Ancillary Issues In Crisis Mode
35th Annual North American Law Summit

After a great dinner and a few glasses of wine, you turn in but forget to put your cell phone on silent mode. When it rings at 3:00 a.m. in the morning, out of habit, you pick-up and say, *"Joe Palooka, Attorney at Law."* It's your sports/entertainment/production house client – the one who/which has a huge retainer in your trust account. Calling from home, your client is blubbering on and on, insisting that -- he didn't do something that is "criminal, grossly negligent, abusive, or otherwise truly heinous -- something happened to adversely affect his production company-- he needs to declare bankruptcy due to his gambling debts -- his wife wants a divorce after learning of his affair. He also tells you that the media has already gotten wind of his situation(s).

Don't hang up! Here are some tools in your wheelhouse which can help both you and your client handle the crisis![1]

- You've been a client therapist/psychologist before. Now is the time to calm down your client. Be empathetic without getting into the specifics of the situation. By calling you, your client already acknowledges faith and trust in you. Foster those feelings.

- You've been trained to be a great communicator. If your client has a team, i.e., manager, agent and/or publicist immediately contact them and arrange for a joint meeting with your client. If no team, arrange to meet with your client and start thinking about what other experts who may need for the team. Either way tell your client not to speak to the media (or anyone else) until the team meets.

- You've also been trained to investigate facts – the good, the bad and the ugly. As far as the media, some members of the team may want to "get ahead of the story", i.e., they want to take control of the narrative with an immediate denial or plausible explanation. However, the best answer may simply be "the matter is under investigation." Why?

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[1] From panelist Carolyn Herman: This submission is largely a composite of two recent and inciteful articles written on the subject of client crises. For a more thorough analysis, see *What do Clients In Crisis Really need from Lawyers*, Zach Olsen, January 22, 2023, https://www.abajournal.com/voice/article/more-than-a-lawyer-what-clients-in-crisis-really-need/ and *How to level with Clients in Crisis*, Arthur Solomon, March 13, 2023, https://www.prnewsonline.conm/author/asolomon/. The use of this submission is for educational purposes only at the Summit and not for further publication or exploitation.

If public statements previously made are contradicted by the ultimate findings, your client is now put on the defensive and those previous statements may now become the focus of the narrative. (Think Alec Baldwin and the shot on the set of *Rust*. The initial criminal case was dismissed. New charges, however, are being considered in light of proof that he had pulled the trigger. Baldwin said he only pulled back the hammer.)

- Among the team, you are the only one who can answer legal questions and draft legal documentation. Moreover, if necessary, you have the ability to make the appropriate referrals, e.g., if you have no experience with bankruptcy or divorce law, it's likely you know someone who does. Failing to consider these actions, you may be violating your duty of competence and other ethical obligations.

- You are accustomed to making split-second decisions, thinking on your feet and analyzing complex situations. By default, that makes you the leader of the team, i.e., the producer who manages the entourage. Client's manager/agent is the one keeping the client functional and receptive during the process. Client's publicist acts as the face of the narrative. (However, no statement to the media and no written material should be released without your approval.)

- You know how to be a team player – even when the team is only the client and you. To assure their continued faith and trust, you need to make the team, including Client, feel part of all the decision-making.

Remember, too, that there is no such thing as finding a time to "bury" a story. With the advent of technology, news is now 24/7 and easily accessible on a multitude of platforms. Also, given our heavily divisive population, someone is always going to find another take on the situation, i.e., no matter who your client is, you probably won't be able to prevent some bad press. Finally, even if the news is in your favor, there still may be legal action in the future, e.g., Simpson may have dodged the criminal bullet only to face wrongful death actions Finally, the media decides when coverage stops – not you, not your client. Moreover, once your client faces a public relations crisis, it can always be brought back to life in a different context.

Whose Life is it Anyway? Treatment of Unique Assets in Bankruptcy

By David L. Neale and Lindsey L. Smith[1]

"A sign of celebrity is often that their name is worth more than their services."

