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### The Uncertain Future of the Unfinished Business Doctrine

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The Uncertain Future of the Unfinished Business Doctrine

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**Introduction**

It is no secret that the legal industry has experience financial difficulty following the great recession. Many law firms have been less profitable, and in some extreme circumstances, have filed for bankruptcy. The worlds largest law firms are of no exception to this recent phenomenon. The collapses of the mega-firms Dewey & LeBoeuf,<sup>1</sup> Coudert Brothers LLP,<sup>2</sup> Heller Ehrman LLP,<sup>3</sup> Howrey LLP,<sup>4</sup> Thacher Proffitt & Wood LLP,<sup>5</sup> and Thelen LLP<sup>6</sup> are prime examples.

Since most law firms, especially large firms, do not reorganize in bankruptcy, a bankruptcy trustee will often be appointed to administer the firm's estate. In order to maximize

<sup>1</sup> The End of an Era: Why Dewey & LeBoeuf Went Under, FORTUNE (May 29, 2012) <http://fortune.com/2012/05/29/the-end-of-an-era-why-dewey-leboeuf-went-under/>.

<sup>2</sup> Jones Day Prevails in Coudert Brothers "Unfinished Business" case in unanimous New York Court of Appeals Ruling, (July 2014) <http://www.jonesday.com/jones-day-prevails-in-coudert-brothers-unfinished-business-case-in-unanimous-new-york-court-of-appeals-ruling/>.

<sup>3</sup> Recession Batters Law Firms, Triggering Layoffs, Closings, THE WALL STREET JOURNAL (Jan. 26, 2009) <http://www.wsj.com/articles/SB123292954232713979>.

<sup>4</sup> Why Howrey Law Firm Could Not Hold It Together, THE WASHINGTON POST (Mar. 19, 2011) [http://www.washingtonpost.com/business/economy/why-howrey-law-firm-could-not-hold-it-together/2011/03/16/ABNTqkx\\_story.html](http://www.washingtonpost.com/business/economy/why-howrey-law-firm-could-not-hold-it-together/2011/03/16/ABNTqkx_story.html).

<sup>5</sup> The Rise and Fall of Thacher Proffitt, THE WALL STREET JOURNAL (Mar. 2, 2009) <http://blogs.wsj.com/law/2009/03/02/the-rise-and-fall-of-thacher-proffitt/>.

<sup>6</sup> The Eight Most Spectacular Law Firm Collapses in History, BUSINESS INSIDER (June 24, 2012) <http://www.businessinsider.com/the-eight-most-spectacular-law-firm-collapses-in-history-2012-6>.

the estate, the trustee in many cases will pursue claw-back actions against the former law firm's partners and creditors. In addition, bankruptcy trustees have turned to the "unfinished business doctrine" as a tool to recover value from former partners and their new firms. When a law firm dissolves, its attorneys naturally must find new firms to call home. Likewise, the dissolved firm's former clients' legal issues do not disappear along with the firm. Accordingly, many former partners of the dissolved firm will take these former clients along with them to their new firms. Many bankruptcy trustees, however, have sought to recover the profits earned on the matters taken by the former partners to their firms from these new firms under the unfinished business doctrine, which provides that the dissolved firm could be entitled to recover the profits earned on the pending hourly matters of its clients.

At first, these bankruptcy trustees successfully recovered the profits earned on the hourly matters taken by the defunct firm's former partners to their new firms. The recent trend, however, has been to not apply the unfinished business doctrine to hourly fee matters.<sup>7</sup> Yet, notwithstanding this trend some courts have continued to hold under the laws of certain jurisdictions the unfinished business doctrine applies to hourly fee matters.<sup>8</sup> Thus, while no longer recognized in certain jurisdictions (including New York and California), law firms operating in jurisdictions that still recognize the unfinished business doctrine face the possibility that they will have to share their fees earned on matters new partners bring with them from their former and now dissolved firm.

This Article will discuss the unfinished business doctrine. The doctrine allows for the bankruptcy trustee of a dissolved law firm to recover the pending hourly fee matters upon the dissolution of the law firm. Part I of this Article will discuss the doctrine generally, and its

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<sup>7</sup> *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP*, C 14-01236 CRB, 2014 WL 2609743 (N.D. Cal. June 11, 2014); *In re Thelen LLP*, 24 N.Y.3d 16, 22, 995 N.Y.S.2d 534, 536-37 (2014).

