Trust (In re National Gypsum Co.), 219 F.3d. 478, 491 (5th Cir. 2000) (noting that since sale was not arm's−length transaction, court should not allow creditors advantage of purchase); Mark A. McDermott, Ponzi Schemes and the Law of Fraudulent and Preferential Transfers, 72 Am. Bankr. L.J. 157, 178 (1998) (reasoning that to establish fraudulent transactions, one must examine whether transactions were at arm's−length). Back To Text

[38] See Ross v. Keleta (In re Ross), No. 98−28812 JFK, 1999 Bankr. LEXIS 582, at *9 (Bankr. W.D. Pa. May 20, 1999) (noting that asset purchase agreement is subject to approval by bankruptcy court); see also In re F.F. Holdings Corp., Nos. 98−37 & 98−38−JJF, 1998 U.S. Dist. LEXIS 10741, at *5 (D. Del. Feb. 17, 1998) (affirming that asset purchase agreements list all terms of sale); In re Chicago, Minn., St. Paul & Pacific R.R., No. 77 B 8999, 1995 U.S. Dist. LEXIS 10914, at *3 (N.D. Ill. July 20, 1995) (noting that upon approval from court, parties execute asset purchase agreement). Back To Text

[39] See Wes−Flo Co. v. Wilson Freight Co. (In re Wilson Freight Co.), 30 B.R. 971, 974 (Bankr. S.D.N.Y. 1983) (noting that Collier Bankruptcy Practice Guide, 3 Collier ¶ 43.02[1] (1982), is authority for setting guidelines for sale); see also Leasing Serv. Corp. v. Appalachian Pocahontas Coal Co. (In re Appalachian Pocahontas Coal Co.), 31 B.R. 579, 580 (S.D. W. Va. 1983) (noting that court set order with guidelines for sale without surrendering courts right for review); Value and Cents: Putting the Right Price on Proprietary Technology, 1996 ABI JNL. LEXIS 666, at *6 (Dec. 1996− Jan. 1997) (listing elements to consider when analyzing guidelines for sale of technology). Back To Text

[40] See Gumport v. China Int'l Trust and Inv. Corp. (In re Intermagnetics Am., Inc.), 926 F.2d 912, 914−15 (9th Cir. 1991) (negating sale which had been approved, because sale was later found to be fraudulent); see also Gazes v. DeArakie (In re De Arakie), 199 B.R. 821, 827 (Bankr. S.D.N.Y. 1996) (noting debtors approval of sale for financial benefit of creditors); In re United States Express, 255 F. Supp. 584, 587 (N.D. Cal. 1966) (noting that upon approval of sale, trustee applies to referee for approval). Back To Text

[41] See State Regulation of Securities Committee, Review of Developments in State Securities Regulation, 49 Bus. Law. 403, 463 (1993) (defining roll−up as combination or reorganization of participants in which securities of participants are offered or sold); Deborah A. DeMott, Rollups of Limited Partnerships: Questions of Regulation and Fairness, 70 Wash U. L.Q. 617, 617 (1992) (defining roll−up as transaction in which limited partnerships are combined or reorganized and new securities are issued); John Geschke, Comment, Regulating Rollups: General Partners' Fiduciary Obligations in Light of the Limited Partnership Rollup Reform Act of 1993, 47 Stan. L. Rev. 85, 85 (1994) (maintaining that rollup involves combining group of limited partnerships into single public corporation). Back To Text

[42] See Perlman v. Catapult Entertainment, Inc. (In re Catapult Entertainment, Inc.), 165 F.3d 747, 754−55 (9th Cir. 1999) (holding that debtor may not assume its nonexclusive patent licenses as part of its reorganization plan without consent of licensor); See Gregory G. Hesse, Ninth Circuit Slams Shut the "Back Door" Access to Patented Technology, 1999 ABI JNL. LEXIS 41, at *18 (April 1999) (criticizing Catapult decision for preventing debtor from assuming patent licenses in reorganization); Honorable Edward D. Jellen, et al., Recent Developments in Business Bankruptcy, 25 Cal. Bankr. J. 261, 277 (2000) (discussing Catapult's application of hypothetical test as opposed to actual test in prohibiting assumption of nonexclusive patent licenses). Back To Text

[43] See Brandon M. Villery, Comment, The Transferability of Non−Exclusive Copyright Licenses: A New Default Rule for Software in the Ninth Circuit?, 22 Hastings Comm. & Ent. L.J. 153, 171 (maintaining that application of hypothetical test in copyright license realm provides licensor power to charge debtor unreasonably high price to maintain license). But cf. In re Catapult Entertainment Inc., at 754 (asserting that policy considerations do not allow court to ignore Congress' statement of law). Back To Text

