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IN RE WEINSTEIN COMPANY HOLDINGS LLC: AN OVERLY SYSTEMATIC APPROACH TO EXECUTORY CONTRACTS LIMITS MUCH-NEEDED FLEXIBILITY

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I. INTRODUCTION

Executory contracts are one of the most complicated and consequential areas of bankruptcy law.[1] Despite the importance of executory contracts, the Bankruptcy Code provides no definition for what an executory contract is.[2] Most courts have adopted the Countryman definition of executory contracts, but alternative analyses exist that focus primarily on the ultimate outcome without the strict form requirements that are present in an analysis of a contract under the definition.[3]

In May 2021, the Third Circuit examined a highly consequential contract in *In re Weinstein Company Holdings LLC*.[4] In this case, The Weinstein Company (TWC) sold a work-made-for-hire contract that was entered into with Bruce Cohen, a movie producer.[5] When TWC filed its voluntary petition for bankruptcy, it owed Cohen $400,000 under the contract.[6]

This Casebrief argues that the Third Circuit should have adopted the analytical framework of Jay Westbrook and Kelsi Stayart White when it determined whether the Cohen agreement was, in fact, executory. Part II of this Casebrief briefly discusses important social issues surrounding this case. Part III analyzes key sections of the Bankruptcy Code and state law

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1. *See* Bob Eisenbach, *Executory Contracts––What Are They And Why Do They Matter In Bankruptcy?*, COOLEY LLP: IN THE (RED) BLOG, (July 18, 2006), https://bankruptcy.cooley.com/2006/07/articles/business-bankruptcy-issues/executory-contracts-what-are-they-and-why-do-they-matter-in-bankruptcy/ [https://perma.cc/6CRJ-6CMM].

2. *See infra* notes 28–45 and accompanying text.

3. *See infra* notes 28–45 and accompanying text (introducing the Countryman definition and discussing its origin, history, and modern use).

4. 997 F.3d 497 (3d Cir. 2021).

5. *See id.* at 501.

6. *See id.* at 502.

that are pertinent to this case. Part IV discusses the facts underlying this case. Part V follows by discussing the Third Circuit's reasoning behind the holding. Part VI analyzes the Cohen agreement under the approach espoused by Westbrook and White and further discusses issues with the Countryman definition of executory contracts. Finally, Part VII looks at the impact that this framework of analysis would have on this case and others like it.

II. OVERVIEW OF THE ENTERTAINMENT INDUSTRY AND THE #METOO MOVEMENT

A. *The Influence of the Entertainment Industry*

One commentator describes the relationship between bankruptcies and the entertainment industry as an "endless matrix of complex, unexplored issues."[7] In addition to wider industry and economic trends, the risk of bankruptcy is right around the corner for even some of the most successful movie studios if an expensive production flops at the box office.[8] In addition to complex bankruptcy considerations, the entertainment industry, more generally, wields a great amount of power over society.[9] Due to the significant influence the entertainment industry holds, it is reasonable to assume that developments in bankruptcy law in this area receive outsize attention, both in the legal and non-legal worlds.

B. *The #MeToo Movement*

The authors would be remiss if we did not mention the context in which this case came to the bankruptcy court. In October 2017, the *New York Times* published an article that revealed claims of sexual misconduct against Harvey Weinstein that spanned nearly thirty years.[10] What fol-

7. *See* Schuyler M. Moore, *Entertainment Bankruptcies: The Copyright Act Meets the Bankruptcy Code*, BUS. LAW., Feb. 1993, at 567, 567 (1992). Entertainment bankruptcies are particularly difficult because they often involve copyright, contract, international, and bankruptcy law. *Id.*

8. *See* Jon O'Brien, *15 Movies That Bankrupted Their Studios*, MENTAL FLOSS (Mar. 16, 2021), https://www.mentalfloss.com/article/643698/movies-that-bankrupted-studios [https://perma.cc/UW42-KHTD] (providing examples of films that were expensive to produce, did not realize commercial success, and ultimately contributed to the bankruptcy of the producing studio).

9. *See* Jonathan Kaufman, *Mindset Matters: The Influence of Entertainment and the Significance of Culture Change in the Business Of a New Decade*, FORBES (Dec. 24, 2019, 1:49 PM), https://www.forbes.com/sites/jonathankaufman/2019/12/24/mindset-matters-the-influence-of-entertainment-and-the-significance-of-culture-change-in-the-business-of-a-new-decade/?sh=68e697035a7e [https://perma.cc/G5BX-LDF4] ("There has been no greater disseminator of culture in the history of humankind than that of the entertainment industry.").

10. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/PFC9-ENU2]. Mr. Weinstein's behavior was well-known in his company and Hollywood, but few people spoke about it. *Id.* A 2015 memo was written by a TWC employee

lowed can only be introduced as a fundamental shift in how the entertainment industry and society understood the complex dynamics between producers and actors, bosses and employees, and those in positions of power over subordinates.[11] Although the rest of this Casebrief does not address the criminal aspects that led to TWC's collapse and bankruptcy, it is imperative that all who read this are reminded of this context.

