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In the case of *SPYGLASS MEDIA GROUP, LLC, f/k/a Lantern Entertainment LLC v. BRUCE COHEN PRODUCTIONS; BRUCE COHEN*, Nos. 20-1750 and 20-1751 (May 21, 2021), the U.S. Third Circuit Court of Appeals held that a work-for-hire contract between a producer and a bankrupt movie studio—in this case, the Weinstein Company—could be sold in the bankruptcy case without the need to pay contingent compensation owed to the producer at the time of the sale.

The court's decision is of particular importance to producers and other talent parties who potentially can avoid this result by contracting around it in their work-for-hire agreements. While the Third Circuit ruling was adverse to the talent parties, the decision provides a road map for producers and other talent parties who want to ensure that a bankrupt studio cannot sell work-for-hire agreements absent payment of past-due compensation to producers and other talent who are parties to those agreements.

During the bankruptcy case, the Weinstein Company sold substantially all of its assets to Spyglass Media Group, including the intellectual property and work for-hire agreements associated with the film *Silver Linings Playbook*. The talent involved in the making of *Silver Linings Playbook* argued that as a result of the sale, they were entitled to payment in full of their past-due contingent compensation, while the Weinstein Company and Spyglass maintained that the past-due contingent compensation should be treated as an unsecured claim in the bankruptcy case, worth pennies on the dollar.

Under bankruptcy law, entitlement to payment in full of past-due amounts turned on the issue of whether there remained material obligations on each side of the contract at the time the Weinstein Company filed its bankruptcy case. The court agreed that the requirement to pay contingent compensation was a material obligation and thus the Weinstein Company had remaining material obligations under the contract. However, the court held that the main purpose of the production contract was to produce the movie, and thus concluded that the remaining obligations on the part of the producer were "ancillary."

Based on the Weinstein decision, producers who want to guard against the potential of a bankrupt studio transferring their contracts without the need to pay them compensation that accrued prior to a bankruptcy sale should include in their work-for-hire agreements: (a) all ongoing obligations of the producer, including those obligations that continue to exist subsequent to the completion of the film in question; (b) a provision stating that all ongoing obligations pursuant to the work-for-hire agreement are material; and (c) a remedies section providing that the breach of any ongoing obligation by the producer will allow the studio to withhold compensation until the breach is either cured or waived. While bankruptcy law in this area continues to evolve, the inclusion of these provisions in work-for-hire agreements substantially increases the likelihood of payment in

the event of a studio bankruptcy.

The contract in question provided that contingent compensation would cease to be paid upon any default by the producer. The inclusion of that provision would lead to the conclusion that all remaining obligations on the part of the producer, even the so-called "ancillary" obligations, should be deemed material. The Third Circuit agreed that a contract could by its own terms make provisions material; however, the court found that the contractual language did not clearly indicate that the parties intended such a result. The court noted that the provision at issue was not in the remedies section of the contract. Rather, it read the language as a condition precedent that had to be fulfilled prior to payment. As such, the Third Circuit affirmed the ruling of the Bankruptcy Court and held that any unpaid compensation at the time of sale would be nothing more than an unsecured claim in the Weinstein bankruptcy case.

In closing, the Third Circuit notes: "To be clear, we recognize that parties can contract around a state's default contract rule regarding substantial performance, and by doing so they can also override the Bankruptcy Code's intended protections for the debtor. However, that result can only be accomplished clearly and unambiguously in the text of the agreement." ■

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