Chapman Law Review

Volume 20 | Issue 2 Article 4

2017

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Recommended Citation
Douglas R. Richmond, *Whither (Wither?) the Unfinished Business Doctrine*, 20 CHAP. L. REV. 283 (2017).
Available at: http://digitalcommons.chapman.edu/chapman-law-review/vol20/iss2/4

Whither (Wither?) the Unfinished Business Doctrine

*Douglas R. Richmond**

I. INTRODUCTION

Large law firms collapse with alarming frequency. In recent years, for example, Altheimer & Gray LLP; Brobeck, Phleger & Harrison LLP; Coudert Brothers LLP; Dewey & LeBoeuf LLP; Heller Ehrman LLP; Howrey LLP; Thacher Proffitt & Wood LLP; Thelen LLP; and Wolf, Block, Schorr & Solis-Cohen LLP have folded. These high profile failures amply demonstrate the extraordinary fragility of law firm partnerships.[1]

Law firm failures may be rooted in competitive pressures, destabilizing internal dynamics, governance or leadership failures, unsatisfactory or unsettling financial prospects or performance, or some toxic combination thereof.[2] These issues drive major rainmaking partners to leave the firm, often taking groups of productive lawyers with them. One key partner departure leads to another and another, producing a "self-reinforcing spiral of withdrawal" akin to a Depression-era run on a bank.[3] A law firm caught in such a "partner run" seldom survives.[4] Indeed, a firm may go from apparent financial health to dissolution in a few months, and perhaps in even less time.[5]

Dissolving law firms typically have scores of open client matters, many of which are far from completion. Litigation matters may take years to conclude.[6] Departing partners who

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1 *See* John Morley, *Why Law Firms Collapse* 1–2 (Yale Law & Econ. Research Paper No. 521, 2015) (arguing that law firms are "uniquely fragile" and "are made of thin glass").

2 *See* Edward S. Adams, *Lessons from Law Firm Bankruptcies and Proposals for Reform*, 55 SANTA CLARA L. REV. 507, 509–10 (2015) (exploring select major law firm bankruptcies as a means of identifying common elements in their failures, including economic turmoil, excessive growth and overcompensation, and toxic firm culture and governance).

3 Morley, *supra* note 1, at 2.

4 *Id.*

5 *Id.* at 1–2.

6 ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS § 4.6.1, at 4:63–64 (2d ed. 2016).

intend to continue practicing law often expect to take open client matters with them to new firms. The law firms to which the partners of the dissolved firm relocate are often vitally interested in the dissolved firm's active clients coming along.

At the same time, the dissolving law firm has landlords, lenders, and other creditors to pay. The firm may have financial obligations to retired partners. Pending client matters may be a dissolving law firm's only significant assets.[7] If the law firm has filed for bankruptcy protection, creditors and any trustee that is appointed will strive to derive value from those assets for the benefit of the bankruptcy estate.[8] The result is frequently litigation, in which a bankruptcy trustee or other administrator sues the departing partners and the law firms to which they relocate to collect fees earned on the dissolving firm's "unfinished business."[9] Unfinished business consists of "all matters in progress which have not been completed at the time the firm is dissolved."[10]

The "unfinished business" doctrine reflects established partnership law.[11] In the law firm world, the unfinished business doctrine is frequently referred to as the *Jewel* doctrine, or the *Jewel* rule, after the seminal California case on the subject, *Jewel v. Boxer*.[12] Regardless of how it is described, the unfinished business doctrine essentially holds that absent contrary agreement, partners in a dissolved law firm must account to the firm and its former partners either for all fees generated from work in progress at the time of the firm's dissolution, or for the profits made on that work (depending on the state's partnership

7 Christine Hurt, *The Limited Liability Partnership in Bankruptcy*, 89 AM. BANKR. L.J. 567, 571 (2015).

8 *See id.* ("Though the partners of a law firm may have incentives to allow for easy exit of themselves and other partners . . . trustees have incentives to retain those assets. The larger the debt of the distressed firm, the more incentive the trustee has to assert claims against financially well-off third party law firms that reaped the benefit of hourly work for former clients of the debtor.").

9 *See* John W. Edson, Comment, *An Unworkable Result: Examining the Application of the Unfinished Business Doctrine to Law Firm Bankruptcies*, 32 EMORY BANKR. DEV. J. 159, 161 (2015) (explaining that "trustees argue that any post-dissolution work derived from client business started at the bankrupt firm is property of the bankrupt firm's estate").

10 Rothman v. Dolin, 24 Cal. Rptr. 2d 571, 573 (Cal. Ct. App. 1993).

11 Douglas R. Richmond, *Migratory Law Partners and the Glue of Unfinished Business*, 39 N. KY. L. REV. 360, 420 (2012); *see also* Scott Fleischer, *The "Unfinished Business" Doctrine in Law Firm Bankruptcies*, NASSAU LAWYER, Dec. 2014, at 7 ("The 'unfinished business' doctrine is not just rooted in one particular section of the UPA or RUPA, but was developed through collective interpretations of many sections.").

12 203 Cal. Rptr. 13, 16 (Cal. Ct. App. 1984). A thorough discussion of *Jewel* and its progeny is beyond the scope of this article. For such a discussion, see Richmond, *supra* 11, at 370–87.

law) in accordance with their percentage interests in the firm.[13] Pending client matters are uncompleted transactions that require winding up after dissolution, and are therefore partnership assets subject to post-dissolution distribution.[14] As the court in *Gull v. Van Epps*[15] explained, "all partners of the dissolved firm are generally entitled to share in fees for pre-dissolution work in progress earned after dissolution, even if the client has exercised [its] right to discharge the attorney or attorneys who are sharing in the fees."[16] This entitlement exists because dissolution does not terminate the firm's pre-existing contracts with its clients, so that partners who perform those contracts do so as fiduciaries for the benefit of the dissolved partnership.[17]

If partners of a dissolving law partnership stayed together during the wind up of the firm's business, the unfinished business doctrine would be of no moment. But they do not—they scatter to new law firms, taking open client matters with them. The work they or their colleagues perform on those matters at their new firms produces fees that their new firms wish to collect and retain, and which they do not want to share with, or surrender to, the dissolved firm. As noted earlier, this leaves an administrator or trustee of the dissolved firm or its bankruptcy estate to negotiate or sue for those fees under the unfinished business doctrine. In this way the unfinished business doctrine substitutes for the orderly winding up of partnership affairs by the partners of the dissolved partnership.[18]

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13 As explained in Part II, under the Uniform Partnership Act ("UPA"), a partner, other than a surviving partner, is not entitled to compensation for her services in winding up the dissolved partnership's affairs other than any sums she will receive for her share in the partnership. *See* UNIF. P'SHIP ACT § 18(f) (1914). *Jewel* was decided under California's version of the UPA. California later adopted the Revised Uniform Partnership Act ("RUPA"). Most other states follow RUPA. Under RUPA, the unfinished business doctrine has been modified to permit former partners to deduct overhead and reasonable compensation before remitting to the dissolved partnership any monies earned from completing unfinished business. *See* Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 326 (Bankr. N.D. Cal. 2009) (explaining California partnership law, which changed after *Jewel* was decided). This allowance of compensation beyond any sums the former partner would receive for her partnership share is often described as "extra compensation" or as "reasonable compensation," with the latter term being more accurate. *Id.* at 326 n.4.

14 *See* Young v. Delaney, 647 A.2d 784, 789 (D.C. 1994); Beckman v. Farmer, 579 A.2d 618, 636 (D.C. 1990).

15 Gull v. Van Epps, 517 N.W.2d 531 (Wis. Ct. App. 1994).

16 *Id.* at 536.

17 *See In re* LaBrum & Doak, LLP v. Ashdale, 227 B.R. 391, 409 (Bankr. E.D. Pa. 1998); *Beckman*, 579 A.2d at 636; Huber v. Etkin, 58 A.3d 772, 780 (Pa. Super. Ct. 2012).

18 Courts have also applied the unfinished doctrine to dissolving law firms organized as limited liability companies ("LLC"), professional associations, and professional corporations. *See, e.g.*, Vowell & Meelheim, P.C. v. Beddow, Erben & Bowen, P.A., 679 So. 2d 637, 640 (Ala. 1996) (involving a firm organized as a professional association);

When a large law firm dissolves, many of the open client matters are billed by the hour. Despite increases in the use of alternative fee structures, most lawyers in large law firms bill hourly.[19] Because the *Jewel* court upheld the unfinished business doctrine in connection with contingent fees,[20] partners in dissolved large law firms resisting unfinished business claims have frequently argued that courts should confine the doctrine to contingent fee cases and should not apply it to hourly matters.[21] For years that argument failed,[22] as should have been expected, because the *Jewel* court did not confine its holding to contingent fee matters.[23] Certainly, the unfinished business doctrine applies to contingent fee cases[24]—but as a matter of partnership law it should apply to other compensation arrangements, including matters billed by the hour.[25] Partnership law provides no basis for treating client matters billed hourly as anything other than the unfinished business of a dissolved law partnership. Indeed, since *Jewel* was decided, California courts have applied the

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Grossman v. Davis, 34 Cal. Rptr. 2d 355, 356 (Cal. Ct. App. 1994) (noting that the unfinished business doctrine applies to professional corporations); LaFond v. Sweeney, 343 P.3d 939, 945–49 (Colo. 2015) (applying the unfinished business doctrine in a case involving a law firm organized as an LLC); Sullivan, Bodney & Hammond v. Bodney, 820 P.2d 1248, 1250 (Kan. Ct. App. 1991) (observing that the policy reasons supporting the rule in *Jewel* applied to the dissolution of a professional corporation).

19 *See* Lucy Muzzy, *Maximizing the Value of Outside Counsel*, FED. LAW., Sept. 2013, at 56, 58 (reporting that large law firms continue to earn approximately eighty percent of their revenue from hourly billing).

20 Jewel v. Boxer, 203 Cal. Rptr. 13, 15–20 (Cal. Ct. App. 1984).

21 *See, e.g.*, Rothman v. Dolin, 24 Cal. Rptr. 2d 571, 572–73 (Cal. Ct. App. 1993) (recognizing, but ultimately rejecting, the argument that *Jewel* and its progeny apply only to contingent fee cases and not to hourly fee matters).

22 *See, e.g.*, Robinson v. Nussbaum, 11 F. Supp. 2d 1, 4–5 (D.D.C. 1997) (citing and discussing Beckman v. Farmer, 579 A.2d 618, 641 (D.C. 1990)); *Grossman*, 34 Cal. Rptr. 2d at 356 (explaining that the unfinished business doctrine applies regardless of "the nature of the compensation agreement with the client"); *Rothman*, 24 Cal. Rptr. 2d at 572–73 ("Neither *Jewel* nor [another case] explicitly states that it is concerned solely with contingency fee cases . . . . Moreover, the policy reasons for the rule announced in *Jewel* . . . apply with equal force to both contingency and hourly rate cases."); *see also* Thomas E. Rutledge & Tara A. McGuire, *Conflicting Views as to the Unfinished Business Doctrine*, BUS. LAW TODAY, Feb. 2015, at 1 (observing that most courts and commentators have applied the unfinished business doctrine to hourly matters as well as to contingent fee cases).

23 *Jewel*, 203 Cal. Rptr. at 18–20.

24 *See, e.g.*, LaFond v. Sweeney, 343 P.3d 939, 944–49 (Colo. 2015) (applying the unfinished business doctrine to a contingent fee matter in the dissolution of a law firm organized as an LLC); Huber v. Etkin, 58 A.3d 772, 780 (Pa. Super. 2012) (concluding that "contingency fees realized post-dissolution are assets of the partnership").