[44] See Hesse, supra note 42, at *18 (noting damaging effects to debtor caused by disallowing assumption of patent licenses and that Catapult decision gives licensor "extraordinary power" over debtors by prohibiting assumption of licenses); David R. Kuney, Dot−Com and High−Technology Companies: Nuclear Waste and Chapter 11?, 17 No. 8

Computer Law 25, 28 (2000) (noting that Catapult decision creates "severe problem" for high technology companies seeking bankruptcy relief). Back To Text

[45] See Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489, 495 (1st Cir.), cert. denied, 521 U.S. 1120 (1997) (holding that because reorganized entity is not distinct from debtor, it may retain patent license in absence of new assignment by licensor); see also Robert P. Simons, Back to Earth from Cyberspace: Dealing with Business Failure of Internet Companies, 8 Nev. Law. 12, 15 (2000) (maintaining that although Institut Pasteur test has some dangers, it avoids devastating effect on debtors caused by Catapult decision); Virginia P. Henschel, "Back Door" Access to Patented Technology, 1998 ABI JNL. LEXIS 49, at *9−*10 (Feb. 17, 1998) (noting that by permitting reorganized debtor to assume patent license, Insitut Pasteur decision allows industry competitor to acquire patented technology). Back To Text

[46] See In re Catapult Entertainment Inc., 165 F.3d at 752, n. 4 (noting that identity of licensee may be very important to licensor and that holding permits licensor to control who licensee is); See Everex Sys. Inc. v. Cadtrak Corp. (In re CFLC, Inc.), 89 F.3d 673, 679 (9th Cir. 1996) (maintaining that to allow free assignability of patents would undermine goal of patent protection because competitor could seek secondary patent license from original licensee); In re Access Beyond Technologies, Inc., 237 B.R. 32, 38 (Bankr. D. Del. 1999) (noting that refusal to allow debtor to assume patent licenses without patent owner's permission furthers patent owner's right to exclude others from using patented invention). Back To Text

[47] See In re Catapult Entertainment Inc., 165 F.3d at 750 (holding that 11 U.S.C. § 365 establishes test whereby debtor may not assume executory contract without assent of contract licensor if debtor would be unable to assign contract to third party); see also 11 U.S.C. § 365(c)(1) (1994) (asserting that trustee may not assume or assign contract on behalf of debtor if "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"). But see Cambridge Biotech Corp., 104 F.3d at 494 (holding that when post bankruptcy entity is essentially same as pre−bankruptcy entity, it may assume executory patent licenses). Back To Text

[48] See In re Catapult Entertainment Inc., 165 F.3d at 750 (asserting that nonexclusive patent licenses are personal contracts (quoting In re CFLC, Inc., 89 F.3d at 680)); In re CFLC Inc., 89 F.3d at 679 (noting that federal law holds that patent licenses are both personal and non−assignable); Gilson v. Republic of Ireland, 787 F.2d 655, 658 (D.C. Cir.1986) (maintaining that right of licensee in nonexclusive patent license is personal right, not property right). Back To Text

[49] See In re Catapult Entertainment Inc., 165 F.3d at 750 (adopting hypothetical test and determining that it prohibits assignment of patent license over licensor's objection if applicable law would bar assignment of license to any third party); City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners, L.P.), 27 F.3d 534, 537 (11th Cir. 1994) (maintaining that plain language of 11 U.S.C. § 365(c)(1) dictates application of hypothetical test). But see Cambridge Biotech Corp., 104 F.3d at 493 (rejecting hypothetical test in favor of actual test that mandates case by case inquiry into contemplated assignment or assumption). Back To Text

[50] See Public Serv. Co. of New Hampshire v. New Hampshire Elec. Coop. Inc. (In re Public Service Co. of New Hampshire), 884 F.2d 11, 14 (1st Cir. 1989) (asserting that when debtor did not assume nor reject executory utility contract, contract remained in effect); Consolidated Gas, Electric Light and Power Co. of Baltimore v. United Rys. & Elec. Co. of Baltimore, 85 F.2d 799, 805 (4th Cir. 1936) (asserting that all debtor's executory contracts pass to reorganized entity absent rejection). Back To Text

[51] See Mark R. Campbell & Robert C. Hastie, Executory Contracts: Retention Without Assumption − "Ride Through" Revisited, 2000 ABI JNL. LEXIS 41 (March 2000) (discussing effects of allowing executory contracts to ride through reorganization). **Back To Text**