III. LEGAL BACKGROUND

A. *Bankruptcy Is a Complex System Designed to Balance the Interests of Debtors and Creditors*

To better understand the legal environment in which this case was decided, it is necessary to review the pertinent sections of the Bankruptcy Code. First, the delineation between state law and federal bankruptcy law, as described in *Butner v. United States*,[12] is described. Then, § 363 of the Bankruptcy Code is discussed to better understand why the contract at issue in this case could be sold in the manner that it was. Next, executory

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and brought to the attention of the company's board, but the board did not conduct an investigation. *Id.* The *New York Times* article revealed that "Mr. Weinstein has reached at least eight settlements with women," including the woman who wrote the 2015 memo. *Id.* The #MeToo movement resulted in a groundswell of credible claims of sexual misconduct against powerful men across the world. *See, e.g.*, Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES, https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html [https://perma.cc/4A8J-EP55] (last updated Oct. 29, 2018). Mr. Weinstein was the focus of at least 100 of these claims. *Harvey Weinstein Sexual Abuse Cases*, WIKIPEDIA, https://en.wikipedia.org/wiki/Harvey_Weinstein_sexual_abuse_cases [https://perma.cc/N5Q4-3A2V] (last visited Oct. 21, 2022). Mr. Weinstein is currently serving a twenty-three-year sentence in New York State prison after being convicted on one count each of first-degree criminal sexual act and third-degree rape. *See* Jan Ransom, *Harvey Weinstein's Stunning Downfall: 23 Years in Prison*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/2020/03/11/nyregion/harvey-weinstein-sentencing.html [https://perma.cc/C8LG-MT8T] (explaining that although Mr. Weinstein faced a minimum of five years in prison, the judge decided to sentence him to a much longer sentence because of the seriousness of the situation). The judge further explained that "there is evidence before me of other incidents of sexual assault involving a number of women, all of which are legitimate considerations for sentence," and "[a]lthough this is a first conviction, it is not a first offense." *Id.* Finally, in July 2021, New York extradited Mr. Weinstein to California to face additional charges of sexual misconduct originating in that state. *See, e.g.*, Jonah E. Bromwich, *Harvey Weinstein Is Transferred to California to Face Sex Crime Charges*, N.Y. TIMES (July 20, 2021), https://www.nytimes.com/2021/07/20/nyregion/harvey-weinstein-california-transfer.html [https://perma.cc/E5WM-LCGB].

11. *See* Maya Salam, *One Year After #MeToo, Examining a Collective Awakening*, N.Y. TIMES (Oct. 5, 2018), https://www.nytimes.com/2018/10/05/us/me-too-movement-women.html [https://perma.cc/5JLX-QLT8] (explaining how the revelations about Harvey Weinstein "hit like a meteor" and kicked off advocacy group and government investigations).

12. 440 U.S. 48 (1979).

contracts and their various definitions are discussed in depth. These topics help lay a foundation for a better understanding of this case.

1. *The* Butner *Principle*

Unless a specific provision of the Bankruptcy Code requires a different treatment, substantive rights of the debtor and creditors are created by state law.[13] The Bankruptcy Code establishes procedure for all cases heard in federal Bankruptcy Courts, but those procedures have to follow the substantive law of the state as if the dispute was being heard in a state court.[14] To summarize, "there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."[15] This straightforward idea is seminal to bankruptcy and, thus, "has been cited thousands upon thousands of times."[16]

One of the main reasons for employing this distinction is the concern the Supreme Court had over forum-shopping.[17] If the Court decided *Butner* the opposite way, a company that did not like its chances in state court could simply declare bankruptcy because it would receive the opposite ruling under the Bankruptcy Court's jurisdiction.[18] Even before *Butner*, the framers of the older Bankruptcy Act and academics were aware of this problem and viewed the *Butner* principle to be the solution.[19]

2. *Sale of Substantially All Assets*

Section 363(b) of the Bankruptcy Code allows a debtor to sell property of the estate, including substantially all of its assets.[20] Importantly, a related provision allows the property to be sold "free and clear of any interest," assuming certain conditions are met.[21] A party that holds an inter-

13. *See id.* at 55. This case came to the Supreme Court due to a circuit split between the Third and Seventh Circuits on one side and the Second, Fourth, Sixth, Eighth, and Ninth Circuits on the other side. *Id.* at 51–52. The issue concerned whether state or federal law governed security interests in rents collected during the bankruptcy proceedings. *Id.* The former group developed a "federal rule of equity that affords the mortgagee a secured interest in the rents even if state law would not recognize any such interest until after foreclosure." *Id.* at 53. The latter group followed the law of whatever state law governed the creation of security interests. *Id.* at 52.

14. *See id.* at 54–55; FED. R. BANKR. P. 1001.

15. *See Butner,* 440 U.S. at 55.

16. Rich Mullen, *Bankruptcy 101—Back to Basics with* Butner, WEIL, GOTSHAL & MANGES LLP: WEIL RESTRUCTURING (Oct. 27, 2011), https://restructuring.weil.com/throwback-thursday/bankruptcy-101-back-to-basics-with-butner/ [https://perma.cc/7KWK-ZF4Q].

17. *See Butner*, 440 U.S. at 55; *see also* G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 511, 516 (2010).

18. *See* Cole & Zywicki, *supra* note 17, at 516.

19. *Id.* at 521.

