S236208

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HELLER EHRMAN LLP,

Plaintiff and Appellant,

v.

DAVIS WRIGHT TREMAINE LLP,

Defendant and Respondent.

SUPREME COURT
FILED
MAY 02 2017
Jorge Navarrete Clerk
Deputy

ON A CERTIFIED QUESTION FROM THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NOS. 14-16314, 14-16315, 14-16317, 14-16318

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE PROFESSOR JOHN MORLEY SUPPORTING RESPONDENT AND BRIEF OF AMICUS CURIAE PROFESSOR JOHN MORLEY SUPPORTING RESPONDENT

AKIN GUMP STRAUSS HAUER & FELD LLP
REX S. HEINKE (SBN 66163)
1999 AVENUE OF THE STARS, SUITE 600
LOS ANGELES, CA 90067-6022
TELEPHONE: 310.229.1000
FACSIMILE: 310.229.1001
EMAIL: RHEINKE@AKINGUMP.COM

ATTORNEYS FOR AMICUS CURIAE
PROFESSOR JOHN MORLEY

S236208

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HELLER EHRMAN LLP,

Plaintiff and Appellant,

v.

DAVIS WRIGHT TREMAINE LLP,

Defendant and Respondent.

ON A CERTIFIED QUESTION FROM THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NOS. 14-16314, 14-16315, 14-16317, 14-16318

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE PROFESSOR JOHN MORLEY SUPPORTING RESPONDENT AND BRIEF OF AMICUS CURIAE PROFESSOR JOHN MORLEY SUPPORTING RESPONDENT

AKIN GUMP STRAUSS HAUER & FELD LLP
REX S. HEINKE (SBN 66163)
1999 AVENUE OF THE STARS, SUITE 600
LOS ANGELES, CA 90067-6022
TELEPHONE: 310.229.1000
FACSIMILE: 310.229.1001
EMAIL: RHEINKE@AKINGUMP.COM

ATTORNEYS FOR AMICUS CURIAE
PROFESSOR JOHN MORLEY

CERTIFICATE OF INTERESTED ENTITIES OR PARTIES

[Cal. Rules of Court, Rule 8.208]

Amicus Curiae Professor John Morley certifies that no entity or person must be listed pursuant to this Rule.

APPLICATION OF PROFESSOR JOHN MORLEY FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE SUPPORTING RESPONDENT

Pursuant to California Rule of Court 8.520(f), Professor John Morley hereby requests permission to file the attached brief as amicus curiae supporting Respondent Davis Wright Tremaine LLP. This application is timely made within 30 days of the filing of the last party brief.

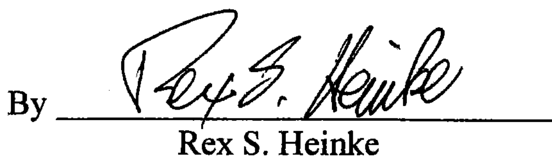
Amicus curiae is a professor of law at Yale Law School, where he teaches business organizations, securities regulation, and trusts and estates. He researches and writes about issues in organization. He has recently written and submitted for publication an extensive review of every large American law firm collapse in the last thirty years. (John Morley, *Why Law Firms Collapse* (2015) Yale Law & Economics Research Paper No. 521.) Using news reports, litigation records, data, and interviews, he has explored why law firms collapse and how to stop them from doing so. His interest in this case is to ensure that law firms, their partners, and creditors are treated fairly and sensibly.

Pursuant to California Rule of Court 8.520(f), no party or counsel for a party has authored any part of the attached brief. Likewise, no party or counsel for any party has made a monetary contribution intended to fund the preparation or submission this brief.

Respectfully submitted,

Dated: April 17, 2017

AKIN GUMP STRAUSS HAUER & FELD LLP



By ______________________
Rex S. Heinke

Attorneys for Amicus Curiae

S236208

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HELLER EHRMAN LLP,

Plaintiff and Appellant,

v.

DAVIS WRIGHT TREMAINE LLP,

Defendant and Respondent.

ON A CERTIFIED QUESTION FROM THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NOS. 14-16314, 14-16315, 14-16317, 14-16318

BRIEF OF AMICUS CURIAE PROFESSOR JOHN MORLEY SUPPORTING RESPONDENT

AKIN GUMP STRAUSS HAUER & FELD LLP
REX S. HEINKE (SBN 66163)
1999 AVENUE OF THE STARS, SUITE 600
LOS ANGELES, CA 90067-6022
TELEPHONE: 310.229.1000
FACSIMILE: 310.229.1001
EMAIL: RHEINKE@AKINGUMP.COM

ATTORNEYS FOR AMICUS CURIAE
PROFESSOR JOHN MORLEY

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. SINCE *JEWEL V. BOXER* WAS DECIDED, CALIFORNIA PARTNERSHIP LAW AND MOST LAW FIRMS HAVE DISTINGUISHED THE DEPARTURE OF A PARTNER FROM THE DISSOLUTION OF A LAW FIRM. 3

II. UNFINISHED BUSINESS LIABILITY ONLY APPLIES TO PARTNERS WHO LEAVE AFTER A FIRM'S DISSOLUTION, NOT BEFORE. 5

III. UNFINISHED BUSINESS LIABILITY DOES MORE HARM THAN GOOD. 7

A. Unfinished business liability encourages law firms to collapse in a "run on the bank." 7

B. Unfinished business liability is unfair. 10

C. Unfinished business liability achieves the opposite of its purported purpose 11

IV. UNFINISHED BUSINESS LIABILITY CANNOT BE FIXED BY EXPANDING IT TO PARTNERS WHO LEAVE BEFORE DISSOLUTION 14

V. ELIMINATING UNFINISHED BUSINESS LIABILITY IS CONSISTENT WITH THE POLICY OF *JEWEL* AND SUBSEQUENT CHANGES IN CALIFORNIA LAW. 17

