

In re Crumbs Bake Shop ? Trademark Licensees May Be Able to Have Their (Cup)Cake And Eat It, Too

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Following a recent line of high profile and notable decisions that have sought to protect the rights of trademark licensees in a trademark licensor's bankruptcy, the U.S. Bankruptcy Court for the District of New Jersey has issued a significant decision that, for the first time, extends the protections of Section 365(n) of the U.S. Bankruptcy Code to trademark licensees on equitable grounds (*In re Crumbs Bake Shop, Inc.*, No. 14-24287 (Bankr. D.N.J. Oct. 31, 2014)).

Section 365(n) generally serves to mitigate an intellectual property licensee's exposure to the risk of the licensor's bankruptcy by allowing the licensee to treat the license as terminated or to elect to retain certain of its rights under the license. If the licensee accepts termination of its license, it can file a claim in the bankruptcy case, which would typically be treated as a pre-petition general unsecured claim. If the licensee makes an election under Section 365(n) to retain its rights, the debtor must comply with the confidentiality and exclusivity provisions of the license agreement and continue to provide access to the licensed intellectual property as it existed immediately before the bankruptcy filing. However, because Congress excluded trademarks from the definition of "intellectual property" under the Bankruptcy Code for the purposes of Section 365(n), courts have traditionally reasoned by negative inference that a trademark licensee's rights to licensed trademarks are vulnerable if a trademark licensor in bankruptcy elects to reject the trademark license under Section 365(a).

Recently, courts within the Third and Seventh Circuits have provided trademark licensees with protections against this vulnerability and the court's decision in *Crumbs* extends this trend. Relying on the reasoning articulated by Judge Ambro in his concurring opinion in *In re Exide Technologies*, 607 F.3d 957 (3d Cir. 2010) (Ambro, J., concurring) and citing the legislative history of Section 365(n), the court concluded that even if Section 365(n) does not expressly apply to trademarks, the court has the equitable power to apply Section 365(n) to trademark licenses. In addition, the court concluded that the trademark licensees' Section 365(n) rights were not vitiated by a Section 363 "free and clear" sale of the licensed trademark because it did not have the consent of the trademark licensees. Finally, because the applicable licenses were excluded from the Section 363 sale, the debtors were entitled to collect future royalties from the licensees.

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