20. *See* 11 U.S.C. § 363(b)(1). This provision specifically applies to the sale of assets "other than in the ordinary course of business." *Id.*

21. 11 U.S.C. § 363(f). Section 363(f) states in full:

est in property to be sold is not without recourse; the court is obligated to block any such sale that does not provide that party with "adequate protection" for its interest.[22]

Judges developed a complex area of law around this provision to account for contours not directly contemplated by the drafters of the Bankruptcy Code.[23] This development allows parties to get more out of the bankruptcy process than they otherwise would without the availability of a sale of all assets.[24] Debtors value this tool because it allows them to dispose of their assets without having to go through a formal liquidation under Chapter 7 of the Bankruptcy Code during which the debtor loses control of the sale process.[25] This can be particularly useful when a debtor has no intention to emerge from a Chapter 11 bankruptcy and continue operating in a substantially similar way as it did prior to bankruptcy, like in *Weinstein Co.* Creditors sometimes prefer a sale because they can either gain control of the assets of the company or be paid out of the proceeds of the sale.[26] In sum, the ability to sell substantially all assets is

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> (f) The trustee may sell property under subsection (b) and (c) of this section free and clear of any interest in such property of an entity other than the estate, only if-
>
> (1) applicable non-bankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest in in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Id. Permitting sales to be free and clear of interests, allows the estate to extract more value out of property sales than it otherwise would. Mark G. Douglas, *Assets May Be Sold in Bankruptcy Free and Clear of Successor Liability*, JONES DAY: INSIGHTS (Aug. 2020), https://www.jonesday.com/en/insights/2020/08/assets-may-be-sold-in-bankruptcy-free-and-clear-of-successor-liability [https://perma.cc/L6DW-9HJS]. Instead of litigating a dispute over property prior to any sale, the property can be sold and the "competing interests . . . can later be resolved in a centralized forum." *Id.*

22. 11 U.S.C. § 363(e).

23. *See* Robert G. Sable, Michael J. Roeschenthaler & Daniel F. Blanks, *When the 363 Sale Is the Best Route*, 15 J. BANKR. L. AND PRAC. 121, 121–22 (2006) (providing an in-depth analysis of all aspects of a sale of assets under § 363).

24. *See* CFI Team, *363 Sale*, CORP. FIN. INST. https://corporatefinanceinstitute.com/resources/knowledge/deals/363-sale/ [https://perma.cc/VN78-VYDA] (last updated Oct. 29, 2019) (explaining that a sale under § 363 (1) grants debtors more control over a liquidation than if it occurred under a trustee appointed by the court and (2) allows the debtor to set a minimum price at which the assets will be sold through the use of a stalking horse bidder who has committed to purchasing the assets at that minimum price).

25. *See id.*

26. *See id.* The Bankruptcy Code allows creditors to use their lien on a piece of property to bid for that property, a process known as "credit bidding." 11 U.S.C. § 363(k). For example, if a creditor has a mortgage for $10 million on a factory and the debtor tries to sell that factory, the creditor may "credit bid" at the sale for $10 million. If the creditor wants to bid $12 million, it can use a combination of its

an invaluable tool for debtors to gain the flexibility needed to navigate bankruptcy effectively.[27]

3. *Executory Contracts*

The "matrix" of issues presented in entertainment bankruptcies is capped off by the ongoing debate surrounding executory contracts, which can have particularly important implications in bankruptcy disputes.[28] The determination of whether a contract is executory or non-executory is the primary issue in this case.[29] Although this is such a consequential issue in many bankruptcies, the Bankruptcy Code provides no definition of what an executory contract is; § 365 directs debtors to "assume or reject executory contracts" but otherwise provides little guidance to debtors.[30] Most courts use the Countryman approach, but some have adopted another method called the functional approach.[31]

$10 million mortgage to credit bid and $2 million cash. Alternatively, if the creditor has no interest in owning the asset, it is entitled to adequate protection of its interest. *Id.* § 363(e). Typically, this will come in the form of a replacement lien on the proceeds from the sale. *Id.* § 361.

27. *See generally* Sable, Roeschenthaler & Blanks, *supra* note 23.

28. *See* John A.E. Pottow, *A New Approach to Executory Contracts*, 96 TEX. L. REV. 1437, 1438–39 (2018) (explaining that the American Bankruptcy Institute's Commission on the Reform of Chapter 11 codified Vern Countryman's approach to executory contracts). However, the commission relied on "well[-]developed case law" to explain executory contracts despite the lack of helpful precedent in bankruptcy cases. *Id.* at 1439 (quoting AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11, 112 (2014)). The author compares Westbrook and White's approach which abolishes "executoriness" and suggests a novel approach that does not require the abolition of "executoriness." *Id.*

29. *See In re* Weinstein Company Holdings LLC, 997 F.3d 497, 501 (3d Cir. 2021) ("The Chapter 11 bankruptcy process gives a debtor many means to rehabilitate its business, including several to manage contractual obligations. Chief amongst them is the flexibility to assume (*i.e.*, continue) or reject (*i.e.,* breach) executory contracts . . . . This case is about whether a work-made-for-hire contract between a producer and a bankrupt movie company is an executory contract."); *see also In re* Trans World Airlines, Inc., 261 B.R. 103, 114 (Bankr. D. Del. 2001) (finding that the ability for a debtor to assume or reject an executory contract is so fundamental that it cannot be waived by an agreement made by the parties before the debtor filed a petition for bankruptcy).

