No. 15-16326
(Consolidated with 15-16327, 15-16328, 15-16329, 15-16330, 15-16331,15-16332, 15-16333)

IN THE
United States Court of Appeals for the Ninth Circuit

ALLAN B. DIAMOND, CHAPTER 7 TRUSTEE FOR HOWREY LLP,
Plaintiff-Appellant,
v.

HOGAN LOVELLS US, LLP,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:14-cv-04889-JD (lead)

MOTION FOR LEAVE TO FILE BRIEF OF PRACTITIONERS AND ACADEMICS AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT

June 2, 2016

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* various identifying practitioners and academics are all natural persons, having no parent corporation, and do not issue any shares of stock.

Motion For Leave To File Brief Of Various Practitioners And Academics As *Amicus Curiae* In Support Of The Appellant

Pursuant to Fed. Cir. R. 29, the undersigned practitioners and academics respectfully move for leave to file the accompanying *Amicus Curiae* Brief. Counsel for *Amicus* endeavored to obtain Appellee's consent to the filing of this brief, but Appellee's counsel has denied that consent.

Interest of *Amicus Curiae*

The *amicus curiae* are a group of attorneys, both practitioners and academics, all with extensive experience in the law of partnerships and other unincorporated business organizations. They are filing this brief based upon a strong interest in the interpretation and application of partnership law, a field to which they have each devoted significant aspects of their professional careers.

The *amicus curiae* support the Appellant in this appeal and urge the Court to reverse the decision below. As is detailed in their brief, it is the view of the *amicus curiae* that this dispute involves a core matter of partnership law with, at minimum, a tangential relationship to the law of professional responsibility. The Unfinished Business Doctrine is a natural and intended consequence of substantive partnership law which governs all firms organized as partnerships, and not only law firms.

Further, is the collective view of the *amicus curiae* that the suggestion that the Unfinished Business Doctrine will have a negative impact upon the ability of any client to choose their attorney is at best a red herring. Rather, numerous other issues, example being fee structure and conflicts, of a far more permanent nature than the transitive application of the Unfinished Business Doctrine will impact upon the ability of clients to choose the attorneys who will serve their interests.

While Appellee may object to the timelines of the brief, it responds in large part to the *amicus curiae* brief filed on their behalf by the American Bar Association. For that reason this brief could not have been filed at the time of the Appellant's primary brief.

For the foregoing reason, the *amicus curiae* request that the Court grant this motion for leave to file the accompanying brief in support of the Appellant and reversal of the District Court's decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on June 2, 2016, I filed this brief with the clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

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9th Circuit Case Number(s) No. 15-16326

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INTERESTS OF THE AMICUS CURIAE

The undersigned, as Amicus Curiae, respectfully submit this brief in support of the Appellant and ask the Court to reverse the decision of the trial court. Notwithstanding contrary arguments, including that made by the American Bar Association in its Amicus Curiae brief, the rule advocated by the Howrey bankruptcy trustee will have no material impact upon client choice. However, the rule advocated by the appellees adds confusion to the law of partnerships and further constitutes a deleterious mechanism for partners to avoid the fiduciary duties they have undertaken to one another.

This is not a debate about having a property ownership in client files, whether clients billed are at an hourly rate, a contingency, a fixed fee or some other billing methodology. Rather, this case relates to the obligation of partners, whether or not they are in a law firm, to satisfy the obligations they have undertaken to one another and their creditors. The full and complete discharge of these obligations is in no manner inconsistent with the Rules of Professional Conduct binding upon attorneys in any jurisdiction.

The Amicus Curiae are legal academics and practitioners with extensive involvement in the law of partnerships.

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Simply by way of example, Allan Donn was the Advisor from the American Bar Association to the Uniform Laws Commission committee that drafted the Revised Uniform Partnership Act, Gerald Niesar was the lead author of the white paper that led to the drafting of the Revised Uniform Partnership Act, Donald Weidner was the reporter for the RUPA project, Robert Keatinge and Thomas Rutledge have served as chair of the Committee on LLCs, Partnerships and Unincorporated

Entities of the Section of Business Law, American Bar Association, while Robert Hillman, William Callison, Donald Weidner, Allan Donn, and Robert Keatinge are authors of major treatise on either law firms or the law of unincorporated organizations.[1]

[1] No signatory to this amicus brief purports to represent the view of any organization here listed.

