

Third Circuit Concurring Opinion Supports Trademark Licensees' Retention of Rights in Bankruptcy Cases

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PRACTICES Intellectual Property

A significant concurring opinion in a recent Third Circuit Court of Appeals case suggests that, contrary to common belief, trademark licensees may be able to retain their rights in bankruptcy cases even if licensors reject the license agreements. The majority held that the trademark license was not an executory contract; therefore, it could not be rejected under the Bankruptcy Code. While the majority opinion applies narrowly to circumstances involving perpetual, exclusive, and royalty-free trademark licenses, the concurring opinion has a potentially broader application. The concurrence helps trademark licensees take the position that, despite intentionally excluding trademarks from the Bankruptcy Code definition of "intellectual property," Congress intended for bankruptcy courts to exercise equitable powers in cases involving rejection of trademark license agreements.

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