

In re Exide Technologies: A Ray of Hope for Trademark Licensees When Licensors File for Bankruptcy?

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In a notable recent decision (*In re Exide Technologies*, Docket Number 08-1872 (3d Cir. Jun. 1, 2010)), the Third Circuit, in reversing a decision by the District of Delaware, held that a trademark license agreement, when considered as part of a set of related transaction agreements executed in connection with the sale of a business, was not an executory contract subject to rejection under Section 365(a) of Chapter 11 of the U.S. Bankruptcy Code because the purchaser/licensee had already substantially performed under the transaction agreements taken as a single “integrated agreement”. In a concurring opinion, Judge Ambro argued that, even if a trademark license can be rejected under Section 365(a), bankruptcy courts can, and often should, use their equitable powers to preserve a trademark licensee’s rights to the licensed marks. The Third Circuit’s decision, if it stands, and the concurring opinion, if it is adopted by courts in future decisions, are significant in that they may provide practitioners with strong new tools with which to protect the interests of trademark licensees and, potentially, the hope of significantly reducing or eliminating, in certain contexts, the risk posed by a trademark licensor’s bankruptcy.

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