~ Daniel J. Borstin

In today's celebrity-obsessed culture, it's hard to avoid the *schadenfreude* associated with a star's fall from grace. Celebrity bankruptcies attract the attention of the press and the public, even though the issues raised in such cases may be mundane and quite routine. Nonetheless, there are some issues that may be unique to bankruptcy cases involving the famous, and the relatively undeveloped state of the law as it relates to new media and technology creates some questions which are sure to be front and center in celebrity bankruptcy cases in the coming years.

1. Publicity Rights – What are they?

One such example of a unique aspect of celebrity bankruptcy cases involves the right to commercially exploit the characteristics of a celebrity. Publicity rights have been the subject of disputes for more than half a century, and promise to be a continuing source of controversy over the coming years. "Publicity rights" themselves are defined as the right to use a celebrity's name, voice, signature, photograph, or likeness for commercial purposes. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 391, 21 P.3d 797 (2001).

An early case that recognized the existence of publicity rights was the case of *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953). In that case, the plaintiff, engaged in selling chewing-gum, entered into a contract with a baseball player that gave the chewing gum company the exclusive right to use the baseball player's photograph in connection with the sale of gum. The contract also provided plaintiff an option to extend the term for a designated period. In the contract, the baseball player agreed not to grant any other gum

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manufacturer a similar right during the term of his agreement.

Defendant, a rival chewing-gum manufacturer, knew of plaintiff's contract, and deliberately induced the baseball player to authorize it to use the player's photograph in connection with the sale of the competing brand of gum. Plaintiff sued defendant and asserted that defendant invaded plaintiff's exclusive right to use the photographs. The defendant argued that there was no actionable wrong because the contract with the plaintiff was no more than a release by the baseball player of any potential claim for an invasion of his right to privacy. Defendant further argued that the statutory right to privacy is personal and not assignable and therefore, plaintiff's contract vested in plaintiff no property right or other legal interest which defendant's conduct invaded.

The Court disagreed with defendant and distinguished a right to privacy from the right to publicity. The Court in *Haelan Labs., Inc.* stated that "We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' *i.e.*, without an accompanying transfer of a business or of anything else. Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth." The Court further stated that "This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no

money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures."

The Supreme Court weighed in on publicity rights in *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573, 97 S. Ct. 2849, 2856, 53 L. Ed. 2d 965 (1977). There, the Supreme Court stated that "The State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. The State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation." The Supreme Court further noted that "In 'right of publicity' cases the only question is who gets to do the publishing."

Currently, the answer to the question of whether a right to publicity is a statutory right and/or a common law right varies from state to state. For example, in California, the right to publicity is both a statutory and common law right. The statutory right originated in Civil Code section 3344 enacted in 1971, authorizing recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent. Later, in *Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813 [160 Cal.Rptr. 323, 603 P.2d 425, 10 A.L.R.4th 1150], California also recognized a common law right of publicity. *See also, Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 391, 21 P.3d 797 (2001)

2. <u>Are publicity rights property of a bankruptcy estate?</u>

11 U.S.C. §541 determines what is property of the bankruptcy estate and provides in relevant part:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

The broad definition of "property of the estate" provided for under 11 U.S.C. §541 would seem to indicate that a debtor's right to publicity would become property of the bankruptcy estate. However, the ability to liquidate such right and the value of such right in the bankruptcy context is not so clear.

3. Can you liquidate the right to publicity in bankruptcy?

In determining whether you can liquidate the right to publicity in bankruptcy, it helps to analyze what Courts have determined is possible with respect to the right to publicity outside of the bankruptcy context. For example, Courts have held that a right of publicity is assignable. In *Haelan Labs.*, *supra*, the Court stated that the right of publicity is assignable during the life of the celebrity, for without this characteristic, full commercial exploitation of one's name and likeness is practically impossible. *Haelan Laboratories v. Topps Chewing Gum, supra*, 202 F.2d at 868. The *Haelan Labs.* Court stated that the right to publicity is assignable *during the life of the celebrity*, which begs the question, does a celebrity's right to publicity survive the celebrity's death?