[52] "Assignment" means transfer of rights or property to another. Black's Law Dictionary 119 (6th ed. 1990). "Assumption" means "laying claim to or taking possession of." Id. at 123. See also Michael T. Andrew, Executory Contracts in Bankruptcy: Understanding "Rejection," 59 U. Colo. L. Rev. 845 (stating "assumption" refers to

agreement by party outside contract to take on obligations of party in contract). Back To Text

[53] See Perlman v. Catapult Entertainment, Inc. (In re Catapult Entertainment Inc.), 165 F.3d 747, 749−50 (9th Cir.1999) ("[P]roper interpretation of § 365(c)(1) has been the subject of considerable disagreement among courts and commentators.") (court found Catapult may not assume Perlman's license when (1) federal patent law excused Perlman from accepting performance from or rendering performance to entity other than Catapult; and (2) Perlman did not consent to assumption). Back To Text

[54] See In re Minton Group, Inc., 27 B.R. 385, 390 (Bankr. S.D.N.Y. 1983) (discussing situation where trustee sought to assume debtors' limited partnership agreements under § 365); In re Harms, 10 B.R. 817, 820 (Bankr. D. Colo. 1981) (discussing trustee's attempt to assume debtors' limited partnership agreements under § 365); see also Phar−mor, Inc. v. Strouss Bldg. Assoc., 204 B.R. 948, 950 (N.D. Ohio 1997) (discussing whether or not limited partnership agreement is executory and therefore may be assumed under § 365). Back To Text

[55] See In re Cardinal Indus., Inc., 116 B.R. 964, 973 (Bankr. S.D. Ohio 1990) (holding partnership agreement is executory therefore applicable non−bankruptcy law did not prohibit assumption of partnership agreements by trustee); see also Smith v. Prokopf Family Partnership (In re Smith), 185 B.R. 285, 292 (Bankr. S.D. Ill. 1995) (stating that most courts consider limited partnership agreements executory contracts and therefore § 365 governs); Breeden v. Catron (In re Catron), 158 B.R. 629, 634−35 (E.D. Va. 1993) (stating partnership agreement is executory contract but is not assumable due to Virginia partnership law). Back To Text

[56] "No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned." 41 U.S.C. § 15 (2000). See, e.g., Arthur Pew Constr. Co. v. Lipscomb, 965 F.2d 1559, 1579 (11th Cir. 1992) (noting general prohibitions against assignments of government contracts); United States v. TechDyn Sys. Corp. (In re TechDyn Sys. Corp.), 235 B.R. 857, 861 (Bankr. E.D. Va. 1999) (noting 41 USC 15 prohibits assignment of government contracts). Back To Text

[57] See In re Techdyn, 235 B.R. at 864 (denying assumption of valuable government contracts, despite fact that government contracts were debtor's sole assets, but noting such denial results in poor bankruptcy policy); see also University Medical Ctr. v. Sullivan (In re University Medical Ctr.), 973 F.2d 1065, 1077 (3d Cir. 1992) (finding nothing in Code or case law that denies debtors opportunity to assume governmental contracts); 3 Collier on Bankruptcy § 365.06[1][d], at 365−61 (15th ed. 1999) (stating non−assignable contracts present problems to debtors and may not allow them to obtain chapter 11 protection because "they may not be able to perform their pre−bankruptcy contracts without permission from the non−debtor parties to the contracts"). Back To Text

[58] See In re Cardinal Indus., Inc., 116 B.R. at 973 (noting that Revised Uniform Partnership Act states general partner in limited partnership ceases to be such upon general partner filing bankruptcy). Back To Text

[59] See id. at 964 (holding debtor's role as general managing partner was not terminated as matter of law by filing chapter 11). Back To Text

[60] See id. (noting 'The Technical Amendments Act of 1980' attempted to correct technical errors, clarify and make minor substantive changes). Back To Text

[61] See NLRB v. Bildisco, 465 U.S. 513, 519 (1984) (holding collective bargaining agreement to be executory contract, subject to rejection by other party to contract); see also Wheeling−Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1076 (3d Cir. 1986) (stating Congress enacted 11U.S.C.1113 in response to NLRB v. Bildisco & Bildisco decision); International Union v. Acorn Bldg. Components, Inc. (In re Acorn Bldg. Components, Inc.), 170 B.R. 317, 319 (E.D. Mich.1994) (stating 11U.S.C.1113 overruled NLRB v. Bildisco & Bildisco). Back To Text

[62] See Perlman v. Catapult Entertainment (In re Catapult Entertainment Inc.), 165 F.3d 747, 749 (9th Cir. 1998), cert. dismissed, 120 S. Ct. 369 (1999) (stating hypothetical test adheres to plain statutory language in governing assumption of executory contracts); see also United States v. TechDyn Sys. Corp. (In re TechDyn Sys. Corp.), 235 B.R. 857, 860

