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Is the Debtor Left Standing when the Music Stops: Assumption and Rejection of Executory Recording Contracts by Insolvent Musicians

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CASENOTES

IS THE DEBTOR LEFT "STANDING" WHEN THE MUSIC STOPS: ASSUMPTION AND REJECTION OF EXECUTORY RECORDING CONTRACTS BY INSOLVENT MUSICIANS

I. INTRODUCTION

The music industry is built on intangibles: hope, dreams, talent, drive and a predictive ability by recording company executives to accurately gauge the future direction of the public's taste in music. The industry is not based solely on mystic speculation however. Record companies need large amounts of money to finance the concrete aspects of the business, which include signing new bands, producing records and promoting performers to the record-buying public. When a business is built on this volatile mix of nebulous elements and the corporate bottom-line, the parties involved necessarily take many financial risks. Indeed, the statistics show that it is more likely that a young band will be a financial liability to the recording company, rather than a commercial success.[1] As a result, the recording industry generally invests in unknown talent with the hope that one artist out of ten may generate profits.[2] The need to spend a great deal of money up front before any success can be measured, and the probability that a band will financially fail, are risks inherent in the music industry that record companies have acknowledged and compensated for in their business practices.[3]

Since the 1982 New York federal court decision of *Matter of Noonan,*[4] record companies have faced an additional risk. The *Noonan* court held that musicians under exclusive recording agreements with record companies could terminate these personal services contracts in bank-

1. Julis & Baez, *Bankruptcy: The Death of Recording Contracts,* 2 CARDOZO ARTS & ENT. L.J. 189, 207 n.89 (Spring 1982). According to the authors, about 70-80% of the albums recorded fail to break even. *Id.*

2. *Id.*

3. Declaration of Miles Copeland in Support of *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction at 3, International Record Syndicate, Inc. v. Mankey, Ch. 7 Case No. LA 87-18211-GM (1987) [hereinafter Declaration of Copeland].

4. 17 Bankr. 793 (Bankr. S.D.N.Y. 1982), *aff'd mem.,* 697 F.2d 294 (2d Cir. 1982).

ruptcy.[5] This decision, reached by a loose interpretation of Bankruptcy Code section 365,[6] has given performers a potent tool to use against recording companies.[7] The threat of a performer's bankruptcy could force the record company into renegotiation of the recording agreement, or if renegotiation fails, the performer can break the contract by rejecting it[8] in the bankruptcy.

The decision also has meant that the discharged contracts are no longer effective between the parties, and thus record companies are left without a remedy for the performers' contractual breach upon bankruptcy. Under the terms of most recording agreements, the company reserves the right to seek a negative injunction[9] to prevent the performer from recording or performing for another company. However, in the face of a discharged recording agreement, the contractual remedy of a negative injunction is useless because it is unenforceable. Hence, record companies have been forced to absorb not only the marketplace risks that

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5. *Id.* at 799.

6. 11 U.S.C. § 365 (1987). Section 365 states in relevant part:

> (d)(1): In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract . . . within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract . . . is deemed rejected.

Id.

The Code does not define what types of contracts are executory. However, the term executory generally refers to contracts on which some performance remains due on both sides. *See generally* Countryman, *Executory Contracts in Bankruptcy,* 57 MINN. L. REV. 439 (1973).

7. Declaration of Michael O'Brien in Support of *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction at 13, International Record Syndicate, Inc. v. Mankey, Ch. 7 Case No. LA 87-18211-GM (1987) [hereinafter Declaration of O'Brien in Support of *Ex Parte* Application].

8. Julis & Baez, *supra* note 1, at 189.

9. 38 Cal. Jur. 3d *Injunctions* §§ 1, 2 (1977). Section 1 states:

> An injunction is a writ or order requiring a person to refrain from a particular act or to do a particular act. A restrictive injunction is a form of preventive relief usually referred to as a prohibitory injunction, whereas an injunction requiring affirmative action is a form of specific relief commonly designated a mandatory injunction.

Section 2 states:

> An injunction is a remedy, not a cause of action, and will not be granted if no cause of action exists. An action for an injunction is an equitable proceeding and must be based on equitable circumstances. The remedy is available generally for the protection of legal rights, its purpose being to prevent threatened action and its office being to restrain a wrongdoer, not to punish him. It is summary, peculiar, and extraordinary, and should not be granted in a doubtful case. The right to an injunction should be clear, and should be based on a showing of impending or threatened injury that can be averted only by the injunctive process. It will not issue to enforce a right or prevent a wrong in the abstract, nor will it be issued where it will retard justice or where it can be of no conceivable benefit to the plaintiff and would thus be useless. The remedy is *in personam,* and lies for the protection of rights, not to enable the perpetration of wrongs.

Id.

a performer will not become successful, but also to absorb the further risk that a performer may be able to walk away from his or her recording agreement by filing for bankruptcy.

The court in *In re James Andrew Mankey,*[10] however, eliminated any chance that a musician could manipulate the bankruptcy process for personal gain by reaching a conclusion contrary to *Noonan.* In *Mankey* the court interpreted the language of section 365 literally.[11] The court held that an executory personal services contract does not fall within the provisions of section 365 of the Bankruptcy Code at all.[12] Thus, the exclusive recording agreements, which are personal services contracts between the performer-debtors and the record company, could not be rejected in bankruptcy court.[13] The *Mankey* court held that the recording agreement remained in effect[14] even after the debtors received their individual bankruptcy discharges[15] from the remainder of their debts.

While record companies will be pleased by the *Mankey* decision because it extends the control the companies wield over performers,[16] the *Mankey* court may have struck a grave blow, and in fact contravened, the "fresh start" policy underlying the Bankruptcy Code. The policy behind the Bankruptcy Code is to give the honest but unfortunate debtor a right of discharge[17] from his debts in order to provide the debtor with a

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10. Ch. 7 Case No. LA 87-18211-GM, slip op. at 5-6 (Bankr. C.D. Cal. Nov. 19, 1987) [hereinafter *Mankey*].

11. *Mankey, supra* note 10, at 5-6. The *Mankey* court stated in its slip opinion that "[t]he Court's opinion in In re [Tia] Carrere . . . is consistent with this case." *Id.* The *Mankey* court fully adopted its reasoning from *Carrere.* Subsequent citations to the *Mankey* slip opinion will be followed by a citation to *Carrere* where the court explains its reasoning. *See* In re Tia Carrere, 64 Bankr. 156 (Bankr. C.D. Cal. 1986).

12. *Mankey, supra* note 10, at 6.

13. *Id.*

14. *Id.*

15. 3 COLLIER ON BANKRUPTCY ¶ 524.01 (15th ed. 1979). Section 524(a)(1) states that a discharge voids any judgment obtained against the debtor at any time to the extent that the judgment is a determination of the personal liability of the debtor. Judgments of this type are avoided even if the debtor has waived his right to discharge the particular debt involved. In addition, § 524(a)(2) specifies that a discharge granted to the debtor under §§ 727, 944, 1141, 1228 or 1328, operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, including telephone calls, letters and personal contacts to collect, recover or offset any discharged debt as a personal liability to the debtor. *Id.*

16. Unknown entertainers have limited bargaining power with the record company. All that young artists have to offer is burgeoning but untested talent and enthusiasm. As a result, they often lock themselves into long-term contracts. Julis & Baez, *supra* note 1, at 189. *See also* CAL. LAB. CODE § 2855 (Deering 1976).