25 *See* Peter W. Rogers, Note, *Who Gets the Jewels When a Law Firm Dissolves? The Unfinished Business Doctrine and Hourly Matters*, 108 NW. U. L. REV. 311, 336 (2013) ("Because the unfinished business doctrine is a function of partnership law that upholds fiduciary duties as a partnership winds up, the doctrine does not clash with . . . the UPA, or RUPA, whether it is applied to matters billed by the hour or on contingency.").

unfinished business doctrine to matters billed by the hour,[26] as have courts in other jurisdictions.[27]

In 2014, however, two decisions from courts on opposite coasts radically altered the unfinished business landscape by rejecting its application to client matters that are billed by the hour. The New York Court of Appeals held in *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*[28] that "pending hourly fee matters are not 'partnership property' or 'unfinished business' within the meaning of New York's Partnership Law."[29] *In re Thelen* came to the court on certified questions from the U.S. Court of Appeals for the Second Circuit[30] after two Southern District of New York courts predicting New York law reached opposite conclusions on the unfinished business doctrine's application to hourly matters in cases arising out of separate large law firm bankruptcies.[31]

In *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP*,[32] a California federal court reasoned that California law was "unsettled on the question of whether a law firm may assert a property interest in hourly fee matters pending at the time of its dissolution,"[33] and went on to hold that equity and public policy weighed against application of the unfinished business doctrine in that context.[34] The trustee of the bankrupt law firm appealed that decision to the Ninth Circuit, which in July 2016 certified this question to the California Supreme Court: "Under California law, does a dissolved law firm have a property interest in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been

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26 *See, e.g.*, *Rothman*, 24 Cal. Rptr. 2d at 573 ("[W]e hold that unfinished business simply consists of all matters in progress which have not been completed at the time the firm is dissolved. . . . That one matter is to be compensated at an hourly rate and another on a contingency basis is of no consequence in determining whether a matter is unfinished business.") (citation omitted).

27 *See, e.g.*, *Robinson*, 11 F. Supp. 2d at 4–6 (applying District of Columbia law).

28 *See* Geron v. Seyfarth (*In re* Thelen LLP), 20 N.E.3d 264 (N.Y. 2014).

29 *Id.* at 266–67.

30 Geron v. Seyfarth (*In re* Thelen LLP), 736 F.3d 213, 225 (2d Cir. 2013) (certifying questions in a case arising out of the Thelen LLP bankruptcy); *In re* Coudert Bros. LLP, Nos. 12-4916(L) et al., 2013 WL 9363394, at *1–2 (2d Cir. Dec. 2, 2013) (certifying questions in a case arising out of the Coudert Brothers LLP bankruptcy).

31 *Compare* Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld, LLP, 480 B.R. 145, 159 (S.D.N.Y. 2012) (concluding "that the New York Court of Appeals would, if confronted with the issue, conclude that all client matters pending on the date of dissolution are assets of the firm—regardless of how the firm was to be compensated for the work"), *rev'd in part, vacated in part by In re* Coudert Bros. LLP, 574 F. App'x 15, 16 (2d Cir. 2014), *with* Geron v. Robinson & Cole LLP, 476 B.R. 732, 743 (S.D.N.Y. 2012) (concluding that "under New York law, a dissolved law firm's pending hourly fee matters are not partnership assets").

32 *See* Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP, 527 B.R. 24 (N.D. Cal. 2014).

33 *Id.* at 30.

34 *Id.* at 30–33.

retained to handle the matters on an hourly basis?"[35] The California Supreme Court accepted the case and restated the certified question as follows: "Under California law, what interest, if any, does a dissolved law firm have in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matter on an hourly basis?"[36] The California Supreme Court's decision will determine the outcome in *Heller Ehrman*.[37]

This Article explains why *In re Thelen* and *Heller Ehrman* were wrongly decided. To be sure, the unfinished business doctrine sometimes produces results that lawyers find maddening. The doctrine's effects are particularly severe in Uniform Partnership Act jurisdictions, as will be explained in the next Part of this article. At a minimum, the doctrine potentially complicates partners' relocation from failed law firms to new firms. But whatever its perceived flaws, the unfinished business doctrine is an established aspect of partnership law that law firms can contract around by inserting *Jewel* waivers in their partnership agreements. The arguments that some commentators, lawyers, and law firms have mounted against the doctrine to date are unpersuasive. There is no compelling reason to except law firms from the operation of a partnership law doctrine to which all other partnerships are subject.

In explaining why the unfinished business doctrine should be applied to matters billed by the hour, as it does to representations in which lawyers are compensated by other methods, we begin in Part II with a discussion of partnership law principles.[38] This includes an overview of partnership dissolution, winding up, and termination, as well as an examination of partners' fiduciary duties post-dissolution. Part III analyzes *In re Thelen* and *Heller Ehrman* in detail and explains why they are incorrectly decided. Finally, Part IV dissects some of the leading arguments that law firms have made in opposing the unfinished business doctrine's application.

35 Heller Ehrman LLP v. Davis Wright Tremaine LLP (*In re* Heller Ehrman LLP), 830 F.3d 964, 965 (9th Cir. 2016).

36 Heller Ehrman LLP v. Davis Wright Tremaine LLP, No. S236208, 2016 Cal. LEXIS 7131, at *1 (Cal. Aug. 31, 2016).

37 *In re Heller Ehrman LLP*, 830 F.3d at 973.

38 *See generally* Richmond, *supra* note 11, at 365–69, which was adapted for Parts II.A and II.B. All text has been updated and remains the author's original work.

II. AN OVERVIEW OF PARTNERSHIP DISSOLUTION, WINDING UP, AND TERMINATION

Partnerships are voluntary associations.[39] They are also creatures of contract.[40] The relationships between partners and their firm are generally governed by the terms of the partnership agreement.[41] A partnership agreement may be oral or written,[42] and may also be inferred from parties' conduct,[43] although there is obvious potential for confusion and uncertainty if the agreement is not in writing. If there is no partnership agreement or the agreement is silent on an issue, state partnership statutes control.[44] In other words, state partnership statutes primarily provide default rules.[45] Regardless, any partnership may dissolve; there is no such thing as an "indissoluble partnership."[46]

A. Understanding Dissolution, Winding Up, and Termination

The Uniform Partnership Act of 1914 ("UPA"), long the foundation for many states' partnership laws and still employed in some states, treats partnerships as aggregates of their members rather than as distinct entities.[47] The UPA defines "dissolution" as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on . . . of the business."[48] Under the UPA approach, a partnership dissolves any time a partner permanently leaves the firm, even if the firm outwardly appears to continue.[49] Again, this is a default rule.[50] Law firm partnerships in UPA states may avoid this result by including in their partnership agreements (a) a

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39 Loft v. Lapidus, 936 F.2d 633, 636 (1st Cir. 1991); Bunger v. Demming, 40 N.E.3d 887, 903 (Ind. Ct. App. 2015); Casey v. Chapman, 98 P.3d 1246, 1252 (Wash. Ct. App. 2004).

40 Husch & Eppenberger, v. Eisenberg, 213 S.W.3d 124, 132 (Mo. Ct. App. 2006).

41 *See* LESLIE D. CORWIN & ARTHUR J. CIAMPI, LAW FIRM PARTNERSHIP AGREEMENTS § 1.05, at 1–30 (2008).

42 Legacy Seating v. Commercial Plastics, 65 F. Supp. 3d 542, 551–52 (N.D. Ill. 2014) (applying Illinois law); Young v. Delaney, 647 A.2d 784, 789 (D.C. 1994).

43 Cressy v. Proctor, 22 F. Supp. 3d 353, 360 (D. Vt. 2014) (discussing Vermont law).

44 *See* CORWIN & CIAMPI, *supra* note 41, § 1.05, at 1–30.

45 *Husch & Eppenberger*, 213 S.W.3d at 132; McCormick v. Brevig, 96 P.3d 697, 703 (Mont. 2004); Ederer v. Gursky, 881 N.E.2d 204, 212 (N.Y. 2007); Bushard v. Reisman, 800 N.W.2d 373, 380 (Wis. 2011).

46 Fischer v. Fischer, 197 S.W.3d 98, 101 (Ky. 2006); Urbane v. Beierling, 835 N.W.2d 455, 459 (Mich. Ct. App. 2013).

47 *See* WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 279 (3rd ed. 2001).

48 UNIF. P'SHIP ACT § 29 (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1914).

49 HILLMAN, *supra* note 6, § 4.3.3, at 4:24. The remaining partners may choose to continue the partnership business following the withdrawal of their peer. If so, "the old firm continues until its affairs are wound up and a new partnership is formed, consisting of the remaining members of the old partnership." *See also* 8182 Md. Assocs., Ltd. P'ship v. Sheehan, 14 S.W.3d 576, 580–81 (Mo. 2000). Any creditors of the old partnership become creditors of the new partnership. *Id.* (citing a Missouri statute).

50 *In re* Popkin & Stern, 340 F.3d 709, 714 (8th Cir. 2003) (applying Missouri law).

provision setting the term of the partnership;[51] or (b) an "anti-dissolution" or "continuation" provision differentiating withdrawal from dissolution and recognizing the latter only upon a partnership vote.[52] The second of these options is common, although its effectiveness is questionable, because "the inherent power of any partner to dissolve a partnership, even in contravention of an agreement, is a central tenet of the UPA."[53] In any event, a partnership agreement may include both types of provisions.[54]

The Revised Uniform Partnership Act ("RUPA"),[55] which has now been adopted in most states, differs from the UPA in several key respects relevant to dissolution. RUPA establishes that a partnership is an entity separate from its constituent partners.[56] Like the UPA, RUPA grants partners the right to withdraw from their partnerships at any time.[57] Unlike the UPA, however, under RUPA, a partner's withdrawal does not necessarily cause the partnership's dissolution.[58] RUPA distinguishes between dissolution and withdrawal through the use of the term "dissociation," which denotes a partner's withdrawal from a partnership, whether voluntary or involuntary.[59]

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51 HILLMAN, *supra* note 6, § 4.3.2.2, at 4:18. A provision in a partnership agreement specifying a term of partnership does not actually prevent a partner from withdrawing prematurely and thus causing the firm to dissolve. But such a premature dissolution is considered wrongful, and the remaining partners may avoid winding up and continue the business uninterrupted. *Id.* § 4.3.2.2, at 4:19.

52 *Id.* § 4.3.2.3, at 4:19.

53 *Id.* § 4.3.2.3, at 4:20–22 (footnote omitted); *see also* Eskenazi v. Schapiro, 812 N.Y.S.2d 474, 477 (App. Div. 2006) (discussing joint venturers' and partners' abilities to repudiate a joint venture or partnership agreement at any time under the New York Partnership Law).

54 *See, e.g.*, *In re* Popkin & Stern, 340 F.3d at 711 (quoting the law firm's partnership agreement).

55 There is no official "Revised Uniform Partnership Act." The National Conference of Commissioners on Uniform Laws revised the UPA in 1994 and again in 1996, with the 1996 revisions subsequently published bearing a 1997 date. The 1994 and subsequent revisions to the UPA came to be known as the "Revised Uniform Partnership Act." HILLMAN, *supra* note 6, § 4.1, at 4:2–3. The official name for what most lawyers call RUPA is the "Uniform Partnership Act (1997)." GREGORY, *supra* note 47, at 262. To avoid confusion, some courts refer to their states' partnership acts by revision date. *See, e.g.*, Faegre & Benson, LLP v. R & R Inv'rs, 772 N.W.2d 846, 852–53 (Minn. Ct. App. 2009) (referring to "the 1994 UPA").