(Bankr. E.D. Va. 1999) (referring to hypothetical test used in Catapult that cases under non−bankruptcy law cannot be assumed); In re Cardinal Indus., Inc., 116 B.R. at 982 (asserting that partner eligible for chapter 11 relief should not have reorganization taken away because of ipso facto bankruptcy provisions in non−bankruptcy law). Back To Text

[63] American Principals Leasing Corp. v. United States, 904 F.2d 477, 479 (9th Cir. 1990) (noting that APLC, general partner of limited partnerships, set up partnerships to lease equipment). Back To Text

[64] See Sally S. Nelly, Partnerships and Partners and Limited Liability Companies and Members in Bankruptcy: Proposals for Reform, 71 Am. Bankr. L.J. 271, 272 (1997) (recognizing ABA proposed changes to Uniform Partnership Act in response to all partnerships); see also Lawrence L. LaSala, Partner Bankruptcy and Partnership Dissolution: Protecting the Terms of the Contract and Ensuring Predictability, 59 Fordham L. Rev. 619, 622 (1991) (asserting split of authority whether partnership dissolution occurs when partner files bankruptcy and this has created confusion); O'Dea & Rosen, Issues in Partnership Bankruptcy, 488 PLI/Comm. 499, 521, 526−527 (1989) (noting uncertain about state law regarding partnership dissolutions). Back To Text

[65] See Hesse, supra note 42, at *17 (noting there are inconsistent policies underlying patent law and bankruptcy law). See generally In re Catapult Entertainment Inc., 165 F.3d at 751 (asserting inconsistency of bankruptcy and patent law); Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.), 104 F.3d 489, 492 (1st Cir.), cert. denied, 521 U.S. 1120 (1997) (discussing inconsistencies in both laws). Back To Text

[66] See In re Access Beyond Techs., Inc. 237 B.R. 32, 45 (Bankr. D. Del. 1999) (noting patent law allows patent holder to choose who to assign to and this rewards patent holder); see also Joshua C. Tate, Case Note: Game Over, 109 Yale L.J. 1709, 1711 (2000) (suggesting since patent law and bankruptcy law are inconsistent future cases of this sort may cause trustee to bring unjust enrichment actions); Hesse, supra note 42, at *18 (noting policy under patent law is to protect patent holder). Back To Text

[67] See Everex Sys. Inc. v. Cadtrak Corp. (In re CFLC, Inc.), 89 F.3d 673, 677 (9th Cir. 1996) (holding federal law makes patent licenses non−assignable and therefore assignment of licenses is barred under § 365 (c)); see also Rieser v. Dayton Country Club Co. (In re Magness), 972 F.2d 689, 694 (6th Cir. 1992) (asserting § 365 (a)(c) and (f) lets trustee assume contracts subject with some limitations); Gilson v. Republic of Ireland, 787 F.2d 655, 658 (D.C. Cir. 1986) (noting patent may be assigned if patent owner authorizes it or license permits it). Back To Text

[68] See Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 150−51 (1989) (noting patent policy focuses on encouraging creation of new advances in technology); see also Hesse, supra note 42, at *17 (asserting bankruptcy policy is to maximize equal distribution). See generally Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489, 493 (1st Cir.), cert. denied, 521 U.S. 1120 (1997) (opining bankruptcy policy should prevail over patent law). Back To Text

[69] See Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489 (1st Cir.), cert. denied, 521 U.S. 1120 (1997). Back To Text

[70] See id. at 495 (noting provisions persuaded court that Pasteur should have anticipated chance of changes in ownership in stock); see also Plumbers & Steamfitters Local No. 150 Pension Fund v. Vertex Constr. Co., 932 F.2d 1443, 1449 (11th Cir.1991) (applying the doctrine of expressio unius est exclusio alteris, when certain matters are mentioned in a contract and others are not deemed intention is exclusion); PG Indus. Inc.v. Guardian Indus. Corp., 597 F.2d 1090, 1096 (6th Cir.1979) (noting out of 11 patent licenses contracts only expressly gave reservation to licenses and this suggested intent not to reserve it in other 9 patents). Back To Text

[71] See Perlman v. Catapult Entertainment (In re Catapult Entertainment Inc.), 165 F.3d 747, 754−55 (9th Cir. 1998), cert. dismissed, 120 S. Ct. 369 (1999) (holding non−exclusive patent license could not be assumed over objection of patent holder); see also Hesse, supra note 42, at *3 n.6 (noting the Bankruptcy Code does not specifically deal with intellectual property licenses from view of licensee in bankruptcy); id. (noting chapter 11 sets out licensor's rights in bankruptcy cases). Back To Text

