

476 B.R. 732  
United States District Court,  
S.D. New York.

Yann GERON, as Chapter 7  
Trustee of Thelen LLP, Plaintiff,

v.

ROBINSON & COLE LLP, et al., Defendants.

Yann Geron, as Chapter 7  
Trustee of Thelen LLP, Plaintiff,

v.

Seyfarth Shaw LLP, et al., Defendants.

Nos. 11 Civ. 8967, 12 Civ. 1364.

|  
Sept. 4, 2012.

### Synopsis

**Background:** Trustee of Chapter 7 estate of dissolved law partnership brought adversary proceeding against firms to which debtor's attorneys departed, seeking to recover, on fraudulent transfer theory, the value of pending hourly fee matters that attorneys brought with them to these new firms. Defendants moved to dismiss trustee's complaint or for judgment on pleadings.

**Holdings:** The District Court, William H. Pauley, III, J., held that:

[1] New York law governed determination of whether, and to what extent, a dissolved law firm had interest in pending hourly fee matters, such that its execution of waiver of its rights therein was in the nature of fraudulent prepetition transfer avoidable by trustee;

[2] under New York law as predicted by federal district court judge in that state, dissolved law firm's pending hourly fee matters are not partnership assets;

[3] assuming that pending hourly fee matters were "assets" of bankrupt law firm at time of its dissolution roughly one year prior to petition date, firm fraudulently transferred those assets

when, without firm's receipt of any consideration in exchange, its partners adopted a so-called *Jewel* waiver on eve of dissolution; and

[4] whether firm had interest in pending hourly fee matters under California law could not be determined on motion to dismiss.

Granted in part and denied in part.

West Headnotes (21)

### [1] Contracts

#### Legal remedies and proceedings

Law firm to which attorneys in bankrupt law partnership moved, not being party to the debtor's fourth partnership agreement, was not bound by choice-of-law provision in that agreement, in fraudulent transfer proceeding brought by Chapter 7 trustee, seeking to capture pending hourly fee matters which departing attorneys brought to this new firm for distribution as assets of estate. 11 U.S.C.A. § 548.

[Cases that cite this headnote](#)

### [2] Contracts

#### Legal remedies and proceedings

Contractual choice-of-law-provision governs only causes of action sounding in contract, not those sounding in tort.

[Cases that cite this headnote](#)

### [3] Contracts

#### Legal remedies and proceedings

#### Fraudulent Conveyances

#### Nature and Form of Remedy

Fraudulent transfer claims sound in tort, so as not to be subject to contractual choice-of-law provision.

[1 Cases that cite this headnote](#)**[4] Bankruptcy** [Effect of state laws in general](#)

In absence of any binding contractual choice-of-law provision, district court had to apply choice-of-law rules of state in which it sat to determine which state's law governed the purported property interests at issue in fraudulent transfer avoidance proceeding. [11 U.S.C.A. § 548](#).

[Cases that cite this headnote](#)**[5] Action** [What law governs](#)

Under New York choice-of-law rules, courts first examine whether actual conflict exists between the laws of the jurisdictions involved, and if there is such a conflict, then courts conduct an “interest analysis” and apply law of the jurisdiction having the greatest interest in litigation.

[Cases that cite this headnote](#)**[6] Action** [What law governs](#)

When ascertaining, for choice-of-law purposes, which state has the greatest interest in pending litigation, New York courts undertake a two-pronged inquiry, determining: (1) what are the significant contacts and in which jurisdiction they are located; and (2) whether purpose of law at issue is to regulate conduct or allocate loss.

[Cases that cite this headnote](#)**[7] Bankruptcy** [Transfer fraudulent as to partnership or individual creditors](#)

New York law governed determination of whether, and to what extent,

a dissolved law firm had interest in pending hourly fee matters, such that its execution of waiver of its rights therein was in the nature of fraudulent prepetition transfer avoidable by trustee of its Chapter 7 estate; while law firm was California limited liability partnership, majority of its former partners who moved to defendant firm and took these pending hourly fee matters with them were licensed to practice in New York, alleged fraudulent transfer occurred in New York, and partnership had filed its Chapter 7 petition in the Southern District of New York, so that New York had greater interest in controversy. [11 U.S.C.A. § 548](#).

[4 Cases that cite this headnote](#)**[8] Torts** [What law governs](#)

When regulation of conduct is at issue, state where the alleged tort took place has greater interest in controversy, for purposes of application of New York choice-of-law rules.

[Cases that cite this headnote](#)**[9] Federal Courts** [State or Federal Laws as Rules of Decision;Erie Doctrine](#)

When presented with state law issue, it is federal court's task to ascertain what the state law is, not what it ought to be.

[Cases that cite this headnote](#)**[10] Federal Courts** [Anticipating or predicting state decision](#)

Without guidance from state's highest court, federal court confronted with state law question must predict how state's highest court would resolve that question.

[Cases that cite this headnote](#)

**[11] Attorney and Client**

 **Client fees**

Under New York law, absent agreement to the contrary, pending contingent fee cases of dissolved law partnership are partnership assets subject to distribution.

[1 Cases that cite this headnote](#)

**[12] Federal Courts**

 **Inferior courts**

**Federal Courts**

 **Anticipating or predicting state decision**

While not binding authority, New York trial court's interpretation of New York law is entitled to great weight, when federal court attempts to predict how the New York Court of Appeals would rule on unresolved state law issue.

[2 Cases that cite this headnote](#)

**[13] Attorney and Client**

 **Client fees**

Under New York law as predicted by federal district court judge in that state, dissolved law firm's pending hourly fee matters are not partnership assets.

