



Court of Appeals to Consider Scope of the “Unfinished Business Doctrine”

The Court of Appeals recently accepted two certified questions from the Second Circuit concerning the scope of the “unfinished business doctrine.”¹

Under the unfinished business doctrine, when a lawyer takes a contingency fee case with him from a dissolved law firm, “the case remains a firm asset. When the case is concluded and the contingent fee is collected, the lawyer is obligated to remit to his former firm the value of the contingency fee case measured as of the time the firm dissolved.”²

Evolution of the Doctrine

The unfinished business doctrine began as a judicial interpretation of the New York Partnership Law, but now applies to all types of law firms, including professional corporations.³ Three of the four Appellate Divisions have adopted the unfinished business doctrine, but the Court of Appeals has never considered the rule.⁴

Recently, the unfinished business doctrine caught the attention of some creative trustees and creditors in bankruptcies of dissolved law firms, including Coudert Brothers LLP and Thelen LLP. In each of those cases, the firms’ trustees and creditors sought to convince the court to include as assets of the dissolved firm client-matters that the former firms’ partners brought with them to their new firms. But in each of those cases, they tried to apply the unfinished business doctrine to hourly fee matters, not contingency cases.

Before 2011, no state or federal court in New York had ever considered whether the unfinished business doctrine applies to hourly fee cases. Now, the three courts to have ruled on the issue have split: One court held that the unfinished business doctrine applies to hourly fee cases, and two courts held that the unfinished business doctrine does not apply to hourly fee cases.⁵

Coudert, Shereksy, and Geron

In *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP* (“Coudert”), the law firm Coudert Brothers filed for Chapter 11 bankruptcy in the Southern District of New York in September 2006. Development

Specialists was appointed as plan administrator of the Coudert estate. Development Specialists filed adversary proceedings against 10 law firms, including Akin Gump, to which several former Coudert partners brought hourly fee cases that originated at Coudert. Development Specialists sought to recover post-dissolution profits from those matters for the Coudert estate.



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The successor firms moved to dismiss, arguing that the unfinished business doctrine does not apply to hourly fee matters. United States Bankruptcy Judge Robert Drain issued an unreported bench ruling predicting that the New York State Court of Appeals would likely conclude that the unfinished business doctrine applies to both contingency and hourly matters. On appeal, United States District Judge Colleen McMahon issued a long and thoughtful opinion, in which the court “conclude[d] that the New York Court of Appeals would, if confronted with the issue, conclude that all client matters pending on the date of dissolution are assets of the firm – regardless of how the firm was to be compensated for the work.”⁶

In contrast, in *Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP*, an expelled former member of a matrimonial law firm sued his former firm and partners in New York County Supreme Court alleging claims for breach of fiduciary duty, constructive trust, breach of contract, promissory estoppel, and a sep-

arately-pleaded cause of action for “unfinished business.” The firm’s business was primarily hourly fee cases. The plaintiff’s former firm and its partners moved to dismiss the claim for unfinished business on the ground that New York law limits the unfinished business doctrine to contingency cases.

Citing *Coudert*, the plaintiff argued that recent cases contradicted the defendants’ characterization of New York law. After considering the District Court’s ruling in *Coudert*, Justice Eileen Bransten concluded that she was “not inclined to recognize a cause of action for unfinished business for hourly fee cases which has, hitherto, not been recognized by the New York courts.” The court held, “It is logical to distinguish between contingency fee arrangements and cases which are billed on the basis of hourly work” because a fee collected by a successor law firm in a contingency fee case may be “much greater than the amount of work expended by the lawyer,” while a fee collected by a successor law firm in an hourly fee case “is based solely on the amount of hourly work performed post-dissolution.”⁷ *Sheresky* is the only case where a New York State court has addressed whether the unfinished business doctrine applies to hourly fee cases.

Finally, in *Geron v. Robinson & Cole, LLP*, a Chapter 7 trustee for the former law firm Thelen filed adversary proceedings alleging claims for fraudulent transfer, accounting and turnover orders against Seyfarth Shaw and Robinson & Cole seeking to recover profits derived from work that former Thelen partners performed on hourly fee matters they originated at Thelen and brought with them to their new firms. Seyfarth Shaw and Robinson & Cole moved to dismiss the complaints.

As District Judge William Pauley framed the issue, “The question here is whether New York law sanctions the expansion of [the unfinished business doctrine] to a dissolved law firm’s pending

hourly fee matters.” After considering the courts’ decisions in *Coudert* and *Sheresky*, the court held that “New York law does not recognize a debtor law firm’s property interest in pending hourly fee matters.”⁸

Thelen: The Second Circuit Frames the Issue

The bankruptcy trustee in *Geron v. Robinson & Cole, LLP* appealed District Judge Pauley’s decision, which resulted in the Second Circuit issuing an opinion in *In re Thelen, LLP*.⁹ In *In re Thelen*, the Second Circuit certified to the New York State Court of Appeals the following question: “Under New York law, is a client matter that is billed on an hourly basis the property of a law firm, such that, upon dissolution and in related bankruptcy proceedings, the law firm is entitled to the profit earned on such matters as the ‘unfinished business’ of the firm?”