[72] See generally 11 U.S.C § 365 (c)(1)(A)−(B) (1994) (detailing restrictions on assignment and assumption of executory contracts); In re Catapult Entertainment, Inc., 165 F.3d at 754−55 (holding that barring consent, debtor in possession may not assume executory contract). Back To Text

[73] See 11 U.S.C. § 365 (n)(1)(B) (1994) (giving licensee ability to retain rights under pre−petition agreement); see also Encino Bus. Management Inc. v. Prize Frize, Inc. (In re Prize Frize, Inc.), 32 F.3d 426, 428 (9th Cir. 1994) (observing "The bankrupt [licensor] cannot terminate and strip the licensee of rights the licensee had bargained for."); Novon Int'l, Inc. v. Novamont S.p.A. (In re Novon Int'l, Inc.), No. 98−CV−0677E(F), 2000 U.S. Dist. LEXIS 5169, at *14 (W.D.N.Y. Mar. 21, 2000) (explaining purpose of Bankruptcy Code in allowing licensee to retain rights). Back To Text

[74] See Lubrizol Enterprises Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.), 756 F.2d 1043, 1048 (4th Cir. 1985) (explaining congressional intent in allowing rejection of executory contracts). See generally 11 U.S.C. § 365(n) (1994) (providing licensee option to retain intellectual property rights). See, e.g., In re Waldron 36 B.R. 633, 642 n.4 (Bankr. S.D. Fla. 1984) (shedding light on § 365 prohibition of specific performance prior to enactment of § 365(n)). Back To Text

[75] See Emplexx Software Corp. v. AGI Software, Inc. (In re AGI Software, Inc.), 199 B.R. 850, 855 (Bankr. D.N.J. 1995) (involving use of § 365(n) to enforce rights under software licensing agreement); In re EI Int'l, 123 B.R. 64, 66 (Bankr. D. Idaho 1991) (contending that licensee of software system should be able to apply provision of § 365 to rejected executory contract). Back To Text

[76] See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 439 (1984) (footnote omitted) (noting "The closest analogy is provided by the patent law cases to which it is appropriate to refer because of the historic kinship between patent law and copyright law."); see also Harris v. Emus Records Corp., 734 F.2d 1329, 1333 (9th Cir.1984) (deeming it appropriate to look to patent law where precedent in copyright law is lacking); In re Patient Education Media, Inc., 210 B.R. 237, 241 (Bankr. S.D.N.Y. 1997) (footnote omitted) (stating that bankruptcy courts have given executory contract status to nonexclusive copyright and patent licenses). Back To Text

[77] See National Peregrine, Inc. v. Capitol Federal Savings & Loan Ass'n of Denver (In re Peregrine Entertainment, Ltd.), 116 B.R. 194, 204 (C.D. Cal. 1990) (holding that compliance with federal registration regulations was necessary, regardless of whether federal law governs priority, to perfect security interest). But see Aerocon Eng'g Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.), 244 B.R. 149, 153 (Bankr. N.D. Cal. 1999) (distinguishing Peregrine court's conclusions as only applicable to registered copyrights); In re Together Development Corp., 227 B.R. 439, 441 (Bankr. D. Mass. 1998) (opining that Peregrine court's conclusions were irrelevant as to trademark cases). Back To Text

[78] See In re Avalon Software Inc., 209 B.R. 517, 521−22 (Bankr. D. Ariz. 1997) (holding that software becomes "copyrightable" at inception thereby requiring filing at Copyright Office). See generally 17 U.S.C. § 204 (2000) (explaining recordation of transfers and other documents as related to copyrights). See, e.g., Zenith Productions Ltd. v. AEG Acquisition Corp. (In re AEG Acquisition Corp.), 161 B.R. 50, 57 (B.A.P. 9th Cir. 1993) (using failure to register foreign films as dispositive in defeating perfection claim). Back To Text

[79] See Harold R. Weinberg & William J. Woodword, Jr., Easing Transfer and Security Interest Transactions in Intellectual Property−An Agenda for Reform, 79 Ky. L.J. 61, 86 (1991) (noting relation back period is grace period to protect filer). Back To Text

[80] See id. (noting that lender must wait 3 months until she can advance collateral money). Back To Text

[81] See In re Avalon Software Inc., 209 B.R. at 522 (perfecting security interest must include registration with U.S. Copyright Office); see also In re World Auxiliary Power Co., 244 B.R. at 154 (identifying that Copyright Act provides no means to perfect security interest in unregistered copyright). Back To Text