[6 Cases that cite this headnote](#)

**[14] Statutes**

 **Conflict**

When confronted with two apparently conflicting statutes, New York courts adopt any fair construction that yields a reasonable field of operation for both statutes.

[Cases that cite this headnote](#)

**[15] Attorney and Client**

 **Standards, canons, or codes of conduct**

While New York Rules of Professional Conduct lack the force of law, New York courts interpret other laws to harmonize with them where possible. N.Y.Rules of Prof.Conduct, Rule 1.1 et seq.

[Cases that cite this headnote](#)

**[16] Attorney and Client**

 **Client fees**

While New York law deems pending contingency fee matters to be assets of dissolved law firm, dissolved firm has no cognizable property interest in fee, where successful settlement of pending contingent fee case post-dissolution is due to surviving partner's post-dissolution efforts, skill and diligence.

[Cases that cite this headnote](#)

**[17] Attorney and Client**

 **Client fees**

Under New York law, when lawyer departs from dissolved law partnership and takes with him a contingent fee case which he then litigates to settlement, dissolved firm is entitled only to the value of case on date of dissolution, with interest.

[1 Cases that cite this headnote](#)

**[18] Attorney and Client**

 **Client fees**

**Bankruptcy**

 **Pleading**

Allegations in complaint filed by trustee of Chapter 7 estate of dissolved law partnership, that firm's partners, at same time that they agreed to dissolve firm, also adopted an amended partnership agreement that, for no consideration, purported to

waive partnership's interest in pending cases except to extent of any fees already earned in those cases at time of dissolution, without making any attempt to distinguish between pending contingent fee matters, in which the dissolved partnership had interest under New York law, and pending hourly fee matters, in which, as predicted by district court, firm had no such interest, did not state a plausible claim for avoidance of waiver as fraudulent transfer. [11 U.S.C.A. § 548](#).

[4 Cases that cite this headnote](#)

**[19] Bankruptcy**

 [Transfer fraudulent as to partnership or individual creditors](#)

Assuming that pending hourly fee matters were “assets” of bankrupt law firm at time of its dissolution roughly one year prior to petition date, firm fraudulently transferred those assets when, without firm's receipt of any consideration in exchange, its partners adopted a so-called *Jewel* waiver on eve of dissolution, pursuant to which they purported to waive partnership's interest in pending cases, except to extent of any fees already earned in those cases at time of dissolution. [11 U.S.C.A. § 548](#).

[Cases that cite this headnote](#)

**[20] Attorney and Client**

 [Client fees](#)

Under California law, dissolved law partnership may have interest in pending hourly fee matters that exist at time of dissolution, but only to extent that these matters generate fees in excess of reasonable compensation for services rendered by attorneys in winding up such unfinished partnership

business. [West's Ann.Cal.Corp. Code § 16401\(h\)](#).

[2 Cases that cite this headnote](#)

**[21] Bankruptcy**

 [Proceedings](#)

Whether compensation received by departing partners in dissolved law firm for winding up unfinished partnership business by prosecuting pending hourly fee matters to conclusion exceeded reasonable compensation for such services, such that firm's gratuitous, prepetition waiver of any interest in these pending matters had deprived it of valuable interest in property that otherwise would have been included in Chapter 7 estate, and that trustee could recover as fraudulent transfer, could not be determined on motion to dismiss fraudulent transfer complaint, without a more fully developed record. [11 U.S.C.A. § 548](#).

[1 Cases that cite this headnote](#)

**Attorneys and Law Firms**

**\*735** Howard P. Magaliff, Esq., DiConza Traurig Magaliff LLP, New York, NY, for Plaintiff.

[Christopher J. Major](#), Esq., Meister Seelig & Fein LLP, New York, NY, for Robinson & Cole LLP.

[Robert W. Dremluk](#), Esq., Seyfarth Shaw LLP, New York, NY.

[Thomas Feher](#), Esq., Thompson Hine LLP, Cleveland, OH, for Seyfarth Shaw LLP.

**MEMORANDUM & ORDER**

[WILLIAM H. PAULEY III](#), District Judge.

These actions arise from an alarming phenomenon—the bankruptcy of a major law firm. The

pursuit of pending hourly fee matters as assets of the estate has become a recurring feature of such bankruptcies. But this concept of law firm “property” collides with the essence of the attorney-client relationship. That relationship springs from agency law, not property law. The client is the principal, the attorney is the agent, and the relationship is terminable at will. The question presented is whether a dissolved law firm's pending hourly fee matters are nevertheless its property.

\*736 Plaintiff Yann Geron (the “Trustee”), the Chapter 7 trustee of the bankruptcy estate of former law firm Thelen LLP (“Thelen”), brings fraudulent transfer and accounting and turnover claims against Defendants Seyfarth Shaw LLP (“Seyfarth Shaw”) and Robinson & Cole LLP (“Robinson & Cole”). Through these claims, the Trustee seeks to recover profits from work that former Thelen partners performed after they joined those two law firms. Seyfarth Shaw moves for judgment on the pleadings under [Federal Rule of Civil Procedure 12\(c\)](#), and Robinson & Cole moves to dismiss all claims against it under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). For the following reasons, Seyfarth Shaw's motion is granted in its entirety and Robinson & Cole's motion is denied. Further, this Court *sua sponte* certifies this order for interlocutory appeal.