CONCLUSION 19

CERTIFICATE OF COMPLIANCE 20

TABLE OF AUTHORITIES

Page(s)

Cases

In re Brobeck, Phleger & Harrison LLP
(Bankr. N.D. Cal. 2009) 408 B.R. 318 13

In re Heller Ehrman LLP,
No. 08-32514DM, 2013 WL 951706 (Bankr. N.D. Cal.
Mar. 11, 2013) 6

Hogan Lovells US LLP v. Howrey LLP
(N.D.Cal. June 3, 2015) 531 B.R. 814 6

Jewel v. Boxer
(1984) 156 Cal.App.3d 171 .... *passim*

In re Thelen LLP
(2014) 24 N.Y.3d 16 .... 6, 8

Statutes

11 U.S.C. § 547 13

Cal. Corp. Code, § 15029 3

Cal. Corp. Code, §§ 16100-16962 4

Cal. Corp. Code, § 16601 4

Cal. Corp. Code, § 16801, subd. (1) 4, 18

Uniform Fraudulent Transfer Act (1984) §§ 4-5 13

Uniform Partnership Act (1914) § 15 13

Uniform Partnership Act (1997) § 601 4

Uniform Partnership Act (1997) § 801, subd. (1) 4

Other Authorities

Susan Beck, *Brobeck's Final Days* (Mar. 4, 2003) 7

Henry Campbell Black, *Treatise on the Law and Practice of Bankruptcy* (3d ed. 2006) §§ 155, 580, 665 13

Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete* (1999) 74 N.Y.U. L. Rev. 575, 575 16

1 Christine Hart et al., *Bromberg & Ribstein on Partnership* (2d ed. Supp. 2016) § 5.10[D] 13

BRIEF OF AMICUS CURIAE PROFESSOR JOHN MORLEY SUPPORTING RESPONDENT

INTRODUCTION

The unfinished business doctrine does more harm than good. It encourages law firms to break apart, treats partners unfairly, and achieves the opposite of its purported purpose. Law firms, their creditors, and their partners would all be better off if unfinished business liability did not apply unless a firm deliberately adopts the doctrine in its partnership agreement.

Professor Morley's review indicates that the basic problem with unfinished business liability is that it discriminates between partners who leave before a firm dissolves and partners who leave after dissolution. A partner who leaves just after a firm dissolves faces extensive unfinished business liability; a partner who leaves just before the firm dissolves does not. The only partners who are liable are the partners who stay until dissolution.

This discrimination between partners who leave before and after dissolution creates a host of problems. The main one is that it encourages a "run on the bank." Because partners who get out early can avoid unfinished business liability, the doctrine encourages partners to race for the exits, often driving a firm to a premature death. As Professor Morley's study has demonstrated, a race for the exits has been a major part of every large law firm collapse in the last thirty years, and the unfinished business doctrine has been a key contributing factor.

A second problem is that by exempting the first partners to leave, the doctrine treats partners unfairly. It punishes partners who stay, but not partners who leave. This difference in treatment is especially unfortunate because the only partners who face liability are the ones who stay the longest and show the most loyalty.

A final problem is that the doctrine achieves the opposite of its purpose. The doctrine's central goal is to prevent a partner from opportunistically leaving and taking a client relationship that the firm has invested in developing. Setting aside for a moment the question of whether a client matter can ever truly belong to a firm such that a partner can be considered to "take" it, the more important point is that even if one assumes that a client matter somehow belongs to a firm, the unfinished business doctrine does not actually discourage a partner from taking the matter, because the doctrine does not apply to most partners who leave. Under the doctrine as it now stands, a partner can leave and take a client without facing any liability at all so long as the partner departs before the firm dissolves. A partner can easily take a client relationship from a firm under the doctrine of unfinished business—he just has to do it early. Unfinished business liability thus does the opposite of what it is supposed to do. Instead of punishing a partner for leaving, it punishes him for staying.

This Court cannot solve the problem with unfinished business liability by extending the doctrine to partners who leave before dissolution, because to do so would create enormous practical problems. Extending unfinished business liability to partners who leave before dissolution would devastate the already well-developed market for lateral partner movement and would make California an extreme outlier relative to the rest of the country, profoundly damaging the state's law firms, lawyers, and legal clients.

Holding the unfinished business doctrine inapplicable by default would not be inconsistent with the original logic of unfinished business liability. Such a holding would simply update the unfinished business doctrine to reflect important changes in the law of partner departure and dissolution that have made the doctrine more problematic than when it first appeared.

The only sensible solution to the problem of unfinished business liability is thus to hold that it does not apply by default. A firm that wants the rule should be able to adopt it; all other firms should be free from it.

ARGUMENT

I. SINCE *JEWEL V. BOXER* WAS DECIDED, CALIFORNIA PARTNERSHIP LAW AND MOST LAW FIRMS HAVE DISTINGUISHED THE DEPARTURE OF A PARTNER FROM THE DISSOLUTION OF A LAW FIRM.

The touchstone case for unfinished business liability in California and elsewhere is *Jewel v. Boxer* (1984) 156 Cal.App.3d 171, which involved the break-up of a four-partner law firm. The firm dissolved when two of the partners left and took some of the firm's clients with them, raising a question about whether these partners should have to share with their former partners the money they subsequently collected on client matters that were open when they left the firm. In response, the court produced the unfinished business liability doctrine.