56 ROBERT W. HILLMAN ET AL., THE REVISED UNIFORM PARTNERSHIP ACT § 201(a) (2015–16 ed.) [hereinafter HILLMAN ET AL., REVISED UNIF. P'SHIP ACT] ("A partnership is an entity distinct from its partners.").

57 *Compare* UNIF. P'SHIP ACT § 31(1)(b)(2) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1914) (discussing dissolutions caused both permissibly and wrongfully), *with* HILLMAN ET AL., REVISED UNIF. P'SHIP ACT, *supra* note 56, at § 602(a) ("A partner has the power to dissociate at any time, rightfully or wrongfully, by express will . . . .").

58 HILLMAN, *supra* note 6, § 4.4.2, at 4:46.

59 *Id.*

Under both the UPA and RUPA, dissolution does not halt partnership operations.[60] Dissolution does not terminate the partnership.[61] "Dissolution" and "termination" are not synonymous.[62] Rather, the dissolved partnership enters a winding up phase.[63] "Winding up" is the time after dissolution and before termination during which all partnership affairs are settled.[64] Winding up a partnership generally "involves reducing the assets to cash (liquidation), paying creditors, and distributing to partners the value of their respective interests."[65] Winding up may also include the prosecution of legal claims belonging to the partnership.[66] A law firm that is winding up will have to notify its clients and perhaps withdraw from representations, and may further be required to assist clients in securing new counsel. Regardless of the specific tasks involved, winding up is a dissolved partnership's sole business or purpose.[67]

When the partnership is a large law firm, dissolution and winding up are usually accomplished pursuant to a formal plan of dissolution, and a firm may engage outside professionals, such as accountants and lawyers, to assist it in winding up.[68] There is no prescribed time within which winding up must be accomplished,[69] although it should be completed within a

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60 *See* UNIF. P'SHIP ACT § 30 (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1914) ("On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."); HILLMAN ET AL., REVISED UNIF. P'SHIP ACT, *supra* note 56, § 802(a) (providing that after dissolution, a partnership continues for the sole purpose of winding up its affairs and that the partnership is terminated when winding up is completed).

61 Disotell v. Stiltner, 100 P.3d 890, 897 (Alaska 2004); Chaney v. Burdett, 560 S.E.2d 21, 22 (Ga. 2002); Hyta v. Finley, 53 P.3d 338, 340 (Idaho 2002); Lai v. Gartlan, 845 N.Y.S.2d 30, 36 (App. Div. 2007); Huber v. Etkin, 58 A.3d 772, 777 (Pa. Super. Ct. 2012).

62 Gast v. Peters, 671 N.W.2d 758, 762 (Neb. 2003); *see also* Scholastic, Inc. v. Harris, 259 F.3d 73, 85 (2d Cir. 2001) (discussing New York law and stating that "[d]issolution is not termination"); 8182 Md. Assocs., Ltd. P'ship v. Sheehan, 14 S.W.3d 576, 580 (Mo. 2000) ("Dissolution, however, is not a termination of the partnership business.").

63 *Hyta*, 53 P.3d at 340; Hurwitz v. Padden, 581 N.W.2d 359, 361 (Minn. Ct. App. 1998); *Lai*, 845 N.Y.S.2d at 36.

64 GREGORY, *supra* note 47, § 227.

65 Estate of Matteson v. Matteson, 749 N.W.2d 557, 567 (Wis. 2008) (quoting First Nat'l Bank of Kenosha v. Schaefer, 283 N.W.2d 410, 418 (Wis. Ct. App. 1979)); *see also Hyta*, 53 P.3d at 340 (similarly describing the winding up process).

66 Faegre & Benson, LLP v. R & R Inv'rs, 772 N.W.2d 846, 853 (Minn. Ct. App. 2009).

67 *In re* Jones & McClain, LLP, 271 B.R. 473, 478 (Bankr. W.D. Pa. 2001); Fischer v. Fischer, 197 S.W.3d 98, 101 (Ky. 2006) (quoting the official commentary to the UPA); Mortgage Grader, Inc. v. Ward & Olivo, L.L.P., 139 A.3d 30, 38 (N.J. 2016).

68 *See* CORWIN & CIAMPI, *supra* note 41, § 7.05[4], at 7–23 (offering a sample plan of dissolution which, among its terms, provides for the retention of professionals to assist in the winding up process).

69 Centerre Bank of Kan. City, N.A. v. Angle, 976 S.W.2d 608, 618 (Mo. Ct. App. 1998).

reasonable time.[70] Law firm wind-ups may drag on because they involve bringing to a close all matters pending at the time of dissolution, and litigation matters may take months and even years to resolve.[71] However long winding up may take, the partnership terminates only when the process is complete.[72]

The UPA and RUPA take quite different approaches to compensating partners for time spent completing a dissolved partnership's unfinished business. Under the UPA, a partner, other than a surviving partner,[73] is entitled to no extra compensation for her services in winding up the dissolved partnership's affairs.[74] "Extra compensation" refers to compensation greater than any sum the partner will receive as her share of the partnership.[75] The refusal to allow extra compensation is sometimes described as the "no compensation rule."[76] In contrast, under RUPA, partners are entitled to reasonable compensation for their services in winding up the dissolved partnership, plus the reimbursement of related overhead.[77]

Law firms that do not want their partners to confront the unfinished business doctrine in the event the firm dissolves may avoid that prospect by including so-called "*Jewel* waivers" in

70 Daniels Trucking, Inc. v. Rogers, 643 P.2d 1108, 1111 (Kan. Ct. App. 1982); Doting v. Trunk, 856 P.2d 536, 542 (Mont. 1993).

71 *See* Robert W. Hillman, *Law Firm Risk Management in an Era of Breakups and Lawyer Mobility: Limitations and Opportunities*, 43 TEXAS TECH L. REV. 449, 465 (2011).

72 Creel v. Lilly, 729 A.2d 385, 391 (Md. 1999); Hurwitz v. Padden, 581 N.W.2d 359, 361 (Minn. Ct. App. 1998); Gast v. Peters, 671 N.W.2d 758, 762–63 (Neb. 2003).

73 The term "surviving partner" as used in the UPA refers to "those partners who have survived another partner's death." Bushard v. Reisman, 800 N.W.2d 373, 381 (Wis. 2011).

74 *See* UNIF. P'SHIP ACT § 18(f) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1914) ("No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."); *see, e.g.*, Kahn v. Seely, 980 S.W.2d 794, 798–99 (Tex. App. 1998) (applying Texas version of UPA and denying former partner extra compensation for winding up dissolved partnership's affairs).

75 Jewel v. Boxer, 203 Cal. Rptr. 13, 16 n.2 (Ct. App. 1984). Under the UPA, partners are entitled to reimbursement for reasonable overhead expenses they incur in completing the dissolved firm's unfinished business. *Id.* at 19. Unfortunately, courts do not agree on how to calculate reasonable overhead expenses for which a partner may seek reimbursement. Hammes v. Frank, 579 N.E.2d 1348, 1353 (Ind. Ct. App. 1991). Under one formulation, "overhead" refers to a lawyer's direct costs, i.e. those costs that can be specifically attributed to a matter without apportionment. *See id.* The other possibility is to include within the definition of overhead indirect costs that cannot be allocated to a particular case or matter, such as rent, library expenses, staff salaries, utilities, and so on. *See id.* (noting the competing approaches).

76 *See, e.g.*, LaFond v. Sweeney, 343 P.3d 939, 943–44 (Colo. 2015) (deciding whether to apply the no compensation rule in the dissolution of a law firm organized as an LLC).

77 Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 326 (Bankr. N.D. Cal. 2009) (discussing California partnership law); HILLMAN ET AL., REVISED UNIF. P'SHIP ACT, *supra* note 56, § 401(h).

their partnership agreements.[78] A *Jewel* waiver is intended to ensure that the partnership has no property interest in client matters at the time of dissolution so that departing lawyers may take open matters with them without having to account for fees earned on them post-dissolution.[79] Although a *Jewel* waiver should override the default rules of state partnership laws, to be effective, it must be adopted at a time when it will not be exposed to challenge in bankruptcy as a fraudulent conveyance or transfer of partnership assets.[80]

B. Partners' Fiduciary Duties Post-Dissolution

Partnership is a fiduciary relation, and partners owe fiduciary duties to one another and to their firms.[81] Dissolution alters partners' fiduciary duties in some respects, but it does not entirely extinguish them. Specifically, dissolution erases a partner's loyalty obligation not to compete with the partnership in the conduct of partnership business.[82] A partner therefore may compete with her former colleagues and dissolved law firm for new business, even if that new business comes from clients that were clients of the firm when it dissolved.[83] In all other respects, however, partners' fiduciary duties continue through the winding up phase.[84] Termination of the partnership terminates the partners' fiduciary duties.[85]

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78 *See* Rachel M. Arnett, *Ripping the Jackson Pollock Off the Wall: Reconciling* Jewel v. Boxer *with the Modern Law Firm*, 26 GEO. J. LEGAL ETHICS 557, 562 (2013) ("A partnership can opt out of the unfinished business rule by including a *Jewel* waiver in its partnership agreement. The effect is simple: partners no longer have any financial obligations to the partnership with regard to fees collected as part of the winding-up phase.") (footnote omitted).

79 Hurt, *supra* note 7, at 577–78; Michael D. DeBaecke & Victoria Guilfoyle, *Law Firm Dissolutions: When the Music Stops, Does Anyone Need to Account for Any Unfinished Business?*, 14 DEL. L. REV. 41, 66 (2013).

80 *See, e.g.*, *In re Brobeck*, 408 B.R. at 336–47 (involving claims by a dissolved law firm's bankruptcy trustee that the firm's *Jewel* waiver gave rise to fraudulent conveyances).

81 *In re* Rueth Dev. Co., 976 N.E.2d 42, 53 (Ind. Ct. App. 2012); RAS AAP, LLC v. Alyeska Ocean, Inc., 358 P.3d 483, 490 (Wash. Ct. App. 2015).

82 HILLMAN ET AL., REVISED UNIF. P'SHIP ACT, *supra* note 56, § 404(b)(3) (restricting a partner's duty of loyalty "to refrain from competing with the partnership in the conduct of partnership business *before* the dissolution of the partnership") (emphasis added).

83 Smith, Keller & Assocs. v. Dorr & Assocs., 875 P.2d 1258, 1267 (Wyo. 1994) (quoting Fraser v. Bogucki, 250 Cal. Rptr. 41, 45 (Ct. App. 1988)).