### BACKGROUND

Until its dissolution in late 2008, Thelen was a registered limited liability partnership governed by California law, (Voluntary Petition (“Pet.”) at 1, *In re Thelen LLP*, Case No. 09–15631 (Bankr.S.D.N.Y.).) On October 28, 2008—in the midst of the global financial crisis—Thelen's partners voted to dissolve the firm. (Complaint against Robinson & Cole and Partner Does, dated Sept. 14, 2011 (“RC Compl.”) ¶ 20; Complaint against Seyfarth Shaw and Partner Does, dated Sept. 14, 2011 (“SS Compl.”) ¶ 20.) At the same time, Thelen's partners adopted the Fourth Amended and Restated Limited Liability Partnership Agreement (the “Fourth Partnership Agreement”), which was also governed by California law. (RC Compl. ¶ 20; SS Compl.

¶ 20.) In connection with the Fourth Partnership Agreement, Thelen's partners voted to wind up Thelen's business under a written Plan of Dissolution. (RC Compl. ¶ 21; SS Compl. ¶ 21.) At the time of its dissolution, Thelen was insolvent. (RC Compl. ¶¶ 23, 28–29; SS Compl. ¶¶ 23, 28–29.)

Unlike Thelen's previous partnership agreements, the Fourth Partnership Agreement incorporated a so-called *Jewel* Waiver. (RC Compl. ¶ 34; SS Compl. ¶ 34.) Specifically, it provides:

Neither the Partners nor the Partnership shall have any claim or entitlement to clients, cases or matters ongoing at the time of 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 or 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 or application of the [California Uniform Partnership Act of 1994, as amended].

(RC Compl. ¶ 34; SS Compl. ¶ 34.)

On September 18, 2009, Thelen filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. At that time, Thelen indicated that it “has been domiciled or has had a residence, principal place

of business, or principal assets” in the Southern District of New York. (Pet. at 2.) After the Trustee was appointed, he instituted adversary proceedings against Seyfarth Shaw, Robinson & Cole, and several former Thelen partners. The Trustee contends that Thelen's adoption of the *Jewel* \*737 Waiver in its Fourth Partnership Agreement constituted a fraudulent transfer by Thelen. The Trustee now seeks to avoid the fraudulent transfer of Thelen's unfinished business, recover its value, and require Defendants to account for and turn over the profits generated from that work.

## DISCUSSION

### I. Legal Standard

Courts evaluate motions for judgment on the pleadings under the same standard as motions to dismiss for failure to state a claim. See *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 922 (2d Cir.2010). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). To determine plausibility, courts follow a “two-pronged approach.” *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937. “First, although ‘a court must accept as true all of the allegations contained in a complaint,’ that ‘tenet’ ‘is inapplicable to legal conclusions,’ and ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.’ ” *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir.2009) (alteration in original) (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). Second, a court determines “whether the ‘well-pleaded factual allegations,’ assumed to be true, ‘plausibly give rise to an entitlement to relief’ ” *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir.2010) (quoting *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937). A court’s “consideration [on a motion to dismiss] is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice

may be taken.” *Allen v. WestPoint–Pepperell Inc.*, 945 F.2d 40, 44 (2d Cir.1991).

### II. Choice of Law

To prevail on its claims against Seyfarth Shaw, the Trustee must demonstrate that Thelen had an interest in “property.” See 11 U.S.C. §§ 542, 544, 548, 550; see also Cal. Civ.Code §§ 3439.04–3439.07. According to the Trustee, Thelen's partners transferred “property” to Seyfarth Shaw and Robinson & Cole when they executed the *Jewel* Waiver. The parties agree that California law defines any “property interest” that Robinson & Cole received.<sup>1</sup> However, the Trustee and Seyfarth Shaw dispute whether California law or New York law defines any “property interest” received by Seyfarth Shaw.

[1] [2] [3] As a preliminary matter, this Court rejects the Trustee's contention that California law applies because Thelen's Fourth Partnership Agreement contained a choice-of-law provision to that effect. Because Seyfarth Shaw was not a party to the Fourth Partnership Agreement, it cannot be bound by that agreement. See *Int'l Customs Assocs., Inc. v. Ford Motor Co.*, 893 F.Supp. 1251, 1255 (S.D.N.Y.1995) (citing *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103 (2d Cir.1985)). Further, “a contractual choice-of-law-provision governs only a cause of action sounding in contract, not one sounding in tort[.]” \*738 *Drenis v. Haligiannis*, 452 F.Supp.2d 418, 425–26 (S.D.N.Y.2006). Fraudulent transfer claims sound in tort. See *Drenis*, 452 F.Supp.2d at 418. Accordingly, Seyfarth Shaw is not bound by the agreement's choice-of-law provision.

[4] [5] In the absence of a binding contractual choice-of-law provision, this Court applies the choice-of-law rules of New York to determine which state's law governs the purported property interest at issue. See *In re Gaston & Snow*, 243 F.3d 599, 600–01, 607 (2d Cir.2001). Thus, this Court first examines whether an actual conflict exists between the laws of the jurisdiction involved. See *Paradigm BioDevices, Inc. v. Viscogliosi Bros., LLC*, 842 F.Supp.2d 661, 665 (S.D.N.Y.2012). If there is such a conflict, this Court conducts an “interest



analysis,” and applies the “law of the jurisdiction having the greatest interest in the litigation[.]” *Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 347, 575 N.Y.S.2d 796, 581 N.E.2d 1042 (1991) (quoting *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 197, 491 N.Y.S.2d 90, 480 N.E.2d 679 (1985)) (internal quotation marks omitted).