States have contrasting positions on whether the right to publicity survives death. In California, the right to publicity survives death and is inheritable. California Civil Code section 3344.1 provides that a right to publicity is inheritable after the celebrity's death and states that

"The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument, executed before or after January 1, 1985." Cal. Civ. Code § 3344.1 (West) In contrast, in New York, one's right of publicity is extinguished at death. *See, Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, 434 F. Supp. 2d 203, 207 (S.D.N.Y. 2006).

4. <u>If you can you liquidate the right to publicity in bankruptcy, what do you get?</u>

Going back to the definition of the right to publicity, if someone purchases a celebrity's right to publicity, does that purchaser obtain the right to exploit the celebrity's name or likeness? If the answer to the foregoing question is yes, without any limitations, this would seem to go against the Bankruptcy Code's fresh start policy, since after the outright sale of such right, the celebrity would not be able to use his or her own name or likeness to generate income in the future. In order to get around this issue, it might be possible to sell the exclusive right to use the celebrity's right to publicity for a limited time or limit the sale so that the purchaser can only use the right to publicity in a limited manner (for example only to advertise certain products), and allow the debtor to retain the right to use his or her name and likeness in other non-conflicting ways.

It should also be noted that the right to publicity, if sold, should not include a requirement that the celebrity perform any specific action in connection with the sale of his or her right to publicity. If such a requirement were included, it could amount to involuntary servitude. In the article *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 11 J. Bankr. L. & Prac. 441 (2002), Melissa B. Jacoby and Diane Leenheer Zimmerman make an important point: "[S]tate-law-created publicity rights are properly understood as purely passive in nature; any associated right to command active participation by a celebrity should be

understood as arising separately as a result of a specifically negotiated contract term. This interpretation makes sense in light of current practices and best comports with existing legal principles. Simply put, publicity rights, standing alone, do not include the right to direct a person's future labor."

5. Are a celebrity's social media accounts property of the bankruptcy estate?

In today's culture, not only are celebrity's social media accounts highly valuable but there are actual, social media celebrities – those celebrities that are famous solely as a result of their social media accounts and whose income is solely generated therefrom. Given the foregoing, what happens when a celebrity with a large social media following and with valuable social media accounts files for bankruptcy? Are those accounts considered property of the bankruptcy estate? The Court in *In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Texas 2015) held that the debtor limited liability company's social media accounts were part of the bankruptcy estate. However, the Court in *CTLI* did analyze the difference between the social media account of an LLC as opposed to an individual:

> "The Facebook Page or Profile of a celebrity or other public figure is a different type of property, related to the interest known as a *persona*. A *persona* is "the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others." *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir.2000) (quoting Restatement (Second) of Torts § 652C (1977)). Although heretofore unrecognized by bankruptcy courts, in most states, including Texas, the *persona* is recognized as a property interest, and therefore that falls within the broad reach of "property of the estate.""' *See Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir.1994) (recognizing the *persona* as property under Texas law). The primary limitation on recognition of a *persona* as estate property is the 13th Amendment's prohibition on involuntary servitude. Just as a debtor may not assume contracts that would require any individual to perform personal services, 11 U.S.C. § 365(c); *Matter of Tonry*, 724 F.2d 467, 469 (5th Cir.1984), a

> debtor may not use estate property in a manner that would require any individual to perform personal services. Because the value in a Facebook Page or Profile lies in the ability to reach Friends or Fans through future communications, the property interest in an individual Profile would likely not become property of the estate. *See generally Smita Gautam, Bankruptcy: Reconsidering "Property" to Determine the Role of Social Media in the Bankruptcy Estate*, 31 Emory Bankr.Dev. J. 127, 127 (2014) (arguing that an individual debtor's interest in his social media accounts should be treated as a "liberty" interest instead of a "property" interest). However, the official Page of a celebrity or public figure that is managed by employees might be treated differently. *See generally* Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L.Rev. 1322, 1347–57 (2002) (discussing how *persona* might be disentangled from personal services in general)."

In re CTLI, LLC, at 367.