In *Jewel*, the court had no occasion to consider the argument at the heart of this brief, which is that unfinished business liability makes little sense when a partner can depart before dissolution. The reason was that the law firm in *Jewel* dissolved upon the very first departure of partners. When two of the lawyers proposed to leave, the firm dissolved immediately by agreement of the partners. The same result would also have been reached under the default rules of statutory partnership law, which would have applied to the firm given the firm's lack of any written partnership agreement. Under the original Uniform Partnership Act, which California had adopted at the time, a partnership dissolved by default immediately when any partner withdrew. (Former Corp. Code, § 15029, repealed by Stats. 1996, ch. 1003, eff. Jan. 1, 1999). The partners who left the Jewel law

firm thus had no ability to take clients with them before the firm dissolved, because the moment of the partners' departures and the moment of the firm's dissolution were the same.

In the years since *Jewel*, however, much has changed in California partnership law. Effective in 1997, California adopted a new partnership law based on the Revised Uniform Partnership Act (RUPA) that uncoupled a firm's dissolution from a partner's departure. (Corp. Code, §§ 16100-16962.) Like RUPA, California created a new concept, known as "dissociation" to describe a partner's withdrawal from a firm. (Corp. Code, § 16601; Uniform Partnership Act (1997) § 601.) But unlike RUPA, California separates dissociation from dissolution. RUPA maintains the old rule in place at the time of *Jewel* -- that a single partner's departure immediately dissolves the entire firm. (Uniform Partnership Act (1997) § 801, subd. (1).) But California modified this provision of RUPA by providing that a partner's departure does not automatically dissolve a firm. A firm only dissolves when at least half of the partners so vote. (Corp. Code, § 16801, subd. (1).)[1]

---

[1] The relevant portion of the statute reads,

> A partnership is dissolved, and its business shall be wound up, only upon the occurrence of any of the following events:
>
> (1) In a partnership at will, by the express will to dissolve and wind up the partnership business of at least half of the partners, including partners, other than wrongfully dissociating partners, who have dissociated within the preceding 90 days, and for which purpose a dissociation under paragraph (1) of Section 16601 constitutes an expression of that partner's will to dissolve and wind up the partnership business.

Technically, a partnership can still dissolve by default merely as a result of the partners' dissociations even without a formal vote. If at least half of the partners appropriately dissociate, the dissociations will be deemed to constitute an expression of the dissociating partners' will to dissolve and the firm will dissolve. What remains clear, however, is that a firm does not

Importantly, the rule that California now applies — i.e., that dissociation does not cause dissolution and dissolution only happens by majority vote — is now standard in many law firms across the country, even in states where this rule does not apply by default, because many firms now adopt it by contract. Professor Morley's study of collapsed law firms, for example, covered 36 different firms, and every one of these firms, regardless of the default rules in its state of organization, provided in its partnership agreement that it would only dissolve by a majority vote of its partners.

The reason firms so commonly unbundle departure and dissolution by contract is that firms find it unworkable to dissolve each time a partner leaves. Imagine, for example, if Skadden Arps had to dissolve every time a partner died, retired, or left for another firm. With numerous partners coming in and out every year, the result would be pandemonium. By default in California and by contract in other states, therefore, it is now standard for law firms to operate under a very different set of partnership rules than those in place in *Jewel.*

II. UNFINISHED BUSINESS LIABILITY ONLY APPLIES TO PARTNERS WHO LEAVE AFTER A FIRM'S DISSOLUTION, NOT BEFORE.

Because *Jewel* never addressed the possibility that departure and dissolution might not occur simultaneously, courts in the years since *Jewel* have had to figure out how to apply the unfinished business doctrine to firms that uncouple departure and dissolution, as has now become standard. Courts have had to decide, in other words, whether unfinished business

---

dissolve on the departure of the very first partner as it would have under the old California partnership law in place at the time *Jewel* was decided. Departure and dissolution are no longer automatically simultaneous in a partnership of more than two partners.

liability should apply to any partner who leaves at any time or only to a partner who leaves after a firm dissolves.

Almost every court that has considered the issue has applied unfinished business liability only to partners who leave after a firm dissolves. The Trustee in this case conceded as much in an earlier hearing in bankruptcy court. (*In re Heller Ehrman LLP* (No. 08-32514DM , Bankr. N.D. Cal., Mar. 11, 2013) 2013 WL 951706, at *3-4. Other courts and bankruptcy trustees have reached the same conclusion. (*In re Thelen LLP* (2014) 24 N.Y.3d 16, 32*; Hogan Lovells US LLP v. Howrey LLP* (N.D.Cal. June 3, 2015) 531 B.R. 814, 826.)

These decisions recognize the modern reality that partners now move between law firms frequently. According to the American Lawyer Media Lateral Partner Moves database, partners in National Law Journal (NLJ) 350 and American Lawyer (AmLaw) 200 firms moved laterally between firms more than 44,000 times between 2000 and 2016. This pattern of frequent and growing partner movement is inconsistent with the application of unfinished business liability to undissolved firms, because almost all of these moves took place between healthy, undissolved firms. It seems highly unlikely that partners would move between healthy firms at such a pace if they or their new firms expected to lose years' worth of revenue under the unfinished business doctrine.

Moreover, if unfinished business liability applied to partners leaving undissolved firms, one would expect to find extensive evidence of litigation about it on Lexis and Westlaw. If indeed the doctrine applied to partners leaving undissolved firms, then with more than 44,000 chances for litigation in the last sixteen years, court reports should be bursting with opinions about it. And yet the trustee in this case has found none. This indicates that unfinished business liability does not apply to partners leaving firms that have not yet dissolved.