84 *See* Tucker v. Ellbogen, 793 P.2d 592, 597 (Colo. App. 1989) ("After the dissolution of a partnership, each partner continues to have a *fiduciary duty* to the other partner until the partnership assets have been divided and the liabilities have been satisfied."); Ruse v. Bleeke, 914 N.E.2d 1, 11 (Ind. Ct. App. 2009) ("Partners owe a fiduciary duty to one another that continues until final termination of the business of the partnership."); Miami Subs Corp. v. Murray Family Tr., 703 A.2d 1366, 1374 (N.H. 1997) (stating that fiduciary duties continue through winding up and until termination); Huber v. Etkin, 58 A.3d 772, 780 (Pa. Super. Ct. 2012) (stating that partners' fiduciary duties continue through winding up); M.R. Champion, Inc. v. Mizell, 904 S.W.2d 617, 618 (Tex. 1995) (stating that partners owe each other and their partnership a fiduciary duty in the

In some jurisdictions, the continuation of fiduciary duties may be statutorily prescribed. Under RUPA, for example, partners' duties to account and to refrain from dealing with the partnership on behalf of a party having an adverse interest expressly continue through wind up.[86] The duty of good faith and fair dealing set forth in RUPA section 404(d) has no durational limit, and therefore should be understood to continue through the winding up phase.[87] Included among partners' post-dissolution duties that continue during the winding-up phase is the duty to complete the partnership's unfinished business.[88] The failure to discharge this duty is actionable and is ordinarily remedied by a monetary damage award that can be credited in an accounting.[89] It is possible to breach this duty by requiring another partner to bear a disproportionate burden of unfinished business to complete.[90]

III. *IN RE THELEN* AND *HELLER EHRMAN* AND THE SHIFTING UNFINISHED BUSINESS TERRAIN

As pointed out earlier, courts have historically applied the unfinished business doctrine to matters billed by the hour.[91]

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winding up of partnership business); Inv'r Assocs. v. Copeland, 546 S.E.2d 431, 436 (Va. 2001) (stating that "partners owe each other a fiduciary duty in winding up the partnership affairs"). *But see* 6D Farm Corp. v. Carr, 882 N.Y.S.2d 198, 201 (App. Div. 2009) (stating that "[t]he 'fiduciary relation between partners terminates upon notice of dissolution, even though the partnership affairs have not been wound up'") (quoting *In re* Silverberg, 438 N.Y.S.2d 143, 144 (App. Div. 1981)). The *6D Farm Corp.* court's blanket statement is dubious, however, since the court in *In re Silverberg*, whose opinion the *6D Farm Corp.* court quoted, was referring only to partners' post-dissolution ability to represent clients who were clients of the firm at the time of dissolution. *In re Silverberg*, 438 N.Y.S.2d at 144. Read properly, *In re Silverberg* expresses only the general rule that dissolution erases a partner's loyalty obligation not to compete with the partnership in the conduct of partnership business, but leaves intact other fiduciary duties. The case certainly does not support the broad rule that the *6D Farm Corp.* court apparently drew from it. Accordingly, courts and lawyers should be very wary of relying on the *6D Farm Corp.* opinion as authority on this issue.

85 *See In re* Rueth Dev. Co., 976 N.E.2d 42, 53 (Ind. Ct. App. 2012) ("Under common law, general partners owe each other and the partnership fiduciary duties until final termination of the partnership."); Marr v. Langhoff, 589 A.2d 470, 476 (Md. 1991) (stating that partners' "mutual fiduciary duties cease when the winding up is completed").

86 HILLMAN ET AL., REVISED UNIF. P'SHIP ACT, *supra* note 56, §§ 404(b)(1), (2).

87 *See id.* § 404(d) ("A partner shall discharge the duties to the partnership and the other partners . . . consistently with the obligation of good faith and fair dealing.").

88 Dickson, Carlson & Campillo v. Pole, 99 Cal. Rptr. 2d 678, 685 (Cal. Ct. App. 2000); Kirsch v. Leventhal, 586 N.Y.S.2d 330, 333 (App. Div. 1992); Smith, Keller & Assocs. v. Dorr & Assocs., 875 P.2d 1258, 1267 (Wyo. 1994) (quoting Bader v. Cox, 701 S.W.2d 677, 682 (Tex. App. 1985)).

89 *Dickson, Carlson & Campillo*, 99 Cal. Rptr. 2d at 685.

90 *Id.*

91 *See, e.g.*, Robinson v. Nussbaum, 11 F. Supp. 2d 1, 4–6 (D.D.C. 1997) (applying District of Columbia law); Rothman v. Dolin, 24 Cal. Rptr. 2d 571, 573 (Ct. App. 1993) ("[U]nfinished business simply consists of all matters in progress which have not been completed at the time the firm is dissolved. . . . That one matter is to be compensated at

Courts have reasonably concluded that the unfinished business doctrine should apply to all matters within its scope regardless of lawyers' compensation arrangements with clients.[92] This conclusion is correct because the unfinished business doctrine is simply an aspect of partnership law that upholds partners' fiduciary duties to one another and to their firm in the event of dissolution.[93]

In 2014, however, two cases radically altered the unfinished business terrain by rejecting the doctrine's application to client matters that are billed hourly. The New York Court of Appeals held in *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*[94] that "pending hourly fee matters are not 'partnership property' or 'unfinished business' within the meaning of New York's Partnership Law."[95] In *Heller Ehrman LLP v. Davis, Wright, Tremaine LLP*,[96] a California federal court reasoned that California law was "unsettled on the question of whether a law firm may assert a property interest in hourly fee matters pending at the time of its dissolution,"[97] and then held that equity and public policy weighed against application of the unfinished business doctrine in that context.[98] That decision was appealed, and the ultimate outcome in *Heller Ehrman* will now be decided by the California Supreme Court on a certified question from the U.S. Court of Appeals for the Ninth Circuit.[99] As will be explained below, *In re Thelen LLP* was wrongly decided as a matter of partnership law, and *Heller Ehrman* was wrongly decided in the district court.

A. *In re Thelen*

Geron v. Seyfarth Shaw LLP (In re Thelen LLP)[100] arose out of the October 2008 dissolution of the law firm Thelen LLP ("Thelen") and the August 2005 dissolution of the venerable law firm Coudert Brothers LLP ("Coudert").[101] Both underlying cases require some discussion.

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an hourly rate and another on a contingency basis is of no consequence in determining whether a matter is unfinished business.") (citation omitted).

92 *See, e.g.*, Grossman v. Davis, 34 Cal. Rptr. 2d 355, 356 (Ct. App. 1994) (stating that the *Jewel* doctrine applies regardless of "the nature of the compensation agreement with the client").

93 Rogers, *supra* note 25, at 336.

94 20 N.E.3d 264, 264 (N.Y. 2014).

95 *Id.* at 266–67.

96 527 B.R. 24 (N.D. Cal. 2014).

97 *Id.* at 30.

98 *Id.* at 30–33.

99 See *infra* Part III.B.3.

100 20 N.E.3d 264 (N.Y. 2014).

101 *Id.* at 267–69.

1. The Underlying Thelen and Coudert Dissolutions and Bankruptcy Cases

First, in connection with Thelen's dissolution in October 2008, the firm's partners adopted a fourth amended partnership agreement and a written plan of dissolution.[102] The new partnership agreement stated that it was governed by California law, and unlike prior agreements, included a *Jewel* or unfinished business waiver.[103] The waiver provided that:

> Neither 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* . . . 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].[104]

Following Thelen's dissolution, ten former Thelen partners joined the New York office of Seyfarth Shaw LLP, and another former Thelen partner joined Seyfarth in California.[105] They brought a number of open matters with them from Thelen.[106] They worked on those matters at Seyfarth and Seyfarth billed the clients for their services.[107]

In September 2009, Thelen filed for bankruptcy protection in the Southern District of New York.[108] The bankruptcy trustee, Yann Geron, sued Seyfarth to recover the value of Thelen's unfinished business for the bankruptcy estate's creditors.[109] He asserted that the open hourly matters the former Thelen partners took to Seyfarth were the dissolved firm's assets, and that Thelen's partners fraudulently transferred those assets to individual partners when they adopted the partnership agreement with the *Jewel* waiver on the eve of the firm's dissolution.[110]

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102 *Id.* at 267.
103 *Id.*
104 *Id.* (quoting the partnership agreement).
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.* at 267–68.

Seyfarth moved for judgment on the pleadings.[111] The district court granted the motion.[112] In holding for Seyfarth, the district court (1) determined that New York law controlled the dispute; (2) reasoned that under New York law, the unfinished business doctrine did not apply to hourly fee matters; and (3) concluded that a partnership does not retain a property interest in such matters upon dissolution.[113] Recognizing the gravity of its decision, however, the district court certified its order for interlocutory appeal.[114] Geron appealed to the Second Circuit as expected.

The Second Circuit agreed with the district court that New York law controlled the dispute, but further recognized the absence of controlling New York authority.[115] Given the significance of the issues involved, the court reasoned that certifying appropriate questions to New York's highest court for determination was preferable to deciding the case based on its singular interpretation of New York law.[116] The Second Circuit therefore certified two questions to the New York Court of Appeals:

> Under New York law, is a client matter that is billed on an hourly basis the property of a law firm, such that, upon dissolution and in related bankruptcy proceedings, the law firm is entitled to the profit earned on such matters as the "unfinished business" of the firm?
>
> If so, how does New York law define a "client matter" for purposes of the unfinished business doctrine and what proportion of the profit derived from an ongoing hourly matter may the new law firm retain?[117]

Turning now to Coudert, the firm dissolved in line with the terms of its partnership agreement in August 2005.[118] On the same day they voted to dissolve, the firm's equity partners adopted a special authorization, which authorized the firm's executive board to:

> [T]ake such actions as it may deem necessary and appropriate, including, without limitation, the granting of waivers, notwithstanding any provisions to the contrary in the Partnership Agreement . . . , in order to:

111 *Id.* at 268.
112 *Id.*
113 *Id.*
114 *Id.*
115 *See In re* Thelen, 736 F.3d 213, 224 (2d Cir. 2013).
116 *See id.* at 223–24.
117 *Id.* at 225.
118 *In re* Thelen, 20 N.E.3d 264, 268 (N.Y. 2014).

> a. . . . sell all or substantially all of the assets of . . . the Firm to other firms or service providers, in order to maximize the value of the Firm's assets and business;
>
> b. wind down the business of the Firm with a view to continuing the provision of legal services to clients and the orderly transition of client matters to other firms or service providers, in order to maximize the value of the Firm's assets and business to the extent practicable.[119]

Former Coudert partners joined several different law firms, taking open matters with them to their new firms.[120] They completed all but two of those matters at their new firms on an hourly basis.[121]

In September 2006, Coudert filed for bankruptcy protection in the Southern District of New York.[122] The administrator of Coudert's estate, Development Specialists, Inc. ("DSI"), brought adversary actions against law firms that had hired former Coudert partners.[123] DSI alleged that the firms were liable to Coudert for any profits derived from the matters brought to them by the former Coudert partners.[124] The law firms moved for summary judgment on the basis that the unfinished business doctrine did not apply to hourly matters, and DSI cross-moved for a declaration that the open client matters were Coudert's property at the time of dissolution.[125] The district court sided with DSI, and held that the former Coudert partners had to account for any profits they earned while winding up the client matters at their new firms.[126]

The district court certified its decision for immediate appeal and, as expected, the law firms appealed.[127] The Second Circuit then certified to the New York Court of Appeals the same two questions asked in *In re Thelen*.[128]

2. The New York Court of Appeals Decision in *In re Thelen*

The *In re Thelen* court began its analysis of Geron's and DSI's unfinished business claims by noting that the New York Partnership Law (the "Partnership Law") was based on the

119 *Id.* at 268–69 (internal quotation marks omitted).

120 *Id.* at 269.

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* (quoting Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld, LLP, 477 B.R. 318, 326 (S.D.N.Y. 2012), *rev'd in part, vacated in part, In re* Coudert Bros. LLP, 574 F. App'x 15 (2d Cir. 2014)).

127 *Id.*

128 *Id.* (*citing In re* Coudert Bros. LLP, Nos. 12-4916(L) *et al.*, 2013 WL 9363394, at *1–2 (2d Cir. Dec. 2, 2013)).