17. 3 COLLIER, *supra* note 15. There is one exception to the general rule that the debtor's post-petition property is protected from pre-petition claims of creditors. Under § 542(a)(3), a creditor can attack a debtor's post-petition property under § 541(a)(6). Post-petition property

new financial future.[18]

As a result of the court's decision in *Mankey* the members of the band Concrete Blonde emerged from bankruptcy with their executory[19] personal services[20] contracts still intact. So long as recording agreements are held to be nonrejectable in bankruptcy proceedings,[21] performer-debtors will be unable to experience the vaunted "fresh start" that the Bankruptcy Code promises to all honest debtors who file in good faith.[22]

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includes proceeds, products, offspring, rents and profits which are derived mainly from prepetition property of the estate and which can be reached by creditors.

One way the discharge concept has been given practical effect is by Congress' broad definition of the term "claim." In 11 U.S.C. § 101(4)(A) and (B), all types of claims which can be reduced to a monetary value are included. This enables all claims against the bankrupt to be valued, paid off according to the rules of bankruptcy and then discharged to free the debtor. If a claim cannot be reduced to a "right of payment" it is not dischargeable, and to the extent that the claim is nondischargeable, the debtor's "fresh start" is impaired. *See generally* 11 U.S.C. §§ 541, 542, 101 (1987).

18. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

19. Countryman, *supra* note 6, at 460. Professor Countryman defines executory contracts as "a contract under which the obligations of both a bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." *Id.* Additionally, Professor Williston has suggested that "[a]ll contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts." 1 S. WILLISTON, CONTRACTS § 14 (3d ed. 1957).

20. 4A COLLIER ON BANKRUPTCY ¶ 70.22[3] (14th ed. 1979). "A personal services contract is a contract which is based upon personal skills, or upon personal trust or confidence. Whether a contract involves personal skill, trust or confidence depends upon the subject of the contract, the circumstances of the case, and the intent of the parties." *Id.*

21. *Mankey, supra* note 10, at 5.

22. In the context of determining the rejectability of executory personal services contracts, the bankruptcy courts have bypassed the issue of good faith at the filing stage. Instead, judges are seeking a satisfactory way to handle these contracts on a regular basis. Hence, this case-note will not deal with the issue of whether the debtor-performers' contract should have been dismissed for lack of good faith.

The framers of the Bankruptcy Code did not explicitly address the issue of good faith filings in Chapter 7 proceedings. Historically, courts have held that judicial interpretation incorporates a standard of good faith for the commencement, prosecution and confirmation of bankruptcy proceedings. Matter of Little Creek Dev. Co., 779 F.2d 1068, 1071 (5th Cir. 1986). *See also* In re Victory Constr. Co., 9 Bankr. 549, 551-60 (Bankr. C.D. Cal. 1981) (containing an excellent historical survey of good faith requirements in bankruptcy).

Courts have recognized that a good faith filing standard is effective in preventing abuse or distortion of reorganization or rehabilitation provisions of bankruptcy law. However, concern that creditors will be delayed or a debtor will be able to achieve reprehensible purposes is not as compelling in a Chapter 7 liquidation case as it is in a Chapter 11 reorganization. *Little Creek*, 779 F.2d 1068, 1071. While courts have the common law power to dismiss Chapter 7 cases if not filed in good faith, the Code does not "explicitly authorize" the court to dismiss a petition even if filed in bad faith. In re Southern California Sound Systems, Inc., 69 Bankr. 893, 899 (Bankr. S.D. Cal. 1987).

There may be at least two rationales for the more flexible Chapter 7 good faith standard. First, even if a debtor is only in the early stages of financial failure, his creditors will get paid

II. *IN RE JAMES ANDREW MANKEY*: THE FACTS

James Andrew Mankey, Harry Everette Rushakoff and Johnette Napolitano compose the talented Los Angeles-based rock band known as Concrete Blonde. On December 5, 1986, the group entered into three agreements with International Record Syndicate, Inc. ("I.R.S."). The parties signed a production agreement, an exclusive songwriting agreement,[23] and a co-publishing agreement.[24] The agreements[25] bound the group for an initial one-year term during which Concrete Blonde was required to complete and deliver to I.R.S. one long-playing record album.[26] Under the terms of the contract, I.R.S. had the option to renew its exclusive contract with Concrete Blonde for successive one-year periods, up to a maximum term of seven contract periods;[27] and I.R.S. obligated itself to fully fund Concrete Blonde in all phases of album production during each term.[28]

The company met all its obligations in the first contract period[29] and spent more than $17,500 to groom and prepare the neophyte band and to promote the release of the band's debut album[30] entitled *Concrete Blonde*.[31] I.R.S. spent $125,000 for an all-encompassing promotional campaign for the debut album. The campaign included planning single releases, producing music videos, and putting together the band's first

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something sooner rather than later when there are even fewer assets for the bankruptcy estate; and second, if the debtor willingly chooses to relinquish all of his personal property except for exempt property, he should be allowed to do so.

23. Declaration of O'Brien in Support of *Ex Parte* Application, *supra* note 7, at 3.

The production agreement and the exclusive songwriting agreement are personal services contracts which may only be performed by the band members. The agreements expressly prohibit the band members from providing their songwriting or recording services to any other party during the term; or from entering into any agreement which could interfere or cause interference with the band's performance of the agreements. The exclusive songwriting agreement provides for each of the band members to furnish the record company with his or her exclusive songwriting services during the term of the production agreement. Ownership of all compositions written during the term, including the copyrights to the works, vest in the recording company. *Id.*

24. *Id.* Under the co-publishing agreement all recordings produced by the band, or any of the band members during the term are, and become, sole and exclusive property of the record company from the inception of the recording. *Id.*

25. *Id.*

26. *Id.*

27. *Id. See also* CAL. LAB. CODE § 2855 (Deering 1976).

28. *Mankey, supra* note 10, at 4.

29. *Id.*

30. Declaration of O'Brien in Support of *Ex Parte* Application, *supra* note 7, at 6.

31. Motion of I.R.S. Records for an Order Dismissing Chapter 7 Case or, in the alternative, Providing that an Executory Contract for Personal Services is Excluded from the Operation of 11 U.S.C. §§ 365(a) and (d)(1) at 4, International Record Syndicate, Inc. v. Mankey, Ch. 7 Case No. LA 87-18211-GM (1987) [hereinafter Motion of I.R.S. for Dismissal].

tour.[32] In addition, I.R.S. gave the band an additional $13,488 to insure that the band members maintained an adequate standard of living[33] while waiting to see how the debut album fared.

