Impressive Treatise for the Federal Court Litigator

By Jennifer Parent

In my role at McLane Middleton, I am often called upon to review publications and resources geared to trial lawyers. When doing so, I look for comprehensive materials, both substantively and procedurally, that are easy to use and contain guidance or tips that will benefit a lawyer's trial practice. I recently found just such a publication.

While not my typical beach read this time of year, "Business and Commercial Litigation in Federal Courts, Fourth Edition," is the perfect treatise for any commercial litigator at any time. The 14-volume work arrived at my office in two fully-packed bankers boxes. As I dug into this treasure trove of hardcovers encompassing the entire life-cycle of a commercial case and 78 substantive law chapters, it felt like Christmas in July.

The Fourth Edition contains 25 new chapters and has approximately 4,400 more pages of text. The revisions from the Third Edition also encompass the procedural and practical changes we have seen in litigation over the past six years. Federal rule changes are captured throughout and the information is organized in a simple and readable format. With today's real-world dynamic of increased technology in business and law and the diminishing borders of law practice, the additional subjects on social media, cross-border litigation, and marketing to potential business clients are welcome.

Editor-in-Chief Robert L. Haig does another incredible job of embracing all aspects of business litigation in federal court. From the assessment of a case when it comes in the door to preparation of pleadings and from the discovery phase of litigation to trial strategies, the Fourth Edition is a valuable resource full of tips on handling a commercial case. The impressive 296 principal authors include 27 judges and top practitioners throughout the country. Together, these authors reveal in the pages of text valuable insights, perspective, and useful step-by-step strategies for trying a commercial case, whether for a plaintiff or a defendant.

To provide a flavor of what is offered by this treatise, I picked a few chapters many of us would find handy in any commercial litigation case. For example, summary judgment motions are covered in Chapter 31. The pages of this chapter walk you through assessing your case to determine how to most effectively and efficiently pursue a Rule 56 filing. Not only does the treatise delve into the requirements under the federal rules of civil procedure, but it guides practitioners in determining when you may want to bring this dispositive motion and how best to plan for obtaining the discovery needed for moving for summary judgment. It also presents convenient information for the nonmovant opposing such a motion and details effective

opposition papers and supporting materials.

For those heading to trial, Chapter 37 addresses how strategic motions *in limine* can help you frame your case pre-trial and potentially limit the other side's case. The pages are full of real case examples of how motions *in limine* have been used in a variety of commercial litigation contexts, which offers a practical perspective. The authors also include helpful checklists.

A series of chapters cover trial strategy and advocacy. This includes guidance on how to tell a story and strategies you can use to develop a theory and a theme for your case. Each aspect of the trial is touched upon — jury selection, opening statements, direct examination, cross-examination, expert witnesses, closings, and more.

As we all know, trials are all about the evidence. There is an extensive chapter dealing with evidence at trial and the evidentiary challenges of getting evidence in or in keeping it out under the federal rules. The authors detail the many evidentiary issues we encounter as trial lawyers during trial, including hearsay and the exceptions to the rule. Laying a foundation for various forms of Electronically Stored Information (ESI) provides further helpful tips to trial lawyers. Pages are dedicated to the admission of social media such as Twitter or Facebook as evidence at trial, which we are all seeing increase in courtrooms nowadays.

Of great assistance to any trial lawyer, this multi-volume set has jury instructions specific to federal litigation and a host of substantive areas of commercial law. The tables of case law, rules, and statutes and comprehensive index are easy to use and show the amazing breadth of topics this publication embraces.

All in all, the ABA Section of Litigation has another winner in this publication. "Business and Commercial Litigation in Federal Courts, Fourth Edition," is a unique publication that would be well used by any commercial litigator in federal court today. Make sure you add this to your summer reading list.

Jennifer L. Parent is a director and chair of the litigation department at McLane Middleton, Professional Association, NHBA Board of Governors Delegate to the ABA, and a past president of NHBA.

Limited Liability Companies: Are Operating Agreements Executory Contracts?

By Christopher M. Candon

> "Although the Bankruptcy Code does not define the term 'executory contract,' the majority of circuits have adopted the definition first articulated by professor Vern Countryman."

Under Section 365(a) of the Bankruptcy Code, "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). This essential right granted to debtors and trustees serves the dual bankruptcy policies of maximizing value and providing a fresh start by permitting burdensome contracts to be abandoned and favorable contracts to be retained. When a limited liability company (LLC) is involved in a bankruptcy case, there will be varying impact on the debtor and non-debtor members and the LLC itself. For example, if an individual LLC member files for Chapter 7 bankruptcy protection, what interests or rights does a Chapter 7 Trustee acquire under the operating agreement? Will a Chapter 7 Trustee be able to stand in the shoes of the debtor and enforce management rights, sell an interest or even seek dissolution of the LLC? The determination that the operating agreement is or is not an executory contract may influence the outcome of these and other related questions.