A contrary conclusion to that reached by the Court in *CTLI* might not result in a meaningful distinction. In *CTLI*, the Court concluded that a celebrity's personal social media account, if managed by the celebrity, is not property of the bankruptcy estate. If the contrary were true – that a social media account becomes property of the bankruptcy estate – since one cannot compel a celebrity to render services in furtherance of the exploitation of that asset absent involuntary servitude (*e.g.*, by forcing the celebrity to post new content), the social media account would likely have no value upon sale.

6. Can you sell normal everyday assets owned by a celebrity for more money because they are celebrity owned?

In this day of crazed fans, Beliebers, groupies and collectors of all sorts, celebrity-owned everyday items may garner more value than those same items owned by non-celebrities. It is common place for celebrities to sell their everyday items at high prices and donate the proceeds to charity – just ask the Kardashian sisters. Often times, when the celebrity items are sold in the normal non-bankruptcy context, they are sold by the celebrity and/or have some sort of

ownership verification so that the buyer or collector has assurance that the item being purchased actually belonged to the beloved celebrity. This certification of ownership surely increases the value of the item even more.

As a result of celebrity worship present in the current culture, if a celebrity were to file for bankruptcy, the celebrity's average personal items could be considerably more valuable than might otherwise be the case, and could be sold to generate substantial funds for the benefit of creditors. If a celebrity were to claim exemptions for ordinary household items, how would one go about valuing such items on the debtor's bankruptcy schedules?

The celebrity debtor (as with all debtors) has a duty to provide accurate schedules of assets and liabilities, including accurate values for such assets. *In re Searles,* 317 B.R. 368, 378 (9th Cir. BAP 2004) (The continuing nature of the duty to assure accurate schedules of assets is fundamental because the viability of the system of voluntary bankruptcy depends upon full, candid, and complete disclosure by debtors of their financial affairs). The Official Form Schedules required to be used by debtors are executed under penalty of perjury for verification in compliance with Fed. R. Bankr.P. 1008. In *In re Leija,* 270 B.R. 497, 502-03 (Bankr.E.D.Cal. 2001), the court found that the term "oath" in Bankruptcy Code section 727(a)(4)(A) necessarily includes the unsworn declarations prescribed in the Official Forms. To hold otherwise would virtually nullify section 727(a)(4)(A) and would render Fed. R. Bankr.P. 1008 meaningless. *Id.* Further, the verification itself is a material representation of fact—that the debtor had read the pleading and that the information was true and correct to the best of the debtor's information and belief. *Id.* Based on the foregoing, the celebrity debtor has a duty to properly value his or her assets taking into account the added value that the celebrity ownership affords to an everyday item.

After determining the proper, and likely, higher value for the celebrity debtor's assets, the celebrity debtor next turns to properly scheduling his or her exemptions in such assets. Under the California exemption scheme, a debtor has two sets of exemptions from which to choose. Under the first set – the set provided pursuant to CCP Section 703 – for the debtor's personal items, the debtor has an unlimited exemption pursuant to CCP Section 703.140(b)(3) so long as no single item is worth more than $675. Additionally, for personal items, a debtor may supplement his or her other exemptions using the wild card exemption provided for under CCP Section 703.140(b)(5).

Under the second set of exemptions offered to a debtor pursuant to CCP Section 704, for a debtor's household and personal items, the debtor can exempt those assets which are *reasonable and necessary* pursuant to CCP Section 704.020. However, Courts have ruled that what is "reasonably necessary for the support of the debtor should be sufficient to sustain basic needs, and not related to the debtor's former status in society or lifestyle to which he or she is accustomed." *In re Gillead,* 171 B.R. 886, 890 (Bankr. E.D. Cal. 1994) *citing In re Taff,* 10 B.R. 101 (Bankr.D.Conn.1981).

Under the first exemption scheme, it appears that the celebrity debtor would be limited to asserting an exemption in the amount of $675 for each personal item; however, it is likely that due to the debtor's celebrity status, his or her personal items would each easily be valued at more than $675. Thus, in under this scenario, a trustee or celebrity debtor, as the case may be, there would need to be an allocation between the exemption amount and the amount available to satisfy creditor claims. Essentially, this could result in the forced liquidation of all of a celebrity's assets because, unlike the "average Joe" creditor, there could be a market for a used article of clothing or furniture.