UPA.[129] It went on to frame the unfinished business doctrine, explaining that absent contrary agreement, profits attributable to work begun by former partners of a dissolved law firm pre-dissolution are a partnership asset that must be finished for the dissolved firm's benefit.[130] Under the Partnership Law and the UPA more generally, "because departing partners owe a fiduciary duty to the dissolved firm and their former partners to account for benefits obtained from use of partnership property in winding up the partnership's business, they may not be separately compensated."[131] But critically, the court noted that the Partnership Law does not define partnership property; it sets "default rules for how a partnership upon dissolution divides property as elsewhere defined" under New York law.[132] As a result, the *In re Thelen* court reasoned the Partnership Law does not control the determination of whether "a law firm's 'client matters' are partnership property."[133]

Continuing, the court explained that in New York, clients have the unqualified right to terminate an attorney-client relationship at any time with no obligation beyond paying the lawyer for the reasonable value of her completed services.[134] As a result, law firms cannot have property interests in future hourly fees because such fees are too uncertain and speculative.[135] Furthermore, prior New York cases on which Geron and DSI relied on had "never suggested that a law firm owns anything with respect to a client matter other than yet-unpaid compensation for legal services already provided."[136] For instance, courts applying the unfinished business doctrine to contingent fee matters had uniformly held that the dissolved law firm could recover only "the 'value' of its services."[137]

The *In re Thelen* court further reasoned that treating a dissolved law firm's open hourly matters as partnership property "would have numerous perverse effects," would offend "basic principles that govern the attorney-client relationship," and would violate ethics rules.[138] To allow the former partners of a dissolved law firm to profit from work they did not perform, at

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129 *Id.* at 270.

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.* (quoting *In re* Cooperman, 633 N.E.2d 1069, 1072 (N.Y. 1994)) (internal quotation marks omitted).

135 *Id.* at 270–71 (quoting Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 990 N.E.2d 121, 124 (N.Y. 2013)).

136 *Id.* at 271.

137 *Id.*

138 *Id.* at 273.

the expense of a former colleague and her new firm, would grant them an unjust windfall.[139] Furthermore, because the unfinished business doctrine does not attach to profits earned on open matters that go with former partners who bolt from a struggling firm before it dissolves, Geron and DSI's approach "would encourage partners to get out the door, with clients in tow, before it is too late, rather than remain and work to bolster the firm's prospects. Obviously, this run-on-the-bank mentality makes the turnaround of a struggling firm less likely."[140] Finally, lawyers who linger too long at a failing firm are placed in a precarious position.[141] Faced with the prospect of rebating their fees to their former law firm, they might advise their clients that they can no longer afford to represent them, which would disrupt the clients' representations and impose a practical restriction on their right to choose their own counsel.[142] "Or, more likely," the *In re Thelen* court worried that tardy lawyers would find it hard to obtain positions with new law firms because any profits from their work for current clients would go to their old firms rather than their new ones.[143]

Geron and DSI argued that clients do not care which law firm their fees go to as long as their matters are handled properly.[144] The *In re Thelen* court disagreed based on its prior reasoning.[145] Additionally, clients might worry that their hourly fee matters would be neglected if the new law firm could not profit off them.[146] The court ridiculed the idea that firms would hire partners from dissolved law firms or accept client matters without the promise of compensation.[147] "Followed to its logical conclusion," the court reasoned that the plaintiffs' approach would hurt clients, lawyers, and law firms without producing the desired financial rewards for bankrupt firms' estates.[148] Ultimately, applying the unfinished business doctrine to hourly fee matters would contradict New York's strong public policy favoring client choice and lawyer mobility.[149]

Finally, the court rejected Geron and DSI's argument that a law firm can avoid the unfinished business doctrine by inserting

139 *Id.* (quoting Geron v. Robinson & Cole LLP, 476 B.R. 732, 740 (S.D.N.Y. 2012)).
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *See id.* (saying that such a position "ignores commonsense and marketplace realities").
148 *Id.*
149 *Id.*

a *Jewel* waiver in its partnership agreement.[150] From the court's perspective:

> This suggestion fails to consider the possibility that classifying clients' pending hourly fee matters as firm property may lead to untoward unintended consequences. For example, the trustees . . . limit their sought-after recoveries to client matters that remain unresolved as of the date of a law firm's dissolution. As Seyfarth pointed out, though, if a client's pending matter is partnership property, why doesn't every lawyer whose clients follow him to a new firm breach fiduciary duties owed his former law firm and partners? In the end, the trustees' theory simply does not comport with our profession's traditions and the commercial realities of the practice of law today, a deficiency beyond the capacity of a *Jewel* waiver to cure.[151]

Accordingly, the court concluded that the first certified question should be answered negatively.[152] It was unnecessary to answer the second certified question.[153]

3. Analysis

In re Thelen should perhaps be read as rejecting the UPA's no compensation rule, rather than as a rejecting the unfinished business doctrine altogether, since many of the court's concerns about the doctrine's effects vanish under RUPA, which permits reasonable compensation for partners who conclude a dissolved law firm's unfinished business.[154] Indeed, the decision should have no persuasive force in jurisdictions that have adopted RUPA. Even in jurisdictions still glued to the UPA, however, the court's reasoning wilts under scrutiny. Courts writing on a blank slate would be justified in disregarding the decision.

First, the position that future hourly fees are too uncertain or speculative to count as partnership property defies logic in practice. If those fees were as uncertain as the court reasoned, no sensible departing partners would take open matters with them to their new firms. No lawyer wants to relocate to a new firm and start that relationship on the wrong foot by delivering uncollectible client matters. Even collecting a security retainer is no protection against a client's termination of a representation.[155] In reality, the clients that lawyers take with them to new firms are almost always reliable payors. Of course, if a lawyer collects fees from matters opened at her former firm at her new firm, the

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150 *Id.* at 274.

151 *Id.*

152 *Id.*

153 *Id.*

154 *See* HILLMAN, *supra* note 6, § 4.6.3.2, at 4:74–75.

155 *See* Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. LEGAL PROF. 113, 129 (2009) (explaining that security retainers are refundable until earned).

fees must be the dissolved partnership's property because they are no longer contingent or speculative in that case.[156]

Second, allowing a dissolved law firm to profit from work it did not perform at the expense of a former partner and her new firm grants the dissolved firm no windfall.[157] The former partner and her new firm would not have had that matter but for the existence and support of the dissolved firm where the matter originated. The client originally hitched its star to the dissolved firm, not the new firm.

Third, the argument that because the unfinished business doctrine does not attach to profits earned on open matters that go with former partners who bolt from a struggling firm before it dissolves, enforcement of the doctrine post-dissolution "would encourage partners to get out the door, with clients in tow, before it is too late, rather than remain and work to bolster the firm's prospects" is at best exaggerated and speculative.[158] On the other side of the speculation coin, *not* enforcing the unfinished business doctrine might also negatively affect partners' behavior. For example, partners who control key client relationships might delay opening new matters for those clients until they have relocated their practices, or attempt to account for time spent on matters pre-dissolution in ways that will defeat the dissolving firm's right to the associated fees. Besides, other legal principles, such as quantum meruit, serve to police opportunistic conduct in those circumstances.

The second part of this argument—the prospect of a trustee or receiver enforcing the unfinished business doctrine creates a "run-on-the-bank mentality [that] makes the turnaround of a struggling firm less likely"[159]—is equally flawed. A partner run typically begins while a firm is profitable, if perhaps not quite as profitable as it was in its best years.[160] In other words, a partner run begins before a firm is "struggling" or requires a "turnaround."[161] It begins long before partners perceive the unfinished business doctrine as a professional threat. While partner runs often cause firms to collapse, their origins are not connected to the unfinished business doctrine.

156 *See* Rutledge & McGuire, *supra* note 22, at 14 (asserting that fees earned from matters open at the time of dissolution are property of the dissolved partnership).

157 *In re Thelen*, 20 N.E.3d at 273 (citing Geron v. Robinson & Cole LLP, 476 B.R. 732, 740 (S.D.N.Y. 2012)).

158 *Id.*

159 *Id.*

160 Morley, *supra* note 1, at 4.

161 *See id*; *In re Thelen*, 20 N.E.3d at 273.

Fourth, the concern that lawyers will neglect open matters they take with them to new firms because of the effect of the unfinished business doctrine assumes that those lawyers are willing to violate their ethical duties of competence and diligence.[162] That can't be right. Furthermore, if a lawyer neglects a matter because it is not profitable and the client is harmed as a result, the client has adequate remedies in the form of causes of action for professional negligence and breach of fiduciary duty against the lawyer and her new law firm. More important, the true value that a partner brings to the new law firm generally is not pending matters, but rather the client relationship and expectation of substantial future work from that client. Inattention to unfinished work would destroy the real asset at issue to the obvious detriment of the lawyers looking to transfer the client relationship, as well as to their new law firms.

Fifth, the rationale that enforcing the unfinished business doctrine would limit clients' right to counsel of their choice is deeply flawed. While clients' right to counsel of their choice is certainly important, it has never been unbridled. For instance, a court may disqualify a lawyer from representing a client in litigation regardless of the client's interest in retaining that lawyer's services.[163] Furthermore, as two commenters have explained in the context of law firm dissolutions:

> In the context of a firm dissolution any number of factors may preclude a client [from] following one or more attorneys to a new firm. There may be a conflict that precludes that engagement from transitioning. The new firm may have a fee structure that the client finds undesirable. The client may have had an adverse relationship with that new firm such that they are not willing to transition their files to that firm. For these and any number of other reasons a client may either elect not to transfer an engagement to an attorney's new firm or be precluded from doing so. Simply put, a lawyer leaving one

162 *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id.* r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

163 *See* Martinez v. Cty. of Antelope, No. 4:15CV3064, 2016 WL 3248241, at *6 (D. Neb. June 13, 2016) ("When considering motions to disqualify, courts must balance public policy concerns and the court's responsibility to uphold the integrity of judicial proceedings with a party's right to select his or her own counsel. In determining whether to disqualify counsel, a court balances the interests and motivations of the attorneys, the clients, and the public."); Parke v. Cowley Cty., No. 15-1372-JTM-TJJ, 2016 WL 2609610, at *2 (D. Kan. May 6, 2016) ("'The right to counsel of choice is an important one subject to override for compelling reasons.' Even so, this right is secondary in importance to preserving the integrity of the judicial process, maintaining the public confidence in the legal system and enforcing the ethical standards of professional conduct.") (footnotes omitted).

> firm is under no obligation to insure that his or her new firm is acceptable to an existing client.[164]

Moreover, the concern the *In re Thelen* court expressed is the so-called "lock-out" effect of the unfinished business doctrine; that is, enforcing the doctrine supposedly locks-out clients from lawyers of their choice.[165] Yet, despite the many law firm dissolutions to date, lock-out has never been shown to have occurred.[166] There is no evidence that the phenomenon exists.[167] Additionally, as I have explained elsewhere, "[a]ssuming client worthiness, migrating partners should seek to continue clients' representations in order to be hired by those clients in new matters. As a general rule, repeat clients face no substantial risk of lock-out."[168]

B. The *Heller Ehrman* Case

1. The District Court Decision

The other recent case, *Heller Ehrman LLP v. Davis, Wright, Tremaine LLP*,[169] traces back to the September 2008 dissolution of the global law firm Heller Ehrman LLP ("Heller").[170] Heller was made up of several professional corporations ("PCs") whose lawyer-shareholders served the firm's clients.[171] The PCs voted to dissolve the firm pursuant to a written dissolution plan after the firm's largest creditor, Bank of America, declared Heller to be in default on the firm's operational $35 million line of credit and

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164 Rutledge & McGuire, *supra* note 22, at 13.

165 *See* Mark H. Epstein & Brandon Wisoff, Comment, *Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice*, 73 CALIF. L. REV. 1597, 1617–18 (1985).