Whether a contract is "executory" within the meaning of the Bankruptcy Code is a question of federal law. Although the Bankruptcy Code does not define the term "executory contract," the majority of circuits have adopted the definition first articulated by professor Vern Countryman. The "Countryman definition" provides that a contract is executory "if at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party." V. Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973).

An LLC operating agreement outlines the financial and working responsibilities and relationships among the owners of the company. The core elements of an LLC operating agreement include provisions relating both to the economic interests (e.g., equity structure: contributions, capital accounts, allocations of profits, losses and distributions) and non-economic rights (e.g., management, voting, books and records, and general provisions such as governing law and dispute resolution). Typically, operating agreements also include provisions concerning dissolution and liquidation upon bankruptcy or insolvency. For example, the operating agreement may contain provisions that require the liquidation of the LLC upon a member's bankruptcy or the immediate removal of a bankrupt member from the management team. *See* Lara R. Fernandez,

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Ipso Facto Provisions and Drafting Operating Agreements to Protect LLC Members from Another Member's Bankruptcy, 2018 ABA Business Law Section Spring Meeting.

With respect to a debtor's membership interest, the operating agreement may provide a right of first refusal for the acquisition by the existing non-debtor members of the bankrupt's membership interest or, alternatively, the repurchase of the bankrupt's membership interest by the LLC. *Id.* These contractual provisions are sometimes supplemented by state laws that govern limited liability companies, specifying disassociation or wind-down procedures upon the occurrence of an insolvency event. Whether contractual or statutory, provisions that have the effect of terminating interests and/or rights upon the filing of bankruptcy are commonly referred to as *ipso facto* clauses. The treatment of such clauses in operating agreements — enforceable or unenforceable — has not been consistent by the courts, resulting in conflicting decisions and, of course, wide-ranging impact on interested parties.

The reason for differing treatment of *ipso facto* provisions in operating agreements is readily discernable. When analyzing the enforceability of such provisions, some courts take the view that operating agreements are not executory contracts. As a result, these courts conclude that operating agreements are property of the debtor's estate under Section 541 of the Bankruptcy Code, which preempts any *ipso facto* provision clauses in the operating agreement, making them unenforceable. Section 541 of the Bankruptcy Code provides that property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). This includes both the economic and non-economic rights provided for in an operating agreement.

On the other hand, certain courts have taken the position that operating agreements are executory contracts that are subject to treatment under Section 365 of the Bankruptcy Code. Like Section 541, Section 365 generally proscribes enforcement of *ipso facto* provisions. However, contradictory to Section 541, the general prohibition against *ipso facto* provisions in Section 365 is not absolute. Sub-sections of Section 365 override the general preemption of *ipso facto* clauses when "applicable law" would otherwise excuse a party, other than the debtor, from accepting performance from or rendering performance without the consent of the party. The exception to the general rule was designed "to protect non-debtor third parties whose rights may be prejudiced by having a contract performed by an entity other than the one with which they originally contracted." In re C.W. Mining Co., 422 B.R. 746, 761 (B.A.P. 10th Cir. 2010). In analyzing operating agreements and the *ipso facto* clauses, this is reduced to the common principle that LLC members should be entitled to choose with whom they do business.

Summary

"[O]perating agreements are analyzed on a case-by-case basis to determine if they contain sufficient unperformed obligations to require treatment as executory contracts." *Meiburger v. Endeka Enterprises, L.L.C. (In re Tsiaoushis)*, 383 B.R. 616, 620 (Bankr. E.D. Va. 2007). If the court determines that the agreement is an executory contract, it is subject to the general prohibition of *ipso facto* clauses under Section 365 unless the exception to the rule applies. If the exception applies, certain benefits of the operating agreement, such as management/control of the LLC, may not be conferred onto the estate. If the agreement is not considered an executory contract, it is instead considered a property interest and governed by the rules of Section 541. This provision invalidates *ipso facto* clauses that restrict the transfer of a property interest, or conditions it on the commencement of a bankruptcy proceeding, no matter whether there is any applicable non-bankruptcy law. This means that all rights under the operating agreement, both economic and non-economic, become part of the estate.

The distinction has consequences. To the extent the rights under the operating agreement are conferred on the estate, a Chapter 7 Trustee may seek to realize value by enforcing rights otherwise available to the debtor, including the sale of the debtor's membership interest (notwithstanding a right of first refusal provision) or even the dissolution or liquidation of the LLC. Accordingly, when an LLC or a member is involved in a bankruptcy case, practitioners should carefully review the operating agreement and any *ipso facto* provisions to analyze whether the agreement might be considered an executory contract and what rights/interests may be impacted by the bankruptcy filing.

Christopher Candon is chair of the Corporate Department of Sheehan Phinney.

