



What Every Technology Company Needs to Know About Assumption, Assumption and Assignment, Or Rejection Of Its Contracts In Bankruptcy

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Technology companies can preserve both significant sums of money and valuable intellectual property rights if they take action when a customer or business partner files for bankruptcy protection. Far less effort is usually required to preserve these rights than what may be involved in a major piece of litigation; but, in almost every case, the company must take timely steps to ensure that its interests are protected. The following is the second part of a brief, three-part overview of the measures that technology companies can take, and the procedures they should be aware of, to protect their rights in this area of law. Part One, published in Buchalter Nemer's Tech Industry Bulletin for March and April 2015, discussed claims which creditors can assert against the estate of a bankrupt customer or business partner. This section will focus on the effects of the decision by the company in bankruptcy to assume, assume and assign, or reject intellectual property contracts in the bankruptcy process.

The most valuable asset a technology company holds is often its intellectual property ("IP"), which the Bankruptcy Code defines to include patents, copyrights, and trade secrets. Frequently, technology companies enter into contracts related to their IP, such as licenses or subscription services. These contracts often are entitled to special status in a bankruptcy case.

The Bankruptcy Code requires the bankrupt company to elect either to retain its rights, and be bound by the terms of the contract going forward (i.e., "assume" the contract), or to disclaim any interest in (i.e., "reject") the contract. The bankrupt company may also attempt to assign its IP contracts to a third party (i.e., "assume and assign" the contract), for example, as part of a larger sale of most or all of the bankrupt company's assets.

In order to assume, or assume and assign, a contract, the company in bankruptcy generally must pay all outstanding amounts owed under the contract. In other words, even though other creditors may only be paid a fraction of their claims against the bankrupt company, a creditor whose contract is assumed must be paid sums equal to the "cure" of any existing defaults under the contract. Often this results in payment in full. However, it is imperative that the company whose contract will be assumed press its claim for the cure payment. Failure to object to an incorrect payment amount before the bankruptcy

court approves the amount typically will result in waiver of any right to seek full payment later.

On the other hand, if the bankrupt customer or business partner chooses to reject the contract, the technology company has a right to file a claim for the losses that it may suffer as a result of its contract being rejected. If no one objects, or if any objections are overcome, such claims will be paid pro-rata with other general creditors of the bankrupt company. Savvy technology companies should recognize that rejection is treated as a breach of the contract, and should assert a claim for all damages that arise out of the breach, in addition to unpaid invoices.

Thus, whether a company's IP contract is assumed, assumed and assigned, or rejected, it is crucial for the technology company to act quickly to assert its rights, protect its IP, and preserve its right to receive payment.



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