Concrete Blonde released its debut album on December 29, 1986.[34] Both the band and the album generated much critical acclaim, and the album sold approximately 90,000 copies worldwide.[35] By April, 1987, *Concrete Blonde* cracked the "Top 100" and soon spawned three popular videos. Later that year, ROLLING STONE magazine profiled the band.[36] Though the record had limited sales, the volume of sales indicated to I.R.S. executives that Concrete Blonde was a promising act with a bright future.[37] Pleased with the band's initial performance, I.R.S. exercised its first option[38] and renewed all of the agreements between Concrete Blonde and I.R.S. for a second year. Under the renewed agreements the recording company paid out at least $23,000 towards the creation of the band's second album. This amount was exclusive of monies paid directly to the band members for living expenses.[39]

Within minutes of each other on September 4, 1987, each member of Concrete Blonde filed separate voluntary petitions[40] in bankruptcy under Chapter 7.[41] In each petition the performer-debtor's schedule listed only three substantial creditors: the band's general and bankruptcy counsel, the band's accountant and the band's manager.[42] Each band member listed identical income and expense figures, and all three members of Concrete Blonde failed to include in their petitions a statement of executory contracts or unexpired leases that each held as required by Bank-

32. Declaration of O'Brien in Support of *Ex Parte* Application, *supra* note 7, at 5.

33. Motion of I.R.S. for Dismissal, *supra* note 31, at 5.

34. Declaration of O'Brien in Support of *Ex Parte* Application, *supra* note 7, at 5.

35. *Id.*

36. *Id.* at Exhibit G.

37. Declaration of Michael O'Brien in Support of I.R.S. Records' Motion for an Order Dismissing Chapter 7 Case or, in the alternative, Providing that an Executory Contract for Personal Services is Excluded from the Operation of 11 U.S.C. §§ 365(a) and (d)(1) at 2, In re James Andrew Mankey, Ch. 7 Case No. LA 87-18211-GM (Bankr. C.D. Cal. 1987) [hereinafter O'Brien in Support of Dismissal].

38. *Id.*

39. O'Brien in Support of Dismissal, *supra* note 37, at 2.

40. 11 U.S.C. § 301 (1987). This section governs the manner in which a voluntary bankruptcy is commenced. The debtor may file under Chapter 11 for corporate reorganization; under Chapter 13 for an individual reorganization; or under Chapter 7 for liquidation.

In a liquidation, the debtor turns over all nonexempt property which is sold and the money is used to repay creditors. In exchange, the debtor is no longer personally liable for any unpaid debts which arose before he filed for bankruptcy. The filing of the petition constitutes an order for relief in the case under that chapter. *Id.*

41. Motion of I.R.S. for Dismissal, *supra* note 31, at 5.

42. *Id.*

ruptcy Rule 1007(b)(1).[43] The statements of affairs[44] attached to the performer-debtors' petitions seemed to suggest that the band members were not in a distressed financial situation.[45]

Each performer-debtor admitted in his or her petition that he or she was filing for bankruptcy in an attempt to reject the group's agreements with I.R.S.[46] Concrete Blonde's intentions to reject the contracts were very clear. The president of I.R.S. stated that, "[s]ince the members of Concrete Blonde filed bankruptcy, the word 'on the street' . . . has been that Concrete Blonde is free of its contractual commitments to I.R.S. and is 'on the market' and that signing with another label is imminent."[47] Furthermore, on September 22, 1987, eighteen days after filing for bankruptcy, Concrete Blonde performed in a "showcase" presentation at the Roxy Theater in West Hollywood. Representatives of the major record labels including A&M Records, Capitol Records and Geffen Records attended. Concrete Blonde performed in the showcase to publicize its desire to sign with a different label.[48]

I.R.S. filed a motion in the bankruptcy court to dismiss the band members' bankruptcy petitions on the grounds that the petitions were filed in bad faith.[49] Alternatively, the record company argued that a contract for personal services was excluded from the operation of 11 U.S.C. section 365 because personal services contracts do not become part of the bankruptcy estate, and thus the band members could not reject the agreements.[50]

On the basis that the agreements were determined nondischargeable, I.R.S. argued that the court should grant the record company its contractual remedy and enjoin Concrete Blonde from performing or recording for any other record company.[51] I.R.S. argued that a denial of the injunction would injure the company's distribution relationship with MCA Records.[52] Denial of the injunction would also mean that I.R.S.

43. *Mankey, supra* note 10, at 4. *See generally* Bankruptcy Rule § 1007(b)(1).

44. *The Statement of Financial Affairs for Debtor Engaged in Business* is a comprehensive official form. It is required by Bankruptcy Rule § 1007(b)(1). The court, however, can waive the statement requirement.

45. Motion of I.R.S. for Dismissal, *supra* note 31, at 5-6. "Evidence of collection efforts, defaults, or repossessions of band member debts of property is noticeably absent from the petitions." *Id.*

46. *Mankey, supra* note 10, at 4.

47. Declaration of Copeland, *supra* note 3, at 1.

48. O'Brien in Support of Dismissal, *supra* note 37, at 3-4.

49. Motion of I.R.S. for Dismissal, *supra* note 31, at 6-7.

50. *Id.* at 12.

51. Declaration of O'Brien in Support of *Ex Parte* Application, *supra* note 7, at 12.

52. *Id.* at 13.

would not receive the benefit of its bargain under the agreements, which was the exclusive right to market and distribute the works and songs of the group.[53] Finally, I.R.S. feared that if the other recording groups signed to its label learned that I.R.S. was powerless to prevent Concrete Blonde from rejecting its contract, the company would be in peril.[54] I.R.S. feared that its other artists would follow Concrete Blonde's example: perform under their agreements until they reached the "initial pinnacle of success," then terminate their contracts by filing for bankruptcy in order to obtain more attractive contracts with other companies.[55]

III. THE COURT'S ANALYSIS

The bankruptcy court in *Mankey* concluded that Concrete Blonde's executory personal services contract survived each performer's discharge in bankruptcy.[56] To determine whether Concrete Blonde's recording agreement with I.R.S. could be rejected in bankruptcy, the court relied upon the reasoning in *In re Tia Carrere*.[57] Following its own precedent, the *Mankey* court analyzed section 365 of the Bankruptcy Code.[58] The *Mankey* court stated that section 365 gives the trustee power to assume or assign executory contracts which he determines are advantageous to the estate and to reject contracts which he believes are not lucrative or beneficial.[59]

The court found that the trustee's rejection powers under section 365 are only effective if he has actual rights and duties in the executory contract at issue. Before the trustee could reject Concrete Blonde's con-

53. Motion of I.R.S. for Dismissal, *supra* note 31, at 11.

54. Declaration of O'Brien in Support of *Ex Parte* Application, *supra* note 7, at 12-13.

55. *Id.* at 13.

56. *Mankey, supra* note 10, at 5.

57. 64 Bankr. 156 (Bankr. C.D. Cal. 1986). Tia Carrere was an actress who had entered into a three year personal services contract with American Broadcasting Company ("ABC"), in which she was guaranteed weekly appearances on the network's daytime television soap opera, "General Hospital." Eight months after she began appearing on the show, Tia Carrere filed for bankruptcy with the primary motivation of rejecting the contract with ABC. Carrere apparently expected to be hired as a regular cast member on the night-time television show "The A-Team" after she had appeared on that show in a supporting role. The court held that Carrere could not reject the ABC contract. *Id.* at 160.

58. *Mankey, supra* note 10, at 5. *See Carrere,* 64 Bankr. at 157.

59. *Mankey, supra* note 10, at 5-6. *See Carrere,* 64 Bankr. at 158.

> [I]f the trustee assumes the contract, the trustee is obligated to perform in place of the debtor, and the nonbankrupt party remains obligated to perform. If the trustee fails to perform after assumption, then the non-bankrupt party receives a first priority administrative claim of the estate. A debtor-in-possession has the same rights and powers as the trustee. Those rights are outlined in 11 U.S.C. §§ 1101-1174 (1987).