30. *See* 11 U.S.C. § 365; *see also* 3 COLLIER ON BANKRUPTCY ¶ 365.02[2][a] (16th ed. 2020) [hereinafter COLLIER ON BANKRUPTCY] ("Section 365 does not define the term 'executory contract.'"); *What Is an Executory Contract in Bankruptcy?*, BEATY HATCH PC (Oct. 31, 2018), https://www.beatyhatch.com/blog/2018/october/what-is-an-executory-contract-in-bankruptcy-/ [https://perma.cc/MD4U-RV4H] ("Unfortunately, the bankruptcy code does not define the term 'executory contract.'"). When a debtor assumes an executory contract, it agrees to cure any pre-petition default and provide "adequate assurance of future performance" of the contract. 11 U.S.C. § 365(b)(1)(C). Alternatively, when a debtor rejects an executory contract, the debtor breaches that contract. 11 U.S.C. § 365(g). The breach is said to have occurred immediately before the debtor filed for bankruptcy. 11 U.S.C. § 365(g)(1).

31. *See* COLLIER ON BANKRUPTCY, *supra* note 30, ¶ 365.02[2][a] (recognizing that while most courts use the Countryman definition of identifying executory con-

According to Vern Countryman, an executory contract for the purpose of bankruptcy is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."[32] The mutuality of obligation means that an executory contract is a mix of assets and liabilities for the debtor.[33] Because of this, the debtor must be allowed to use its business judgment to determine whether the value of the contract outweighs the costs that will have to be outlaid to realize that value.[34]

A contract that contains material obligations for only one of the parties should be viewed purely as an asset of or claim against the estate, not a mix of the two that must be weighed.[35] If there is no material performance remaining for the debtor, then there would be no sense in allowing it to choose whether to assume or reject because the debtor is entitled to performance by the other party and can bring a traditional contract claim to enforce that right.[36] If the debtor has not materially performed and the non-debtor has, then it should similarly not be allowed to choose to assume or reject the contract because the debtor has received all the benefits of the contract and, therefore, can weigh what is best for the estate from a purely financial perspective—pay the claim of the non-debtor in pro rata bankruptcy dollars.[37] The determination of whether a remaining obligation under a contract is material is determined by the relevant non-

tracts, several courts have "employed a result-oriented approach that focuses on whether the estate will benefit from the assumption or rejection of the contract rather than looking at mutuality of commitments").

32. Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973). This executory contract definition is unique to bankruptcy because, as Countryman notes, "[a]ll contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts." *Id.* at 450 (quoting SAMUEL WILLISTON & WALTER H.E. JAEGER, WILLISTON ON CONTRACTS § 14 (3d ed. 1957)). In addition to being adopted by most courts, this view of executory contracts seems to be supported by the legislative history of the Bankruptcy Code. *See In re* Columbia Gas Sys. Inc., 50 F.3d 233, 238 (3d Cir. 1995) ("[The definition of executory contract] 'generally includes contracts on which performance remains due to some extent on both sides.'" (quoting H.R. REP. NO. 95-595, at 347 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6303)).

33. *See* Countryman, *supra* note 32, at 461.

34. *Id.*

35. *See id.* at 450–51.

36. *See id.* at 459. Additionally, a rejection would purely be a loss to the debtor and not confer any harm upon the non-debtor party to that contract. *Id.* There would consequently be no claim against the debtor because the debt held by the creditor is zero. *Id.* at 458–59.

37. *See id.* at 452–54. To assume a contract already performed by the non-debtor party would require the debtor to pay 100% of the claim held by creditor to receive the same benefits that it would receive by paying some amount less than 100% of the claim. *Id.* This would be a waste of estate property, so it should not be allowed. *Id.*; *see also* COLLIER ON BANKRUPTCY, *supra* note 30, ¶ 365.02.

bankruptcy law that governs the contract.[38] This is the most common test used to determine whether a contract is executory, and thus able to be assumed or rejected; this test has been accepted not only by courts and academics, but also the American Bankruptcy Institute per its 2014 *Commission Recommendation Report*.[39]

Alternatively, some courts have adopted what is known as the "functional approach."[40] There are four points to this approach. First, a debtor must determine whether the contract at issue meets the common law definition of an executory contract.[41] Next, if the only remaining obligations under the contract are on the part of the debtor, then the creditor holds a "mere claim" that can be enforced under § 502, not § 365.[42] If, however, there are still obligations held by a party other than the debtor, the trustee needs to determine whether assumption, resulting in full payment of any obligations and the realization of any benefits, outweighs the value of any claim that will be brought by the creditor.[43] Finally, the trus-

38. *See* Butner v. United States, 440 U.S. 48, 55 (1979); *see also In re* Exide Techs., 607 F.3d 957, 962 (3d Cir. 2010).

39. AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: 2012–2014 FINAL REPORT AND RECOMMENDATIONS, 112 (2014) (recommending that the Code explicitly adopt the Countryman definition of executory contract by making it a defined term).

40. *See* COLLIER ON BANKRUPTCY, *supra* note 30, ¶ 365.02[2][a].