SUMMARY OF ARGUMENT

1. This is not a dispute about the rules of professional conduct or who can claim an ownership interest in the matters entrusted by a client to a particular law firm. Rather, this is a case about the application of partnership law generally and in law firms in particular.
2. It is important to recognize that there is not a separate body of partnership law governing law firms organized as partnerships.
3. In organizing law firms in any particular organizational form including partnerships, limited partnership associations, professional limited liability companies, professional service corporations or as is otherwise permitted by the rules of the controlling state Supreme Court or state bar, the participants adopt and agree to particular rules of conduct. In most instances, those rules of conduct are subject to modification by private ordering. Where no such private ordering takes place, the default rules of the organizational statute control.
4. Long settled principles of partnership law directly relevant to this case have required that upon the dissolution of a firm the proceeds of work ongoing at the time of the dissolution be remitted to the firm, even if that work is performed at a successor firm, in order that those funds may first be applied to the satisfaction of the debts and obligations of the predecessor firm with

any remaining balance distributed amongst the partners in accordance with their agreed sharing ratios. This rule is referred to as the Unfinished Business Doctrine.

5. The Unfinished Business Doctrine is inapplicable outside the context of dissolution of a particular firm. No claim is or has been made that the Unfinished Business Doctrine is applicable in the context of a client's termination of an engagement.

6. The Unfinished Business Doctrine does not constitute a restrictive covenant that in any manner improperly limits lawyer mobility or client choice. As already noted, the Unfinished Business Doctrine is applied exclusively at the time of a firm's dissolution; the doctrine has no application to the ordinary lateral movement of attorneys between law firms. At the time of a firm's dissolution, its attorneys will for the most part be moving to other firms. To the extent that the application of the Unfinished Business Doctrine may require that certain proceeds of ongoing work performed by the attorneys, now housed at a new firm, be remitted in order to satisfy the prior firm's creditors at most requires a recognition of the economic cost, by the new firm, of bringing on those transitioning attorneys. This is only one, and likely a relatively small, factor in that economic calculus.

7. The Unfinished Business Doctrine is a default rule of partnership law; the rule may be altered through private ordering by means of the partnership agreement. Having not, amongst themselves, determined to modify the application of the Unfinished Business Doctrine, it is entirely fair and appropriate that partners of a dissolved firm be required to conduct their affairs in accordance therewith.
8. The application of the Unfinished Business Doctrine will not necessitate ongoing court involvement in the allocation of fees. Rather, it must be expected that the various firms involved (or, as applicable, a trustee on behalf of a failed firm) will quickly come to agreement as to formulaic resolution of claims. The likelihood of such resolution is demonstrated by the existing history as to common departures of attorneys from firms and the private agreements that must exist with respect to the division of fees, those private agreements being evidenced in the absence of extensive litigation as to those allocations.

ARGUMENT

I. THE UNFINISHED BUSINESS DOCTRINE IS NOT INCONSISTENT WITH THE ETHICAL RULES GOVERNING ATTORNEYS.

Notwithstanding repeated assertions to the contrary, the Unfinished Business Doctrine is in no manner inconsistent with the rules governing the practice of law by attorneys. Rather, the suggestion that the Unfinished Business Doctrine violates the rules of professional conduct is a perverse suggestion that the client, having satisfied its obligation to the firm, has an ongoing right to dictate the manner in which those funds will be disbursed.

The argument of the Appellee is as follows:

> (1) On Day 1, Attorney A, affiliated with firm ABC, does work for Client and is paid by Client. Firm ABC utilize those funds to pay its debts and distributes the net among the partners in accordance with the partnership agreement. Appellees have no problem with this arrangement.
>
> (2) On Day 3, Firm ABC ceases operating, and Attorney A transfers her practice to Firm XYZ.
>
> (3) On Day 5, Attorney A does further work on the Day 1 project, bills Client for that work, and client pays. Appellee asserts that the Client has the right and capacity to direct that the funds it has paid to Firm XYZ benefit only XYZ and not be used to satisfy any creditors of Firm ABC or to satisfy any obligation of Attorney A to her partners in ABC.

Why that would be the case is never explained. Rather, there is raised the spectra of limitations of the ability of clients to choose their attorneys. The

Unfinished Business Doctrine does not preclude Client from transitioning its file from Firm ABC to Firm XYZ. The sole function of the Unfinished Business Doctrine is to require that some portion of the proceeds of that work be devoted to the discharge of Firm ABC's obligations.