The Second Circuit also certified a related question: If the unfinished business doctrine does apply to hourly fee cases, “how does New York law define a ‘client matter’ for purposes of the unfinished business doctrine and what proportion of the profit derived from an ongoing hourly matter may the new law firm retain?” The Second Circuit suggested that the Court of Appeals could consider a “number of strong legal and policy arguments on both sides of the issue.”

The Second Circuit identified three factors that weigh in favor of applying the unfinished business doctrine to hourly fee matters. First, the New York State Court of Appeals has held that executory contracts to perform professional services are partnership assets, even where the contract is terminable at will.¹⁰

Second, the Partnership Law provides that New York courts should, where possible, interpret its provisions consistently with the decisions of the courts of other states interpreting the Uniform Partnership Act. A majority of other state courts have held that the unfinished business doctrine applies to hourly fee cases.¹¹

Third, declining to apply the unfinished business doctrine to hourly fee cases might “encourage the view” that an individual partner’s clients are not firm assets, but “personal property” belonging to the individual lawyer, which the Second Circuit suggested was not “sound policy.”

The Second Circuit also identified four factors that weigh against applying the unfinished business doctrine to hourly fee matters. First, the New York State Court of Appeals has used language in its opinions that “clients are not merchandise,” so recognizing a property interest in pending client matters might be “inconsistent” with the Court of Appeals’ conception of the attorney-client relationship.¹²

Second, applying the unfinished business doctrine to hourly fee matters might discourage law firms from accepting lateral attorneys from dissolved firms with ongoing matters “for fear that a substantial portion of the resulting profits may be turned over to the dissolved law firm or its creditors.”

Third, the New York Rules of Professional Conduct arguably “forbid the unfinished business doctrine altogether” by prohibiting fee splitting and agreements restricting lawyer mobility.

Fourth, hourly fee matters are “arguably different” than contingency fee matters because a dissolved firm that originated a contingency fee case might be paid nothing for its work without the benefit of the unfinished business doctrine, even though it did a substantial majority of the work that earned the fee. In contrast, the work performed each month on an hourly fee matter is easily distinguishable from work performed in preceding months and so “can be construed as new, rather than unfinished, business.”¹³

Whither the Doctrine?

So how is the Court of Appeals likely to rule on these questions? The Court of Appeals could reject the unfinished business doctrine altogether – for both contingency fee cases and hourly fee cases. That outcome is less likely because the unfinished business doctrine has been part of this state’s jurisprudence for more than 20 years. A more likely outcome is that the Court of Appeals will hold that the unfinished business doctrine applies to contingency fee cases, but not hourly fee cases.

There does seem to be an important qualitative difference between contingency and hourly fee cases. A firm with a contingency fee case is not entitled to a fee until the case is finally resolved, no matter how much work it has done on the matter. If a firm with a contingency fee case has the misfortune of dissolving shortly before

the case is resolved, it could be deprived of compensation altogether, even though it did the vast majority of the work. Conversely, the successor firm could be entitled to the entire fee, even though it did very little work. That is the basic wrong the unfinished business doctrine remedies.

With hourly fee matters, in contrast, the work performed by the dissolved firm is easily divisible from work done by the successor firm by monthly billings. Fees in hourly matters are commonly earned and due upon the client’s receipt of the bill, so once a bill is sent, there should be little difficulty distinguishing between pre-dissolution work and post-dissolution work. The dissolved firm may bill and be compensated for all of its pre-dissolution work, and the successor firm may bill and be compensated for all of its post-dissolution work.

Applying the unfinished business doctrine to hourly fee matters would provide a windfall to a dissolved firm (and possibly its creditors) by providing compensation for post-dissolution work performed solely by the successor firm, on which the dissolved firm did no work and contributed no effort. In short, there should be no need for the unfinished business doctrine when a matter is billed on an hourly basis. Time will tell if the Court of Appeals agrees.

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1. *In re Thelen LLP*, 22 N.Y.3d 1017 (2013).
2. *Santalucia v. Seabright Transp., Inc.*, 232 F.3d 293, 300–01 (2d Cir. 2000).
3. *Id.*; see Partnership Law § 73.
4. See, e.g., *Shandell v. Katz*, 217 A.D.2d 472, 473 (1st Dept. 1995); *Dwyer v. Nicholson*, 193 A.D.2d 70, 73 (2d Dept. 1993); *Kirsch v. Leventhal*, 181 A.D.2d 222, 225–26 (3d Dept. 1992).
5. See *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 480 B.R. 145, 154 (S.D.N.Y. 2012); *Geron v. Robinson & Cole, LLP*, 476 B.R. 732, 739–41 (S.D.N.Y. 2012); *Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP*, 35 Misc. 3d 1201(A), 2011 WL 7574999, at *5–6 (Sup. Ct., N.Y. Co. Sept. 13, 2011).
6. *Development Specialists, Inc.*, 480 B.R. at 159.
7. *Sheresky*, 35 Misc. 3d 1201(A), 2011 WL 7574999 at *5–6.
8. *Geron*, 476 B.R. at 741.
9. *In re Thelen LLP*, 736 F.3d 213, 221–25 (2d Cir. 2013).
10. *Id.* at 222 (citing *Stem v. Warren*, 227 N.Y. 538, 546–47 (1920)).
11. *Id.* at 222 n.10 (collecting cases).
12. *Id.* at 222–23 (quoting *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 98 (1989)).
13. *Id.*