41. *See* Jay Lawrence Westbrook & Kelsi Stayart White, *The Demystification of Contracts in Bankruptcy*, 91 AM. BANKR. L.J. 481, 489 (2017). In full, Westbrook and White describe their approach as:

> 1. Under state contract law, determine if the contract contains some obligations that remain to be performed and therefore is executory under the common law definition. If not, it is not a contract at all, just a bit of historical residue.
>
> 2. If there is nothing remaining under the contract except obligations owed by the debtor, almost always this is what we think of as a "mere claim" against the estate—that is, the only performance obligation left is the estate's payment of money in Bankruptcy Dollars (BD$), typically worth a fraction of full U.S. dollars. These "mere claims" do not require treatment under section 365 because there is nothing left to do except payment and discharge through the bankruptcy process, so here section 502 is the relevant provision.
>
> 3. If some obligations remain other than those described in number two, will the net benefit to the estate from the performance by both parties (assumption) exceed the net benefit from the estate's breach of the contract and payment of the breach (rejection) claim in fractional amounts (BD$)?
>
> 4. The trustee should choose and the court should approve the course of action producing net benefit to the estate, unless some other specific provision in section 365 requires a different conclusion.

Id. at 489–90 (footnotes omitted).

42. *Id.*; *see also id.* at App. 546–47 (citing *In re Exide Techs.*, 378 B.R. at 762) ("A 'mere claim' is when the debtor owes money to another party but there [are] no other obligations that must be fulfilled by either party. It is what the legislative history refers to when it says that executory contracts should not include accounts receivable or notes.").

43. *See id.* at 489.

tee should follow whatever the analysis says—if assumption brings a greater net benefit to the estate than rejection, then the contract should be assumed.[44] This approach might seem similar to the Countryman definition in both form and function, but the key distinction is that the Countryman definition focuses first on form and the functional approach relies primarily on the ultimate benefit to the estate without a requirement that strict steps need to be taken to ensure there is material performance remaining on both sides of the contract.[45]

B. *Material Breach and Substantial Performance Considerations Under New York Contract Law*

According to the *Butner* principle, state law creates substantive rights in a bankruptcy proceeding.[46] One key consideration under the Countryman definition of executory contracts is whether a breach is considered material, thus relieving the non-breaching party from its obligations.[47] The combination of these two statements necessitates a brief examination of the idea of material breach under New York contract law.[48]

New York follows the contract principle of substantial performance.[49] In the seminal case of *Jacob & Youngs, Inc. v. Kent*,[50] then-Judge Benjamin Cardozo stated that, "an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture."[51] Even though this case is now over one hundred years old, it is still "the standard

44. *Id.*

45. *Id.* at 482. One perennial issue, although not at the core of the issues discussed in this Casebrief, is what to do with contracts that have not been either assumed or rejected, regardless of whether a court uses the Countryman or functional approach. *See* Westbrook & White, *supra* note 41, at 518 n.184; *see also* COLLIER ON BANKRUPTCY, *supra* note 30, ¶ 365.03[6]. Due to the "permissive" language regarding the debtor's ability to assume or reject executory contracts and the requirement that the court approve the debtor's action, it is possible for an executory contract to be neither assumed nor rejected for the entire bankruptcy proceeding, including through confirmation. *See* COLLIER ON BANKRUPTCY, *supra* note 30, ¶ 365.03[6]. In that case, the contract simply "rides through" the bankruptcy; it exists on the other side. *Id.* Because the approach put forth by Westbrook and White and this Casebrief is more permissive than the Countryman definition, it is reasonable to think that this might be a more pervasive problem that needs to be addressed. Westbrook and White posit that this issue is resolved by broad language in confirmation plans that either assume all contracts not rejected or reject all contracts not assumed. *See* Westbrook & White, *supra* note 41, at 517–18. The prevalence and effectiveness of this solution is unknown, but it warrants further research.

46. *See* Butner v. United States, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law.").

47. *See* Countryman, *supra* note 32, at 453.

48. The contract at the heart of the dispute in *Weinstein Co.* is governed by New York law. *See infra* Part IV.

49. *See* HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 11.3 (2022).

50. 129 N.E. 889 (N.Y. 1921).

51. *See id.* at 890.

both for the analysis of the respective rights of parties when there is a breach and for the determination of whether there has been substantial compliance with the contract."[52]

IV. THE PRINCIPAL CASE—*IN RE WEINSTEIN COMPANY HOLDINGS LLC*

In 2011, Bruce Cohen and his production company entered into a contract (the Cohen Agreement) with SLP Films, Inc. to produce the film *Silver Linings Playbook* (the Picture).[53] The contract was structured as a "work-made-for-hire" contract, so Cohen did not own any of the intellectual property in the Picture.[54] Cohen was paid $250,000 in fixed initial compensation as well as contingent future compensation equal to about 5% of the Picture's net profits.[55]

After the Picture was released and following a series of intra-entity transfers, TWC purported to own all the rights pertaining to the Picture, including the Cohen Agreement.[56]

In 2017, following sexual misconduct allegations against Harvey Weinstein, TWC attempted to sell its business and found Spyglass as the only interested buyer.[57] As a result, TWC filed for Chapter 11 Bankruptcy in March 2018, which required the bankruptcy court to approve the sale to Spyglass under § 363 of the Bankruptcy Code.[58] Following the Bankruptcy Court's approval, Spyglass purchased TWC under an asset purchase agreement which closed in July 2018.[59] The purchase agreement gave Spyglass until November 2018 to designate which executory contracts it wanted to assume from TWC as part of the sale.[60]

In October 2018, Spyglass filed a declaratory judgment action against Cohen seeking a determination that the Cohen Agreement "is not execu-

52. *See* HUNTER, *supra* note 49.