<sup>8</sup> *In re Howrey LLP*, 515 B.R. 624, 631 (Bankr. N.D. Cal. 2014).

origination. The unfinished business doctrine was created in the *Jewel v. Boxer*<sup>9</sup> case in a California federal district court. Part II will discuss some previous case law, in which the court applied the unfinished business doctrine. Part III will discuss recent case law illustrating that some courts have recently departed from the doctrine.<sup>10</sup> These courts have held that the dissolved firms have no such property interest in the pending hourly fee matters, and that the benefits of such pending matters are to be awarded to the new firms where the former partners of the dissolved firms currently are employed.<sup>11</sup> However, some courts still apply the doctrine, continuing to hold that trustees of dissolved law firms have an interest in the hourly fee matters pending upon the dissolution of the law firm.<sup>12</sup> The case law in which the court elected to apply the doctrine will be discussed in Part IV. Finally, part V will show that certain implications are inherent in these decisions of the various courts, and each holding effects the bankruptcy estates of the dissolved firm, the displaced partners, as well as the former clients of the dissolved firm.

## **I. The Unfinished Business Doctrine Generally**

The unfinished business doctrine is premised essentially on the idea that a law firm owns the rights to its clients' matters. When a firm dissolves, its former partners cannot take the former matters of the firm's former clients without paying the dissolved firm the profits earned on those matters. As a result, the former partners of the dissolved firm own the pending legal fees as well. The new firms that hired the former partners and performed the work are not entitled to any portion of the fees regarding the pending legal matters. The unfinished business doctrine was a concept created by the California courts in the seminal case of *Jewel v. Boxer*.<sup>13</sup>

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<sup>9</sup> *Jewel v. Boxer*, 156 Cal. App. 3d 171, 174, 203 Cal Rptr. 13, 15 (Ct. App. 1984).

<sup>10</sup> *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP*, C 14-01236 CRB, 2014 WL 2609743 (N.D. Cal. June 11, 2014); *In re Thelen LLP*, 24 N.Y.3d 16, 22, 995 N.Y.S.2d 534, 536-37 (2014).

<sup>11</sup> *Id.*

<sup>12</sup> *In re Howrey LLP*, 515 B.R. 624, 631 (Bankr. N.D. Cal. 2014).

<sup>13</sup> *Jewel*, 156 Cal. App. 3d 171, 174, 203 Cal Rptr. 13, 15 (Ct. App. 1984).

### A. *Jewel v. Boxer* – The Basis for the Unfinished Business Doctrine

The California case *Jewel v. Boxer*,<sup>14</sup> is the seminal unfinished business doctrine case. In *Jewel*, both the plaintiffs and defendants were former partners of a firm that had dissolved.<sup>15</sup> After their former firm dissolved, the plaintiffs sued the defendants seeking an accounting of the fees earned by the new firms on the matters that were pending at the time the old firm dissolved, contending that these fees were assets of the dissolved firm. The matters at issue were both the hourly and contingency fees of the dissolved firm.

The *Jewel* court held that, without a partnership agreement, the “attorneys’ fees received on cases in progress upon dissolution of a law partnership [we]re to be shared by the former partners according to their right to fees in the former partnership, regardless of which former partner provides legal services in the case after the dissolution.”<sup>16</sup> The *Jewel* court required that any “income generated through the winding up of unfinished business” be distributed to the dissolved firm’s former partners in accordance with their respective interests in the dissolved firm, absent a contrary agreement.<sup>17</sup> Importantly, the *Jewel* court rejected awarding the new firms a portion of the fees on the pending legal matters. Some jurisdictions have continued to apply the unfinished business doctrine, as set forth under the *Jewel* case.

### II. Previous Case Law Applying The Unfinished Business Doctrine

Some jurisdictions have elected to continue to apply the unfinished business doctrine. The court in *In re Labrum & Doak, LLP*<sup>18</sup> held that the fees derived from work in progress at the time of dissolution in hourly-fee cases were estate property recoverable

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<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id. at 176.