Zaretsky, *Personal Contracts,* N.Y.L.J., Oct. 16, 1987, at 1, col. 1. For a discussion of how a trustee assumes an executory contract *see infra* note 84. *See also* 11 U.S.C. § 1104 (1987).

tract with I.R.S., the court determined that it had to address the threshold issue of whether the executory personal services contract entered into the bankruptcy estate at all.[60]

The court pointed out that section 541(a)[61] exemplifies the expansive reach of the Bankruptcy Code intended by Congress.[62] Congress determined that the bankruptcy estate is comprised of all legal and equitable interests in property that belong to the debtor on the date he or she files a petition in bankruptcy.[63] Furthermore, as the court noted, Congress intended that all of the debtor's property becomes part of the estate unless Code provisions specifically exclude the property, or allow the debtor to exempt the property.[64] By broadly defining "property of the estate," Congress insured that most of the debtor's assets were available for distribution to the creditors in repayment of their debts.[65]

To determine if property was excluded from the bankruptcy estates of the band members, the court looked to section 541(a)(6).[66] This provision excludes "earnings from services performed by an individual debtor after the commencement of the case" from the bankruptcy estate.[67] The court concluded that post-petition earnings were not assets to which creditors could look for repayment.[68]

The court also concluded that the 1979 congressional expansion of the types of property that entered the bankruptcy estate did not alter the common law concept that personal services contracts remained outside the estate, and also were not available to satisfy creditors' claims.[69] The court found that section 541(a)(6) was a codification of prior cases holding that "[w]here an executory contract between the debtor and another is based on personal service or skill of the debtor, the trustee does not take title to the bankrupt's rights in the contract."[70] The court reasoned

60. *Mankey, supra* note 10, at 5. *See Carrere,* 64 Bankr. at 158.

61. 11 U.S.C. § 541(a) (1987).

62. *Mankey, supra* note 10, at 5. *See Carrere,* 64 Bankr. at 158.

63. *Id.*

64. *Mankey, supra* note 10, at 5. *See generally* 11 U.S.C. § 541 (1987). Both tangible and intangible property is included in the bankruptcy estate. This includes causes of action and all property recovered by the trustee under § 542. *Id. See also* 11 U.S.C. § 522 (1987).

65. "[M]ost of bankruptcy law is concerned . . . with providing a compulsory and collective system for satisfying the claims of creditors." Jackson, *The Fresh-Start Policy in Bankruptcy Law,* 98 HARV. L. REV. 1393, 1395 (1985).

66. *Mankey, supra* note 10, at 5. *See Carrere,* 64 Bankr. at 158.

67. 11 U.S.C. § 541(a)(6) (1987).

68. *Mankey, supra* note 10, at 5. *See Carrere,* 64 Bankr. at 158. *See also* Matter of Noonan, 17 Bankr. 793, 798 (Bankr. S.D.N.Y. 1982), *aff'd mem.,* 697 F.2d 294 (2d Cir. 1982).

69. *Mankey, supra* note 10, at 5. *See Carrere,* 64 Bankr. at 158.

70. Ford, Bacon & Davis, Inc. v. Holahan, 311 F.2d 901 (5th Cir. 1962) (*see* 4A COLLIER ON BANKRUPTCY ¶ 70.22 (14th ed. 1978)).

that because the personal services contract is excluded from the estate, the trustee has no interest in that contract.[71]

The court next addressed the issue of whether the trustee's general powers still enable him to reject the executory contract.[72] The court held that because the trustee has no interest in the contract, he has no standing to dispose of the executory personal services contract under section 365.[73] Therefore, absence of a legal interest in the contract prevents the trustee from assuming or rejecting the personal services recording agreement.

The court then considered whether the performers possessed the required standing to dispose of the recording agreement in the bankruptcy proceeding.[74] The court noted that the unusual nature of the personal services contract meant that the performer-debtors were the only parties in the bankruptcy proceeding who had rights and duties under the recording agreement.[75] The court determined, however, that the debtors were unable to act on the contract because the language of section 365(d)(1) provides that only the *trustee* has the power to reject an executory contract.[76] Thus, the statute precludes a debtor from rejecting the contract on his or her own.[77]

The *Mankey* court, therefore, concluded that an executory personal services contract is beyond the reach of the trustee's powers because the trustee cannot have any interest in a personal services contract.[78] Additionally, the court concluded that the debtors lacked the requisite standing to reject the contract under the Code.[79] Thus, an executory personal services contract passes through bankruptcy unaffected.

IV. ARTICLE OVERVIEW

Mankey and *Matter of Noonan* arrived at contrary results concerning the rejectability of executory personal services contracts in bankruptcy. These decisions come from California and New York, the two

71. *Mankey, supra* note 10, at 6. *See Carrere,* 64 Bankr. at 158 n.2. The right of the trustee or the debtor-in-possession to possess and control property is created by the Bankruptcy Code. It grants standing to deal with "property of the estate." There is no right given to a trustee or a debtor-in-possession to take control of property which is *not* property of the estate. *See* 11 U.S.C. §§ 704(1), 1106, 1107 (1987).

72. *Mankey, supra* note 10, at 6. *See Carrere,* 64 Bankr. at 158.

73. *Mankey, supra* note 10, at 5. *See Carrere,* 64 Bankr. at 159.

74. *Mankey, supra* note 10, at 6. *See Carrere,* 64 Bankr. at 157-58.

75. *Mankey, supra* note 10, at 5. *See Carrere,* 64 Bankr. at 159.

76. 11 U.S.C. § 365(d)(1) (1987).

77. *Mankey, supra* note 10, at 6. *See Carrere,* 64 Bankr. at 159.

78. *Mankey, supra* note 10, at 5.

79. *Id.*

states where most of the record industry is located.[80] The dichotomy of the holdings threatens to make an unstable industry even shakier, and also illuminates the absence in the Bankruptcy Code of appropriate guidelines for dealing with the issue. Until Congress intervenes, uncertainty will persist about the post-bankruptcy relationship between recording artists and record companies. Without a statutory amendment, cases on this issue will turn solely on whether a court gives more weight to the executory nature of the contract and deems the contract rejectable by the trustee under section 365; or whether the court gives more weight to the unique personal services aspect of the agreement and excludes the contract from the bankruptcy estate.

If the court finds the contracts rejectable, the court must further determine which party to the bankruptcy, the trustee or the debtor, possesses the requisite standing[81] to determine the fate of the contract. The *Mankey* court held the contract to be nonrejectable because it gave greater weight to the personal services aspect of the executory agreement and therefore prohibited the contract from entering the bankruptcy estate.[82] By its findings, the court necessarily determined that no party to the bankruptcy process, neither trustee, nor the performer-debtors, had the requisite standing to dispose of the exclusive recording agreements.[83]

Since the framers of the Bankruptcy Code dealt specifically with the trustee's powers to assume,[84] assign[85] and reject[86] general executory contracts in section 365, it seems anomalous that Congress left the disposi-

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80. D. BIEDERMAN, R. BIERRY, E. PIERSON, M. SILFERN, J. GLASS, LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 2 (1987) [hereinafter BIEDERMAN, LAW AND BUSINESS]. Most entertainment contracts negotiated today are entered into and performed in California and New York. "Because the entertainment industries are so firmly entrenched in those states, extensive regulations of the entertainment industries exist in those jurisdictions." *Id.*

81. BLACK'S LAW DICTIONARY 1260-61 (5th ed. 1979). BLACK'S defines "standing" in pertinent part:

> Standing to sue means that a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution. . . . The requirement of "standing" is satisfied if it can be said that the plaintiff has a legally protectable and tangible interest at stake in the litigation. Standing . . . focuses on the question of whether the litigant is the proper party to fight the lawsuit. . . .