53. *See In re* Weinstein Company Holdings LLC, 997 F.3d 497, 501 (3d Cir. 2021).

54. *Id.* at 501.

55. *Id.* at 502. The contingent compensation provision of the Cohen Agreement provided that if "[Cohen] fully perform[s] all required services and obligations hereunder and in relation to the Picture, and [is] not otherwise in breach or default hereof, [Cohen] shall be entitled to receive [Contingent Compensation]." *Id.* (alterations in original) (quoting Appendix 2329, Cohen Agreement ¶ 3, *Weinstein Co.*, 997 F.3d 497 (Nos. 20-1750 and 20-1751)).

56. *Id.* at 502 n.2 (explaining that SLP Films transferred its rights in the Picture to SLPTWC Films, LLC, another special purpose entity, which subsequently dissolved in October 2013, leaving TWC, as the sole member of SLPTWC, all the rights of the picture, including the Cohen Agreement).

57. *Id.* at 502.

58. *Id.* (explaining that the District of Delaware bankruptcy court was required to approve the sale of TWC under the bankruptcy code).

59. *Id.* (explaining that the bankruptcy court approved the sale to Spyglass subject to an asset purchase agreement between the parties).

60. *Id.* (demonstrating that TWC had a number of executory contracts and Spyglass was given an option of which it would assume under the asset purchase agreement).

tory and therefore was already [sold] to [Spyglass] pursuant to Bankruptcy Code section 363."[61] Shortly after, other writers, producers, and actors with similar works-made-for-hire contracts (the Talent Party Agreements) argued that their contracts were also executory, resulting in Spyglass's legal responsibility for millions of dollars in contingent compensation.[62]

In January 2019, the Bankruptcy Court issued a bench ruling granting Spyglass's motion for summary judgment, concluding that the Cohen Agreement was not an executory contract and thus could be sold under § 363.[63] The district court affirmed the bankruptcy court's decision and Cohen timely appealed to the Third Circuit.[64]

V. NARRATIVE ANALYSIS

The Third Circuit began its analysis by emphasizing the importance of this case, stating, "[a]t stake is whether Spyglass must cure existing defaults and pay around $400,000 owed to Cohen before the sale's closing."[65] The Third Circuit analyzed Cohen's claim under § 365(a) of the Bankruptcy Code.[66] The Supreme Court previously explained that Congress intended the term "executory" to mean "a contract 'on which performance is due to some extent on both sides.'"[67]

However, believing this definition to be too broad, the Third Circuit has taken a narrower view of the term.[68] The Third Circuit summarized their test for executory contracts to be, "under the relevant state law governing the contract, each side has at least one material unperformed obligation as of the bankruptcy petition date."[69]

61. *Id.* (alterations in original) (quoting Appendix 1152, *Weinstein Co.*, 997 F.3d 497 (Nos. 20-1750 and 20-1751)) (demonstrating the initial disagreement over the status of the Cohen agreement as executory or not).

62. *Id.* at 503.

63. *Id.*

64. *Id.*

65. *See id.* at 501. The court furthered that Spyglass's motivations for buying the Cohen Agreement were irrelevant for the legal question at issue, but noted that Spyglass claimed it wanted to purchase the Cohen Agreement as "evidence of [the transfer of intellectual property] and the rights that came with it." *Id.* at 503 n.4 (alteration in original) (quoting Oral Argument Transcript at 29:6–10, *Weinstein Co.*, 997 F.3d 497 (Nos. 20-1750 and 20-1751)). The court emphasized its skepticism that this was the only reason behind the purchase and explained that Cohen could not interfere with the Picture's intellectual property even if TWC breached the Cohen Agreement. *Id.*

66. *See id.* at 504.

67. *See id.* (quoting NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522 n.6 (1984)).

68. *See id.* (citing *In re* Columbia Gas Sys. Inc., 50 F.3d 233, 238 (3d Cir. 1995)).

69. *See id.* The Third Circuit adopted the executory contract definition offered by Vern Countryman, which stated, "[An executory contract is] a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." *See* Coun-

The Third Circuit emphasized the practicality of this test by explaining that this framework "attempts to foolproof the debtor's choice to assume or reject contracts."[70] Under § 363, if the buyer wants to buy an executory contract, the debtor must assume and then assign that contract to the buyer.[71] Importantly, to assume a contract, the debtor or the buyer must cure all existing defaults or provide adequate assurance of a cure.[72] The Third Circuit views this approach as a "fairness" exercise and explained that it allows the debtor to continue doing business despite its bankrupt status.[73]

Alternatively, if the contract is not executory, it can be sold to a buyer under § 363 like any other liability or asset.[74] The court explains that in a case like this, where only the debtor has material obligations left to perform, the contract is a liability on the estate that the buyer voluntarily

tryman, *supra* note 32, at 460; *see also In re* Gen. DataComm Indus., Inc., 407 F.3d 616, 623 (3d Cir. 2005); COLLIER ON BANKRUPTCY, *supra* note 30, ¶ 365.02[2](a) n.10. "Thus," the Third Circuit explained, "unless both parties have unperformed obligations that would constitute a material breach if not performed, the contract is not executory . . . ." *Weinstein Co.*, 997 F.3d at 503 (quoting *Columbia Gas*, 50 F.3d at 239). Further, the Third Circuit in *Columbia Gas* importantly noted that the test of unperformed obligations should be conducted at the time of the bankruptcy petition and is governed by state law. *See Columbia Gas*, 50 F.3d at 239–40 n.10.

