

UNIVERSITY OF TEXAS LAW CLE
2015 CONFERENCE ON LLCs, LPS AND PARTNERSHIPS

The Consequences Of An LLM Member Filing Bankruptcy
From Ehmman To Denman And Beyond

Program: 10 July at 9:00 a.m.

Carter G. Bishop, Suffolk University Law School, Boston, MA

Jay Adkisson, Riser Adkisson LLP, Henderson, NV

Ehmann And Its Progeny

by Jay D. Adkisson

- *Movitz v. Fiesta Investments, LLC (In re Ehmann)*, 319 B.R. 200 (D.Ariz. 2005) — Debtor/member's non-managing interest in "Family LLC" arrangement did not require any further significant action on the part of the debtor to receive distributions, and were thus non-executory in nature and § 365 would not apply. Future potential obligations, such as to respond to cash calls, did not render the contract executory. The interest thus comes into the debtor's bankruptcy estate under § 541, and restrictions in the Operating Agreement that would prohibit transfer are rendered inapplicable under § 541(c)(1).
- *In re Capital Acquisitions & Management Corp.*, 341 B.R. 632 (N.D.Ill., 2006) — Future and remote contingencies do not render an Operating Agreement to be an executory contract under § 365.
- *Miller v. Bill & Carolyn Limited Partnership (In re Baldwin)*, 463 B.R. 142 (10th Cir. BAP, 2006) — The debtor/member's limited partnership interest comes into her bankruptcy estate under § 541 and thus the Bankruptcy Trustee is not limited to pursuing a charging order against the debtor/member's interest. However, the Bankruptcy Trustee takes the interest subject to restrictions under the Operating Agreement, and thus would be prohibited from dissolving the limited partnership even if such were otherwise allowed under applicable Oklahoma law.
- *Meiburger v. Endeka Enterprises, LLC (In re Tsiaoushis)*, 383 B.R. 616 (Bk.E.D.Va., 2007) — The debtor/member's non-managing interest comes into his bankruptcy estate under § 541, but was not an executory contract under § 365 where the debtor/member had

no unperformed duties, but only "remote or speculative future duties" under the Operating Agreement, commenting "There is no *per se* rule. Each operating agreement is separately analyzed." The Bankruptcy Trustee was then able to enforce the provisions of the Operating Agreement that required the LLC to be dissolved upon a member's filing for bankruptcy, overcoming objections that such clauses amounted to impermissible *Ipso Facto* clauses.

- *Fursman v. Ulrich (In re First Protection, Inc.)*, 440 B.R. 821 (9th Cir. BAP, 2010) — Post-petition, the husband and wife debtors diluted their 100% interest in an LLC by issuing interests to Thompson (wife's mother), the latter who agreed to provide financing to finishing a constructive project. The Bankruptcy Trustee commenced an adversary action to set aside the transfer since it was post-petition. The Court held that the LLC's issuance of new interests to Thompson was in a way of a transfer, and the transfer was void because the debtors did not own any interests post-petition, but rather those interests were owned by their bankruptcy estate. The Court held that the Trustee was not limited to a charging order against the LLC interests, but rather took possession of the totality of the debtors' rights under §541 per *In re Albright* (since the LLC was essentially a single-member LLC being owned by co-debtor husband and wife), and that because § 365 was designed in part "to protect non-debtor third parties whose rights may be prejudiced by having a contract performed by an entity other than the one with which they originally contracted", and there were no non-debtor members here, that § 365 would not apply to restrict the Trustee's ability to essentially take over *in toto* the LLC.
- *Bensusan v. Prebul (In re Prebul)*, 2011 WL 2947045 (Bk.E.D.Tenn., 2011) — Operating Agreement was not an executory contract under § 365 merely because of a potential future