III. UNFINISHED BUSINESS LIABILITY DOES MORE HARM THAN GOOD.

A. Unfinished business liability encourages law firms to collapse in a "run on the bank."

When unfinished business liability applies only to firms that have already dissolved, it creates a host of problems. The most serious is to encourage a kind of "run on the bank." Because unfinished business liability applies only to partners who stay until dissolution, the clear incentive is to get out quickly. A partner who leaves quickly can walk away with no liability; a partner who stays too late can lose millions.[2] As each partner leaves, however, the risk of dissolution increases, which only pushes more partners to leave, and so on until a firm finally dissolves in a self-propelling spiral of decline.

This incentive to run is aggravated by the fact that a partner might never know precisely if or when a firm will dissolve. When the storied San Francisco law firm of Brobeck, Phleger & Harrison dissolved on January 30, 2003, for example, most of the partners who showed up at the meeting thought they were about to hear good news about a merger with Morgan Lewis. (Susan Beck, *Brobeck's Final Days* (Mar. 4, 2003) American Lawyer.) Instead, the firm's chairman announced that the firm was dissolving, with the result that everyone in the room now faced millions of dollars in unfinished business liability. Naturally, with experiences like Brobeck's in mind, a partner who is uncertain about when her firm will

---

[2] In practice, liability for an unfinished business claim actually tends to apply to a partner's new firm, rather than the partner personally, since a client who moves with the partner technically tends to be represented by the new firm, rather than to the partner. Nevertheless, a partner who leaves a dissolved firm stands to lose a great deal from unfinished business liability personally, because the expected risk and cost of liability tend to diminish a new firm's willingness to hire and pay a partner.

dissolve will tend to err on the side of caution by leaving early. Because a partner does not know when exactly his firm will dissolve, the only rational course of action is to get out quickly. This problem of a run on the partnership has been noticed by others, including the New York Court of Appeals in its opinion holding unfinished business liability inapplicable to hourly matters in the bankruptcies of Thelen and Coudert Brothers. (*In re Thelen*, *supra*, 24 N.Y.3d at p. 32.)

Professor Morley's research on law firm collapses confirms this intuition. In connection with his study, he reviewed the demises of 36 large law firms. For each of the 16 firms for which American Lawyer Media kept sufficient data on lateral partner movements, Professor Morley tallied the number of partners who departed in each month before a firm's collapse and then compared that to the number of partners who left peer firms during the same periods. He defined a collapsed firm's peers as the firms that ranked one spot above and one spot below the collapsed firm in the AmLaw profits-per-partner rankings in the year before the collapsed firm's demise.

Figures 1 and 2 present the results. The horizontal axis of the graph represents points in time, with points further to the right lying closer to the date of collapse. Date 0, on the right edge, represents the actual date a firm ceased operations. The graphs express the number of partners who departed in a given month as a percentage of the total partners present on date 0. The dots in the graphs represent the averages in each month for all firms in the relevant populations.

Figure 1: Average Percentage of Partners Departing From Collapsed Firms

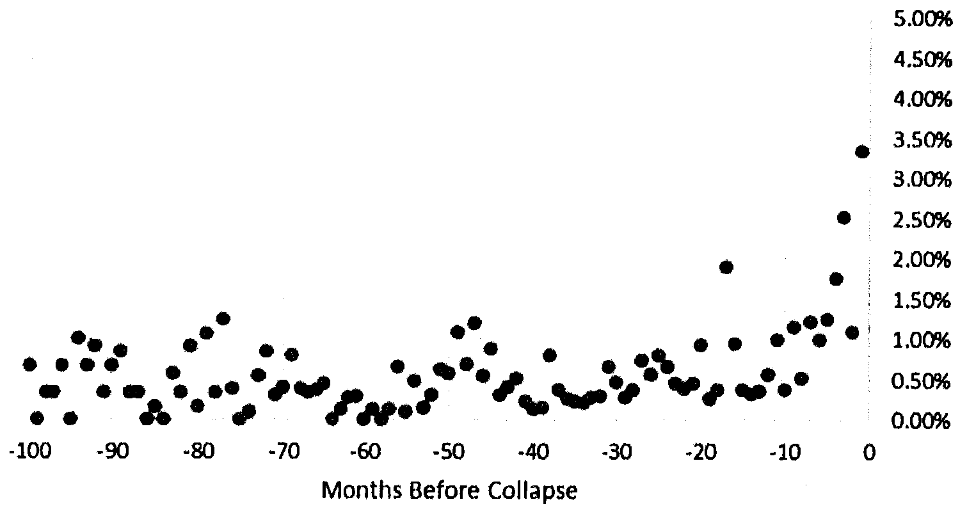
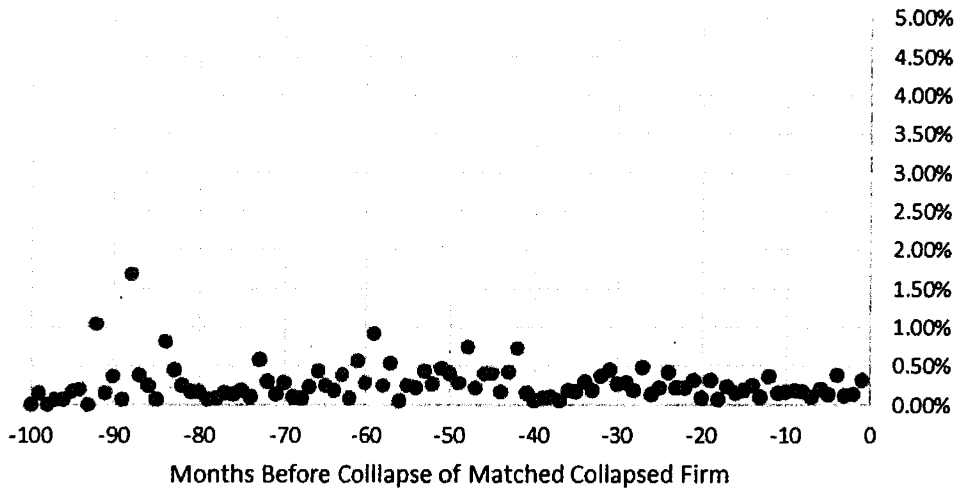