[6] For the reasons described below, the existence and scope of a dissolved law firm's property interest in pending hourly fee matters vary under New York and California law. This Court therefore examines the competing interests of New York and California in this action. In ascertaining the state with the greatest interest, this Court undertakes a two-pronged inquiry, determining “(1) what are the significant contacts and in which jurisdiction are they located; and, (2) whether the purpose of the law [at issue] is to regulate conduct or allocate loss.” *Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 521, 620 N.Y.S.2d 310, 644 N.E.2d 1001 (1994) (citation omitted).

[7] [8] Here, the majority of the significant contacts occurred in New York. The Trustee does not dispute that the majority of the former Thelen partners who moved to Seyfarth Shaw are licensed to practice law in New York. Moreover, Thelen filed its Chapter 7 petition in the Southern District of New York, indicating that it “has been domiciled or has had a residence, principal place of business, or principal assets” in the Southern District of New York. (Pet. at 2.) In view of these contacts, Thelen's status as a California limited liability partnership is inconsequential. See *El Cid, Ltd. v. N.J. Zinc Co.*, 575 F.Supp. 1513, 1518–19 (S.D.N.Y.1983). And where, as here, regulation of conduct is at issue, the state where the alleged tort took place has the greater interest. See *GFL Advantage Fund, Ltd. v. Colkitt*, No. 03 Civ. 1256 (JSM), 2003 WL 21459716, at \*3 (S.D.N.Y. June 24, 2003); see also *Roselink Investors, L.L.C. v. Shenkman*, 386 F.Supp.2d 209, 225 (S.D.N.Y.2004) (“A fraudulent conveyance statute is conduct regulating rather than loss allocating.” (internal citation and quotation marks omitted)). Here, the alleged tort occurred in New York. Accordingly, New York has the greatest interest in this litigation,

and New York law defines the property interest—if any—that Seyfarth Shaw received.

### III. Unfinished Business Under New York Law

[9] [10] To prevail on its claims against Seyfarth Shaw, the Trustee must demonstrate that Seyfarth Shaw received a property interest of Thelen's. To that end, the Trustee seeks to recover Thelen's purported ownership interest in profits from its former clients' hourly fee matters that were pending when Thelen dissolved. The Trustee also seeks to recover profits from pending contingency fee matters. In opposing these claims, Seyfarth Shaw contends that New York law does not recognize \*739 a law firm's property interest in pending hourly fee matters. It is this Court's task “to ascertain what the state law is, not what it ought to be.” *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Accordingly, without guidance from the state's highest court, this Court must “predict how the New York Court of Appeals would resolve the question[.]” *Amerex Grp., Inc. v. Lexington Ins. Co.*, 678 F.3d 193, 200 (2d Cir.2012) (quoting *Highland Capital Mgmt. LP v. Schneider*, 460 F.3d 308, 316 (2d Cir.2006)) (internal quotation marks omitted).

The Trustee bases his claims on the “unfinished business doctrine,” which is “[t]he general rule that the business of a partnership that is unfinished on the date the partnership dissolves is an asset of the partnership, and must be concluded for the benefit of the dissolved partnership.” *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 477 B.R. 318, 2012 WL 1918705, at \*11 (S.D.N.Y. May 24, 2012) (“DSI”) (citing *Stem v. Warren*, 227 N.Y. 538, 125 N.E. 811 (1920)). The seminal case applying this doctrine to law partnerships is *Jewel v. Boxer*, 156 Cal.App.3d 171, 179, 203 Cal.Rptr. 13 (Cal.App. 1 Dist.1984), where the court noted that “each former partner has a duty to wind up and complete the unfinished business of the dissolved partnership.”<sup>2</sup> The court also observed that “[t]he Uniform Partnership Act unequivocally prohibits extra compensation for postdissolution services, with a single exception for surviving partners.” *Jewel*, 156 Cal.App.3d at 176–77, 203 Cal.Rptr. 13 (citing Cal. Corp.Code § 15018(f) (since repealed)).

Applying this “no compensation” rule, the court in *Jewel* held that “absent a contrary agreement, any income generated through the winding up of unfinished business is allocated to the former partners according to their respective interests in the partnership.” *Jewel*, 156 Cal.App.3d at 176, 203 Cal.Rptr. 13. New York's Partnership Law is a codification of the Uniform Partnership Act (“UPA”), and the “no compensation” rule applies in New York. *See DSI*, 477 B.R. at 327, 2012 WL 1918705, at \*5 (citing N.Y. P'ship Law § 1); *see also* N.Y. P'ship Law § 40(6). After *Jewel*, some courts have characterized a dissolved law firm's unfinished business as a “partnership asset.” *See, e.g., In re Brobeck, Phleger & Harrison LLP*, 408 B.R. 318, 333 (Bankr.N.D.Cal.2009). The question here is whether New York law sanctions the expansion of such a rule to a dissolved law firm's pending hourly fee matters.

[11] Under New York law, it is well settled that “[a]bsent an agreement to the contrary, pending *contingent fee cases* of a dissolved partnership are assets subject to distribution.” *Santalucia v. Sebright Transp., Inc.*, 232 F.3d 293, 297 (2d Cir.2000) (emphasis added). But New York courts have not expanded the unfinished business doctrine to reach pending hourly fee matters. Rather, the only New York \*740 court to consider whether a debtor law firm possesses a property interest in its unfinished hourly fee matters concluded that it does not. In *Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP*, 35 Misc.3d 1201(A), 2011 WL 7574999, at \*5 (N.Y.Sup.Ct. Sept. 13, 2011), the state court declined to expand the unfinished business doctrine to pending hourly fee matters, reasoning that “[i]t is logical to distinguish between contingency fee arrangements and cases which are billed on the basis of hourly work.” Citing the New York Rules of Professional Conduct, the court refused “to recognize a cause of action for unfinished business for hourly fee cases which has, hitherto, not been recognized by the New York courts.” *Sheresky*, 2011 WL 7574999, at \*6.