70. *See Weinstein Co.*, 997 F.3d at 504. The *Columbia Gas* court provided a helpful example, explaining that executory contracts are essentially "a combination of assets and liabilities to the bankruptcy estate; the performance the nonbankrupt owes the debtor constitutes an asset, and the performance the debtor owes the nonbankrupt is a liability." *Columbia Gas*, 50 F.3d at 238 (citing THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 106–07 (1986). Under this approach, treating a contract as executory where one of the parties has fully performed but the other has not risked either "inadvertent rejection" or "inadvertent assumption" which would result in a remaining obligation of the debtor to pay. *See Weinstein Co.*, 997 F.3d at 504 (citing COLLIER ON BANKRUPTCY, *supra* note 30, ¶ 365.02[2](a)).

71. *See Weinstein Co.*, 997 F.3d at 505 (citing *In re* CellNet Data Sys., Inc., 327 F.3d 242, 251 (3d Cir. 2003); *In re* Access Beyond Techs., Inc., 237 B.R. 32, 47 (Bankr. D. Del. 1999)).

72. *See Weinstein Co.*, 997 F.3d at 505 (citing 11 U.S.C. § 365(b); *Columbia Gas*, 50 F.3d at 238). The contract essentially needs to be put in "the same place as if the bankruptcy did not happen" in order to be assumed. *See id.* The Bankruptcy Code "mandates that the debtor accept the liability with the asset and fully perform his end of the bargain," for an assumed executory contract. *Id.* (quoting *Columbia Gas*, 50 F.3d at 238). If the executory contract is instead rejected, the non-breaching party would be relegated to an unsecured creditor. *Id.* at 505 n.7 (citing *CellNet Data Sys., Inc.*, 327 F.3d at 249).

73. *See id.* at 505 (citing *In re* Penn Traffic Co., 524 F.3d 373, 382 (2d Cir. 2008)) (explaining that by assuming the contract, the debtor can essentially force others to continue doing business with them despite the other parties being reluctant due to their bankrupt status).

74. *See supra* notes 20–21 and accompanying text; *see also Weinstein Co.*, 997 F.3d at 505 (citing *In re* Am. Home Mortg. Holdings, Inc., 402 B.R. 87, 94 (Bankr. D. Del. 2009)) (explaining that § 363 "permits a debtor to transfer its rights and obligations under a non-executory contract").

assumes.[75] However, without an agreement otherwise, neither party is required to cure existing defaults on these liabilities.[76]

As noted above, if the Cohen Agreement is an executory contract and therefore assumed and assigned under § 365, Spyglass would be responsible for approximately $400,000 in previously unpaid contingent compensation.[77] If Spyglass instead purchased the Cohen Agreement as a non-executory contract under § 363, Spyglass would be responsible only for obligations on a go-forward basis after the sale closed.[78]

The Third Circuit determined that New York law governs the Cohen agreement and noted that, "[i]n New York, '[a] material breach is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract.'"[79] Further, New York follows the substantial performance doctrine.[80]

Applying the above standard, the court concluded that the obligation to pay contingent compensation to Cohen was "clearly material."[81] Therefore, TWC had at least one material obligation left to perform under the Cohen Agreement.[82] Next, the court addressed whether Cohen had any

75. *See Weinstein Co.*, 997 F.3d at 505 n.8 (explaining that the issue of assuming liabilities, although seemingly unfavorable, is often negotiated between the debtor and buyer for a discount on the purchase price). The negotiated purchase eliminates the fairness concerns for the bankrupt counterparty. *See id.* at 506.

76. *See id.* at 505–06 (citing 11 U.S.C. § 363(f); *In re* Trans World Airlines, Inc., 322 F.3d 283, 289 (3d Cir. 2003)) (noting that successor liability is often "extinguished" in a § 363 sale). Typically, a buyer must fulfill obligations under the contract it bought after the sale closes, but since the nonbankrupt counterparty is already in "at least as good a position as without the sale," no cure is necessary. *Id.* The Court further explains that the nonbankrupt would only expect to recover cents on the dollar if no buyer came forward, so they "should simply be grateful that someone agreed to buy its contract and assume obligations after the sale's closing." *Id.* at 506.

77. *See id.* at 506.

78. *See id.*

79. *See id.* (alterations in original) (quoting Feldmann v. Scepter Grp., Pte. Ltd., 185 A.D.3d 449, 450 (N.Y. App. Div. 2020)). The central question before the court was whether the Cohen Agreement contained "at least one obligation for both [TWC] and [Cohen] that would constitute a material breach under New York law if not performed." *Id.* (alterations in original) (quoting *In re* Exide Techs., 607 F.3d 957, 962 (3d Cir. 2010)).

