

Mission Product: Trademarks? Yes. Mootness? No

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In *Mission Product Holdings, Inc. v. Tempnology, LLC*, 587 U.S. ____ (2019), the Supreme Court held that a debtor's rejection of a trademark license does not eliminate the licensee's right to use the trademark through the completion of the contract, settling a split in the Circuits. The Supreme Court also ruled that the case was not moot, despite the bankruptcy estate's distribution of all of its assets, which may have important implications for the developing jurisprudence on mootness in bankruptcy cases.

In *Mission Product*, Tempnology LLC was a Chapter 11 debtor that owned a variety of intellectual property (IP) related to certain athletic products designed to keep the user cool during exercise. Tempnology entered an agreement with Mission Product Holdings Inc. that included a nonexclusive license for Mission Product to use its trademark. A few years later, before the agreement expired, Tempnology sought bankruptcy court approval to reject the agreement with Mission Product and a declaratory judgment ruling that rejection terminated the trademark license. The bankruptcy court held that Tempnology's rejection resulted in termination of the license and that Mission Product could only recover pre-petition damages for breach of contract as a result. The Bankruptcy Appellate Panel for the First Circuit reversed, but the First Circuit reinstated the Bankruptcy Court's rulings on appeal.

Justice Elena Kagan, writing for a majority of the Court, reversed the First Circuit. The Supreme Court held that under Section 365 of the Bankruptcy Code, "a debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy" and "[s]uch an act cannot rescind rights that the contract previously granted..." In this case, this meant that the debtor-licensor's rejection did not take away Mission Product's right to continue using the trademark until the end of the contract term.

This case resolved an issue that had divided the First and Seventh Circuits. The Supreme Court rejected the argument that Congress's failure to include trademarks within the purview of 365(n)'s special licensee protections gives rise to a "negative inference" that a trademark licensee may not retain its license rights post-rejection. Rather, the Supreme Court relied on the more general provisions of Section 365, including 365(g), which provide that a rejection of an executory contract constitutes a breach of such contract, with "breach" defined by reference to the non-bankruptcy law applicable to the contract. Therefore, a trademark license, like other rights granted under a contract, could not be rescinded merely as the result of a rejection.

The Supreme Court's mootness analysis may also prove important in bankruptcy cases. Appellate courts faced with appeals of bankruptcy court decisions recognize the doctrine of mootness when determining whether to grant relief. Bankruptcy debtors often assert the doctrine of mootness – whether constitutional Article III mootness or equitable mootness – to oppose appeals after plans of reorganization have been consummated. In *Mission Product*, an 8-1 majority of the Court held that an appeal may be heard even where the "practical impact" of a favorable decision for the appellant is "unsure." The Supreme Court ruled that if there is any chance of a recovery for the appellant, the case is not moot, even if such recovery may be "uncertain or even unlikely." The ruling is particularly relevant to the issue of appeals subsequent to confirmed plans of reorganization, especially in the context of liquidating plans where the main result is the distribution of monies to creditors as opposed to reorganization and refinancing of corporate, operational, and capital structures. The Supreme Court ruled that notwithstanding the debtor's argument that the "bankruptcy estate has recently distributed all of its assets, leaving nothing to satisfy Mission's judgment," because Mission Product could seek "the unwinding of prior distributions to get its fair share of the estate," the appeal was not moot.

Contacts



Ronald J. Silverman

Co-Head of U.S. Business Restructuring
and Insolvency, New York

T +1 212 918 3880

ronald.silverman@hoganlovells.com



Sean A. Feener

Associate, New York

T +1 212 918 5708

sean.feener@hoganlovells.com

Jason Sloan

Summer Associate, New York

T +1 212 918 6332

jason.sloan@hoganlovells.com

www.hoganlovells.com

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