[12] [13] Although *Sheresky* is not binding authority, a New York trial court's interpretation of New York law is entitled to “great weight.” *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d

831, 850 (2d Cir.1992) (internal quotation marks omitted). And this Court finds *Sheresky* persuasive. Unlike in the contingency fee context, applying the unfinished business doctrine to pending hourly fee matters would result in an unjust windfall for the Thelen estate, as “compensating a former partner out of that fee would reduce the compensation of the attorneys performing the work.” *Sheresky*, 2011 WL 7574999, at \*5. Such an expansion of the doctrine would violate New York's public policy against restrictions on the practice of law. *See Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 96, 551 N.Y.S.2d 157, 550 N.E.2d 410 (1989). Indeed, recognizing a property interest in pending hourly fee matters would clash directly with New York's Rules of Professional Conduct, which state:

A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same firm unless: (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyers assumes joint responsibility for the representation; (2) the client agrees to the employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and (3) the total fee is not excessive.

22 NYCRR 1200.0, DR 1.5(g).

[14] [15] When confronted with two apparently conflicting statutes, New York courts adopt “any fair construction” that yields “a reasonable field of operation for both statutes.” *Cnty. of St. Lawrence v. Shah*, 95 A.D.3d 1548, 945 N.Y.S.2d 443, 446 (3d Dep't 2012) (quoting *Con. Edison Co. of N.Y., Inc. v. Dep't of Envtl. Conservation*, 71 N.Y.2d 186, 195, 524 N.Y.S.2d 409, 519 N.E.2d 320 (1988)) (internal quotation marks and alteration omitted). Although the Rules of Professional Conduct lack the force of law, *cf. Niesig v. Team I*, 76 N.Y.2d 363, 369, 559



N.Y.S.2d 493, 558 N.E.2d 1030 (1990), New York courts interpret other laws to harmonize with them where possible. See *Sheresky*, 2011 WL 7574999, at \*5.

[16] [17] Further, recognizing a property interest in pending hourly fee matters would contravene New York law's treatment of post-dissolution contingency fee matters. Although New York cases deem pending contingency fee matters to be “assets” of a dissolved firm, they hold that a dissolved firm has “no cognizable property interest in [a] fee” where the “successful settlement of a pending contingent fee case post-dissolution is due to a surviving partner's post-dissolution efforts, skill and diligence [.]” *Santalucia*, 232 F.3d at 298 (quoting *Shandell v. Katz*, 217 A.D.2d 472, 629 N.Y.S.2d 437, 439 (1st Dep't 1995)) (internal quotation marks omitted). \*741 “Thus, in a case where a lawyer departs from a dissolved partnership and takes with him a contingent fee case which he then litigates to settlement, the dissolved firm is entitled only to the value of the case at the date of dissolution, with interest.” *Santalucia*, 232 F.3d at 298 (citing *Kirsch v. Leventhal*, 181 A.D.2d 222, 586 N.Y.S.2d 330, 333 (3d Dep't 1992)). In an hourly fee case, unlike a contingency fee case, all post-dissolution fees that a lawyer earns are due to that lawyer's “post-dissolution efforts, skill and diligence[.]” *Shandell*, 629 N.Y.S.2d at 439 (quoting *Kirsch*, 586 N.Y.S.2d at 333) (internal quotation marks omitted). Accordingly, New York law does not recognize a debtor law firm's property interest in pending hourly fee matters.

And recognizing such a property interest would have bizarre consequences. If such an interest exists, it becomes property of the estate upon the filing of a bankruptcy petition. See 11 U.S.C. § 541. It would appear, then, that the Bankruptcy Code empowers a debtor law firm to sell its pending hourly fee matters to the highest bidder. See 11 U.S.C. § 363 (“The trustee, after notice and hearing, may use, sell, or lease ... property of the estate [.]”). When this Court asked the Trustee whether a debtor firm could auction off its pending matters, the Trustee was unable to answer definitively. (Hearing Transcript, dated July 31, 2012 (“Hr'g Tr.”) at 31 (12 Civ. 1364, ECF No. 17).) And the Trustee's

reticence is understandable, as allowing such a sale of “property” is inconsistent with a client's right to choose attorneys. See *Demov, Morris, Levin & Shein v. Glantz*, 53 N.Y.2d 553, 556, 444 N.Y.S.2d 55, 428 N.E.2d 387 (1981) (“[It is] well rooted in our jurisprudence [ ] that a client may at any time, with or without cause, discharge an attorney [.]”). Similarly, under the Trustee's interpretation of the unfinished business doctrine, it is unclear whether a client who discharges a debtor law firm and transfers his case to a new firm violates the automatic stay. See 11 U.S.C. § 362 (prohibiting “any act to obtain possession of property of the estate ... or to exercise control over the property of the estate”).