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 which precludes that engagement from transitioning. The new firm may use 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. A lawyer leaving one firm is under no obligation to ensure that his or her new firm is acceptable to an existing client.

As 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 to date having applied the Unfinished Business Doctrine, 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, one sufficient to justify the New York Court of Appeals setting aside the

text of the Uniform Partnership Act,[2] cannot be shown to have ever occurred. Lawyer mobility is a fact of life in the legal profession, and there is no evidence that the Unfinished Business Doctrine is impeding lawyers from relocating their practices, an transitioning their clients, upon a Firm's failure.

The lower court's reasoning that the attorney's attention on client matters should not be limited by financial obligations to former partners and the old firm is not by its terms limited to that factual situation. Rather, by placing the interests of the client in a position superior to the partners' inter-se agreement, the client is afforded the right to dictate the partnership's disposition of the fees it pays. To that end, a client desiring that they receive the particular attention of a particular attorney could insist that the sharing ratio on those fees be altered in that attorney's favor. While it cannot be suggested that this is what the *Thelen* court intended, this outcome is the logical application of its weighting of interests between the firm and the client. By affirming the Unfinished Business Doctrine, the suggestion that the client may dictate the intra-firm allocation of fees is eliminated.

In *LaFond v. Sweeney*,[3] the Colorado Supreme Court responded to the argument that application of the Unfinished Business Doctrine interferes with the client's right to counsel in that "an attorney would be unwilling to represent the

[2] *In re Thelen*, 20 N.E.3d 264 (N.Y. 2014).
[3] 343 P.3d 939 (Co. 2015).

client unless the attorney is entitled to additional compensation for his work."[4] Rejecting that argument, the Court wrote:

> We are unaware of any authority for the proposition that fiduciary duties attorneys owe to their firms may be eschewed under the circumstances of a case like the one before us. The division of the contingent fee between LaFond and Sweeney does not affect the amount of money Maxwell had to pay upon successful resolution of his case. Hypothetical harm, as opposed to actual harm to the client's ability to choose counsel in the case, is not a pertinent consideration when determining the rights and obligations of attorneys to their firms. *See Jewel*, 203 Cal. Rptr. at 17 ("[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.").[5]

II. IN FAVOR OF THE UNFINISHED BUSINESS DOCTRINE

An important function of the Unfinished Business Doctrine is to police otherwise opportunistic behavior by partners. If a partner cannot expect to earn more from a file by working the case in the current firm than she would were she to dissolve the firm and leave with the file, the incentive to depart is eliminated.

Consider firm ABC. During the partnership's term, B originates a particularly lucrative contingent fee case. B is aware that if the case is resolved

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[4] *LaFond*, 343 P.3d at 947.

[5] *Id. Accord 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 either respect to profits from unfinished partnership business because since, once the fee is paid to an attorney, it is if no concern to the client how the fee is distributed among the attorney and his partners.").

while she is part of ABC that she will realize 30% of the net recovery; A and C will equally split the balance of 70% of the recovery. Absent the Unfinished Business Doctrine, B has a significant incentive to dissolve ABC by withdrawing therefrom and (with client consent) taking this case with her, all with an eye to keeping for herself 100% of the ultimate recovery, offset only by ABC's claim in quantum meruit. Likewise, absent the Unfinished Business Doctrine, and presuming they are unwilling to accept only a quantum meruit recovery, A and C will have a claim for opportunistic dissolution by B of ABC. One benefit of the Unfinished Business Doctrine is that it preserves the agreement of the parties and avoids separate challenges based in bad-faith and breach of fiduciary duty.

The Unfinished Business Doctrine is that it is a default partnership law; partners are free to negotiate a different rule. The fact that partners may not want to "jinx" the deal by focusing upon dissolution when forming the partnership is of no import.[6] At a time when the partners are negotiating any number of items, some of which, such as sharing ratios, are zero sum, they should either negotiate matters

[6] *See also* Mark H. Epstein & Brandon Wisoff, *Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice*, 73 CALIF. L. REV. 1597, 1614 (1985) ("Of course, the partners can agree by contract to provide for compensation in the event winding-up burdens fall inequitably. Nevertheless, because partnerships are likely to be forged in an atmosphere of optimism and mutual respect, partners may suppress notions of dissolution and conflict. Should the various partners consider the potential problems involved in dissolving, they may choose not to raise the issue for fear of disrupting the harmony of the moment.").