[82] See 17 U.S.C. § 205(c) (2000) (outlining steps necessary to perfect security interest in copyrights); see also In re Avalon Software Inc., 209 B.R. at 522 (explaining steps creditors must take in order to obtain perfected security interest in copyrightable material); In re AEG Acquisition Corp., 127 B.R. 34, 41 (Bankr. C.D. Cal. 1991) (discussing how creditor may protect security interest and steps necessary to perfect interest in copyright). Back To Text

[83] See Aerocon Engineering Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.), 244 B.R. 149, 156 (N.D. Cal. 1999) (explaining that Copyright Act provides no way to perfect security interest in unregistered copyrights); see also National Peregrine, Inc. v. Capitol Federal Savings & Loan Ass'n of Denver (In re Peregrine Entertainment, Ltd.), 116 B.R. 194, 200 n.7 (C.D. Cal. 1990) (explaining that security interest in copyright may only be recorded and perfected in Copyright office if it has been registered). Back To Text

[84] See In re World Auxiliary Power Co., 244 B.R. at 155 (holding "[d]octrine of federal preemption does not prevent a secured creditor from perfecting its security interest by filing a UCC−1 with the UCC office."). But see In re Peregrine Entertainment, Ltd., 116 B.R. 194, 199, 202−03 (holding that federal copyright law preempts state methods for perfecting security interests). See generally Patrick R. Barry, Software Copyrights as Loan Collateral: Evaluating the Reform Proposals, 46 Hastings L.J. 581, 587−88, 606 (1995) (arguing that Copyright Act should not and does not preempt UCC filing with regards to perfection of security interest). Back To Text

[85] See generally Edward R. Leahy & Michael O'Brien, Telecommunications Law and Technology In The Developing &World, 22 B.C. Int'l & Comp. L. Rev. 1, 16−27 (1999) (analyzing telecom system development in United States and abroad); Lawrence A. Sullivan, Post Privatization in America: Competition Law Policy and The Alternative: The U.S., The E.U., The W.T.O., The Americas And Telecom Competition, 6 S.W. J. of L. & Trade Am. 63, 67−75 (1999) (discussing telecommunication (telecom) markets and its history in United States). Back To Text

[86] Telecommunications Act of 1996, Pub. L. No. 104−104, 110 Stat. 56. Back To Text

[87] See, e.g., Iowa Utilities Bd. v. F.C.C., 219 F.3d. 744, 747, 749−50 (8th Cir.2000) (defining ILEC as local telephone service providers or "incumbent local exchange carriers" and discussing effect of Telecom Act of 1996 on ILEC's); David A. Rice, Third Party Intellectual Property Rights and Contractual Restrictions: Implications for Implementation of the Telecommunications Act of 1996, 5 Roger Williams U. L. Rev. 159, 162−3 (1999) (detailing effect of Telecom Act on ILEC and discussing problems and lawsuits stemming from those effects); Thomas J. Hall, Note, The F.C.C. And The Telecom Act of 1996: Necessary Steps to Achieve Substantial Deregulation, 11 Harv. J. Law & Tech. 797, 801 (1998) (discussing obligations and restrictions placed upon ILEC's by Telecom Act). Back To Text

[88] See, e.g., AT&T Comm. of So. States, Inc. v. BellSouth Telecommunications, Inc., 2000 U.S. App. LEXIS 24945, at *3 (4th Cir. Oct. 6, 2000) (defining CLEC or "competing local exchange carrier" as telecommunication carrier who wishes to compete in ILEC market); id. at *3 (explaining and detailing situations where CLEC's are permitted under Telecom Act of 1996 to use ILEC's existing infrastructure); Rice, supra note 87, at 162−63 (analyzing effect of Telecom Act on CLEC's); Hall, supra note 87, at 801 (discussing how Telecom Act aided CLEC's who wished to enter local telecommunication exchange markets). Back To Text

[89] See 11 U.S.C. § 365(d)(10) (2000) (observing administrative powers of trustee); see also In re Tel−Central Comm., Inc., 212 B.R. 342, 345−46 (Bankr. W.D. Mo. 1997) (explaining how statute effects claims in bankruptcy); In re Elder Beerman Stores Corp., 201 B.R. 759, 761−65 (Bankr. S.D. Ohio 1996) (discussing requirements and application of § 365(d)(10)). Back To Text