These unworkable results militate powerfully against extending the unfinished business doctrine to hourly fee matters. Perhaps for this reason, New York courts have endeavored to cabin the doctrine, holding that “[r]etainers from former clients on new matters—even matters, like appeals, that are related to finished representations—... [are] ‘new business’ and not subject to the duty to account.” *DSI*, 477 B.R. at 332, 2012 WL 1918705, at \*11 (citing *Talley v. Lamb*, 100 N.Y.S.2d 112, 117–18 (N.Y.Sup.Ct.1950)). Given this background, characterizing unfinished hourly fee matters as “property” makes little sense.

In arguing that pending hourly fee matters are nevertheless Thelen property, the Trustee relies heavily on *Stem v. Warren*, 227 N.Y. 538, 125 N.E. 811 (1920), a hoary case involving architecture partnerships. According to the Trustee, *Stem* stands for the proposition that a partnership's executory contracts may be partnership property even if they are terminable at will. But the Trustee's reading of the case is overbroad. Rather, “under *Stem*, if an executory contract with a third party contemplates that it should survive dissolution, it remains a joint venture asset and the co-venturers have an obligation to perform with the concomitant right to its benefits.” *Scholastic, Inc. v. Harris*, 259 F.3d 73, 89 (2d Cir.2001). Here, Thelen's hourly fee matters cannot have contemplated post-dissolution survival without infringing a client's right to terminate an attorney at will. See \*742 *Demov, Morris, Levin & Shein*, 53 N.Y.2d at 556, 444 N.Y.S.2d 55, 428

N.E.2d 387. Although the contract in *Stem* was, by its terms, terminable at will, see 227 N.Y. at 544, 125 N.E. 811, contracts for legal services are categorically different from architecture contracts. Clients repose “ultimate trust and confidence” in their attorneys. *In re Cooperman*, 83 N.Y.2d 465, 472, 611 N.Y.S.2d 465, 633 N.E.2d 1069 (1994). “The attorney’s obligations, therefore, transcend those prevailing in the commercial market place,” and “[t]he contract under which an attorney is employed by a client has peculiar and distinctive features[.]” *Cooperman*, 83 N.Y.2d at 472–73, 611 N.Y.S.2d 465, 633 N.E.2d 1069 (quoting *Martin v. Camp*, 219 N.Y. 170, 172, 114 N.E. 46 (1916)) (internal quotation marks and citations omitted).

A pending client matter is not an ordinary article of commerce. Contrary to *DSI*, an hourly fee matter is not akin to “a Jackson Pollack [sic] painting” that a departing attorney “rip[s] off the wall of the reception area [.]” *DSI*, 477 B.R. at 329, 2012 WL 1918705, at \*7. The client, not the attorney, moves a matter to a new firm. Thus, the attorney-client relationship is unique, and applying *Stem* to hourly fee legal service contracts would undermine it. New York law does not countenance such a result. See *Sheresky*, 2011 WL 7574999, at \*5–6. In *Cohen*, the New York Court of Appeals drew on an ethics opinion from the New York County Lawyers’ Association to emphasize New York’s commitment to client autonomy: “Clients are not merchandise. Lawyers are not tradesmen.... An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status.” *Cohen*, 75 N.Y.2d at 98, 551 N.Y.S.2d 157, 550 N.E.2d 410 (internal quotation marks omitted). This policy applies just as forcefully to client matters.

The Trustee also cites cases from other jurisdictions for the proposition that “every other court confronted with this issue ... has held that pending cases, regardless of whether they are hourly-fee cases or contingent-fee matters [are] ... assets of the partnership subject to post-dissolution distribution.” *In re Labrum & Doak, LLP*, 227 B.R. 391, 408 (Bankr.E.D.Pa.1998) (citing *Sufrin v. Hosier*, 896 F.Supp. 766, 769 (N.D.Ill.1995)). But the cases on which the Trustee relies do

not represent a consensus view. See *Sheresky*, 2011 WL 7574999, at \*5–\*6. In *DSI*, the district court nonetheless gave substantial weight to these decisions on the ground that “New York courts must harmonize their rulings with those of other UPA jurisdictions by statute[.]” *DSI*, 477 B.R. at 336, 2012 WL 1918705, at \*15 (citing N.Y. P’ship Law § 4(4)). This Court respectfully disagrees.

The purpose of UPA is to harmonize partners’ duties regarding partnership property, not to delineate the scope of such property. See *Welman v. Parker*, 328 S.W.3d 451, 458 (Mo.Ct.App.2010) (explaining that state common law, and not the Uniform Partnership Law, determines “which party is entitled to the contingent fee”); see also *DSI*, 477 B.R. at 334, 2012 WL 198705, at \*13 (“There is surprisingly little New York authority on how a court is to determine what property is within or without a partnership.”) (quoting *Sriraman v. Patel*, 761 F.Supp.2d 7, 18 (E.D.N.Y.2011)); cf. *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) (“[T]here is no reason why [property] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.”). The Trustee identifies no provision of UPA that addresses whether pending hourly fee matters are partnership property. And, for the reasons discussed above, recognizing a property right in unfinished hourly fee matters conflicts with New York’s strong public policy in \*743 favor of client autonomy and attorney mobility. See *Cohen*, 75 N.Y.2d at 98, 551 N.Y.S.2d 157, 550 N.E.2d 410; see also *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 381–82, 604 N.Y.S.2d 900, 624 N.E.2d 995 (1993). Accordingly, the Trustee’s contention that the court in *Sheresky*, 2011 WL 7574999, at \*6, failed to engage in the requisite analysis of out-of-state case law is without merit. (Hr’g Tr. at 28.) To the extent that the out-of-state cases suggest a result that is irreconcilable with New York policy, they are not reliable indicators of New York law.

