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## Treatment of Social Media Accounts in Bankruptcy

### From the Experts

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In today's digital marketplace, understanding how the law applies to virtual assets is becoming as important as understanding how it applies to the brick-and-mortar world. According to studies conducted by the Center for Marketing Research at the University of Massachusetts Dartmouth, in 2014, 93 percent of the Inc. 500—the fastest-growing private U.S. companies, as compiled by Inc. Magazine—used at least one social media platform. Similarly, of the Fortune 500 companies in 2014, 83 percent had corporate Twitter accounts and 80 percent had Facebook accounts, among several social media tools. Despite the importance of the Internet to commerce, however, it is still unclear how important provisions of bankruptcy law apply to certain virtual assets. For example, do social media accounts constitute property of the bankruptcy estate? A recent case decided by a Texas bankruptcy court, *In re CTLI*, suggests that the answer is far from clear. It seems to depend on a granular analysis of the social media page in question and how closely that page is tied to the business sponsoring it.

#### **SOCIAL MEDIA CASE LAW**

Section 541(a)(1) of the Bankruptcy Code defines property of the estate, with certain exceptions, as "all legal or equitable interests of the debtor in property as of the commencement of the case." As the U.S. Supreme Court held in *United States v. Whiting Pools*, the scope of section 541 is broadly construed and "includes all kinds of property, including tangible or intangible property [and] causes of action." While the Bankruptcy Code provides a basis for determining the scope of the bankruptcy estate, it does not specify what constitutes property. In order to reach that determination, bankruptcy courts must look to nonbankruptcy law.



The question of who owns a social media page and/or user-created content submitted to a social media network (e.g., "likes" on the Facebook platform) have been the subject of at least a few adjudicated disputes. In the context of employee-employer disputes, courts tackling this question typically distinguish between content owned by the employee versus content that belongs to the employer. For example, *Mattocks v. Black Entm't Television*, a 2014 decision by a federal district court applying Florida law, considered whether the migration of the "likes" associated with a former employee's Facebook fan page for a television series to another fan page created by the employer constituted conversion. The *Mattocks* court found that the employee, who created the Facebook fan page, did not have an ownership interest in the "likes" of the Facebook page because the user could revoke the "like" by clicking the "unlike" button. The "likes," the court reasoned, belonged to the individuals responsible for them—not the creator of the Facebook page. As a result, the court granted the employer summary judgment on the former employee's conversion claim.

In another recent case, *Cellular Accessories for Less v. Trinitas*, a California district court dealt with the issue of whether the LinkedIn contacts developed during a former employee's employment constitute the employer's trade secrets under California law. The employer sued its former employee on, among other claims, a trade secret misappropriation claim under the California Uniform Trade Secrets Act. Because the LinkedIn contacts were publicly available, the former employee argued, they were not trade secrets. The court declined to decide the issue at the summary judgment stage because the record did not contain sufficient information on the public nature of the contacts in question.

Several other cases discuss the potential misappropriation of social media accounts under trade secret law. In *Eagle v. Morgan*, for example, a Pennsylvania district court ruled that a LinkedIn account created by a former employee and used primarily for business purposes belonged to the employee—not to her former employer. In *Eagle*, the former employer changed the password to the employee's LinkedIn account and proceeded

to change the picture and other information on the account to that of the new CEO of the company. The court agreed with the employee on several counts and held that the employer used her name without authorization, invaded her privacy and misappropriated her identity. Notably, the court did not award damages to the employee, because she failed to prove damages with reasonable certainty.

In *Christou v. Beatport* (decided at the motion to dismiss stage), a Colorado district court held that MySpace friend lists could constitute trade secrets. And in yet another similar case, *PhoneDog v. Kravitz*, a different California district court held that Twitter account follower lists and passwords could constitute trade secrets.

As the above cases indicate, courts addressing the question of ownership in the social media context tend to grapple with fact-intensive analyses instead of applying bright-line tests. *In re CTLI*, which tackles similar questions, suggests that the bankruptcy analysis will be similarly fact-bound and situation-specific.