<sup>18</sup> *In re Labrum & Doak, LLP*, 227 B.R. 291 (Bankr. E.D. Pa. 1998).

by committee on behalf of the debtor.<sup>19</sup> The *Labrum* court held that, under Pennsylvania law, the hourly fees that were “derived from work in progress at the time of dissolution...were estate property recoverable” by the debtor.<sup>20</sup>

Likewise, the court in *LaFond v. Sweeney* held that, as a matter of first impression in the state of Colorado, the unfinished business rule required the profits from the case to be distributed to its members according to the profit sharing agreement that existed at the time of the dissolution.<sup>21</sup>

However, recent case law pertaining to the unfinished business doctrine has followed a trend of rejecting the rule as it relates to hourly fees. Many jurisdictions have elected not to follow the rule as outlined by the *Jewel* court.

### **III. Recent Case Law Involving the Unfinished Business Doctrine**

Multiple jurisdictions have elected not to follow the precedent, set by the *Jewel* case, including the state from which *Jewel* came, California, and, New York. Yet the doctrine still is followed by some jurisdictions as well.

#### **A. *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP* – California Law**

Recently, a federal district court in California in *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP*,<sup>22</sup> held that, under California law, the unfinished business doctrine does not apply to hourly fee matters.<sup>23</sup> In so holding, the *Heller Ehrman* court concluded that the bankruptcy estate of a dissolved law firm could not retain a property interest in the hourly fee matters that

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> *LaFond v. Sweeney*, 2015 CO 2,343 P.3d 939.

<sup>22</sup> *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP*, C 14-01236 CRB, 2014 WL 2609743 (N.D. Cal. June 11, 2014).

<sup>23</sup> Id.

were pending at the time the firm dissolved.<sup>24</sup> Therefore, the bankruptcy trustee was not entitled to recover the fees that the new law firms earned on these pending hourly matters.

In *Heller*, the trustee of the estate of a dissolved law firm brought a proceeding, which sought to compel the law firms to which its former partners had relocated, and which the dissolved firm's former clients retained for their pending legal matters.<sup>25</sup> The trustee sought to account for the dissolved firm's property interest in these hourly fee matters at the time it was dissolved.<sup>26</sup>

The dissolution plan of Heller Ehrman included a "*Jewel* Waiver," which waived any unfinished-business claims for the profits generated by former Heller Ehrman attorneys from any pending hourly fee matters.<sup>27</sup> The firm then filed for bankruptcy.

The bankruptcy trustee sought to avoid the "*Jewel* Waiver" as a fraudulent transfer and recover the profits earned on the pending hourly fee matters that the former partners brought with them to their new firms from these firms on two grounds. First, citing *Jewel v. Boxer*<sup>28</sup>, the trustee argued that, under California law, the bankruptcy estate had a property interest in the pending hourly fee matters<sup>29</sup> because the former partners of the dissolved law firm violated their fiduciary duty "with respect to unfinished partnership business for personal gain."<sup>30</sup> Second, the trustee asserted that public policy reasons supported his claim.<sup>31</sup>

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<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.; See Generally, *Jewel*, 156 Cal. App. 3d 171, 174, 203 Cal. Rptr. 13, 15 (Ct. App. 1984).

<sup>28</sup> *Jewel*, 156 Cal. App. 3d 171, 175 (Ct. App. 1984).

<sup>29</sup> *Heller Eherman LLP*, C 12-01236 CRB, 2014 WL 2609743 (N.D. Cal. June 11, 2014).

<sup>30</sup> *Jewel*, 156 Cal. App. 3d 171, 175 (Ct. App. 1984).

<sup>31</sup> *Heller Eherman LLP*, C 14-01236 CRB, 2014 WL 2609743 (N.D. Cal. June 11, 2014) (The first was that "preventing extra compensation to law partnerships 'prevents partners from competing for the most remunerative cases during the life of the partnership in anticipation that they might retain those cases should the partnership dissolve.'" Basically, this would allow firms to operate as one entity and to dissuade the firm's individual partners from serving their own interests in leaving the firm and taking the firm's clients with them. The second policy reason was that the *Jewel* holding discourages former partners from scrambling to keep physical possession of files in order to seek personal gain by soliciting a firm's existing clients upon dissolution.)