166 Rutledge & McGuire, *supra* note 22, at 13. In *Heller Ehrman LLP v. Jones Day (In re Heller Ehrman LLP)*, the record included internal Heller communications in which shareholders discussed other law firms' possible reluctance to employ Heller lawyers and staff absent a *Jewel* waiver. *In re* Heller Ehrman LLP, No. 08-32514DM, 2013 WL 951706, at *7 (Bankr. N.D. Cal. Mar. 11, 2013). For example, one shareholder wrote that other firms were "acutely aware of the *Jewel v. Boxer* problem" and would "want some assurance that they won't get trapped in that net." *Id.* To suggest otherwise, he speculated, would cause those firms to "simply opt out with no jobs for individuals and nothing for the firm." *Id.* Of course, none of that private conjecture constitutes evidence of lock-out.

167 *See* Rutledge & McGuire, supra note 22, at 13 ("[A]s to the argument that clients may be, consequent to the Unfinished Business Doctrine, locked out of the counsel they desire, it is only that, an argument. With a majority of jurisdictions having to date followed *Jewel*, it would be expected that the cases and commentary would recite incidents of lock-out. It is at minimum curious that such a calamitous outcome . . . cannot be shown to have ever occurred.").

168 Richmond, *supra* note 11, at 418.

169 Heller Ehrman LLP v. Davis, Wright, Tremaine LLP, 527 B.R. 24 (N.D. Cal. 2014).

170 *Id.* at 27.

171 *Id.*

seized the firm's bank accounts.[172] Heller's dissolution plan included a *Jewel* waiver that waived any rights and claims under the unfinished business doctrine to fees resulting from hourly fee matters open at the time of dissolution.[173] Heller filed for Chapter 11 bankruptcy in December 2008.[174]

Heller's bankruptcy trustee sued Davis, Wright, Tremaine LLP ("Davis Wright") and other law firms to which Heller's lawyers dispersed.[175] The trustee alleged that the bankruptcy estate was entitled to recover profits from open hourly fee matters because the *Jewel* waiver in the dissolution plan was a fraudulent transfer of Heller's property under either bankruptcy code or California law.[176] The bankruptcy court granted the defendant's summary judgment.[177] The trustee sought review by the district court.

The district court reasoned that it was addressing a question of first impression: "whether a law firm—which has been dissolved by virtue of creditors terminating their financial support, thus rendering it impossible to continue to provide legal services in ongoing matters—is entitled to assert a property interest in hourly fee matters pending at the time of its dissolution."[178] The district court answered this question negatively, and started by shredding the trustee's claim that *Jewel v. Boxer*[179] controlled the outcome in this case.

> *Jewel* is different . . . for five key, related reasons. First, the dissolution of the firm . . . in *Jewel* was voluntary, while Heller's dissolution was forced when Bank of America withdrew the firm's line of credit. This is significant because the partners in *Jewel* could have, but chose not to, finish representing their clients as or on behalf of the old firm. Here, Heller lacked the financial ability to continue providing legal services to its clients, leaving clients . . . no choice but to seek new counsel and Heller [s]hareholders no choice but to seek new employment. Second, in *Jewel*, "[t]he new firms represented the clients under fee agreements entered into between the client and the old firm." . . . Here, the clients signed new retainer agreements with the new firms. Third, in *Jewel*, the new firms consisted entirely of partners from the old firms. . . . Here, [the] [d]efendants are preexisting third-party firms that provided substantively new representation, requiring significant resources, personnel, capital, and

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172 *Id.*
173 *Id.*
174 *Id.*
175 *Id.*
176 *Id.*
177 Heller Ehrman LLP v. Jones Day (*In re* Heller Ehrman LLP), No. 08-32514DM, Adversary No. 10-3221DM, 2013 WL 951706, at *17 (Bankr. N.D. Cal. Mar. 11, 2013).
178 *Heller Ehrman*, 527 B.R. at 25.
179 203 Cal. Rptr. 13 (Cal. Ct. App. 1984).

> services well beyond the capacity of either Heller or its individual [s]hareholders. Where in *Jewel*, the departed partners continued to have fiduciary duties to each other and the old firm, here, the third-party firms never owed any duty . . . to the dissolved firm. Fourth, *Jewel* treated hourly fee matters and contingency fee matters as indistinguishable. Here, there are no contingency fee cases at issue. Finally, *Jewel* was decided in 1984 and thus applied the Uniform Partnership Act . . . which the materially different Revised Uniform Partnership Act . . . has since superseded. The RUPA, which applies after 1999 to all California partnerships, allows partners to obtain "reasonable compensation" for helping to wind up partnership business . . . and thus undermines the legal foundation on which *Jewel* rests.[180]

The *Heller Ehrman* court observed that cases applying *Jewel* were poorly reasoned, predated California's adoption of RUPA, or both.[181] The California Supreme Court had not addressed the unfinished business doctrine in this context.[182] Because, in the court's view, California law was unsettled on the issue of a law firm's property interest in hourly fee matters open when it dissolved, the court felt free to weigh the equities.[183]

The court began its analysis on the "bedrock" idea that lawyers expect to be paid for their services and clients expect to pay the law firm that employs the lawyers who serve them.[184] It was therefore easy to conclude that the firms that did the work at issue should keep the fees earned from it.[185]

The trustee argued that the former Heller shareholders owed a fiduciary duty to the firm's estate to account for profits their new firms earned from the former Heller matters.[186] But, the court noted, the fiduciary duty to account is limited to partnership property,[187] and the equities did not support the recognition of a property interest here.[188] As the court explained:

> A law firm never owns its client matters. The client always owns the matter, and the most the law firm can be said to have is an *expectation* of future business. . . . [T]he Trustee was unable to articulate a basis for calculating the value of this expected future business. The Trustee suggested that the value at issue here is "good will," which does not ordinarily appear on law firm balance sheets which are on a modified cash basis. In California, and beyond,

180 *Heller Ehrman*, 527 B.R. at 29 (citations omitted).
181 *Id.* at 30.
182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.*
186 *Id.*
187 *Id.* (citing CAL. CORP. CODE § 16404(b)(1)).
188 *Id.*

> professional law partnerships do not have a "good will" asset. . . . The good will the [t]rustee discussed may be real in one sense: certainly a firm's reputation is a crucial part of its ability to obtain work. However, good will is not an asset to which a property interest attaches. Moreover, Heller's bankruptcy did much to undermine the firm's otherwise stellar reputation and to eviscerate any reasonable expectation of future business.
>
> Obviously, the expectation of future business—if it is "good will"—would disappear as soon as either (1) the client removes business, which it can do at will, or (2) the law firm ceases to be able to perform the work to generate those expected future profits. . . . Here, the client matters at issue ceased to be Heller's partnership business and became the [d]efendants' partnership business when the clients terminated Heller and retained new, third-party counsel.[189]

The trustee had conceded in bankruptcy court that the departing lawyers' duty to account for unfinished business was attributable solely to Heller's dissolution.[190] This puzzled the district court, which saw no reason "why the duties, rights, and property interests at stake . . . should be different simply because Heller dissolved."[191] If dissolution did alter the equitable terrain, it did so in favor of Davis Wright and the other defendant law firms.[192] Once Heller dissolved, it could no longer represent its clients, thereby forcing them to seek alternative representation.[193] The defendants "came to the rescue of these clients" and agreed to represent them in their existing matters.[194] The former Heller clients entered into new retainer agreements with the defendants, which "provided substantively new representation, requiring significant resources, personnel, capital, and services" that dwarfed the capacity of Heller and its former shareholders.[195]

The court recognized that, as in all bankruptcies, the plight of creditors and former employees was "deplorable."[196] Nonetheless, because the defendant law firms generated the fees at issue, the equities supported the retention of those fees.[197]

The *Heller Ehrman* court also reasoned that public policy backed the defendant law firms.[198] The trustee had argued that

189 *Id.* at 30–31 (citations omitted).
190 *Id.* at 31.
191 *Id.*
192 *Id.*
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.* at 32.
197 *Id.*
198 *Id.*

enforcing the *Jewel* no compensation rule prevents partners from wrestling for the most lucrative cases during the life of the firm in the hope of keeping them should the firm dissolve.[199] Second, the *Jewel* rule discourages partners from effectively looting the firm by soliciting existing clients upon dissolution.[200] Unfortunately for the trustee, neither issue concerned the court.[201]

Because the profits in question were generated by Davis Wright and the other law firms, any incentive the former Heller shareholders may have had to game their former firm's system was not squarely at issue.[202] Furthermore, the former Heller clients chose to engage the defendant law firms, not because any shareholders had physical possession of their files, but because Heller could no longer represent them.[203]

Strangely, the trustee could not even provide a workable definition of "winding up" or "unfinished business."[204] The court acknowledged that Heller should be paid "for the time its lawyers spent filing motions for continuances, noticing parties and courts that it was withdrawing as counsel, packing up and shipping client files back to the clients or to new counsel, and getting new counsel up to speed on pending matters" on the basis that such tasks are "what winding up unfinished business entails when a firm dissolves in the context of a bankruptcy."[205] The court found it incomprehensible that winding up Heller's affairs might encompass litigating matters long after the firm dissolved.[206] "Public policy [could not] favor such an outcome."[207]

Like the *In re Thelen* court,[208] the *Heller Ehrman* court believed that enforcing the unfinished business doctrine would perversely "incentivize partners of a struggling firm to jump ship at the first sign of trouble to avoid the kind of suit [the] [d]efendants now [found] themselves in, even if that would destabilize an otherwise viable firm."[209] Recognizing the unfinished business doctrine here would further discourage law firms from hiring former partners of dissolved firms and from accepting new clients formerly represented by lawyers in

199 *Id.* (quoting Jewel v. Boxer, 203 Cal. Rptr. 13, 18 (Ct. App. 1984)).
200 *Id.*
201 *Id.* (saying that neither issue was "at play here").
202 *Id.*
203 *Id.*
204 *Id.*
205 *Id.* (footnote omitted).
206 *Id.*
207 *Id.*
208 Geron v. Seyfarth Shaw LLP (*In re* Thelen LLP), 20 N.E.3d 264, 273 (N.Y. 2014).
209 *Heller Ehrman*, 527 B.R. at 32.

dissolved firms.[210] The court concluded that it was not in the public interest to make it harder for partners leaving a dissolved firm to find new jobs or to limit clients' choice of counsel by preventing firms from profiting off the labor and capital they expend or invest in matters previously handled by a dissolved firm.[211]

In the end, the court could not justify recognizing a property interest in Heller's pending hourly matters.[212] It thus entered summary judgment for the defendants.[213]

2. Analysis

Heller Ehrman is an unfortunate mix of suspect reasoning, incomplete analysis, unfounded assumptions, insufficient attention to partnership law, and detachment from the reality of large law firm practice. District court decisions are never precedential,[214] but *Heller Ehrman* is not even persuasive when closely analyzed.

First, in explaining that the former Heller shareholders' fiduciary duty to account to the estate was "limited to partnership property" en route to deciding that equity did not support recognition of a property interest in unfinished business, the court misread the statute on which it relied, California Corporations Code § 16404(b)(1).[215] This was a fatal error. Section 16404(b)(1), which duplicates RUPA § 404(b)(1), extends the duty to account well beyond partnership property. Section 16404(b)(1) states that a partner's duty of loyalty requires her to account for "any property, *profit, or benefit derived by the partner in the conduct and winding up of the partnership business* or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity."[216] In short, the former Heller shareholders' duty to account to the estate was clearly *not* limited to partnership property, but plainly extended to the profits the trustee was seeking to recover.

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210 *Id.* at 33.

211 *Id.* (citing Geron v. Seyfarth Shaw LPP (*In re* Thelen LLP), 736 F.3d 213, 223 (2d Cir. 2013)).