Id.

82. *Mankey, supra* note 10, at 5.

83. *Id.* at 6.

84. 11 U.S.C. § 365 (1987). The policy behind § 365 is that executory contracts and unexpired leases should be freely assignable to allow the bankruptcy estate to benefit from the incremental value which will be derived from performance of the contract. Free assignability permits the estate to replace marginal business arrangements with profitable business arrangements. The trustee or debtor-in-possession must take specific steps in order to assume the executory contract. If the debtor defaulted on the contract, the trustee must (A) cure the default and (B) give adequate assurances of future compensation or immediately compensate for any pecuniary losses suffered by the nonbankrupt contracting party. However, if the

tion of a subgroup of executory contracts, personal services contracts, solely to judicial discretion. Additionally, the nature and complexity of the recording industry makes the issue of rejecting personal services contracts a thorny one. There is a tension between the needs and desires of the record company and those of the performer or band.[87] These tensions emerge from the history of the business, the current practices and the nature of the relationship between artist and company.

A. A Brief History of the Recording Industry

At the turn of the century the record industry began to develop with a magnitude and complexity not even Thomas Edison could have foreseen.[88] The advent of radio in the 1920s and the invention of television in the 1940s tempered the growth of the sound recording industry. However, by 1950 United States record sales were approximately $189 million per year.[89] By 1985 that figure was up to $4.4 billion based on yearly sales of 653 million units sold domestically.[90] From the 1950s until 1978, the industry grew tremendously.[91] But in 1978, the record industry found itself competing in the marketplace for the consumer's entertainment dollars. The fierce competition was created by the advent of video games and the increasing demand for home entertainment in the form of

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debtor's only default on the contract is the bankruptcy filing, § 365(b)(2) states that the trustee (or debtor-in-possession) need not give the other party adequate assurances. *Id.*

85. *Id.* The trustee can assign the contract to another party for completion if the trustee has properly assumed the contract under § 365(b)(1) and (b)(2) and gives the nondebtor contracting party adequate assurances of future performance by the assignee. The assignee must be assured that he or she will receive the benefit of the contract bargain.

86. *Id.* In a Chapter 7 proceeding, the trustee has 60 days to assume the contract, otherwise it is automatically rejected. There is no comparable time limit under Chapter 11. The trustee can reject the contract if, in his business judgment, assumption of the contract will not benefit the estate. *Id.*

87. Declaration of Copeland, *supra* note 3, at 3.

> In recognition of the realities of the industry, the typical artist's agreement provides for a lengthy relationship, with royalties to the artist that escalate as more recordings are sold, and with non-returnable advances against such royalties escalating as the term of the agreement goes on. These advances are only recoverable by the recording company from royalties. The typical agreement also leaves the recording company with the costs of production of recordings. In short, the record company invests its money, without asking the artist to share that risk or bear the cost of its efforts, while the artist invests his or her time and talent. Both share in success when and if it comes. But in order for the recording company to share in that success, and to recover its initial up-front investment in production and promotion, it must be assured of the exclusive and long-term services of the artist.

Id.

88. BIEDERMAN, LAW AND BUSINESS, *supra* note 80, at 203.

89. *Id.*

90. *Id.*

91. *Id.*

cable television and videocassettes.[92] The resulting recession which hit the record industry affected both sales and profits and lasted until 1984.[93] Mega-selling hits from superstar vocalists such as Michael Jackson, Bruce Springsteen and Prince led the industry back to brighter times,[94] but the recession forced record companies to rethink their business methods.[95] The record companies, worried about being able to reach a break even point on record sales for each album, began focusing on signing previously tested and already profitable talent.[96] As a result, unknown singers or groups have had fewer opportunities in the past few years to break into the field and obtain a contract from a major recording label.[97] In fact, simply having any kind of recording agreement is considered a major achievement for a band.[98]

B. The Contractual Arrangement Between the Parties

The business of making records is complicated. Before the performers begin to work on an album, several contractual agreements are signed by both band and record company.[99] Collectively, the agreements comprise what is commonly known as the exclusive recording agreement.

The record company typically signs the artist or band to a long-term exclusive recording agreement that has a short initial term, usually one year, with a series of options exercisable by the company to extend the term of the agreement.[100] Recording agreements are almost always "exclusive."[101] The performer is bound by the terms of the agreement to record and perform solely for the particular company until the record

92. *Id.*

93. BIEDERMAN, LAW AND BUSINESS, *supra* note 80, at 203.

94. *Id.*

95. *Id.* at xiv.

96. *Id.* at 205. An album produced by a major record company must sell approximately 250,000 copies in order for the company to reach the break-even point. The distinction between a *distributed* record and a *sold* record is very important because it affects how recoupable costs are determined. Usually, record retailers and wholesalers have an arrangement which allows the retailer to return some, if not all, of the unsold records of a group. The potential "returned" record problem creates serious concern in contracts between retailer and record wholesaler, and between record company and artist. *Id.* at 206.

97. *Id.* at xiv.

98. Declaration of Copeland, *supra* note 3, at 4.

99. BIEDERMAN, LAW AND BUSINESS, *supra* note 80, at 1. "Entertainment is a document-intensive business." *Id.*

100. *Id.* at 207.

101. *Id.* Exceptions to the general rule of exclusivity can be drafted into the recording contract. These exceptions include "work as a 'sideman' for another artist's recording session and performances on [movie] soundtrack records." *Id.* The typical recording agreement usually also includes the additional exclusive provision called the "rerecording restriction." This provision restricts the artists from rerecording compositions recorded during the term of the

company decides not to renew an option, or until the record company has exercised all of its contractual options. In the standard recording agreement, the band must deliver one long-playing record album in each contract period,[102] and the recording company must provide the capital, in the form of advances.[103] The advances are paid directly to the band for living expenses and to cover album production costs.[104]

This multi-option arrangement appears to give the record company flexibility. However, the renewable contract fails to minimize the risks the company faces each time a band or individual performer is signed. The various advances usually are recoupable only against the artist's or band's royalties.[105] If the record company chooses not to renew the agreement, advances expended on the band are never recoupable. It makes better business sense for a record company to renew its options than to release a band when success for the group may be just around the corner.

On the other hand, if a band has received critical acclaim but the group's first and second albums have not generated a high number of sales, the band may believe it is getting deeper into debt to the record company. Even if a subsequent album makes a large profit, the band may see very little of the money because the record company is first repaid all advances it is owed. Furthermore, as each new album is recorded under the same contract, the band finds itself locked into a low contract rate with escalation rates it finds insufficient.[106] The record company must hold onto the band to recoup its investment while the artists want to move on to earn greater profits once the group has gained some measure of fame.

