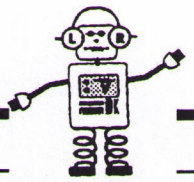
TECHNOLOGY CORNER



Domain names as bankruptcy estate property revisited

By ***L.P. Harrison 3rd*** *and* ***Stephen Z. Starr*** *of* ***Curtis, Mallet-Prevost, Colt & Mosle LLP.***
Harrison is chair of the firms's bankruptcy department.

The recently decided **Virginia Supreme Court** decision of *Network Solutions, Inc. v. Umbro International, Inc. et al.*, No. 991168, 2000 Va. LEXIS 75 (Va. Sup. Ct. Apr. 21, 2000), relies in large part on old bankruptcy cases to find that domain names do not constitute property interests. If the reasoning of the *Umbro* decision is followed by bankruptcy courts, the case could have widespread ramifications for future bankruptcy cases involving internet and e-commerce companies.

In *Umbro*, the Virginia Supreme Court was faced with the issue of whether a domain name can be garnished under state law judgment enforcement procedure. The appellee, **Umbro International, Inc.**, had obtained a default judgment and permanent injunction in the U.S. District Court for the District of South Carolina against a Canadian corporation and its Canadian owner in a case involving the defendant's use of the Internet domain name "umbro.com." The order included an award of attorneys' fees and expenses of $23,489.98.

Umbro subsequently domesticated the judgment in Virginia and instituted a garnishment proceeding to enforce the judgment in Virginia state court. In a garnishment summons, Umbro named the Internet domain name registrar, **Network Solutions, Inc.**, as garnishee, and sought to garnish 38 Internet domain names belonging to the judgment debtor which had been registered with NSI.

In response to the summons, NSI answered that it had no money or other garnishable property belonging to the judgment debtor. It characterized the domain names not as property, but as incidental to "standardized, executory service contracts" or "domain name registration agreements." *Umbro*, 2000 Va. Lexis 75 at *3.

The trial court did not agree with NSI's characterization of the domain names, finding that the judgment debtor's Internet domain name registrations were "valuable intangible property subject to garnishment." *Id.* at *5. The court ordered NSI to deposit control over all of the judgment debtor's domain names into the registry of the court for sale by the sheriff's office. *Id.*

On appeal, the Virginia Supreme Court framed the issue as whether Umbro should be allowed to garnish NSI's "services," which created a contractual right to use a specified domain name. The court expressed concern that permitting garnishment of domain names under such circumstances would lead to garnishment of practically any type of service, such as a prepaid balance on a satellite television customer's subscription. Id. at 23. The court also cautioned that this would open the door for garnishment of corporate names by service of a garnishment summons on the **State Corporation Commission**, since it was responsible for registering corporate names in Virginia in an analogous manner to NSI's responsibility for registering domain names. *Id.*

In reaching its decision, the *Umbro* court relied upon a 2nd Circuit bankruptcy decision from 1961, *Slenderella Sys. Of Berkeley, Inc. v. Pacific Tel. & Telegraph Co.*, 286 F.2d 488, 490 (2nd Cir. 1961), and a 9th Circuit bankruptcy decision from 1971 which followed *Slenderella* with little comment, *Rothman v. Pacific Tel. & Telegraph Co.*, 453 F.2d 848, 849-50 (9th Cir. 1971), *cert. den'd*, 406 U.S. 919 (1972), both of which held that telephone numbers are not estate property.

In *Slenderella* the 2nd Circuit Court of Appeals found that a debtor in bankruptcy did not have any property right in telephone numbers because the terms of the underlying contracts and published tariffs deny any property right in the telephone number to the subscriber. *Slenderella* at 490. The court held that "the license to use a specific telephone number does not amount to the possession required as a basis for [the bankruptcy court's] summary jurisdiction." *Id.* Finding that "property" of the debtor was not involved, the *Slenderella* court ruled that any remedy of the debtor could not be had in a summary proceeding, and would have to be pursued in a plenary action. *Id.* at 491.

However, the *Umbro* court disregarded a number of subsequent bankruptcy cases that went the other way. In *South Central Bell Telephone Co. v. Simon*, 508 F.2d 1056 (5th Cir. 1975), *reh'g denied*, 512 F.2d 1406 (5th Cir. 1975), which involved a

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hotel that was reorganizing under Chapter X of the Bankruptcy Act, the 5th Circuit Court of Appeals found that "[r]ight of use is surely the most important attribute of possession, and the hotel clearly had the right of use as to these telephone numbers at the time the petition in bankruptcy was filed." *Simon*, 508 F.2d at 1059.