212 *Id.*

213 *Id.*

214 *See* Vertex Surgical, Inc. v. Paradigm Biodevices, Inc., 648 F. Supp. 2d 226, 231 (D. Mass. 2009) ("As Judges Posner and Easterbrook have repeatedly and accurately observed, with characteristic bluntness, district court decisions are neither authoritative nor precedential.").

215 *Heller Ehrman*, 527 B.R. at 30 (citing CAL. CORP. CODE § 16404(b)(1)).

216 CAL. CORP. CODE § 16404(b)(1) (West 2016) (emphasis added).

Second, the court's efforts at distinguishing *Jewel* missed the mark. The attempt to do so on the basis that the firm's decision to dissolve in *Jewel* was voluntary and thus the partners could have finished their clients' matters on behalf of the old firm, while Heller was forced to dissolve and thus could not continue serving clients, was poorly aimed. The UPA and RUPA do not distinguish between voluntary and involuntary dissolutions. While Heller, as an entity, could not continue to represent its clients, individual shareholders could—and did. Their doing so at new firms is no basis to differentiate *Jewel* because the partners there also represented the former firm's clients at new firms. To say that the Jewel partners, unlike the Heller shareholders, could have stayed together through winding up invites the argument that the unfinished business doctrine is untenable because of the "lock-in" effect—that is, it forces partners to remain together in violation of basic freedom of contract principles to avoid financial disadvantages that may accompany dissolution and winding up.[217]

In terms of perverse effects, to distinguish *Jewel* on the basis that the partners in that case continued to represent their former firm's clients under old engagement agreements, while Heller's clients signed new engagement agreements with the firms to which the Heller lawyers dispersed, is to allow partners of dissolved firms to avoid their fiduciary duties by exalting form over substance. That result is neither equitable nor good public policy.

The attempt to discount *Jewel* on grounds that the partners there "continued to have fiduciary duties to each other and the old firm," while the defendants in *Heller Ehrman* "never owed any duty, fiduciary or otherwise, to the dissolved firm,"[218] is a real head-scratcher. While the defendant law firms did not owe any duties to Heller, *the former Heller shareholders* who moved their practices to those law firms certainly did. It is hard to understand how the highly-regarded district judge could have missed this critical and obvious point.

Distinguishing *Jewel* on the basis that the court there similarly treated contingent and hourly fees, while in this case there were no contingent fees in dispute, is mysterious reasoning at best. The *Jewel* court did not distinguish contingent fees from hourly fees, and this case involved hourly fees. The absence of disputed contingent fees in *Heller Ehrman* had nothing to do with anything.

217 Richmond, *supra* note 11, at 59.

218 *Heller Ehrman*, 527 B.R. at 29.

The only valid basis for distinguishing *Jewel* was California's subsequent adoption of RUPA. But that did not mean Heller's bankruptcy estate was entitled to no recovery from the law firms; rather, the adoption of RUPA simply meant that the estate should have recovered less from those firms than it would have if the UPA's no compensation rule had remained California law. This is because under RUPA, the defendants were entitled to reasonable compensation for their work on the unfinished matters at issue. Heller was entitled to recover the difference between (a) the amount the clients paid for the work at the new law firms, and (b) the reasonable compensation to which those firms were entitled for performing the services.

Third, the court concluded as a matter of equity that the law firms "that did the work [in question] should keep the fees," and that because the fees were produced through the defendants' efforts rather than Heller's, the trustee could not argue that the defendants had received a windfall.[219] What the court seemingly overlooked was RUPA's allowance of reasonable compensation for lawyers' services in winding up a dissolved firm's affairs.[220] Surely the allowance of reasonable compensation to the law firms for completing Heller's unfinished business would have alleviated the court's concerns about the law firms performing work for which they would not be paid.[221]

In the same thread, the district court's focus on ownership of client matters was misplaced.[222] Although Heller did not own the client matters that departing shareholders took to their new firms, it did have an enforceable interest in the fees earned by its former shareholders from those matters.[223] The *Heller Ehrman* court apparently did not grasp this distinction. And while it is true that a client's termination of its relationship with a former Heller lawyer would sever any claim by the bankruptcy estate to profits subsequently earned on the client's matters, the estate had an interest in any fees earned before a particular client took that step. There had to be a reasonable way to calculate profits earned from matters open at the time of Heller's dissolution, apart from the trustee's odd muttering about good will. The court's related discussion of future new business from former Heller clients was hopelessly confused, especially since the

219 *Id.* at 30.

220 CAL. CORP. CODE § 16401(h) (West 2016); HILLMAN, *supra* note 6, § 4.6.3.2, at 4:75.

221 HILLMAN, *supra* note 6, § 4.6.3.2, at 4:75.

222 *See Heller Ehrman*, 527 B.R. at 30 ("A law firm never owns its client matters. The client always owns the matter, and the most the law firm can be said to have is an *expectation* of future business.").

223 Rutledge & McGuire, *supra* note 22, at 14.

unfinished business doctrine does not apply to new matters opened post-dissolution.

Fourth, in weighing the equities, the court's perception that the law firms "came to the rescue" of Heller's former clients in regard to their ongoing matters reflects a basic misunderstanding of large law firm practice in general, and of third party law firms' conduct post-dissolution in particular.[224] Davis Wright and the other excellent law firms involved rescued no one; they accepted as clients those former clients of Heller whom or which they viewed as profitable and as sources of future business. That was perfectly fine—Davis Wright and the other firms were firmly within their rights to make those business judgments. But they acted out of self-interest. They certainly did not lower rescue swimmers or launch lifeboats to bring aboard *all* former Heller clients who might need continued or future representation. They left plenty of former Heller clients adrift for later extraction by trawlers.

Fifth, the court's decision to arbitrarily reconceive or redefine winding-up to shorten this phase of a firm's demise was wrong as a matter of partnership law.[225] Again, winding up is the time after dissolution and before termination during which all partnership affairs are settled.[226] The fact that it takes longer to wind up a law firm's affairs than it does to wind up another business's affairs is an understandable reason to lament the unfinished business doctrine's application to law firm dissolutions, but it does not empower a court to circumscribe this phase for the sake of convenience. The court cited no case law, statutory authority, or secondary authority for its crabbed view of winding-up.

Sixth, the court overreached when it asserted that applying the unfinished business doctrine to hourly fee matters "would discourage third-party firms from hiring former partners of dissolved firms and discourage third-party firms from accepting new clients formerly represented by dissolved firms."[227] In fact, law firms want to admit partners from dissolved firms who can bring desirable business with them. In most cases, firms are less

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224 *Heller Ehrman*, 527 B.R. at 31.

225 *Id.* at 32 (agreeing "that Heller should bill and be paid for the time its lawyers spent filing motions for continuances, noticing parties and courts that it was withdrawing as counsel, packing up and shipping client files back to the clients or to new counsel, and getting new counsel up to speed on pending matters," and stating that this "is what winding up unfinished business entails when a firm dissolves in the context of a bankruptcy").

226 GREGORY, *supra* note 47, at 368.

227 *Heller Ehrman*, 527 B.R. at 33.

focused on the open matters that partners bring with them (beyond clearing conflicts of interest) than they are in establishing a continuing relationship with those clients that will yield substantial future business. Negotiating the resolution of unfinished business claims is a cost of doing business, and a low cost at that. The partners who are in danger of not finding new employment when a law firm dissolves are the so-called service partners who control no meaningful business. But they are not casualties of the unfinished business doctrine; they are victims of a law firm culture that generally values technical skill less than rainmaking ability.

As noted in the analysis of *In re Thelen*, there is no evidence that the unfinished business doctrine discourages firms from representing former clients of a dissolved firm. If a migratory partner's new firm declines to represent some of her clients from her former firm, it is more likely because those clients are not viewed as sufficiently profitable, because they do not fit the new firm's practice model in other respects, or because their representation would create conflicts of interest with the new firm's existing clients.

3. The Trustee's Appeal to the Ninth Circuit

Heller's trustee appealed the district court's decision to the Ninth Circuit. After hearing oral argument in June 2016, the Ninth Circuit certified this question to the California Supreme Court in July 2016: "Under California law, does a dissolved law firm have a property interest in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matters on an hourly basis?"[228] The California Supreme Court's decision will determine the outcome of the case.[229]

At the time this article was submitted, the California Supreme Court had only recently accepted the case on referral from the Ninth Circuit, in the process restating the certified question to ask: "Under California law, what interest, if any, does a dissolved law firm have in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matter on an hourly basis?"[230] In restating the question as it did, the court appears to have left the focus of the inquiry on the dissolved law

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228 Heller Ehrman LLP v. Davis Wright Tremaine LLP (*In re* Heller Ehrman LLP), 830 F.3d 964, 965 (9th Cir. 2016).

229 *Id.* at 973.

230 Heller Ehrman LLP v. Davis Wright Tremaine LLP, No. S236208, 2016 Cal. LEXIS 7131, at *1 (Cal. Aug. 31, 2016).

firm rather than on the obligations of the partners or shareholders of the dissolved firm, which is where the focus should be. This is one of the places where the district court in *Heller Ehrman* became confused. Again, it is critical to recall that *the former Heller shareholders* who relocated their practices to the defendant law firms continued to owe duties to each other and to Heller. To the extent the defendant law firms believe that focusing on the individual shareholders penalizes them for finishing Heller's business, they need to reconsider. Under RUPA, which California adopted after *Jewel*, they are entitled to reasonable compensation for their work on unfinished matters.

It is difficult to criticize the California Supreme Court before it even hears the case, but the question presented might have been better restated along these lines: Must shareholders or partners of a dissolved law firm who transfer hourly matters that were open at the time of dissolution from their former law firm to a new law firm account to their former firm for the profits earned on those matters consistent with their obligation to wind up the dissolved firm's affairs? Restating the question that way clearly would have focused attention on the obligations of the former Heller shareholders.

IV. RECOGNIZING THE UNFINISHED BUSINESS DOCTRINE

The unfinished business doctrine is imperfect. It is a nagging inconvenience for law firms. It potentially produces results in some cases that perhaps are not "the most equitable or logical."[231] This is particularly true in jurisdictions that follow the UPA and consequently prohibit partners from receiving extra compensation for their efforts in winding up partnership affairs.[232] This is the strict *Jewel* rule, or the "no compensation" rule.[233] Fortunately, the seeming unfairness of the ban on extra compensation for time spent on winding up partnership affairs that was enforced in *Jewel* is cured in states that have adopted RUPA, and therefore permit lawyers who perform legal services in the wind-up to receive reasonable compensation for their efforts.[234]

At base, the unfinished business doctrine prioritizes partners' fiduciary duties to one another and the dissolved

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231 Sufrin v. Hosier, 896 F. Supp. 766, 770 (N.D. Ill. 1995).

232 *See* UNIF. P'SHIP ACT § 18(f) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1914) ("No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.").

233 Jewel v. Boxer, 203 Cal. Rptr. 13, 18–19 (Cal. Ct. App. 1984).

234 *See supra* Part II.A.

partnership over other competing considerations.[235] It is on these duties that courts must focus. Courts should appreciate the importance of fiduciary duties between partners and between partners and their firms, and they ought to recognize the value in upholding those duties at times when relationships between partners are tested. To the extent the unfinished business doctrine further emphasizes the financial interests of creditors of the dissolved law firm over those of the firms to which the partners of the dissolved firm relocate, that is a simple policy choice.