Ultimately, the *Heller* court rejected the trustee’s arguments and held that under California law, the unfinished business doctrine does not apply to hourly fee matters.<sup>32</sup> In so holding, the *Heller* court relied on law, equity and public policy.<sup>33</sup>

Turning to the law, the *Heller* court initially distinguished the facts from *Jewel* from the facts from *Heller* on five different grounds.<sup>34</sup> First, the *Heller* court decided that Heller’s lender forced the dissolution, compared to the firm in *Jewel*, where the dissolution was voluntary.<sup>35</sup> As such, Heller’s former partners were left with no choice but to seek new employment, just as their clients were forced to seek new counsel.<sup>36</sup> Second, in *Jewel*, the new firm represented the clients using the fee agreements, entered into between the client and the old firm.<sup>37</sup> In *Heller*, however, the clients signed new fee agreements with their new firms.<sup>38</sup> Third, unlike where in *Jewel*, the new firms consisted entirely of the partners of the dissolved firm, in *Heller*, the defendants were preexisting law firms that hired some, but not all, of Heller’s partners.<sup>39</sup> As such, although the partners in *Jewel* continued to owe fiduciary duty to each other and the old firm, the defendant law firms in the *Heller* were third parties that never owed any form of duty, fiduciary or otherwise, to Heller Ehrman.<sup>40</sup> Fourth, in *Jewel*, there were both contingency fee and hourly fee matters at issue.<sup>41</sup> In *Heller*, there were no contingency fee matters at issue.<sup>42</sup> Finally, *Jewel* applied the Uniform Partnership Act (“UPA”), which has since been superseded by the Revised

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<sup>32</sup> Heller Eherman LLP, C 14-01236 CRB, 2014 WL 2609743 (N.D. Cal. June 11, 2014).

<sup>33</sup> Id. at 7.

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.



Uniform Partnership Act (“RUPA”).<sup>43</sup> Unlike under the UPA, which imposed a fiduciary duty to not take any action with respect to unfinished partnership business for personal gain on former partners of a dissolved firm, under RUPA, while partners have a duty not to compete with the partnership prior to dissolution, such a duty does extend to winding up the business or to post-dissolution activities. “Thus, a partner is free to compete immediately upon an event of dissolution . . .”<sup>44</sup>

The *Heller* court noted that while dozens of cases from California and beyond “have cited *Jewel* reflexively and uncritically,” neither the California Supreme Court had ruled on the issue nor had any reported California cases decided under RUPA cited *Jewel* for its unfinished business rule. Accordingly, absent clear authority from California, the *Heller* court then turned to the equities of the case. The *Heller* court determined that “[b]alancing the equities, it [wa]s simple enough to conclude that the firms that did the work should keep the fees.”<sup>45</sup> In particular, the *Heller* court found the fees the trustees sought to recover were “generated by [the d]efendants’ labor, not Heller’s.”<sup>46</sup> Moreover, the *Heller* court emphasized, “A law firm never owns its clients matters.”<sup>47</sup> As such, a law firm, may only have an expectation of future business with its clients instead of a property right in such business. Therefore, a law firm, including Heller Ehrman, cannot assert a claim for loss of expected future business because such expectation would disappear as soon as the client discharges the firm, which it could, at will, or the firm is no longer able to continue providing service to those clients.<sup>48</sup> Further, the *Heller* court emphasized that new firms came to rescue these clients and it was these new firms that

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<sup>43</sup> Id.

<sup>44</sup> Id.; see also RUPA § 404 cmt. 2.

<sup>45</sup> Heller Ehrman LLP, C 14-01236 CRB, 2014 WL 2609743 (N.D. Cal. June 11, 2014).

<sup>46</sup> Id. at 5.

<sup>47</sup> Id.

<sup>48</sup> Id. at 6.

provided the capability to provide legal service and did the work that generate the fees.<sup>49</sup> As such, the *Heller* court concluded that equality dictated that the new firms should keep these fees.

Finally, the *Heller* court found that the public policy favored the new law firms. In so finding this, the *Heller* court rejected the trustee's two public policy arguments. In particular, the *Heller* court concluded that it is not in the public interest to make it more difficult for partners leaving a struggling firm to find new employment, or to limit the representation choices a client has available, by establishing a rule that prevents third-party firms from earning a profit off labor and capital investments they make in a matter previously handled by a dissolved firm. In *Heller*, the trustee asked the Court to deprive the new firms of profits earned off of the new firms labor and capital investment. The *Heller* court found that Public policy weights strongly against such an outcome.<sup>50</sup>