involving the dissolution of the venture or accept the consequences of the law's default rules. Absent such private ordering, the Unfinished Business Doctrine carries forward for all partners what was the agreement under which they have performed during the partnership's pendency. Not only is the partners' inter-se agreement preserved, but time-consuming disputes as to the treatment of income from individual matters are avoided.[7]

An important change in the underlying law has been the abandonment of the no compensation rule of UPA § 18(f) and the adoption of a reasonable compensation rule as set forth in RUPA § 401(h).[8] In a partnership governed by

[7] *See also* Mark I. Weinstein, *The Revised Uniform Partnership Act: An Analysis of Its Impact on the Relationship of Law Firm Dissolution, Contingent Fee Cases and the No Compensation Rule*, 33 DUQ. L. REV. 857, 867 (1995) ("A significant advantage of the No Compensation Rule is its practicality due to its mechanical application. In implementing the rule, courts need not examine the dissolution process on an ad hoc basis to determine the fee proportion owed to each partner. The automatic application of the No Compensation Rule by courts also encourages private dispute resolution. Abandoning the rule in favor of quantum meruit compensation would force courts to examine, weigh, and formulate various factors to determine the amount of compensation owed to former partners. Courts would have to determine what percentage of the fee was accrued before and after dissolution, the expected value of the case, and how much time the partner actually spent working on the case.") (footnote omitted).

[8] *See* REV. UNIF. P'SHIP ACT § 401(h), 6 (pt. I) U.L.A. 133 (2001) ("A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership"). *Compare* UNIF. P'SHIP ACT § 18(f) (1914), 6 (pt. II) U.L.A. 101 (2001) ("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."). RUPA has been adopted in

RUPA § 401(h), a partner completing partnership business is entitled to "reasonable compensation" for completing partnership business as part of its winding up. With this change, the firm to which the attorney has moved is compensated for the work transitioned from the former firm. As observed by Professor Hillman:

> Under RUPA, he explained, partners are entitled to reasonable compensation for winding up a dissolved firm's business; accordingly, former partners of a dissolved firm and their new firms would not be deprived of all recompense for their work if the unfinished business doctrine were applied. Because RUPA furnishes a way out from the dilemma that lawyers and firms face in UPA states by allowing firms to finish business but be compensated, courts applying RUPA may be more likely to accept the unfinished business doctrine for hourly fee matters that former partners of dissolved firms take to other firms, Hillman said. [9]

While there is to date a dearth of case law on the interpretation of RUPA § 401(h), one paradigm would be to consider the claim as in the nature of a quantum meruit action by the partner against the firm. Once the value of the services rendered in completing the partnership business has been thereby determined, the net proceeds would be firm assets divided among all of the partners in accordance with the sharing ratios set forth in the partnership agreement. In addition, the

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thirty-six states, the District of Columbia and the Virgin Islands. *See* REV. UNIF. P'SHIP ACT, 6 (pt. I) U.L.A. (Supp. 2014) 1.

[9] *See* Joan C. Rogers, *Profits From Finishing Bankrupt Firms' Cases Belong to Law Firms That Complete Them*, Bloomberg BNA (July 16, 2014), http://www.bna.com/profits-finishing-bankrupt-n17179892367/.

"reasonable compensation" provided for in RUPA § 401(h) provides for disparate treatment among the partners who oversee and conclude the firm's unfinished business. Partners who undertake the more onerous tasks will be compensated for doing so while those who complete the less strenuous tasks will receive proportionally less compensation for the services rendered on the partnership's behalf. In consequence, RUPA's adoption of a compensation rule, in opposition to UPA's no compensation rule, militates the perceived negative consequence of the prior law.

While the objective of the Unfinished Business Doctrine is to retain for the partnership the fruits of those projects in process at the time of dissolution with the objective of sharing the net proceeds among the partners in accordance with their agreed sharing ratios, it must be recognized that the rule first protects the rights of partnership creditors.[10] If firm assets do not include fees from completion of unfinished business, then the creditors are restricted to collections on accounts receivable outstanding as of the firm's dissolution/bankruptcy. It will be common