[18] Thus, 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 contingency fee matters and hourly fee matters, the complaint is deficient. See *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. Accordingly, Seyfarth Shaw's motion for judgment on the pleadings is granted, and the Trustee's claims against Seyfarth Shaw are dismissed. If the Trustee intends to pursue claims against Seyfarth Shaw regarding Thelen's pending contingency fee matters, the Trustee must amend his complaint.

#### IV. Unfinished Business under California Law

In contrast to Seyfarth Shaw, Robinson & Cole concedes for the purposes of its motion to dismiss that California law governs any property interest that it received. Robinson & Cole argues that, notwithstanding *Jewel* and the cases following it, California law no longer recognizes a dissolved law firm's property right in its pending hourly fee matters. Robinson & Cole also maintains that, even assuming the existence of such a property interest, the interest was never transferred to Robinson & Cole. The Trustee responds that California law recognizes pending hourly fee matters as assets, and that Thelen transferred those assets to Robinson & Cole when its partners executed the *Jewel* Waiver.

[19] Assuming that pending hourly fee matters are “assets,” Thelen fraudulently transferred those assets when its partners adopted the *Jewel* Waiver on the eve of dissolution without consideration. See *In re Heller Ehrman LLP*, No. 08–32514DM, 2011 WL 1539796, at \*5 (Bankr.N.D.Cal. April 22, 2011); see also 11 U.S.C. § 101(54) (a “transfer” is “each mode, direct or indirect, ... of disposing of or parting with—(i) property; or (ii) an interest in property”). Under section 550(a) of the Bankruptcy Code, the Trustee may recover the value of fraudulently transferred property from “(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee.” 11 U.S.C. § 550(a). And when Thelen's former partners brought pending matters to Robinson & Cole, they transferred that “property” to their new firm. Thus—assuming that pending hourly fee matters are “property”—Robinson & Cole may be liable as an “immediate or mediate transferee” of those assets. See 11 U.S.C. § 550(a)(1). That Robinson & Cole owes no fiduciary

duties to Thelen is irrelevant to its status as a transferee. See *Brobeck*, 408 B.R. at 339 n. 31

[20] The central question, then, is whether California law recognizes a dissolved law firm's pending hourly fee matters as partnership assets. In *Jewel* and the cases following it, California courts held that such matters were, indeed, assets of a dissolving firm. See *Jewel*, 156 Cal.App.3d at 176, 203 Cal.Rptr. 13; see also \*744 *Rothman v. Dolin*, 20 Cal.App.4th 755, 758–59, 24 Cal.Rptr.2d 571 (Cal.App. 2 Dist.1993). And *Jewel* applies to registered limited liability partnerships like Thelen. See *Fox v. Abrams*, 163 Cal.App.3d 610, 616, 210 Cal.Rptr. 260 (Cal.App. 2 Dist.1985) (extending the *Jewel* doctrine to the dissolution of a law corporation because *Jewel* “was not based solely on partnership law but also cited ‘sound policy reasons’ for its decision”). However, Robinson & Cole argues that California's enactment of the Revised Uniform Partnership Act (“RUPA”) in 1994 abrogated the *Jewel* doctrine. *Jewel* and its progeny relied on UPA's “no compensation” rule. See *Jewel*, 156 Cal.App.3d at 176–77, 203 Cal.Rptr. 13; see also *Rothman*, 20 Cal.App.4th at 757, 24 Cal.Rptr.2d 571. But RUPA abolished the “no compensation” rule, providing instead that a partner is entitled to “reasonable compensation for services rendered in winding up the business of the partnership.” Cal. Corp.Code § 16401(h).

Robinson & Cole's argument is persuasive. In applying the unfinished business doctrine to law partnerships, *Jewel* relied expressly on UPA's “no compensation” rule, reasoning that “[t]he Uniform Partnership Act unequivocally prohibits extra compensation for postdissolution services, with a single exception for surviving partners.” *Jewel*, 156 Cal.App.3d at 176–77, 203 Cal.Rptr. 13. But RUPA transformed the law on which *Jewel* relied and eroded the theoretical underpinnings of the *Jewel* doctrine. Because RUPA entitles partners of a dissolving firm to “reasonable compensation for services rendered in winding up the business of the partnership,” Cal. Corp.Code § 16401(h), there is no basis to require Thelen's former partners to remit all profits earned from former Thelen matters to the Thelen estate.<sup>3</sup>

[21] Nevertheless, the former Thelen partners' post-RUPA entitlement to "reasonable compensation" does not necessarily mean that Robinson & Cole did not receive Thelen "assets." The question of "reasonable compensation" is fact-intensive, and this Court cannot, on a motion to dismiss, determine whether the former Thelen partners are entitled to retain all profits earned from pending hourly fee matters. Robinson & Cole cites *Jacobson v. Wikholm*, 29 Cal.2d 24, 30–31, 172 P.2d 878 (1946), for the proposition that "reasonable compensation" includes profits resulting from a partner's post-dissolution skill and effort, except to the extent that those profits result from the use of the dissolved partnership's capital. Yet, notwithstanding *Jacobson*, the fact-bound "reasonable compensation" inquiry may not be resolved on a motion to dismiss. See *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir.2012) ("Fact-specific questions cannot be resolved on the pleadings." (internal alterations, quotation marks, and citations omitted)). Thus, Robinson & Cole's liability turns on the extent to which the former Thelen partners received remuneration beyond "reasonable compensation." This question can only be resolved on a more fully developed record.