#### **B. *In Re Thelen LLP – New York Law***

In addition to the *Heller* decision, the New York State Court of Appeals, in *In Re Thelen LLP*,<sup>51</sup> held that the unfinished business doctrine does not apply to hourly fee matters.<sup>52</sup> The *Thelen* court concluded “pending hourly fee matters are not partnership ‘property’ or ‘unfinished business’ within the meaning of New York’s Partnership Law. A law firm does not own a client or an engagement, and is only entitled to be paid for services actually rendered.”<sup>53</sup>

The *Thelen* court was also faced with the issue of whether a bankruptcy trustee could recover profits earned on pending hourly fee matters from the firm’s former partners’ new firms. The partners of Thelen LLP, a larger law firm, voted to dissolve the

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<sup>49</sup> Id.

<sup>50</sup> Id. at 7.

<sup>51</sup> *In re Thelen LLP*, 24 N.Y.3d 16, 22, 995 N.Y.S.2d 534, 536-37 (2014).

<sup>52</sup> Id.

<sup>53</sup> Id.

firm, and in doing so, also adopted a written plan of dissolution that, like the Heller Ehrman plan, included a *Jewel* Waiver.<sup>54</sup> As was the case in *Heller*, the former partners of Thelen moved the unfinished matters to their new firms and continued to bill the clients for their services.<sup>55</sup>

Almost a year after its partners voted to dissolve the firm, Thelen filed for bankruptcy. The chapter 7 trustee subsequently commenced an adversary proceeding against the former partner's new firms, asserting that he was entitled to recover the profits on behalf of the estate under the unfinished business doctrine.<sup>56</sup> The *Thelen* trustee commenced an adversary proceeding in the Southern District of New York against one of the new firms that the former partners went.<sup>57</sup> The trustee sought to avoid the "unfinished business waiver" under California state law, and to recover the dissolved firms unfinished business, based on the assumption that the pending hourly fee matters were considered firm assets.<sup>58</sup> The new firm argued that New York law governed whether it received any "property interest."<sup>59</sup>

The *Thelen* court held that under New York State law, a dissolved law firm's pending hourly fee matters are neither partnership property, nor unfinished business.<sup>60</sup>

The *Thelen* court also made a point, as the *Heller* court did, to sort through the public

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<sup>54</sup> Id. (noting "[n]either the partners nor the partnership shall have any claim or entitlement to clients, cases, or matters ongoing at the time of the dissolution of the partnership other than the entitlement for collection of amounts due for work performed by the partners and other partnership personnel prior to their departure from the partnership. The provisions of this section are intended to expressly waive, opt out of and be in lieu of any rights any partner of the partnership may have to 'unfinished business' of the partnership, as the term is defined in *Jewel v. Boxer*, 156 Cal.App.3d 171 [203 Cal.Rptr. 13] (Cal.App. 1 Dist. 1984), or as otherwise might be provided in the absence of this provision through the interpretation of the [California Uniform Partnership Act of 1994, as amended].")

<sup>55</sup> Id.

<sup>56</sup> Id. at 29. (noting "the trustees have not cited any New York case in which the law firm was awarded the client matter itself, or any fee not earned by the law firm's own work. This is hardly surprising since, as already discussed, a client's legal matter belongs to the client, not the lawyer.").

<sup>57</sup> Id. at 24.

<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> Id. at 21.

policy considerations involved in the unfinished business doctrine decisions.<sup>61</sup> First, the court asserted that if, as the trustee urged, pending hourly fee matters were held to be partnership property, it would result in a conflict with “basic principles that govern the attorney-client relationship under New York law and the Rules of Professional Conduct.”<sup>62</sup> The court reasoned that “by allowing former partners of a dissolved firm to profit from the work they do not perform, all at the expense of a former partner and his new firm, the trustees’ approach creates an ‘unjust windfall,’ as remarked upon by the District Court Judge in *Geron*.”<sup>63</sup>

Second, the court asserted that the trustee’s approach would encourage partners of a struggling law firm to “get out the door, with client in tow, before it is too late, rather than remain and work to bolster the firm’s prospects.”<sup>64</sup> Additionally, the trustee’s approach would create possibly an even greater problem for those attorneys who choose to stay with the failing firm, because it would be “difficult to secure a position in a new law firm because any profits from their work for existing clients would be due [to] their old law firms, not their new employers.”<sup>65</sup>

Finally, the *Thelen* court opined that the trustee’s approach would potentially be harmful to the clients as well because “clients might worry that their hourly fee matters are not getting as much attention as they deserve if the law firm is prevented from profiting from its own work on them.”<sup>66</sup> Therefore the *Thelen* court concluded that the approach would unjustly harm clients, lawyers and the former partners’ new law firms.