[10] *See, e.g.*, Douglas R. Richmond, *Migratory Law Partners and the Glue of Unfinished Business*, 39 N. KY. L. REV. 359, 362 (2012) ("But dissolved law firms have creditors, and firms that either voluntarily or involuntarily enter bankruptcy following dissolution create estates administered by bankruptcy trustees who are charged with maximizing the value of the estate."). *See also* UNIF. P'SHIP ACT § 38, 6 (pt. II) U.L.A. 487 (2001); N.Y. P'SHIP ACT § 69. *Accord* TEX. BUS. ORG. CODE § 152.706(a); KY. REV. STAT. ANN. § 362.1-807(1); REV. UNIF. P'SHIP ACT § 807(a), 6 (pt. I) U.L.A. 206 (2001); *id.* cmt. 2 ("Subsection (a) continues the rule of UPA Section 38(d) that, in winding up the business, the partnership assets must first be applied to discharge partnership liabilities to creditors.")

for those assets to be insufficient to satisfy those creditor claims.[11] While the shifting of risk to unsecured creditors is the accepted and intended effect of affording business owners limited liability,[12] firms advertise their credit worthiness based on factors including their history of exploiting client relationships and the income being currently derived from them.[13] Creditors may legitimately assert that they extended credit against the firm's recognition of that income.

As a subset of creditors as discussed above, there are retired partners who have claims on firm assets by reason of non-ERISA benefit plans which provide,

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[11] Another source of funds, depending upon state law, will be the recovery of partner distributions made when the firm was insolvent. *See, e.g.*, DEL. CODE ANN. tit. 6, § 15-309; KY. REV. STAT. ANN. § 362.1-932. This recovery is distinct from the Unfinished Business Doctrine.

[12] *See, e.g.*, I. MAURICE WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS 18 (Baker Voorhis & Co., 1927) ("The policy of our law to-day sanctions incorporation with the consequent immunity from individual liability. It follows that no fraud is committed in incorporating for the precise purpose of avoiding and escaping personal responsibility. Indeed, that is exactly why most people incorporate, and those dealing with corporations know, or at least are presumed to know, the law in this regard."); Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77 ("It is generally accepted that limited liability creates negative externalities. Limited liability allows equity holders to cause the firm to externalize part of the risk and costs of doing business onto other constituencies of the firm and, perhaps, even onto society at large.").

[13] *See, e.g.*, Private Placement Memorandum from Dewey & Leboeuf LLP 18 (Martin 2010), http://chapter11cases.com/2012/05/10/read-the-private-placement-memorandum-for-dewey-leboeufs-125-million-senior-secured-notes/ ("Client relationships historically have tended to be long-term due to the in depth client knowledge Dewey maintains to provide exceptional service. The level of trust and familiarity fostered by the long-standing relationships with Dewey's clients help minimize the risk of losing clients to competitors.")

inter alia, for certain payments post-retirement, typically but not necessarily based upon some function of the retired partner's income in the years preceding retirement. Absent the Unfinished Business Doctrine these obligations are, being charitable, at risk. By way of example, in March 2015 the Lincoln, Nebraska firm of Harding Shultz announced it was dissolving.[14] According to a press report, the dissolution of the firm was precipitated by two partner's retirements, which triggered certain payment obligations.[15] Reading between the lines, other attorneys had no interest in working to fund those obligations and left, ultimately precipitating the firm's demise.[16]

Moving from the particulars of the Harding Shultz firm, partners who anticipate significant payments upon retirement may find those commitments to be illusory if the Unfinished Business Doctrine is not applied. Assuming the firm has

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[14] *See* Richard Piersol, *Harding and Shultz Law Firm is Dissolving*, JOURNALSTAR.COM (Mar. 12, 2015), http://journalstar.com/business/local/harding-shultz-law-firm-is-dissolving/article_b5f1e841-1d7e-5ac0-bf51-9285a6147c02.html.

[15] *See* Martha Neil, *Law firm is dissolving after nearly 60 years; senior partner points finger at retirement plan*, ABA JOURNAL.COM (Mar. 13, 2015), http://www.abajournal.com/news/article/law_firm_is_dissolving_after_nearly_60_years_senior_partner_points_finger/?utm_campaign=weekly_email&utm_source=maestro&job_id=150319AX&utm_medium=email.

[16] *See also* Jeff Blumenthal, *Wolf Block work still unfinished*, PHILADELPHIA BUSINESS JOURNAL (Mar. 22, 2010), http://www.bizjournals.com/philadelphia/stories/2010/03/22/story2.html ("But the biggest issue of contention could be retired partners who lost their pension because of Wolf Block's unfunded pension plan. Those retirees must stand in line with other creditors.")

elected a limited liability structure, the firm's assets will be those on hand as of dissolution plus the accounts receivable that are ultimately collected. The Unfinished Business Doctrine prevents departing lawyers from draining the assets of their firm to the prejudice of creditors of the firm. Even assuming that the obligations to make the retirement payments have a higher priority than other claims, it cannot be expected that those accounts will satisfy the debts undertaken in prior years. Conversely, application of the Unfinished Business Doctrine generates additional funds through which the firm may discharge those obligations.