The California legislature has acknowledged the competing interests between artist and company. Recognizing that a fruitful creative relationship takes time to develop, the legislature decided to give companies up to seven years in which to make that relationship profitable.[107] The

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agreement for a period of three to five years after the artist has signed with another record company. *Id.*

102. Declaration of Copeland in Support of *Ex Parte* Application, *supra* note 3, at 3.

103. BIEDERMAN, LAW AND BUSINESS, *supra* note 80, at 207.

104. *Id.*

105. *Id.* Royalties are usually based on the percentage of the total wholesale or retail amounts of the artist's records sold. *Id.*

106. *Id.* Escalation clauses increase the royalties that the band realizes each time an option is exercised. In virtually all recording agreements, the record royalties escalate both on subsequent records of the artist and on a sales threshold. *Id.*

107. CAL. LAB. CODE § 2855 (Deering 1976). This section states in pertinent part: "A contract to render personal service . . . may not be enforced against the employee beyond seven years from the commencement of service under it." *Id.*

main focus of the legislation, however, was an attempt to protect the talent. The seven year limitation on personal services contracts was imposed as a direct response to the "star system" which had developed in Hollywood in the 1920s and 1930s. The star system exploited young talent by signing them to lengthy contracts at salaries that would prove to be below market value as the performer gained public popularity.[108] This contractual limitation protects performers[109] from the unequal bargaining powers that exist between artist and record company. While exclusive agreements with inequitable escalation clauses are still valid, the law has at least released the artist from perpetual bondage.[110]

C. The Dual Nature of the Recording Agreement

Unlike most other industries, the entertainment industry is primarily based on the "unique, intangible, and highly subjective talents of an individual performer or artist."[111] An exclusive recording agreement between a band and a record company constitutes a personal services contract for which special rules of law apply.[112] Personal services contracts present a problem under the Bankruptcy Code because these contracts are often simultaneously executory contracts. While the Bankruptcy Code gives the trustee in bankruptcy the power to determine the fate of an executory contract,[113] not all executory contracts are within the trustee's power to assume, assign or reject.[114] Historically, courts[115] have held that the trustee has no interest in personal services contracts[116] because the services under these agreements cannot be performed by a third party.[117]

Because a recording agreement is an intimate personal services contract between the group and the record company, it is useless for a trustee to take title to such a contract.[118] The trustee cannot fulfill the band's obligations under the contract either by assuming the contract and performing it himself, or by assigning the recording agreement to another band. Based on the multi-option feature of exclusive recording

108. BIEDERMAN, LAW AND BUSINESS, *supra* note 80, at 20.
109. *Id.*
110. *Id.*
111. *Id.* at 207.
112. *See generally* CAL. LAB. CODE § 2855 (Deering 1976).
113. 11 U.S.C. § 365(a) (1987).
114. 2 COLLIER ON BANKRUPTCY ¶ 365.05 (15th ed. 1979).
115. Ford, Bacon & Davis, Inc. v. Holahan, 311 F.2d 901 (5th Cir. 1962).
116. *Id.* at 902.
117. 2 COLLIER ON BANKRUPTCY ¶ 365.03 (15th ed. 1979).
118. *Ford*, 311 F.2d at 901.

agreements, when the performer files bankruptcy, the recording agreement is usually still executory and theoretically must still be performed.

Because of the duality of the contracts and the conflicting desires of the parties involved, an ultimate determination of whether these contracts should be rejectable means that record companies will be forced to shoulder the risk of a band's insolvency.

V. RAMIFICATIONS OF THE COURT'S HOLDING

The *Mankey*[119] decision is the result of strict statutory interpretation.[120] The judicial analysis is technically correct, but the court's rigid interpretation of the Bankruptcy Code creates serious problems for Concrete Blonde, I.R.S., and for performer-debtors and record companies in general. First, the *Mankey* decision contravenes the Bankruptcy Code policies, and thus interferes with and undermines congressional intent. Second, the decision that these contracts cannot be rejected forces the performers to assume the contract and hence to work involuntarily, possibly in violation of constitutional protections.

A. Contravention of Bankruptcy Code Policies

The court's literal interpretation of sections 365 and 461 contravenes general Bankruptcy Code policies. Specifically, the Bankruptcy Code policy is thwarted because nonrejection permits the record company to seek and enforce the negative injunction against the performer or band members when the band refuses to assume the still valid recording agreement.

The foundational policy behind the Bankruptcy Code is that debtors can start over financially after surrendering their nonexempt property for distribution to creditors.[121] This means giving the debtor a "new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt . . . ."[122] The fresh start concept is given practical effect by the debtor's nonwaivable right of discharge from his debts.[123] The bankruptcy statutes have always interpreted "discharge" to mean "that an individual's human capital, (as manifested in [the debtor's] future earnings), [is] freed of liabilities he [or she] incurred in the past."[124] The Bankruptcy Code codified this equita-

119. *Mankey, supra* note 10, at 5-6.
120. *See generally* 11 U.S.C. §§ 365, 541 (1987).
121. Jackson, *supra* note 65, at 1393.
122. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
123. Jackson, *supra* note 65, at 1393.
124. *Id.* at 1396.

ble policy in 11 U.S.C. section 541(a)(6), which specifically excludes a debtor's future earnings from the definition of "property of the estate."[125]

As Professor Jackson[126] wrote, "[i]t is not surprising that bankruptcy law has traditionally afforded distinctive protections to human capital. Of the various forms of wealth, human capital is not only the least diversifiable, but also has the most direct bearing on the future well-being of the individual . . . . "[127] In the instant case, the members of Concrete Blonde emerged from their individual bankruptcies discharged from their preexisting debts, yet all bearing the burden of the nonrejectable exclusive recording agreement they had signed with I.R.S.[128] This clearly deprived the performers of the "full scope of [their] discharge[s],"[129] effectively preventing the members of Concrete Blonde from voluntarily practicing their chosen profession as recording artists.[130]

The *Noonan*[131] court considered what would happen if the recording artist was compelled to assume the exclusive recording agreement he had with the record company.[132] While the *Noonan* case did not deal directly with the issue of whether a personal services contract can be rejected in bankruptcy as did *Mankey,* the *Noonan* court clearly held that a personal services contract is not part of the estate's property.[133]

In *Noonan,*[134] the performer-debtor, Willie Nile, originally filed a petition for a Chapter 11 reorganization. But when Nile realized that Arista Records was prepared to fight[135] to keep him from rejecting his

125. 11 U.S.C. § 541(a)(6) (1987).

126. Thomas H. Jackson. Prof. Harvard. b. 1950. B.A., 1972 Williams Coll.; J.D., 1975 Yale. Yale L.J. *Admitted* NY, 1976; CA, 1979. Law Clerk, Judge M. Frankel, NY, 1975-76; Law Clerk, Justice Rehnquist, DC, 1976-77; Ass't Prof., Stanford, 1977-80, Assoc. Prof., 1980-82; Harvard, since 1986. *Subjects: Commercial Law; Contracts; Creditors' Rights* Cases, Problems and Materials on Bankruptcy (with Baird), 1985; The Logic and Limits of Bankruptcy Law, 1986; Cases, Problems and Materials on Security Interests in Personal Property (with Baird), 2d ed. 1987. *Member:* Phi Beta Kappa. THE A.A.L.S. DIRECTORY OF LAW TEACHERS 1987-88 at 445 (West).

127. Jackson, *supra* note 65, at 1432.

128. *Mankey, supra* note 10, at 5-6.

129. Matter of Noonan, 17 Bankr. 793, 800 (Bankr. S.D.N.Y. 1982), *aff'd mem.,* 697 F.2d 294 (2d Cir. 1982). "Discharge, the doctrine that frees the debtor's future income from the chains of previous debts, lies at the heart of the bankruptcy policy." Jackson, *supra* note 65, at 1393.

