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A *Jewel [v. Boxer]* is a Law Firm Bankruptcy Trustee's Best Friend; Unfinished Law Firm Business Taxes Departing Partners and Their New Law Firms for Years

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In a recent post on these pages dealing with the consequences of a law firm failure on the firm's partners, I described the clawback provisions of *Jewel v Boxer*, sometimes called the "unfinished business" doctrine:

> [A] line of cases in California beginning with *Jewel v Boxer* state that the law "requires that attorneys' fees received on cases in progress upon dissolution of a law partnership are to be shared by the former partners according to their right to fees in the former partnership, regardless of which former partner provides legal services in the case after the dissolution. The fact that the client substitutes one of the former partners as attorney of record in place of the former partnership does not affect this result." In short, *Boxer* holds that fees received by a partner and his or her firm in connection

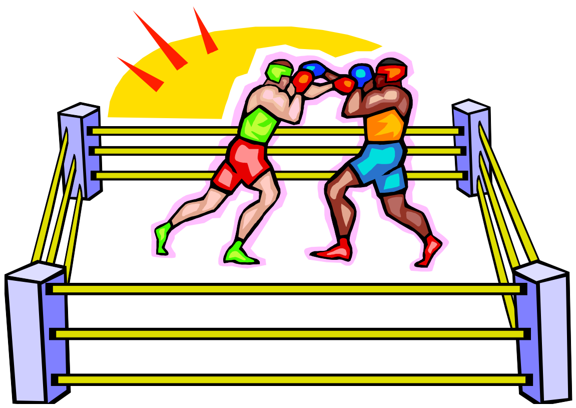
with a case which was started at the now dissolved law firm belongs to the former firm. The *Boxer* case and its progeny have been heavily criticized and are not followed in many jurisdictions, but they do provide mighty weapons to a receiver or a dissolution committee.

Yesterday's *Wall Street Journal* breathlessly described the long tail of the *Jewel v Boxer* clawbacks as if this were news. A number of commentators seemed rather surprised, indeed, even offended, that these clawbacks exist, including Professor Larry Ribstein and Ed Poll.

These clawbacks have been with us for quite some time. Nor is the doctrine an aberrant anomaly of California law, as a recent decision in the Coudert case demonstrates. In *Coudert*, a Southern District of New York case, three years after confirmation of the firm's plan of liquidation, which itself had a five year gestation period, numerous *Jewel v Boxer* claims are still being actively litigated, involving "unfinished business" that spans the globe.

Law firm partnerships cannot, as Professor Ribstein suggests, contractually write their way out of *Jewel v Boxer*. Bankruptcy Judge Dennis Montali of the Northern District of California, the jurist with the most experience in law firm dissolutions, having presided over Brobeck, Heller Ehrman, Thelen and now Howrey, has plainly ruled that so called "Jewel waivers" are unenforceable and has so held in several cases. As an aside, in several law firm dissolutions, as some law firms see the inevitable end as being around some firms have attempted to create life preservers for their partners by amending their partnership agreements to include "Jewel waivers" in the waning days of the firm. Unfortunately, for these partners and the firms they join, last minute "Jewel Waivers" are simply voidable preferences and unenforceable.

Well then, what to do? With some strong likelihood that the next 24 months will see at least several further law firm dissolutions, the prospect for lateral partners bringing along with them unintended *Jewel v Boxer* liabilities as their former firms sink under the waves, is a material consequence that law firms must consider. I am afraid that there is no way around it. In assessing a potential new lateral partner candidate, law firms need to consider the prospect that they may be required to disgorge revenues brought along by the new partner should his or her former firm fail. Sometimes, the potential of a law firm is obvious from either media reports or simply based on the fact that a law firm is suddenly inundated with a raft of partner resumes from a particular firm. In these instances, I suggest that potential candidates be queried about the financial strength and viability of his or her former law firm. In the ordinary course of risk and reward assessment, the potential exposure of *Jewel v Boxer* claims simply must be part of the calculus.



We have recently seen some law firms address the issue in a different fashion: They have inserted provisions in their partnership agreements a provision which would require a partner upon withdrawal from the firm remit amounts ranging from 10 to 20% of revenues they derive from clients of the firm that follow them to their new firms for a period of one or two years. The purpose of these provisions, it seems to me, is to attach mathematical certainty to *Jewel v Boxer* claims. The unintended consequence is that lawyers burdened by these contractual provisions are essentially unmarketable. It is highly unlikely that a new firm would assume that kind of liability. Additionally, that departure tax is a hefty and prohibitive additional tax for an individual partner to bear.

But, on the positive side, such departure taxes aren't all bad. In the 32 large law firm bankruptcies since Finley Kumble filed in 1988, the *coup de grace* has uniformly been the massive defections of partners with books of business. These departure taxes will necessarily provoke a "why can't we all just all get along" dialogue with a view towards all working in synch to resolve what ails the firm. And these departure taxes will provide potent shark repellent and keep those who would draw the lifeblood of a law firm at bay.

Jerry Kowalski, who provides consulting services to law firms, is also a dynamic (and often humorous) speaker on topics of interest to the profession and can be reached at jkowalski@kowalskiassociates.com .