III. A *JEWEL* WAIVER

As is often the rule in business organizations, questions involving claims on legal fees easily can be avoided by proper drafting of the organizational document. Some firms will include a *Jewel* waiver.[17] The Howrey firm, a group that should have had an appreciation of partnership law as sophisticated as that of anyone else, did not elect in their partnership agreement to waive the Unfinished Business Doctrine. The partners thus chose to be governed by the partnership law's default rules for the treatment of post-dissolution work on partnership business. As *Jewel* waivers are common but by no means universal, many partners of other law firms have made exactly the same choice.

[17] *See also* ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY § 4.6.1.1 (discussing *Jewel* waivers).

Allowing certain partners (and the firms to which they have relocated their practices) the right to avoid the Unfinished Business Doctrine affords them the right to retroactively amend the partnership agreement to the disadvantage of other partners and of the prior firm's creditors. That should not be permitted, especially in light of the sophistication of the partners as well as their ability to bear the economic cost of the rule under which they chose to practice. A ruling against application of the Unfinished Business Doctrine will functionally rewrite the partnership agreements not only of the Howrey firm but also virtually every firm subject to this Court's jurisdiction. Holding the Howrey partners to the inter-se deal they made preserves all existing agreements for firms, whether they be law, another profession, or otherwise, entered into as partners.

IV. *THELEN* AND *COUDERT BROTHERS* GO TOO FAR IN RELYING UPON CLIENT CHOICE

The crux of the *Thelen* and *Coudert Brothers* decisions is that application of the Unfinished Business Doctrine would limit client choice by restricting the ability of attorneys to move from dissolved firms to new firms. On closer analysis the courts' reasoning is questionable.

The *Thelen* court's reasoning is that, inter-se, business organization law is irrelevant if it might impact upon an attorney's ability to relocate to a new firm after another's dissolution. In effect there is one body of law governing the inter-se rights of law firm partners and another body of law governing the inter-se rights in

non-law partnerships. Except, of course, there is not a separate organizational form for law partnerships versus other partnerships. There is no suggestion that the Unfinished Business Doctrine be disregarded in all professions (including medicine and dentistry) where client choice supposedly may be affected.

The question of a "property interest" in the file is a red herring. While neither the firm nor an attorney may have an enforceable property interest in the client's file, the firm does have an enforceable property interest in the proceeds of the attorney's work with respect thereto. The *Thelan* court failed to recognize this distinction. Rather it conflated the absence of an enforceable possessory interest in the file with the lack of a possessory interest in the attorney fees generated therefrom. In joining a firm and undertaking work on a particular file, an attorney commits that those proceeds in the form of attorney fees will be remitted to the firm and shared amongst its partners in accordance with the partnership agreement and, where the partnership agreement is silent, the underlying partnership law.

CONCLUSION

The venerable decision *Meinhard v. Salmon*[18] provides:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the

[18] 164 N.Y.S.2d 545 (N.Y. 1928).

> marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[19]

In re Thelen and *In re Coudert Brothers* constitute an abandonment of this standard, providing in effect that the "punctilio of an honor" does not apply where a third-party to the inter-partner relationship might arguably be impacted thereby. Rather, notwithstanding that the partnership "continues" through dissolution,[20] the New York Court of Appeals decreed that partners are free to seek to move existing engagements to new firms and uniquely capture for themselves the benefits of work performed for that client, including work that is but a continuation of work pending at the time of the prior firm's dissolution. While those who would advance and benefit from a mercenary view of attorneys (a too broadly held view in society generally) may laud the *Thelen* and *Coudart* decisions, they represent a sad departure in the law for those who believe inter-partner obligations have enforceable meaning.

For the reasons stated above, the *Amicus Curiae* named above respectfully request that the Court reverse the judgment of the District Court.

Respectfully submitted,

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[19] *Id*. at 546 (N.Y. 1928).

[20] *See* UNIF. P'SHIP ACT § 30, 6 (pt. II) U.L.A. 354 (2001); N.Y. P'SHIP ACT § 61; TEX. BUS. ORGS. CODE § 152.701(1).

Date: June 2, 2016

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