The unfinished business doctrine is an established aspect of partnership law that applies to all businesses organized as partnerships, including professional practices. Why should law firms be treated differently from other partnerships in connection with matters where they bill by the hour? There is no good answer to this question.[236] The recycled argument that the unfinished business doctrine is unworthy of enforcement because it impairs client choice does not hold water.

Lawyers making this argument contend that applying the unfinished business doctrine to matters billed by the hour creates a financial disincentive for the former partners of a dissolved firm to continue representing their clients when they transition to their new firms.[237] That is, when a partner realizes that she and her new colleagues will have to perform all of the ongoing work but will have to remit a material share of the associated fees to her former firm, she will opt to terminate the representation even though the client may want her to continue.[238] But as explained earlier, the true value that a partner brings to her new law firm generally is not pending matters in their own right, but the client relationship and the expectation of significant future matters from that client. Withdrawal from current matters out of frustration with the unfinished business doctrine would destroy the real asset at issue to the detriment of the lawyers and their new law firms. It is almost certainly for this reason that this claimed risk has never been shown to have occurred.[239]

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235 *Sufrin*, 896 F. Supp. at 770.

236 The unfinished business doctrine certainly applies to contingent fee matters. *See, e.g.*, Santalucia v. Sebright Transp., Inc., 232 F.3d 293, 297–98 (2d Cir. 2000) (quoting Shandell v. Katz, 629 N.Y.S.2d 437, 439 (App. Div. 1995)). Indeed, lawyers generally accept the doctrine's application in that context.

237 Dev. Specialists, Inc. v. Akin, Gump, Strauss, Hauer & Feld LLP, 480 B.R. 145, 170 (S.D.N.Y. 2012), *rev'd in part, vacated in part*, *In re* Coudert Bros., 574 F. App'x 15 (2d Cir. 2014).

238 *Id.*

239 Rutledge & McGuire, *supra* note 22, at 13.

Not surprisingly, courts presented with client choice arguments have repeatedly rejected them.[240] Some courts have specifically noted the speculative "sky is falling" nature of these arguments.[241] As the Colorado Supreme Court aptly observed in *LaFond v. Sweeney*,[242] "[h]ypothetical harm, as opposed to actual harm to the client's ability to choose counsel in [a] case, is not a pertinent consideration when determining the rights and obligations of attorneys to their firms."[243]

For that matter, a variety of factors may deter or prevent a client from following a lawyer from a dissolving firm to another firm.[244] A conflict of interest may prevent the lawyer from representing the client at the second firm, or the client may find the second firm's fee structure unacceptable and therefore seek different representation.[245] Lawyers who depart dissolving law firms for new firms have no obligation to ensure that their new firms are acceptable to their existing clients.[246]

Another common argument against the unfinished business doctrine in the law firm context asserts that because clients are not property and belong to no lawyer[247] and can discharge their lawyers at any time for any reason or for no reason at all,[248] their open matters cannot fairly be characterized as property of the dissolved firm. But this argument is unsupportable. First, it ignores the fact that the subject clients had not discharged the

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240 *See, e.g.*, Jewel v. Boxer, 203 Cal. Rptr. 13, 17 (Cal. Ct. App. 1984) ("[T]he right of a client to the attorney of one's choice and the rights and duties as between partners with respect to income from unfinished business are distinct and do not offend one another. Once the client's fee is paid to an attorney, it is of no concern to the client how that fee is allocated among the attorney and his or her former partners."); Ellerby v. Spiezer, 485 N.E.2d 413, 416 (Ill. App. Ct. 1985) ("This right of the client is distinct from and does not conflict with the rights and duties of the partners between themselves with respect to profits from unfinished partnership business because since, once the fee is paid to an attorney, it is of no concern to the client how the fee is distributed among the attorney and his partners.").

241 *See, e.g.*, *In re* LaBrum & Doak, LLP, 227 B.R. 391, 409 (Bankr. E.D. Pa. 1998) ("Although the Defendants bluster about the allegedly disastrous public policy of such principles, they are unable to cite any cases from any jurisdictions regarding law firms to the contrary.").

242 LaFond v. Sweeney, 343 P.3d 939 (Colo. 2013).

243 *Id.* at 947.

244 Rutledge & McGuire, *supra* note 22, at 13.

245 *Id.*

246 *Id.*

247 *See* Phil Watson, P.C. v. Peterson, 650 N.W.2d 562, 565 n.1 (Iowa 2002) ("[C]lients do not 'belong' to [a] firm or its individual members . . . ."); Shamberg, Johnson & Bergman, Chtd. v. Oliver, 220 P.3d 333, 341 (Kan. 2009) ("A client is not an article of property in which a lawyer can claim a proprietary interest, which he can sell to other lawyers expecting to be compensated for the loss of a property right.") (quoting Palmer v. Breyfogle, 535 P.2d 955, 966 (Kan. 1975)).

248 Nabi v. Sells, 892 N.Y.S.2d 41, 43 (App. Div. 2009); MODEL RULES OF PROF'L CONDUCT r. 1.16 cmt. 4 (AM. BAR ASS'N 2016).

dissolved firm and, indeed, followed their lawyers to their new firms. Second, although the dissolved law firm may not have an enforceable property interest in the client's matter, it does have an enforceable property interest in the proceeds from its lawyers' work.[249] In undertaking work for a client, a partner commits that those fees will flow to the firm and be shared among the partners according to the partnership agreement, or in the absence of a partnership agreement, pursuant to the jurisdiction's partnership law.[250] Third, the new law firms wanted the dissolved law firm's partners to join them precisely because they would transfer their clients. The relocating lawyers surely promoted their client relationships when negotiating their moves to their new firms. The lawyers and their new firms cannot fairly disclaim the unfinished business doctrine on client choice principles even as they are counting on client loyalty to obtain financial benefits.

The best argument against the unfinished business doctrine is that it must not be worth enforcing because it can be so easily waived. Phrased as a question, if a law firm can circumvent the unfinished business doctrine simply by inserting a *Jewel* waiver in its partnership agreement, what value is there in enforcing the doctrine in the absence of such a waiver? The answer, it would seem, is either "none" or "not much."

As sensible and appealing as this argument is, it is unlikely to carry the day. The trouble is its flipside: a law firm is a sophisticated organization with the ability to avoid the unfinished business doctrine by drafting its partnership agreement accordingly. A treatise on law firm partnerships even offers a sample *Jewel* waiver for lawyers to use when drafting or amending their partnership agreements.[251] In short, a firm that chooses not to include a *Jewel* waiver in its partnership agreement effectively consents to governance at dissolution by default partnership law and thus submits to application of the unfinished business doctrine.[252] Furthermore, the unfinished business doctrine's status as a default rule does not make it undeserving of recognition or enforcement. If that were the case, every jurisdiction would have to abandon its partnership statutes. After all, the UPA and RUPA primarily set default rules.[253]

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249 Rutledge & McGuire, *supra* note 22, at 14.

250 *Id.* (citing Ellerby v. Spiezer, 485 N.E.2d 413, 416 (Ill. App. Ct. 1985)).

251 CORWIN & CIAMPI, *supra* note 41, § 6.03[7], at 6-40.4.

252 *See* Rutledge & McGuire, *supra* note 22, at 9.

253 Husch & Eppenberger, LLC v. Eisenberg, 213 S.W.3d 124, 132 (Mo. Ct. App. 2006); McCormick v. Brevig, 96 P.3d 697, 703 (Mont. 2004); Ederer v. Gursky, 881 N.E.2d 204, 212 (N.Y. 2007); Bushard v. Reisman, 800 N.W.2d 373, 381 (Wis. 2011); *see, e.g.*, HILLMAN ET AL., REVISED UNIF. P'SHIP ACT, *supra* note 56, § 103(a) ("To the extent the

V. CONCLUSION

Law firm failures are disturbingly common. Even brand name law firms collapse with odd frequency. Regardless of the particular firm or reasons for dissolution, failed law firms typically have open client matters. This triggers application of the unfinished business doctrine, which is an entrenched aspect of partnership law. Under the unfinished business doctrine, absent an agreement to the contrary, partners have a duty to account to the dissolved firm and their former partners for either all fees or profits generated from work in progress at the time of the firm's dissolution in accordance with their percentage interests in the dissolved firm.

For years, courts have applied the unfinished business doctrine to all client matters, including those billed by the hour. There seemed to be no doubt that the unfinished business doctrine applied to hourly matters just as it did to contingent fee cases. Then, in 2014, two courts upset the applecart when they rejected the doctrine's application to client matters that are billed hourly. In *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*,[254] New York's highest court held that "pending hourly fee matters are not partnership 'property' or 'unfinished business' within the meaning of New York's Partnership Law."[255] In *Heller Ehrman LLP v. Davis, Wright, Tremaine LLP*,[256] a California federal court reasoned that California law was "unsettled on the question of whether a law firm may assert a property interest in hourly fee matters pending at the time of its dissolution,"[257] and held that equity and public policy weighed against recognition of the unfinished business doctrine in that context.[258] The losing bankruptcy trustee appealed to the Ninth Circuit, and the case has now reached the California Supreme Court on a certified question from the Ninth Circuit. The California Supreme Court's decision will determine the outcome in *Heller Ehrman*.

In re Thelen and *Heller Ehrman* were wrongly decided. The principal arguments against the unfinished business doctrine that have been made to date are unpersuasive. But if the California Supreme Court holding compels the Ninth Circuit to affirm the district court's decision in *Heller Ehrman*, it will be fair to wonder whether the unfinished business doctrine will

partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.").

254 20 N.E.3d 264 (N.Y. 2014).

255 *Id.* at 266–67.

256 527 B.R. 24 (N.D. Cal. 2014).

257 *Id.* at 30.

258 *Id.* at 30–33.

survive in jurisdictions other than California and New York. It is hard to have any confidence that other courts will reject the reasoning of courts as influential as the New York Court of Appeals and the California Supreme Court, regardless of the strength of any contrary arguments.

None of this is to say that the unfinished business doctrine is perfect or that it does not yield results in some cases that appear unfair to the lawyers involved. But the unfinished business doctrine is a default rule that lawyers can contract around. And whatever unfairness lawyers claim is arguably matched by the unfairness that creditors of the dissolved law firm will feel if the doctrine is abrogated in the hourly fee context. Insofar as law firms that hire lawyers from dissolved law firms go, operation of the unfinished business doctrine is simply a cost of doing business. If they want the client relationships that relocating lawyers are able to deliver, they need to be prepared to either (a) share the fees generated by open matters that are transferred to them; or (b) negotiate some preferable resolution with the dissolved firm's administrator or trustee. Recent experience teaches that law firms can settle unfinished business claims for pennies on the dollar.

In contrast, abrogating the unfinished business doctrine in connection with law firms' hourly representations may come at a cost. For example, it is fair to worry that courts' rejection of the doctrine may lessen some companies' willingness to do business with law firms or will cause them to insist on terms that are disadvantageous to law firms. More broadly, exempting law firms from the doctrine's operation in connection with matters billed by the hour risks creating the impression that courts are favoring lawyers over other partnerships that remain subject to the doctrine.[259] The appearance of such self-interest is potentially corrosive to the legal profession.

In conclusion, partnership law requires courts to apply the unfinished business doctrine to client matters that law firms bill by the hour. The California Supreme Court in *Heller Ehrman* should so hold to be consistent with the state's lower appellate courts that have long done so. This is the correct result as a matter of partnership law, even if it is unpopular with lawyers and law firms.

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259 *See generally* Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 454–55 (2008) (stating the hypothesis, later said to be established, that "if there is a clear advantage or disadvantage to the legal profession in any given question of law, the cases are easy to predict: judges will choose the route (within the bounds of precedent and seemliness) that benefits the profession as a whole").