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a series of severe restrictions on access to judicial review of deportation orders in federal court. In essence, the REAL ID Act bars *habeas corpus* and other immigration relief to immigrants seeking to challenge *E.O. 13768*. Its effect is to force immigrants to embark on a byzantine voyage through what one federal judge has called a "corn maze" of regulation. It usually ends at the Board of Immigration Appeals (BIA), in Falls Church, Virginia, an administrative agency with no equitable powers.

In Renato's case, while the Department of Justice (DOJ) was fighting him in the First Circuit Court of Appeals, the Board of Immigration Appeals (also part of DOJ) was working to deny his claim. They did. In an "Alice Through the Looking Glass" move, the immigration regulations provide that if an immigrant is forcibly removed from the United States his pending appeal is deemed "abandoned."

Elvecio's case was fast-tracked by ICE. His permanent status, in the form of an I-130 Alien Relative Petition "green card" application remains pending. Such applications are routinely approved, but the government declined to exercise prosecutorial discretion to allow him to remain until it was approved. In fact, the family now suspects that filing the Alien Relative Petition in November of 2017, may have actually triggered his deportation. His eligibility to return to the US once his petition is approved is subject to a 10-year bar, unless he can secure a waiver from USCIS. Curiously, this is the same I-130 Immediate Relative Petition process that allowed Melania Trump's parents to immigrate to the US in 2017 because of the First Lady's US citizenship, obtained through naturalization. The President often derisively refers to this process as "chain migration."

Renato's case remains in the First Circuit seeking to enforce the promises made to him by the US government in exchange for his law enforcement work. Without the endorsement of ICE or the US Attorney, Renato cannot obtain an "S" visa which is specifically designed for immigrants who cooperate with US law enforcement. In Renato's case, that "S" visa could save his life. When word of his cooperation with the US government reached criminal elements in Brazil, social media exploded with threats of kidnapping, torture and murder. Renato has been warned not to return to Brazil. His life is in grave danger. The government's refusal to acknowledge his assistance is a mystery.

If Renato had lived five miles south of his Nashua home, the Massachusetts federal court might well have asserted jurisdiction, similar to an order by Chief Judge Patti Saris in *Devitri v, Cronin*, Civil Action, No. 17-11842-PBS (2018), a case arising in Dover, NH, involving 50 Christian Indonesians who had the good fortune of having to report to ICE/Boston instead of ICE/Manchester.

The cases of Renato and Elvecio echo the battle unfolding on our southern border, as U.S. citizens are separated from, or face separation from, their families. In both cases, while New Hampshire businesses struggle to find workers in world of 2.8 percent unemployment, the U.S. immigration system is harming businesses, and inflicting pain and torment upon U.S. families who remain behind.

While Congress and the President dicker over immigration reform, Renato, Elvecio and their U.S. families, "Dreamers" and other immigrants all over the U.S. must navigate a failed, expensive, inhumane immigration system, long in disrepair and unable to meet the modern needs of businesses, families and persons escaping persecution consistent with our democratic ideals. The obsession over a multi-billion-dollar wall is not a substitute for a rational immigration policy, nor is the administration's latest proposed solution: to do away with due process altogether.

Ambassador George Bruno, of Mesa Law LLC, Manchester, and Robert E. McDaniel and Laurie McDaniel of The McDaniel Law Office, LLC in Meredith, are part of the International Resource Group, LLC. For more information, visit internationalresourcegroup.org.

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Where protecting creditors' interests requires lifting of the codebtor stay, then the opposite should also be true – perfection of a lien without lifting of the codebtor stay should be a violation of the statute.

Recently two New Hampshire courts grappled with the issue of whether continuing a mortgage reformation action in the Superior Court was a violation of the codebtor stay when the automatic stay as to the debtor had been lifted. The United States Bankruptcy Court for the District of New Hampshire declined to decide whether the codebtor stay applied and ruled on other grounds. *Currivan v. Santander* Bank, NA, United States Bankruptcy Court for the District of New Hampshire, No. 18-01028-BAH (June 7, 2018)(Order, Harwood, J.). In the related proceeding, the Rockingham County Superior Court held that the codebtor stay did not apply by finding that reformation of a mortgage does not fit within the dictionary definition of the verb "to collect." Santander Bank, NA v. Jerome J. Day, Jr. Trustee of the Jerome J. Day, Hr., Recovable Trust u/t/d November 10, 2000, et. al., Rockingham County Superior Ct., No. 218-2017-CV-00555 (June 18, 2018) (Order, Delker, J.).

Despite the fact that Section 1301 was created to protect the debtor and despite the fact that the legislative history shows that a broader prohibition was envisioned, the practical application of Section 1301 is very narrow. Although Section 1301(a) contains very similar language to that of Section 362(a)(6), protection under these sections is widely disparate. An "act to collect" is not "any act to collect."

Terrie Harman and Kristina Finley practice at Harman Law Offices in Exeter, NH. Their practice focuses on civil litigation, including consumer protection, bankruptcy-related litigation, and probate and estate matters.