The *Simon* court distinguished the *Slenderella* and *Rothman* decisions as relying heavily upon the telephone companies' published tariffs, holding, "[a] tariff . . . drafted by the [telephone] company and certain to be self-serving, cannot determine the meaning of the term 'property' in the federal bankruptcy statute. The telephone numbers are a valuable asset, just like the hotel's building or furniture." *Id*; *In re Kassuba*, 396 F.Supp. 324, 326 (N.D. Ill. 1975) ("We agree that tariffs filed by a utility with a state regulatory agency cannot determine the jurisdiction of federal bankruptcy court."); *In re Personal Computer Network, Inc.*, 85 B.R. 507 (Bankr. N.D. Ill. 1988) (debtors' telephone numbers are property of the estate); *In re Conn. Pizza, Inc.*, 193 B.R. 217, 226 (Bankr. D.Md. 1996) ("[T]elephone numbers are valuable business assets. . . .").

In future e-commerce and Internet related bankruptcies, domain names may be among the debtors most valuable assets. Although the *Umbro* court recognized that a market place for domain names exists, it held that it would not sanction garnishment of the domain names under Virginia's present garnishment statute. The *Umbro* decision appears to have been wrongly decided and will hopefully not influence future bankruptcy decisions. The *Umbro* court relied upon bankruptcy authorities finding that telephone numbers are not property of the estate, but the modern trend in bankruptcy law is that telephone numbers are property of the estate.

For any questions regarding this article, please feel free to contact the authors at *lharrison@cm-p.com* or *sstarr@cm-p.com*.

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Indeed, May, who practices in the areas of business reorganization, bankruptcy and creditors' rights, rejoins former colleague **Scott Shuker**, who is representing the debtor in **Mission Health, Inc.**, one of the largest Chapter 11s in the Middle District of Florida.

In 1998, Rodney himself represented **Bank of America**, which had a $26 million claim in the second **Pan Am** case in Miami. He has also represented trustees, including former **SIPC** president **Theodore Focht**, in stockbroker liquidation cases. One of these cases, **Old Naples Securities, Inc.**, is awaiting a decision by the Eleventh Circuit as to whether the participants in a Ponzi scheme are "customers" under the **Securities Investor Protection Act**.

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The complex and often contentious international case has been presided over by **Judge Ray Reynolds Graves** (Bankr. D. Mich.).

Allard is represented by **Deborah Fish** of **Allard & Fish** in Detroit, **Sheldon Toll**, **Robert Weiss**, and **Judy Calton** of **Honigman Miller Schwartz and Cohn** in Detroit, **Whitney Gerard** and **Zachary Shimer** of **Chadbourne & Parke** in New York, and **Michael Hess**, the lead trial lawyer in the New York case, who left Chadbourne & Parke after concluding the trial to become **Mayor Giuliani**'s city corporation counsel.

Jay Alix and **Rob Rock** of **Jay Alix & Associates** in Southfield, Mich. have been Allard's accountants since 1983. U.S. Trustee **Donald M. Robiner** and Assistant UST **Marion J. Mack, Jr.** have administered the bankruptcy proceeding for many years.

Eagle Geophysical et al. file joint reorganization plan

Eagle Geophysical, Inc. and its subsidiaries, which filed Chapter 11 Sept. 29 before **Judge Mary Walrath** (Bankr. D. Del.), announced May 26 that they had filed a joint plan of reorganization.

Disclosure statements were approved May 24 and a confirmation hearing is scheduled for June 28. One of the debtor subsidiaries, **Atlantic Horizon, Inc.**, previously filed and obtained confirmation of a plan of liquidation in March 2000.

The proposed plan generally provides for payment of secured claims. An option for holders of allowed unsecured claims totaling $100,000 or less is to take either a cash payment of 15 percent of their claims or shares of new common stock in the reorganized company. The proposed plan also provides for the company's bondholders and remaining allowed unsecured creditors to receive shares of new common stock in the reorganized company.

All of the currently outstanding shares of common stock of the company would be cancelled, with current shareholders receiving no interest in the reorganized company.

Eagle Geophysical has now sold the majority of its marine assets, and the reorganized company will sell the remaining marine assets and continue to conduct the company's business as an onshore and transition zone seismic data acquisition company.

S. David Peress of **Young Conaway Stargatt & Taylor** in Wilmington represents the debtor.