#### **IN RE CTLI**

In this case, the bankruptcy court for the Southern District of Texas was asked to determine whether an insolvent business' social media presence constituted property of the bankruptcy estate. In answering the question, the court trained its analysis on the question of who owned the social media page—the business or the individual who created and populated the page. Like the courts described above, the *CTLI* court applied a granular, fact-intensive approach.

The debtor, doing business as “Tactical Firearms,” was formed by Jeremy Alcede as a firearms retailer. Early on in its lifespan, Tactical Firearms benefited from the investment of Coe Wilson, who became a 30 percent equity holder in the debtor. The initially friendly relationship between Alcede and Wilson, and the economic fortunes of Tactical Firearms, soon soured. By 2014, Tactical Firearms was in bankruptcy, with Wilson and Alcede on opposite ends of the bargaining table.

The confirmed plan of reorganization awarded Wilson 100 percent of the equity of the reorganized debtor. Among other things, the plan required Alcede to deliver possession and control of passwords for Tactical Firearms' social media accounts to Wilson on behalf of

the reorganized debtor. Asserting that Tactical Firearms' Facebook and Twitter accounts were personal, Alcede refused to turn them over. The court overruled Alcede's objections and held that the social media accounts in question were business accounts and, likening them to subscriber lists, held that such business social media accounts fell within the definition of “property of the estate.”

The determination that the Facebook page was a business page and not a personal page of Alcede was based on an intensive factual analysis. The court relied on the following facts to support its holdings:

1. Since the Facebook page was named after the business, a presumption arose that the page was not Alcede's personal page but rather the debtor's.
2. The Facebook page was directly linked to Tactical Firearms' web page.
3. Alcede's Facebook status update posts used to promote the Tactical Firearms business and its products was determinative of the commercial nature of the Facebook page.
4. Alcede had shared his personal Facebook login information with a business associate in order to allow the associate to promote Tactical Firearms' products via status updates on the Tactical Firearm Facebook page.

Similarly, since the Twitter account in question was named “Tactical Firearms,” it included a description of the company's business and it was linked to the company's web page, the court held that the Twitter account was a business rather than a personal account.

Notably, the court also rejected Alcede's proposed distinction between business and personal content. To support his argument that the Facebook and Twitter accounts were his personal accounts, Alcede placed great emphasis on the fact that some of the Facebook status updates and Twitter posts were personal in nature. For example, Alcede argued that his “tweet” about his attendance at a firearms exposition and his politically charged posts were personal and not business-related. The court disagreed, noting that the firearms exposition tweet exemplified “prototypical social media use” and was typical of “subtle forms of marketing.”

Ultimately the court agreed with Wilson's counsel: “[I]t's very hard for me to stipulate that anything on this page is not business-related due to the nature of the business and

the fact that this type of business is frequently affiliated with a particular political affiliation.”

#### **IMPLICATIONS**

*CTLI* demonstrates the complexity of applying “brick-and-mortar” logic to the digital marketplace. Because neither *CTLI*, nor the nonbankruptcy cases in this area, adopt an easily replicable bright-line test but rather a granular, fact-intensive analysis, parties may find outcomes difficult to predict. Assuming, however, the *CTLI* approach prevails going forward, parties may expect that courts will rationalize limited personal contributions to social media pages as inextricably bound to the commercial nature of such pages. That said, business enterprises using social media may be well-advised to take a conservative approach and adopt policies and procedures limiting their employees' and agents' personal use of corporate social media outlets.

Beyond the strictures of the law, *CTLI* also demonstrates the difficulty of enforcing certain judgments in this area. For example, the *CTLI* court struggled with the fact that Alcede had changed the name of the “Tactical Firearms” page to “Jeremy Alcede Entrepreneur” post-petition. While the court squarely held that the page should be handed over to Wilson, the court noted that because Facebook's policies prohibited owners of business pages from changing the account's name more than once, the court was unable to force Facebook to permit Wilson to revert the page's name to “Tactical Firearms.” Rather, the court suggested that Wilson petition Facebook for the requested relief or, alternatively, seek compensation from Alcede. Accordingly, business enterprises using social media should review carefully any terms of use, terms of service or similar policies governing their social media accounts to avoid (or at least predict) future complications should they become insolvent.

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