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<sup>61</sup> Id. at 31.

<sup>62</sup> Id.

<sup>63</sup> Id. at 31-32 (citing *Geron v. Robinson & Cole LLP*, 476 B.R. 732, 740 (S.D.N.Y. 2012)).

<sup>64</sup> *In re Thelen LLP*, 24 N.Y.3d 16 at 32, 995 N.Y.S.2d 534, 536-37 (2014).

<sup>65</sup> Id.

<sup>66</sup> Id.

Following *Heller* and *Thelen*, it is now clear that under California and New York law, the unfinished business doctrine does not apply to hourly fee matters. Therefore, *Heller* and *Thelen* started a trend in recent case law that seemed to suggest that the unfinished business doctrine would no longer provide bankruptcy trustees with an avenue for recovering profits earned by debtor firm's pending hourly fee matters.

#### **IV. Courts that Continue to Apply the Unfinished Business Doctrine to Hourly Fee Matters**

The unfinished business doctrine is not completely dead, however. Indeed, some courts have declined to adopt the reasoning from *Heller* and *Thelen* and, continue to apply the unfinished business doctrine to hourly fee matters. For example, *In Re Howrey LLP*,<sup>67</sup> the court concluded that, under District of Columbia law, the trustee properly stated a claim to recover the profits earned on the pending hourly fee matters under the unfinished business doctrine.<sup>68</sup> In holding so, the court emphasized that notwithstanding the holdings in *Heller* and *Thelen*, which interpreted California and New York law respectfully, the unfinished business doctrine remained viable under District of Columbia law.<sup>69</sup>

Therefore, it is clear that some jurisdictions, including the District of Columbia and Pennsylvania may still continue to apply the unfinished business doctrine. However, some jurisdictions have recently rejected the idea of upholding the doctrine. The *Jewel* ruling has recently been departed from regarding pending hourly fee matters of dissolved

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<sup>67</sup> *In re Howrey LLP*, 515 B.R. 624, 631 (Bankr. N.D. Cal. 2014).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 631-32. (finding “[w]ith the Debtor’s expectations frustrated, it follows that the law firm defendants do not have a greater legal or equitable claim to the profits the pre-dissolution partners brought with them, away from Debtor. Finally, the court will not conclude that, on the mere allegations of the complaints alone, that retention of such profits by the law firm defendants is ‘just’ rather than what the trustee contends is ‘unjust.’ Whether the trustee may only recover profits on Howrey Unfinished Business attributed to the former Debtor partners themselves or he may recover all profits realized by the law firms may require the finder of fact to determine how much would be ‘just’ to return to the trustee and how much would be ‘unjust’ to take from the defendants.”).

firms. Courts have taken a second look at the implications of the unfinished business doctrine and have become unwilling to follow the ruling of *Jewel*.

## **V. The Implications of the Current State of the Law Regarding the Unfinished Business Doctrine**

The uncertain future of the unfinished business doctrine brings with it an array of possible implications. Recently, courts have begun to hold that the unfinished business doctrine does not apply to hourly fee matters. However, as illustrated by the *Howrey* court, the doctrine is not completely dead. Going forward, because of the nature of the doctrine, four groups will be affected by the ongoing dispute as to whether the unfinished business doctrine applies to hourly fee matters: the bankruptcy estates of dissolved law firms, former partners of dissolved law firms, and former clients of dissolved law firms, and the new law firms that hire the former partners and represent the former clients.

### **A. Bankruptcy Estates of Dissolved Law Firms**

Bankruptcy trustees for defendant firms clearly have a distinct interest in the pending fees at the time of dissolution.<sup>70</sup> Before the *Heller* and *Thelen* rulings, the unfinished business doctrine favored the debtor firms' creditors (and the bankruptcy trustees). This was because there would be more money in the estate, creating a greater return. Given the recent decisions of the New York and California courts, which held that unfinished business doctrine does not apply to hourly fee matters, there is uncertainty as to whether the doctrine still provides a viable avenue to the dissolved firm's trustee to recover.