[90] See, e.g., In re Big Rivers Elec. Corp., 233 B.R. 726, 736 (Bankr. W.D. Ky. 1998) (holding that "no−shop" clause in agreement between debtor−in−possession and potential purchaser of debtor's assets precluded possibility of negotiating more advantageous price, and, therefore, that it prevented debtor from fulfilling its fiduciary duty to maximize value of bankruptcy estate for benefit of creditors); In re Carter Paper Co., 220 B.R. 276, 301 (Bankr. M.D. La. 1998) (finding that duty to creditors to maximize value of estate includes duty to rid estate of burdensome property). Back To Text

[91] See 11 U.S.C. § 365(d)(10) (2000) (providing that trustee must timely perform all obligations of debtor which first arise from or after 60 days after order for relief in chapter 11case under unexpired lease of personal property, until such lease is assumed or rejected); In re Pan American Airways Corp., 245 B.R. 897, 899−900 (Bankr. S.D. Fla. 2000) (observing that legislative history of § 365(d)(10) supports conclusion that only those obligations under unexpired lease that initially come due more than 60 days after order for relief must be timely fulfilled by trustee). Back To Text

[92] See 11 U.S.C. § 552(b)(2000) (providing exception to general rule that pre−petition security agreement may not encumber property acquired by estate post−petition where pre−petition security agreement creates security interest not only in property acquired pre−petition, but also in proceeds, product, offspring or profits derived from such property post−petition); see also Third Nat'l Bank in Nashville v. James M. Fischer, Jr. (In re Fischer), 184 B.R. 293, 300 (Bankr. M.D. Tenn. 1995) (stating that § 552(b) exception allowing security interest in proceeds, profits, offspring, product and rents of secured property exists only to extent that security document and other non−bankruptcy law permit such perfection); In re Keneco Fin. Group, Inc., 131 B.R. 90, 93 (Bankr. N.D. Ill. 1991) (observing that § 552(b) permits post−petition proceeds of collateral to be subject to creditor's security interest only if creditor has valid pre−petition security interest in underlying collateral). Back To Text

[93] See Black's Law Dictionary 17 (17th ed. 1999) (defining account receivable as "an account reflecting a balance owed by a debtor; a debt owed by a customer to an enterprise for goods or services−often shortened to receivable"). Back To Text

[94] See United States of America, Department of Housing and Urban Development v. Hillside Assocs. (In re Hillside Assocs. Ltd. Partnership), 121 B.R. 23, 24−25 (B.A.P. 9th Cir. 1990) (holding that term "contract rights" in UCC−1 filing did not create security interest in nursing home revenues since such revenues were general intangibles, and 1972 amendments to U.C.C. specifically excluded contract rights from definition of general intangibles). But see Kenneth G.M. Mather v. Borden Inc., (In re Griffith), 194 B.R. 262, 267 (Bankr. E.D. Okla. 1996) (finding security interest in covenant not to compete perfected by financing statement covering contract rights, despite court's determination that such covenants are actually general intangibles). See generally 8 Hawkland UCC Series ¶9−106:02 (Clark Boardman Callaghan 1999) (opining that, although 1972 amendments to U.C.C. deleted phrase "contract rights" from definition of accounts and general intangibles under § 9−106, secured lender should be able to claim as collateral rights which devolve from contracts between debtor and third parties, regardless of whether such rights are classified as accounts or general intangibles). Back To Text

[95] See 11 U.S.C. § 366 (2000) (preventing utility from altering, refusing or discontinuing service to debtor solely on basis of debtor's filing of bankruptcy petition or debtor's pre−petition non−payment unless within 20 days of order for relief. Such utility is furnished with adequate assurance of payment, in form of deposit or other security, for service after such date); see also John C. Tarrant v. City of Douglas Georgia (In re Tarrant), 190 B.R. 704, 707 (Bankr. S.D. Ga. 1995) (asserting that § 366 places affirmative duty on utility to restore previously interrupted service once it has notice that customer has filed bankruptcy petition). Back To Text

[96] See Black's Law Dictionary 610 (6th ed. 1991) (defining Federal Communications Commission as agency created under Communications Act of 1934 with broad regulatory powers over interstate and foreign communications including radio and television broadcasts; telephone telegraph and cable television operations; two−way radio and radio operations; and satellite communications. See generally Carolyn Hochstadter Dicker, PCS Licensees and the "Specter" of Bankruptcy, 6 CommLaw Conspectus 59,59−60(1998) (noting that bankruptcy courts generally defer to telecommunications law when faced with assumption or rejection of F.C.C. licenses in bankruptcy, despite similarities such licenses have to executory contracts). Back To Text

[97] See Federal Communications Commission v. Nextwave Personal Communications (In re NextWave Personal Communications, Inc), 200 F.3d 43, 51 (2d Cir. 1999) (holding that license granted by F.C.C. does not convey property right, but simply permits licensee to use specific frequency within electromagnetic spectrum in accordance with terms of license), cert. denied, NextWave Personal Communications, Inc. v. F.C.C., No. 99−1980, 2000 WL 795201 (Oct. 10, 2000). Back To Text