130. Appellant's Opening Brief at 4, Rushakoff, Mankey, Napolitano v. International Record Syndicate, Inc., Ch. 7 Case No. LA 87-18211-GM (1988).

131. 17 Bankr. 793 (Bankr. S.D.N.Y. 1982).

132. *Id.* at 800.

133. *Id.* at 797. *See also* In re Tia Carrere, 64 Bankr. 156, 159 (Bankr. C.D. Cal. 1986).

134. Matter of Noonan, 17 Bankr. 793 (Bankr. S.D.N.Y. 1982).

135. *Id.* at 795.

recording agreement with the company, Nile converted[136] from a Chapter 11 reorganization case to a liquidation case[137] under Chapter 7, and acknowledged that he wanted to benefit from the automatic rejection feature of section 365(d)(1).[138] To avert rejection, Arista suggested a plan to the court that allegedly benefited all of Noonan's creditors, and required Noonan to assume his recording agreement with Arista.[139]

The *Noonan* court inferred from the language of section 365(d)(1) that although the trustee did not take title to the personal services contract,[140] the contract could still be rejected under the statute.[141] The court failed to see that, technically, if the performer's recording contract could not become property of the estate, the rejection provision of section 365(d)(1) could not affect the contract. However, the *Noonan* court gave credence and weight to congressional intent and reached its holding that personal service contracts are rejectable by focusing on the essential Bankruptcy Code policies.[142]

The *Noonan* court determined that if Nile could be compelled to assume his recording agreement with Arista, the performer would leave his bankruptcy subject to at least $300,000 of indebtedness. Arista could recoup this indebtedness from future earnings.[143] The Code's clear intent to preserve all post-petition earnings solely for the benefit of the debtor after the bankruptcy filing influenced the court.[144] The *Noonan* court's analysis implicitly followed the reasoning that though section 541 fails to specify whether rights under an executory personal services contract come within the definition of "property of the estate," the absence is a mere semantic oversight.[145] Because the statute specifically addresses and excludes the post-bankruptcy fruits of such contracts, the court reasoned that the contract itself could be automatically rejected under the Code.[146]

However in *Mankey,* the conclusion that Concrete Blonde's record-

136. 11 U.S.C. § 706 (1987). This section confers on the debtor the right to convert his or her bankruptcy case from a Chapter 11 to a Chapter 7 proceeding. *Id.*

137. *Noonan,* 17 Bankr. 793, 795-96 (Bankr. S.D.N.Y. 1982).

138. *Id.*

139. *Id.* at 796.

140. *Id.*

141. *Id.*

142. *Noonan,* 17 Bankr. at 800.

143. *Id.* at 800.

144. *Id.* at 797.

145. Appellee/Cross-Appellant International Record Syndicate Inc.'s Opening Brief at 13, Rushakoff, Mankey, Napolitano v. International Record Syndicate, Inc., Ch. 7 Case No. LA 87-18211-GM (1988).

146. *Noonan,* 17 Bankr. at 796.

ing contract with I.R.S. was not rejectable contradicts the rationale behind Congress' explicit exclusion of future earnings from the bankruptcy estate.[147] The United States Supreme Court commented that the broad definition of "property of the estate" has limitations.[148] The limitations grow out of the Bankruptcy Code's competing policy of allowing the bankrupt to accumulate future wealth which is free from creditors' claims.[149] Furthermore, "[t]he right to a fresh start embodied in discharge is not merely a matter of bankruptcy law, but rather a special example of the increasingly common legal requirement that individuals preserve a certain portion of their assets for the future."[150]

In *Mankey* the band members are precluded from preserving their "human capital" for themselves post-bankruptcy. Additionally, the court's holding potentially binds Concrete Blonde to its contract with I.R.S. for an additional six years. This perverts the fresh start concept.

B. The Fresh Start Policy and the Negative Injunction

Outside the bankruptcy context, a breach of the agreements by the band would probably entitle I.R.S. to a negative injunction.[151] This equitable right to enjoin an artist from performing for others can be traced directly back to *Lumley v. Wagner*,[152] a landmark English case decided 137 years ago which American courts have generally followed.[153] In *Lumley,* an opera singer contractually agreed to sing at plaintiff's theater for a certain period of time. An express covenant contained in the agreement barred the opera singer from singing anywhere else during the same period.[154] The plaintiff brought suit to prevent the opera singer from performing for the plaintiff's competitor during the contract period.[155] The chancellor in *Lumley* admitted that he could not specifically enforce the entire contract, but he granted a negative injunction which restrained

147. 11 U.S.C. § 541(a)(6) (1987).

148. Segal v. Rochelle, 382 U.S. 375, 379 (1966).

149. *Id.*

150. Jackson, *supra* note 65, at 1398 n.15. "Bankruptcy discharge, accordingly, offers individuals only limited protection from the mistakes or misfortunes of the past. As such, it is part of a wider range of programs, such as social security, through which society forces individuals to provide for the future." *Id.*

151. 38 Cal. Jur. 3d *Injunctions* § 1 (1977). *See also* CAL. CIV. PROC. CODE § 525 (Deering 1972).

152. 1 De G. M. 604, 42 Eng. Rep. 687 (1852); Tannenbaum, *Enforcement of Personal Services Contracts in the Entertainment Industry,* 42 CALIF. L. REV. 18, 20 (1954) [hereinafter Tannenbaum, *Personal Services*].

153. Tannenbaum, *Personal Services, supra* note 152, at 20.

154. *Id.* at 18.

155. *Id.* at 19.

the defendant singer from performing at the rival theater.[156] The chancellor said that "while he was not trying to do indirectly that which he could not do directly . . . if the injunction tended to cause the [singer] to perform her contract with [the] plaintiff, so much the better."[157]

As with the opera singer's contract in *Lumley,* the exclusive recording agreement signed by Concrete Blonde and I.R.S. included the major provisions of the express negative covenant which insured the record company Concrete Blonde's exclusive services during the contract period.[158] The major provisions of the express negative covenant included a covenant under which the band members agreed to devote their services exclusively to the record company, a covenant forbidding the members from performing for another employer, a stipulation that the services of the band were special and unique, and a stipulation that the record company could seek injunctive relief to prevent breach of the contract terms.[159]

I.R.S. would have preferred the exclusive use of Concrete Blonde's talents rather than the next best solution of preventing the band from recording albums for another company. California courts will not order specific performance of a personal services contract. However, these courts have held that a breach of contract may be enjoined as long as the following factors are proven:[160] 1) The personal services contract must be written, and must provide for minimum compensation to the employee at the statutory rate, 2) The contemplated services at issue in the contract must be of that special and unique character that gives them peculiar value, and the loss to the employer of these services cannot be reasonably or adequately compensated[161] in damages.[162] California courts have added the caveat that, in order to grant a negative injunction, the employer must prove that it will receive value beyond the possibility that the band may be induced by the injunction to perform under the agreement.[163] In general, negative injunctions are granted by the courts to eliminate unfair competition, and not to regulate the employee's acceptance of new employment.[164]

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156. *Id.*

157. *Id.*

158. Motion of I.R.S. for Dismissal, *supra* note 31, at 11.

159. *Id.* at 19.

160. 38 Cal. Jur. 3d *Injunctions* § 526 (1977).

161. *Id.* An injunction may be granted when pecuniary compensation would not afford adequate relief. *Id.*

162. 38 Cal. Jur. 3d *Injunctions* § 41 (1977).