In arguing that dismissal of the claims against it is warranted, Robinson & Cole advances many of the same policy arguments proffered by Seyfarth Shaw. But these arguments are less persuasive in the context of California law because California \*745 courts have rejected them. See *Fox*, 163 Cal.App.3d at 616, 210 Cal.Rptr. 260 (discussing "sound policy reasons" supporting *Jewel* doctrine); see also *Jewel*, 156 Cal.App.3d at 179, 203 Cal.Rptr. 13. And New York's commitment to attorney mobility appears to be stronger than California's. Compare *Cohen*, 75 N.Y.2d at 98, 551 N.Y.S.2d 157, 550 N.E.2d 410, with *Howard v. Babcock*, 6 Cal.4th 409, 422–23, 25 Cal.Rptr.2d 80, 863 P.2d 150 (1993) (declining to follow *Cohen*).

In sum, RUPA's "reasonable compensation" rule undermines the *Jewel* doctrine, which applied the older "no compensation" rule. Nevertheless, California law may still recognize a dissolving firm's pending hourly fee matters as "assets." Specifically,

to the extent that Robinson & Cole earned profits from former Thelen matters exceeding "reasonable compensation," California law dictates that those profits belong to Thelen. Accordingly, Robinson & Cole's motion to dismiss the Trustee's claims is denied.

#### V. Interlocutory Appeal

A district court may certify an order for interlocutory appeal if "the district judge 'is under the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation.'" *United States v. Culbertson*, 598 F.3d 40, 45 (2d Cir.2010) (quoting 28 U.S.C. § 1292(b)). The question whether a dissolved law firm's pending hourly fee matters are partnership assets under New York law and California law is controlling. And "reversal of [this] opinion, even though not resulting in dismissal, could significantly affect the conduct the action[.]" *Primavera Familienstiftung v. Askin*, 139 F.Supp.2d 567, 570 (S.D.N.Y.2001).

These issues impact a large number of cases, and they present substantial grounds for difference of opinion. The *DSI* court recently certified its decision for interlocutory appeal, and that decision implicates many of the controlling issues in this Memorandum & Order. See *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, Nos. 11 Civ. 5994 (CM), *et seq.*, 2012 WL 2952929, at \*7–8 (S.D.N.Y. July 18, 2012). Further, certification of these questions to the New York Court of Appeals and the California Supreme Court may be warranted because those high courts have "not squarely addressed" the issues, and the scope of the unfinished business doctrine is of great importance to both the legal profession and clients. *Joseph v. Athanasopoulos*, 648 F.3d 58, 67 (2d Cir.2011) (quoting *10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112, 125–26 (2d Cir.2011)). Notwithstanding its humble beginnings, some lower courts have applied the *Jewel* doctrine expansively, with untoward consequences for the bar and clients. In this Court's view, there is good reason to believe that the highest courts of New York and California would decline to follow suit.



In these circumstances, “the prompt resolution” of these issues on appeal will promote judicial economy and doctrinal clarity. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 607, 175 L.Ed.2d 458 (2009). Accordingly, this Court *sua sponte* certifies this order for interlocutory appeal.

### CONCLUSION

For the foregoing reasons, Seyfarth Shaw LLP's motion for judgment on the pleadings is granted, and Robinson & Cole LLP's motion to dismiss is denied. This Court certifies this order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Any party seeking leave for the Court of

Appeals to hear an interlocutory appeal \*746 shall direct its application to the Court of Appeals within ten days. See 28 U.S.C. 1292(b). This Court hereby stays all proceedings in the district court pending a decision on certification from the Court of Appeals.

The Clerk of the Court is directed to file this Memorandum & Order in both 11 Civ. 8967 and 12 Civ. 1364. The Clerk of the Court is further directed to terminate the motions pending at ECF No. 13 in 11 Civ. 8967 and ECF No. 9 in 12 Civ. 1364.

### All Citations

476 B.R. 732, 56 Bankr.Ct.Dec. 269

### Footnotes

- 1 Robinson & Cole is based in Connecticut, (RC Compl. ¶ 4), but the parties do not contend that Connecticut law governs the “property interest” at issue. Because the parties agree that California law applies and they did not brief applicable Connecticut law, this Court declines to consider whether Connecticut law applies. See *Julio & Sons Co. v. Travelers Cas. & Sur. Co. of Am.*, 591 F.Supp.2d 651, 656 n. 3 (S.D.N.Y.2008).
- 2 *Jewel* involved a four-partner law firm handling principally personal injury and workers' compensation cases that dissolved in 1977. Thereafter, the partners split into two two-partner law firms, with clients retaining the attorney who handled their matter at the old firm. Because they had no written partnership agreement, the partners disputed the allocation of attorneys' fees from these cases. Reversing the trial court, an intermediate appellate court concluded that the profits from this “unfinished business” were owed to the former partners in proportion to their partnership interests. *Jewel*, 156 Cal.App.3d at 174–76, 203 Cal.Rptr. 13. Over the last three decades, courts have cited *Jewel* reflexively and uncritically. Thus, from modest beginnings in a dispute involving a small Alameda County general practice firm, the *Jewel* doctrine has grown to ensnare some of the largest law firms in the United States.
- 3 This Court declines to address Robinson & Cole's argument—raised only in a footnote—that the Trustee fails adequately to allege Thelen's insolvency at the time of the *Jewel* Waiver. See *Bryant Park Capital, Inc. v. Jelco Ventures*, No. 05 Civ. 8702(GEL), 2007 WL 2119486, at \*1 (S.D.N.Y. July 23, 2007) (declining to consider argument raised only in footnote).