[98] See CommWorld becomes authorized Nortel Dealer; Company Moves into True IP Technologh, PR Newswire, July 26, 2000, available in LEXIS, News Group File (describing Nortel as a "global internet and communications leader with capabilities spanning optical, wireless, local internet and eBusiness."); Sylvia Dennis, Nortel Unveils Exportable Network Technology, Newsbytes, Nov. 25, 1998, available in LEXIS, News Group File (stating "[a]ccording to Nortel, its contivity Extranet Switch is one of the first to actually ship with an export license approved by the DoC…[t]he switch supports 128−bit encryption and…can now be exported from the US to more than 40 countries…"). Back To Text

[99] See Perlman v. Catapult Entertainment (In re Catapult Entertainment Inc.), 165 F.3d 747, 754−55 (9th Cir. 1999) (holding "where applicable non−bankruptcy law makes an executory contract non−assignable because the identity of the non−debtor party is material, a debtor in possession many not assume contract absent consent of the non−debtor party."); see also 11 U.S.C. § 365(c)(1) (2000) (stating that a debtor in possession "may not assume or assign an executory contract where applicable law bars assignment and non−debtor objects) (emphasis added). While the 9th Circuit applies the plain language of the statute, other circuits have applied the "actual test". See, e.g., Summit & Dev. Corp. v. Leroux, 69 F.3d 608, 613 (1st Cir. 1995) (applying "actual test."); In re Catapult Entertainment Inc., 165 F.3d at 754 (differentiating "actual test" from plain language approach by describing "actual test" as "engraft[ing] a narrow exception onto § 365 (c)(1) for debtors in possession, providing that, as to them, the statute only prohibits assumption and assignment, as opposed to assumption or assignment."); 3 Lawrence P. King, Collier on Bankruptcy § 365.06 [1][d][iii] (15th ed. revised) (arguing that sound bankruptcy policy supports "actual test"). Back To Text

[100] See 11 U.S.C. § 363 (2000) (describing "Use, sale or lease of property" in bankruptcy law); see also The Bank of Nova Scotia v. St. Croix Hotel Corporation (In re St. Croix Hotel Corp.), 44 B.R. 277, 279 (Bankr. D.V.I. 1984) (stating § 363, in instance of sale of property, is subject to lien that secures allowed claim, if holder of such claim purchases property, such holder may offset such claim against purchase price of such property to permit only those persons with a valid security interest in property to be sold to claim a setoff); Part II What, if Anything, Should be Done About Claims Trading?, BCD News and Comment, June 30, 1999, available in LEXIS, News Group File (stating "[c]laim traders do allow some creditors to bail out of the bankruptcy process and maybe survive what could have been the catastrophic loss of a major account.") Back To Text

[101] Section 363 (f) of the Bankruptcy Code states:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if−

1. applicable nonbankruptcy law permits sale of such property free and clear of such interest;
2. such entity consents;
3. such interest is a lien and the price at which such property is sold is greater than the aggregate value of all liens on such property;
4. such interest is in bona fide dispute; or
5. such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 365(f) (2000); See Volvo White Truck Corporation v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (holding Bankruptcy Court's power to order sale of debtor's assets free and clear of claims must be interpreted consistent with its power to discharge claims under plan of reorganization); In re Clavary Temple Evangelistic Ass'n, 47 B.R. 520, 523 (Bankr. D. Minn. 1984) (discussing creditor's committee to sell property free and clear of liens."). Back To Text

[102] See US ONE Communications – A Case Study of a Failed Start−Up, 1998 ABI JNL. LEXIS 37 (1998) (describing becoming competitive local exchange carrier (CLEC) and owning local dial−tone as "the fastest and most efficient way to [build traffic]."); US WEST Challenges Interconnection Agreements in 9th Circuit, Telecommunications Industry Litigation Reporter, Jan. 2000, available in LEXIS, News Group File (describing case where US WEST asked appeals court to reserve and remand district court's decision where district court required US WEST to compensate competitive local exchange carriers (CLEC's at tandem rates for traffic through non−tandem switches);

Bell South Refuses to Pay Reciprocal Compensation for IPS Calls, Telecommunications Industry Litigation Reporter, June 1998, available in LEXIS, News Group File (stating "BellSouth, the incumbent local exchange carrier (ILEC) entered into an interconnection agreement with ALEC, a competitive local exchange carrier (CLEC)"). Back To Text