

Have Contract Counterparties Increased Their Negotiating Power in the Wake of *Tempnology*?

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New York Associate **Chelsey Rosenbloom** and Boston Partner **Jonathan Young** co-authored the cover article for the June edition of the American Bankruptcy Institute Journal — an examination of how bargaining leverage among contract counter-parties has changed in the two years since the U.S. Supreme Court’s influential ruling in *Mission Prod. Holdings Inc. v. Tempnology LLC (Tempnology)*. In *Tempnology*, the Supreme Court considered whether a Chapter 11 Debtor and trademark licensor could cut off its go forward obligations to maintain the trademark by pursuing a bankruptcy rejection of the underlying trademark license. The Supreme Court declined to permit the debtor/licensor to avoid these obligations, holding that the rejection of a trademark licensing agreement amounts to a breach of the agreement but not a termination or rescission of the rights granted through such license. The ruling resonates in a variety of scenarios beyond the trademark license at issue in the case and courts and practitioners have begun to decipher its import and applications in contexts beyond *Tempnology*’s specific facts. The authors detail the background of *Tempnology* and several subsequent decisions that have impacted the understanding of *Tempnology*. Rosenbloom and Young note, “As the post-*Tempnology* jurisprudence continues to evolve, contract counterparties may consider how to structure their relationships to obtain vested property rights, in addition to rights of ongoing performance under relevant agreements. *Tempnology* demonstrates that these sorts of enhanced property rights are likely to survive contract rejection and might become an important negotiating tool for purposes of obtaining some degree of additional performance.”

They conclude, “*Tempnology* has created real negotiating leverage for contract counterparties holding vested property rights. Parties can be expected to dispute, on a case-by-case basis, what constitutes a vested property right and what constitutes an unperformed contractual provision. As these battles play out, practitioners and companies alike should be on the lookout for further additions to the post-*Tempnology* body of law and further judicial crystallization of *Tempnology*’s impact.”

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