Figure 2: Average Percentage of Partners Departing From Surviving Peer Firms



The two graphs show a striking pattern: in collapsing firms, departures ramp up exponentially in the months just before collapse, and in surviving peer firms, departures stay basically flat over the same periods. These diverging patterns are consistent with a self-propelling spiral of decline in collapsing law firms, in which each partner's departure encourages other partners to follow him out the door.

This graphical evidence is also consistent with qualitative evidence. In connection with Professor Morley's study, he interviewed partners from collapsed law firms and extensively reviewed news and litigation records. The overall impression from this research was clear: law firms collapse because their partners depart, and partners depart because other partners have departed before them. The forces that initially spark the first partner to withdraw vary from firm to firm. But the ultimate cause of death is always the same: firms collapse because their partners depart in a self-reinforcing spiral of decline.

Unfinished business liability, to be sure, is not the only force that pushes partners to follow each other out the door. Professor Morley has argued in his study that partners also leave declining firms to escape declining profits and other forms of liability that are triggered at the moment of a firm's demise, including fraudulent and preferential transfer liability for profit and capital distributions in the months leading up to a firm's collapse. It is thus difficult to say exactly how much of the spiral of departures in any given firm is driven by unfinished business liability and how much is driven by these other factors. But unfinished business liability certainly makes things worse. Given all of the other pressures bearing down on a declining law firm, it seems profoundly unwise to add unfinished business liability as a spur encouraging partners to leave.

B. Unfinished business liability is unfair.

The race for the exits is not the only problem with unfinished business liability. Another problem is that it is unfair. It unaccountably treats partners who stay at a firm worse than partners who leave. Because liability only applies to partners who remain until dissolution, dissolution becomes an arbitrary dividing line between partners that has no basis in principle. A partner who leaves one day before dissolution walks away free; a partner who waits until one day after dissolution loses millions.

Indeed, if anything, unfinished business liability reserves its harshest punishment for the partners who least deserve it. The partners who stay until dissolution are the stalwarts who show the greatest loyalty. They are the ones who are least culpable for a firm's collapse. And the partners who stay, by definition, cannot ever be accused of having done the misdeed that is unfinished business liability's raison d'être. Unfinished business liability ostensibly exists to discourage partners from departing opportunistically, but partners who stay until dissolution cannot be accused of having departed opportunistically; they stay until the firm itself forces them to leave.

C. Unfinished business liability achieves the opposite of its purported purpose.

The unfinished business doctrine's tendency to spark "runs on the bank" and treat partners unfairly is damaging, but it might be bearable if the doctrine generated enough benefits to outweigh its harms. If unfinished business liability did partners and creditors enough good, then we should be willing to put up with its damaging consequences. In fact, however, unfinished liability does not do any good, because it achieves the exact opposite of what it is supposed to achieve.

The basic purpose of unfinished business liability, in the trustee's view, is to prevent a partner from opportunistically leaving and taking clients with him. The defendants contest this, arguing that a partner can never be said to "take" a matter from a firm, because a client matter can never truly belong to a firm in the first place. Professor Morley expresses no view on this dispute. It is nevertheless clear that if one assumes, purely for the sake of argument, that the trustee is right and that it is possible for a firm to have some legal interest in an ongoing hourly-fee matter, the central purpose of unfinished business liability is surely to stop a partner from leaving and taking such a matter with him.

The trouble with the unfinished business doctrine, however, is that it does not actually serve this purpose. Even if we assume that a matter can truly belong to a firm, the unfinished business doctrine does not generally stop a partner from "taking" it. And the same is true if (as the defendants argue) the choice of whom to hire rests at all times with the client. Even if the unfinished business doctrine applies to a partner, the partner can leave for any reason, and be rehired by the client, so long as he does it before his firm dissolves. The unfinished business doctrine simply does not apply to the great majority of partners who leave and take matters from their firms.

The failure of unfinished business liability to stop partners from leaving pre-dissolution has been evident in almost every large law firm collapse in the last thirty years. Almost every large firm that has collapsed in the past thirty years has fallen apart because its partners left and their clients followed. This is the core finding of Professor Morley's study. But the doctrine of unfinished business liability did nothing to stop partners from leaving, because the doctrine did not apply to partners who left. Rather than applying to the partners who left, the doctrine only applied to the partners who stayed. The net effect is to produce the exact opposite of the incentives we want. The lesson of unfinished business liability is not to stay with a firm—it is to get out early.

The trustee might argue that even if unfinished business liability does not discourage partners from leaving early, it does discourage them from leaving late. It might stop partners from leaving once a firm has already dissolved. But this makes no sense, because once a firm has dissolved, a partner has no choice but to leave. No amount of liability can stop a partner from leaving a dissolved firm, because a dissolved firm is not a viable business.

The trustee might further argue that we have stated the purpose of the unfinished business doctrine incorrectly. The purpose of unfinished

business liability, the trustee might argue, is not to stop partners from leaving opportunistically, but to protect creditors. Thus, it might not matter whether the doctrine encourages or discourages partners from leaving, because its only function is to get more assets into the bankruptcy estate once the bankruptcy has happened.