Under the second exemption scheme, a celebrity debtor could argue that although his or her particular personal item is more valuable than normal due to the debtor's celebrity status, that personal item is reasonable and necessary. Thus, using the second exemption scheme a celebrity debtor might have a better chance of retaining his or her ordinary personal assets. This result is more questionable when dealing with exotic cars, jewelry and other goods perceived to be luxuries.

Another issue unique to a celebrity debtor is that often after a celebrity's death, his or her assets may increase in value even more. Given the foregoing, what happens when a celebrity debtor dies during his or her bankruptcy case and the value of his or her assets suddenly skyrocket? How are his or her claimed exemptions affected? To answer this question, it helps to look to bankruptcy cases of non-celebrities in which the debtors have passed away during the bankruptcy.

When a debtor passes away during the pendency of his or her bankruptcy case, the only assets that go into the probate estate are the property claimed as exempt in the debtor's bankruptcy case. *In re Bauer*, 343 B.R. 234, 236–37 (Bankr. W.D. Mo. 2006). Because the Debtor's right to claim a (homestead) exemption is generally fixed upon the date the chapter 7 petition is filed, the Debtor's post-petition death does not affect his right to claim a (declared homestead) exemption under California law. *In re Combs*, 166 B.R. 417, 421 (Bankr. N.D. Cal. 1994); *See also In re Peterson*, 897 F.2d 935, 935 (8th Cir. 1990).

However, any appreciation in value of assets that occurs after the filing of the bankruptcy that are above the amount of the claimed exemptions belongs to the estate. *In re Gebhart*, 621 F.3d 1206, 1211 (9th Cir. 2010). The Court in *In re Gebhart,* citing several cases, stated "what is frozen as of the date of filing the petition is the value of the debtor's exemption, not the fair

market value of the property claimed as exempt. *See Hyman v. Plotkin (In re Hyman),* 967 F.2d 1316, 1320 n. 9 (9th Cir.1992). A number of our cases have held that, under the California exemption scheme, the estate is entitled to postpetition appreciation in the value of property a portion of which is otherwise exempt. *See Alsberg v. Robertson (In re Alsberg),* 68 F.3d 312, 314-15 (9th Cir.1995); *Hyman,* 967 F.2d at 1321; *Schwaber v. Reed (In re Reed),* 940 F.2d 1317, 1323 (9th Cir.1991); *see also Viet Vu v. Kendall (In re Viet Vu),* 245 B.R. 644, 647-48 (9th Cir.BAP2000)." *Id.*

Taking into account the above, it seems that any increase in the value of the celebrity's assets due to the celebrity's post-petition death would be property of the bankruptcy estate and the celebrity's probate estate would be limited to the exemption amounts asserted by the celebrity at the beginning of the bankruptcy case.

In addition, could a trustee compel a celebrity debtor to certify ownership of a particular item to be sold, thereby increasing its value? Although it might be in the celebrity's financial best interest to cooperate and certify ownership of the item so to ensure that the highest possible price is received, there is no provision of the Bankruptcy Code under which one could compel the celebrity to do so. More likely, if the celebrity is unwilling to certify ownership and a trustee is appointed in the particular case, the trustee would sell the item and could make the statement that based upon the celebrity debtor's schedules filed under penalty of perjury, the trustee represents that the item to be sold was owned by the celebrity debtor; however, this type of representation would be inconsistent with the typical sale of assets under 11 U.S.C. § 363 that is accomplished on an "as is, where is" basis to avoid later litigation over such representation.

In summary, a number of unique issues may arise when a bankruptcy is filed by a celebrity. Due to the current culture, expanding number and types of celebrities and dramatic

developments in media and technology, one should expect that these issues will become more and more common. It also appears likely that each of the states will be called upon to address issues concerning publicity and related matters.

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