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<sup>70</sup> The bankruptcy trustee is entitled to a portion of the amount that he recovers [American Bankruptcy Institute Law Review](#) | St. John's School of Law, 8000 Utopia Parkway, Queens, NY 11439

Interestingly, if the firm that dissolved is large enough, it may have had offices in both jurisdictions that continue to apply the doctrine, like the District of Columbia, and those that do not, like New York or California. This may be problematic because the former partners of the same dissolved firm may be treated differently, depending on the location of the litigation, regarding the pending hourly fee matters.

## **B. Displaced Partners**

The *Heller* and *Thelen* rulings are a major victory for those partners of a failed or failing law firm because those partners will be less likely to be viewed as unemployable since a bankruptcy trustee will be less likely to be able to recover the profits these partners generate on pending hourly fee matters from the partner's new firms. Indeed, as the *Heller* court noted, "it is not in the public interest to make it more difficult for partners leaving a struggling law firm to find new employment."<sup>71</sup> However, a strange result was that partners that came from offices in jurisdictions that continue to recognize the unfinished business doctrine, such as the District of Columbia, might still be viewed as unemployable even though their partners in other jurisdictions that do not recognize the doctrine are not. As a result some partners in the same firm may face potential barriers to joining a new firm, while other do not.

Depending on the choice of law of the court, some partners will face these issues, and some will not. In *Geron v. Robinson & Cole LLP*, the court held that, while coming from the same firm, the partners joined different firms, located in different jurisdictions, which triggered different laws to be applied.<sup>72</sup> Depending on the location of the

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<sup>71</sup> *Heller Eherman LLP*, C 14-01236 CRB, 2014 WL 2609743 (N.D. Ca. June 11, 2014).

<sup>72</sup> *Geron v. Robinson & Cole LLP*, 476 B.R. 732, 743 (S.D.N.Y. 2012) aff'd sub nom. *In re Thelen LLP*, 762 F.3d 157 (2d Cir. 2014) (finding that "under New York law, a dissolved law firm's pending hourly fee matters are not partnership assets. And because the trustee's complaint against Seyfarth Shaw fails to distinguish between pending [American Bankruptcy Institute Law Review](#) | St. John's School of Law, 8000 Utopia Parkway, Queens, NY 11439

litigation, the courts will apply a difference standard of law, more importantly, a different standard of the unfinished business doctrine.

### **C. Former Clients**

The *Heller* and *Thelen* decisions are positive for the former clients of a dissolved law firm. The holdings in these cases enable the former clients of the dissolved firms to continue to be represented by the same attorneys, after they join new firms. The rulings encourage the new firms to represent these clients, which in turn allow the clients to keep their current counsel. In particular, this allows the same attorneys to continue working on the hourly fee matters that were pending at the time the failed law firm collapsed, which eliminates the costs and time associated with bringing new attorneys up to speed on these matters. Moreover, it permits the clients to dictate which attorneys represent them. As the *Heller* court emphasized, “a law firm and its attorneys do not own the matters on which they perform their legal services. Their clients do.”<sup>73</sup>

### **Conclusion**

Under the unfinished business doctrine, a dissolved law firm may be entitled to the profits earned on hourly fee matters that were pending at the time the firm dissolved.

The historical rule, created by the *Jewel* court, stated that a trustee was entitled to the pending hourly fee matters at the time the law firm in question dissolved. The matters were considered to be assets of the dissolved firm. Recently, this rule has come into question, following the *Heller* and *Thelen* rulings. In both decisions, the courts respectively held that the pending hourly fee matters at the time of dissolution belonged

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contingency fee matters and hourly fee matters, the complaint is deficient. Accordingly, Seyfarth Shaw’s motion for judgment on the pleadings is granted, and the trustee’s claims against Seyfarth Shaw are denied.”); *Id.* at 744 (finding that “nevertheless, California law may still recognize a dissolving firms pending hourly fee matters as “assets.” “Accordingly, Robinson & Cole’s motion to dismiss the Trustee’s claims is denied.”).

<sup>73</sup> *Id.* at 1.



to the new firms where the former partners went. Notwithstanding these decisions, some courts have continued to apply the unfinished business doctrine, exhibiting that the doctrine is not yet completely dead.