This rationale for the doctrine, however, is inconsistent with the doctrine's larger structure. A key fact about the unfinished business doctrine is that the doctrine can be waived unilaterally by a firm's partners without the consent of their creditors. If the partners of a firm write appropriate language into their partnership agreement before a firm becomes insolvent, the unfinished business doctrine will not apply to them. (*Jewel, supra*, 156 Cal.App.3d at p. 179; *In re Brobeck, Phleger & Harrison LLP* (Bankr. N.D. Cal. 2009) 408 B.R. 318, 327.)

That partners have the ability to waive unfinished business liability without a creditor's consent is important, because it tells us that the doctrine's principal function is not to protect creditors. We can tell when a doctrine exists to protect creditors, because it cannot be waived without their consent. We see this in myriad other doctrines whose purpose truly is to protect creditors. Under the original Uniform Partnership Act, for example, partners could not waive their general liability for debts without the consent of each creditor who might be affected. (Uniform Partnership Act (1914) § 15; 1 Christine Hart et al., *Bromberg & Ribstein on Partnership* (2d ed. Supp. 2016) § 5.10[D].) The same is true now for fraudulent and preferential transfers. (11 U.S.C. § 547; Uniform Fraudulent Transfer Act (1984) §§ 4-5; Henry Campbell Black, *Treatise on the Law and Practice of Bankruptcy* (3d ed. 2006) §§ 155, 580, 665.) None of these forms of liability can be waived by a debtor without a creditor's consent, because, unlike unfinished business liability, these rules are actually designed to protect creditors.

And even if unfinished business liability were supposed to protect creditors, it would not be serving this purpose very well because it does as much to hurt creditors as to help them. Premature collapse is never in a creditor's interest, because a law firm typically has few hard assets for a creditor to seize. And so although a creditor might sometimes demand that a firm liquidate its assets when a run on the partnership enters its terminal stage, the best case scenario for any creditor is for a firm to remain healthy and never to have a run on the partnership in the first place. When the creditor first makes a decision to lend, therefore, it may very well prefer a policy that reduces the odds of a run on the firm over a policy that maximizes recovery if a run actually happens. Although a creditor in a firm that has already collapsed will quite rationally want to grab everything it can, a creditor in a healthy firm will want to avoid at the outset ever creating the incentives that might drive the partners to flee in the first instance.

IV. UNFINISHED BUSINESS LIABILITY CANNOT BE FIXED BY EXPANDING IT TO PARTNERS WHO LEAVE BEFORE DISSOLUTION.

Given the problems that follow from the unfinished business doctrine's tendency to discriminate between partners who leave before and after dissolution, one might ask whether this Court could repair the doctrine by simply expanding its application. Perhaps, one might argue, the doctrine could apply to every partner who leaves a law firm, including a partner who departs before the firm dissolves. A partner would have no incentive to race for the exits and no reason to fear unfair treatment if unfinished business liability would catch him no matter when he departed.

Of course, that issue is not presented here, either on the facts of this case or in the certified question. And, in any event, this solution would not actually work, because to apply unfinished business liability before

dissolution would be unworkable. The reason almost every court in America has chosen to apply unfinished business liability only on dissolution is that to do otherwise would be wildly impractical.

The biggest problem is that holding every departing partner liable for unfinished business would profoundly upset the market for lateral partners. As noted above, in just the small number of firms that comprise the AmLaw 200 and NLJ 350, partners moved laterally more than 44,000 times between 2000 and 2016. If unfinished business liability extended to every partner leaving even an undissolved firm, then each of these tens of thousands of partners would face enormous penalties. Court dockets would quickly fill with litigation about what exactly qualified as a "matter" or a "client" and what it meant for a matter to be "unfinished." The genie of partner movement is decades too far out of the bottle for this kind of fundamental restriction.

Another problem is that changing the rule now to apply to every partner leaving every healthy firm would upset expectations. Even if extending the rule were good policy, it would overturn the assumptions on which partners all across the legal industry have built their careers. In connection with Professor Morley's study of collapsed law firms, he interviewed a great many law firm partners. Tellingly, none of them believed they would face unfinished business liability for leaving a firm before it dissolved. The booming market in lateral partners and all of the institutions and service providers that support it are built on the assumption that unfinished business liability does not apply to most partners who move. The prospect of unfinished business liability would significantly change the calculus about whether to become a partner at a law firm in the first place and then whether to stay or go once partnership was attained.

Were California to expand the unfinished business doctrine unilaterally on its own, firms in California would find themselves at a

significant disadvantage in recruiting lateral partners. A California firm would find it harder to compete for lateral partners with a firm outside of the state, because potential partners would understandably be wary about the California firm's implicit threat to lock them in. Imagine a partner who wanted to leave a firm in Los Angeles and move to another firm that also had offices in L.A. If the partner interviewed with the L.A. offices of both Morrison & Foerster and Sullivan & Cromwell, the partner might very well prefer Sullivan & Cromwell, because Sullivan is organized in New York while MoFo is organized in California. And the threat of being locked into MoFo, but not Sullivan, might very well tip the balance.

For California to become the only outlier state on partner movement would be especially unfortunate because of the way it would clash with the state's broader policy of encouraging free movement of workers. California law famously has a longstanding policy of protecting the right of workers to move between employers, and this policy has often been cited as a key explanation, among other things, for the rise of the tech industry in the Bay Area. (E.g., Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete* (1999) 74 N.Y.U. L. Rev. 575, 575.) For California to become the only state in America to lock lawyers into their law firms by applying *Jewel* before dissolution would be deeply anomalous to the state's broader legal tradition.