163. Tannenbaum, *Personal Services, supra* note 152, at 20.

164. *Id.* at n.5.

I.R.S. could persuade a court to enjoin Concrete Blonde, but the bankruptcy context creates new concerns and requires a rebalancing of competing policies and equities. A decision concerning the effect bankruptcy should have on a personal services contract is required. The debtor's fresh start after bankruptcy should be weighed more heavily than the financial losses the record company will encounter, as well as the additional risks that are created by rejectability.[165]

In *Savoy Record Co. v. Mercury Record Corp.*,[166] a singer named Melvin Lightsey, known professionally as Mel Walker, was under an exclusive contract to furnish personal services as a vocalist when he filed a petition in bankruptcy.[167] Soon after the bankruptcy filing, Lightsey signed a new recording agreement with Mercury Records.[168] The district court discharged the debtor from his debts, but found that the discharge did not relieve Lightsey of his contract with Savoy Records.[169] Since the executory personal services contract was not discharged in bankruptcy, Savoy obtained a preliminary injunction to prohibit Mercury Records from the further manufacture and sale of recordings made by Lightsey.[170] The *Savoy* rule[171] states where a debtor files bankruptcy to evade obligations under a personal services contract,[172] he has not filed as an honest but unfortunate debtor and is not entitled to be freed from his indebtedness.[173]

The *Savoy* court viewed the purpose of the Bankruptcy Act as primarily to convert the assets of the bankrupt into cash for distribution among creditors.[174] While equality of distribution is a key bankruptcy policy, the *Savoy* court did not consider Lightsey's right to a fresh start in its decision. The *Savoy* holding nullified the beneficial effects the bankruptcy discharge could have had on Lightsey's future.

As in *Savoy,* the court in *Mankey* also effectively eliminated the fresh start sought by the members of Concrete Blonde. The *Mankey* holding is akin to granting a negative injunction to I.R.S. The effect of a nonrejectable contract is to compel the band to remain idle and deprived

165. As stated earlier, this article does not discuss the good faith/bad faith filing distinction.
166. 108 F. Supp. 957 (D.N.J. 1952).
167. *Id.* at 958.
168. *Id.*
169. *Id.* at 959.
170. *Id.* at 958.
171. *Savoy,* 108 F. Supp. 957, 959. *See also* In re Tia Carrere, 64 Bankr. 156 (Bankr. C.D. Cal. 1986), and In re Southern California Sound Systems, Inc., 69 Bankr. 893 (Bankr. S.D. Cal. 1987).
172. *Savoy,* 108 F. Supp. at 958.
173. *Id.* at 959.
174. *Id.* at 958-59.

of its earning power, or to perform for I.R.S. Outside of bankruptcy, and even where the nonbreaching party has a right to the remedy, courts have shown a disinclination to enforce the negative covenant where the effect would force the breaching party to choose between remaining idle and deprived of earning capacity or working against his or her will.[175]

C. *The Constitutional Problem Caused by Nonrejection*

The proscriptions against involuntary servitude are still paramount to Americans. The intention to prevent forced labor remains as vital today as when the thirteenth amendment was added to the Constitution.[176] Congress was aware that the prohibition against involuntary servitude loomed large in bankruptcy.[177] To insure that debtors are not enslaved by their creditors, Congress prohibits involuntary Chapter 13 cases[178] where the individual with a regular income, who has generally not been paying his or her debts,[179] is forced into laboring for his creditors. Congress believes that financial slavery strips the debtor of all that makes life worth living.[180]

Theoretically, while nonrejectability of the contract is not the same as explicitly forcing the band to assume the contract, both achieve the same result. Realistically, survival of the contract post-bankruptcy forces the band to assume the burdensome recording contract and perform under it for the duration of the contractual period.[181]

As the court in *Noonan*[182] postulated, forcing assumption on Concrete Blonde means the members leave the bankruptcy process still indebted to I.R.S., which has the right to recoup its advances from the band's second album. This contravenes the policy of leaving future earnings to the debtor alone.[183]

VI. CONCLUSION

I.R.S. alleged that other record companies are interested in signing Concrete Blonde. This industry interest in the acclaimed band is irrelevant because the contract between the band and I.R.S. is still effective. Until the contract is terminated, Concrete Blonde cannot sign with a new

175. Tannenbaum, *Personal Services, supra* note 152, at 20.
176. U.S. CONST. amend. XIII, § 2.
177. Matter of Noonan, 17 Bankr. 793, 799 (Bankr. S.D.N.Y. 1982).
178. *Id. See also* 11 U.S.C. §§ 303(a), 706(c) and 1301 *et seq.* (1987).
179. 11 U.S.C. § 303(h) (1987).
180. *Noonan,* 17 Bankr. at 799 (Bankr. S.D.N.Y. 1982).
181. *See generally* Tannenbaum, *Personal Services, supra* note 152, at 18.
182. *Noonan,* 17 Bankr. at 793.
183. 11 U.S.C. § 541(a)(6) (1987).

label. Thus, Concrete Blonde and I.R.S. remain intertwined with each other.

A reversal of *Mankey* would guarantee Concrete Blonde and others who are similarly situated their right to a fresh start in life. Executory personal services contracts should be rejectable in bankruptcy as a general rule. Certainly, a performer should not be able to misuse the bankruptcy process, but methods could be created for barring rejection of the contract if the bankruptcy petition was filed in bad faith. While rejectability will injure record companies' interests, such a holding would send a strong and loud message to all that these contracts must be entered into with more care and ought to be more equitably drafted from the start.

Rejectability will force the companies to reduce the large dollar amounts of front end advances to young bands. The companies will no longer be able to rely on the contract's inviolability in bankruptcy. Since "[a] keystone to the entertainment industries has been the ability to thwart a star from walking,"[184] allowing the rejection of personal services contracts will shift some power from the record companies to the performers. While the continued vitality of the contract after the bankruptcy discharge could encourage the renegotiation of contracts between performers and record companies, the existing balance of powers suggests that such renegotiation is not a realistic expectation. So long as *Mankey* is followed, record companies need not engage in renegotiation because they know the contracts are indestructible even from the performers' bankruptcy.

Thus, rejection of these contracts will level the playing field. At first, the ability of untested talent to get a recording contract may be more difficult, but as advances are reduced the record companies will actually be able to sign more performers to contracts and spread the risks over a greater number of performers and bands. Reduced advances not only protect the record companies from future bankruptcy-induced losses, but also protect both companies and performers by decreasing the likelihood that the performers will become insolvent through overindulgence in the high life before there are profits. Reversing *Mankey* will send a signal to entertainment executives that it is time to stop proceeding in creative ventures on the twin elements of miscalculation and overextension.[185]

The Bankruptcy Code policies have been frustrated by the decision

184. BIEDERMAN, LAW AND BUSINESS, *supra* note 80, at 46.

185. *Id.* at 91.

in *Mankey*[186] because the debtors' fresh start has been severely impaired. The *Noonan* court stated "[a]s the full measure of a debtor's fresh start flowing from the bankruptcy is vital to Congress' mission in enacting the Code, anything which would frustrate the mission must be scrutinized carefully."[187] The *Noonan* court decision should be followed.

Cherise M. Wolas

186. *See generally Mankey, supra* note 10.
187. *Noonan,* 17 Bankr. at 800.