One might argue that the problems with unfinished business liability could be solved more modestly by applying it only to partners who leave after a firm becomes insolvent, rather than after a firm dissolves, because insolvency often comes before dissolution. This would not work, however, because it would merely reproduce all of the same problems with applying the doctrine on dissolution. The moment of insolvency would merely take the place of the moment of dissolution. Instead of rushing to leave before

dissolution, for example, partners would just rush to leave before insolvency. And instead of treating partners unfairly if they stayed until after dissolution, the doctrine would just treat partners unfairly if they stayed until after insolvency. The real problem with unfinished business liability, in other words, is that it flips on like a switch at a specific moment in time. Whether that moment is insolvency or dissolution does not matter—what matters is that one can avoid the doctrine by leaving before the switch gets flipped. It is this possibility for avoidance that drives the "run on the bank," the unfairness, and the mismatch between the doctrine's purposes and effects. And this possibility would remain if the doctrine applied only on insolvency.

V. ELIMINATING UNFINISHED BUSINESS LIABILITY IS CONSISTENT WITH THE POLICY OF *JEWEL* AND SUBSEQUENT CHANGES IN CALIFORNIA LAW.

Defendants argue that the unfinished business doctrine has never applied to hourly billed matters and that holding the doctrine inapplicable to Heller now would make no change to existing law. Defendants may well be right about this, though Professor Morley expresses no view. Still, even if we assume that the unfinished business doctrine has previously applied to hourly billed matters, making a change in the doctrine now would make sense as a way of updating it to conform to recent changes in California's statutory law and broader legal practice.

The reason the unfinished business doctrine made sense in *Jewel* was that, as noted above, the law firm there did not distinguish between withdrawal and dissolution. The firm dissolved immediately upon the departure of the very first partners to leave, as required by both the default rules of statutory California partnership law at the time and an agreement among the partners in the firm.

Times have changed, however. The reason all of the issues that we have identified in this brief now arise is that very few firms now combine departure with dissolution like the firm in *Jewel* did. Every collapsed firm in Professor Morley's study, including Heller Ehrman, had a provision in its partnership agreement that said the firm only dissolved on a vote of the partnership, rather than on a withdrawal or dissociation of a partner. And as a result of amendments to California's statutory law of partnership, this is also the rule that now applies by default in California even to law firms that do not adopt it by contract. (Corp. Code, § 16801, subd. (1).)

Given that the rules of departure and dissolution have changed so significantly since *Jewel* came down, it would be consistent with the original spirit of *Jewel* to modify the rules of unfinished business liability to make them consistent with the new rules of dissolution. Now that departure no longer automatically results in dissolution, unfinished business liability no longer makes as much sense as it once did.

What Professor Morley proposes, therefore, is not to abandon *Jewel,* but merely to update it to reflect changes in legal practice and the default rules of partnership law. Even if one accepts the trustee's view that *Jewel* has applied to hourly matters in the past, one could nevertheless also believe that the doctrine should not apply to these matters in the future, because the partnership rules that made the doctrine workable in *Jewel* have since been eliminated by default or contract in almost every law firm in California. By matching the default rule of unfinished business liability to the new default rules of dissolution, therefore, this Court could harmonize long-established rules with recent changes to the law that surrounds them.

The case for eliminating unfinished business liability by default is unusually strong in California because California's changes to the law of dissolution have been codified by statute. But eliminating the unfinished business doctrine would make sense even if California had not changed its

statute, because so many law firms have changed the rules of dissolution by contract anyway.

CONCLUSION

This Court should answer the certified question by holding that the unfinished business doctrine does not apply to hourly matters by default. Firms that wish to adopt a rule of unfinished business liability should be free to do so in their partnerships agreements, but other firms should not be forced into the rule by default.

Respectfully submitted,

Dated: April 17, 2017

AKIN GUMP STRAUSS HAUER & FELD LLP

By

Rex S. Heinke

Attorneys for Amicus Curiae
Professor John Morley

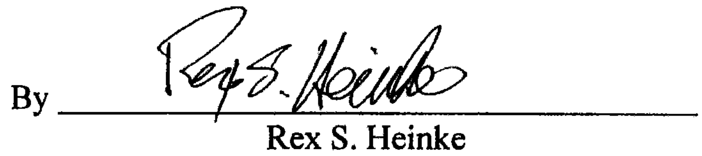
CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, Rule 8.520(c)]

This brief consists of 5516 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: April 17, 2017

AKIN GUMP STRAUSS HAUER & FELD LLP



By ______________________
Rex S. Heinke

Attorneys for Amicus Curiae
Professor John Morley

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

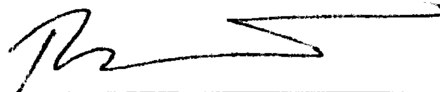
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1999 Avenue of the Stars, Suite 600, Los Angeles, California 90067. On April 17, 2017, I served the foregoing document described as: **APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE PROFESSOR JOHN MORLEY SUPPORTING RESPONDENT AND BRIEF OF AMICUS CURIAE PROFESSOR JOHN MORLEY SUPPORTING RESPONDENT** on the interested parties below, using the following means:

SEE ATTACHED SERVICE LIST

☒ **BY UNITED STATES MAIL** I enclosed the document in a sealed envelope or package addressed to the respective addresses of the parties stated above and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Los Angeles, California.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 17, 2017, at Los Angeles, California.



Risa Slavin
[Print Name of Person Executing Proof]

[Signature]

SERVICE LIST

Christopher D. Sullivan
Diamond McCarthy LLP
150 California Street
San Francisco, CA 94111

Jeffrey T. Makoff
Valle Makoff LLP
388 Market Street, Suite 1300
San Francisco, CA 94111

Kevin William Coleman
Schnader Harrison Segal & Lewis LLP
650 California Street, 19th Floor
San Francisco, CA 94108

Attorneys for Heller Erhmann LLP: Plaintiff and Appellant

Shay Dvoretzky
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001

Robert Mittelstaedt
Jason McDonell
Nathaniel Garrett
Jones Day
555 California Street, 26th Fl.
San Francisco, CA 94104

Attorneys for Jones Day: Defendant and Respondent

Steven A. Hirsch
Steven P. Ragland
Keker, Van Nest & Peters LLP
633 Battery Street
San Francisco, CA 94111

Attorneys for Davis Wright Tremaine LLP: Defendant and Respondent

Peter Paul Meringolo
Luther Kent Orton
PMRK Law LLP
One Sansome Street, Suite 3500
San Francisco, CA 94104

Attorneys for Foley & Lardner LLP: Defendant and Respondent

Rachel Wainer Apter
Christopher J. Cariello
Anjali S. Dalal
Orrick, Herrington & Sutcliffe LLP 51
West 52nd Street
New York, NY 10019

Eric A. Shumsky
Orrick, Herrington & Sutcliffe LLP
Columbia Center
1152 15th Street, N.W.
Washington, DC 20005

Charles W. Tyler
Orrick, Herrington & Sutcliffe LLP
405 Howard St.
San Francisco, CA 94105

Attorneys for Orrick, Herrington & Sutcliffe LLP: Defendant and Respondent

Cassidy Estell Chivers
Hinshaw & Culbertson LLP
1 California Street, 18th Floor
San Francisco, CA 94111

Anthony E. Davis
Hinshaw and Culbertson LLP
800 Third Avenue, 13th Floor
New York, NY 10022

Joel D. Bertocchi
Hinshaw and Culbertson LLP
222 North LaSalle Street, Suite 300
Chicago, IL 60601

Jonathan M. Gordon
Alston & Bird LLP
333 South Hope Street, 16th Floor
Los Angeles, CA 90071

John W. Amberg
Bryan Cave LLP
120 Broadway, Suite 300
Santa Monica, CA 90401

H. Joseph Escher
Dechert LLP
One Bush Street, Suite 1600
San Francisco, CA 94104

Ann Marie Mortimer
Hunton & Williams LLP
550 South Hope Street, Suite 2000
Los Angeles, CA 90071

David C. Powell
McGuire Woods LLP
Two Embarcadero Center, Suite 1300
San Francisco, CA 94111

Stuart N. Senator
Munger, Tolles & Olson LLP
350 South Grand Avenue
Los Angeles, CA 90071

James Reid Sigel
Morrison & Foerster, LLP
425 Market Street
San Francisco, CA 94105

Miriam A. Vogel
Morrison & Foerster, LLP
707 Wilshire Boulevard, Suite 6000
Los Angeles, CA 90017

Brian Robert Matsui
Morrison & Foerster, LLP
2000 Pennsylvania Ave., Suite 5500
Washington, DC 20006

Peter J. Engstrom
Baker & McKenzie
Two Embarcadero Center, # 1100
San Francisco, CA 94111

Ann M. Mooney
Cooley LLP
101 California Street, 5th Floor
San Francisco, CA 94111

G. Andrew Lundberg
Latham & Watkins LLP
355 South Grand Avenue
Los Angeles, CA 90071

Leiv Blad
Lowenstein Sandler LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037

Anthony J. Barron
Nixon Peabody LLP
One Embarcadero Center
San Francisco, CA 94111

Martin S. Checov
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111

Jeffrey Margulies
Norton Rose Fulbright US LLP
555 South Flower Street, 41st Floor
Los Angeles, CA 90071

Adam R. Fox
Squire Patton Boggs (US) LLP
555 South Flower Street, 31st Floor
Los Angeles, CA 90071

Charles F. Barker
Sheppard, Mullin, Richter & Hampton
333 South Hope Street, 43rd Fl.
Los Angeles, CA 90071

Michael L. Charlson
Vinson & Elkins LLP
555 Mission Street, Suite 2000
San Francisco, CA 94105

Donald E. Bradley
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304

Charles L. Deem
DLA Piper LLP
401 B Street, Suite 1700
San Diego, CA 92101

Sonia R. Martin
Dentons US LLP
One Market Plaza Spear Tower, 24th Fl.
San Francisco, CA 94105

Sheldon Eisenberg
Drinker Biddle & Reath LLP
1800 Century Park East, Suite 1500
Los Angeles, CA 90067

Allison Lane
Duane Morris LLP
Spear Tower
One Market Plaza, Suite 2200
San Francisco, CA 94105

Brian H. Newman
Dykema Gossett LLP
333 South Grand Avenue, Suite 2100
Los Angeles, CA 90071

Calvin L. Litsey
Faegre Baker Daniels LLP
1950 University Avenue, Suite 450
East Palo Alto, CA 94303

John W. Thornburgh
Fish & Richardson P.C.
12390 El Camino Real
San Diego, CA 92130

Jon L. Benjamin
Farella Braun & Martel LLP
235 Montgomery Street, Russ Building
San Francisco, CA 94104

Kevin S. Rosen
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071

Forrest A. Hainline
Goodwin Procter LLP
Three Embarcadero Center, 28th Floor
San Francisco, CA 94111

Jeff E. Scott
Greenberg Traurig LLP
1840 Century Park East, Suite 1900
Los Angeles, CA 90067

Peter R Jarvis
Holland & Knight LLP
2300 U.S. Bancorp Tower
111 South West Fifth Avenue
Portland, OR 97204