80. *See id.* (defining substantial performance as "[i]f the party in default has substantially performed, the other party's performance is not excused." (quoting Hadden v. Consol. Edison Co., 312 N.E.2d 445, 449 (1974))). However, the court notes that substantial performance and material breach are "two sides of the same coin" because if a breach is material, "it follows that substantial performance has not been rendered." *Id.* (quoting *In re* Interstate Bakeries Corp., 751 F.3d 955, 962 (8th Cir. 2014)).

81. *See id.* (explaining that the amount of contingent compensation "far exceeded that of fixed compensation," and therefore was the "primary consideration" under the agreement (citing Awards.com, LLC v. Kinko's, Inc., 834 N.Y.S.2d 147, 155 (N.Y. App. Div. 2007))). The *Awards.com* court specified that failure to pay the "primary consideration" is a material breach. *Id.*

82. *See id.* at 506–07.

remaining obligations.[83] The court explained that his remaining obligations were immaterial because he completed his work on the Picture, which was released six years prior, and he performed no further work post-release.[84] The remaining obligations were each ancillary and did not go to the "root of the contract" or "defeat the purpose of the entire transaction" if breached.[85]

Finally, Cohen argued that the court should not substitute its holding for obligations that the parties have already agreed were material.[86] While the court agreed with Cohen that parties can contract around the substantial performance rule, they rejected his overall argument because "the parties did not clearly and unambiguously avoid the substantial performance rule."[87] Unlike previously upheld materiality provisions, the Cohen Agreement was not dealing with a remedies or termination section of the

83. *See id.* at 507 (noting that the "essence of the Cohen Agreement" was the production of the Picture for compensation).

84. *See id.* at 507 (citing *In re* Qintex Ent., Inc., 950 F.2d 1492, 1497 (9th Cir. 1991); *In re* Stein & Day Inc., 81 B.R. 263, 266 (Bankr. S.D.N.Y. 1988)) (noting that most courts agree that work-made-for-hire contracts usually do not have material obligations after the work is completed, even if there are ancillary negative covenants or indemnification obligations in the contract).

85. *See id.* (quoting *In re* Exide Techs., 607 F.3d 957, 962–63 (3d Cir. 2010)). The court addressed each obligation as follows:

> Cohen agreed to refrain from seeking injunctive relief about the exploitation of the Picture. But that covenant is redundant, for Cohen has no claim to the Picture's intellectual property rights and is already obligated to respect that property under relevant law. Also immaterial is Cohen's obligation to indemnify TWC against third-party claims arising from the breach of his representations, warranties or covenants, as the statute of limitations has likely expired on most, if not all, of the potential claims. Finally, the restrictions on Cohen's ability to assign the contract are ancillary boilerplate provisions. For instance, the Agreement requires Cohen to comply with a set of procedures to give TWC the right of first refusal if Cohen tries to sell or assign his right to receive contingent compensation. This obligation, however, is not a "significant undertaking," as Cohen "has no obligation to [TWC] if he wants to accept more favorable terms from [others]."

Id. (alterations in original) (citations omitted) (quoting *Stein & Day*, 81 B.R. at 267).

86. *See id.* The Cohen Agreement provided that TWC must pay contingent compensation provided Cohen is "not otherwise in breach or default." *Id.* (quoting Appendix 2329, Cohen Agreement ¶ 3, *Weinstein Co.*, 997 F.3d 497 (Nos. 20-1750 and 20-1751)).

87. *Id.* at 508. *See also* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2049 (2012) (explaining that parties can avoid the default substantial performance rule by "apt and certain words"). The court further acknowledged its decision in *In re General DataComm Industries, Inc.* that held, "where the contract makes plain that certain unperformed obligations are material, we can conclude the contract is executory without further analysis." *Id.* at 508 (citing *In re* Gen. DataComm Indus., Inc., 407 F.3d 616, 623–24 (3d Cir. 2005)). The court conceded that a breach can be considered material if "upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract." *Id.* (quoting RICHARD A. LORD, 23 WILLISTON ON CONTRACTS § 63:3 (4th ed. 2018)).

contract.[88] The court also clarified that the Cohen Agreement includes a condition precedent to TWC's payment obligation rather than a breach or default.[89]

VI. CRITICAL ANALYSIS

The need for a uniform standard of analysis for executory contracts is evident in this case. One commentator refers to the Countryman test as "a tempest in a teapot," and notes the "muddied analysis and conflicting case law" surrounding executory determinations is often irrelevant.[90] This debate creates a theoretical exercise with not many practical differences.

Another pair of commentators take a harsher approach, theorizing that the Countryman test was due for a "well-deserved demise."[91] The authors discuss the evolution of the definition of "executory" over the years and the "executoriness" effects of the 1978 Bankruptcy Code.[92] Similarly,

88. *Compare Weinstein Co.*, 997 F.3d at 507–08, *with Gen. DataComm*, 407 F.3d at 623–24, *and In re* Hawker Beechcraft, Inc., 486 B.R. 264, 278 (Bankr. S.D.N.Y. 2013) (explaining the court's views this case which deals with a "covenant" and the one's cited by Cohen which deal with "termination provision[s]" as distinct), *and* Avant Guard Props., LLC v. NYC Indus. Dev., No. 115209/10, 2015 WL 7070066, at *5 (N.Y. Sup. Ct. Jan. 7, 2015) (explaining that this case turned on the contract's termination provision which "made it clear . . . that only complete performance will satisfy the agreement"). The court emphasized that there is a clear distinction between covenant and termination provisions because "[w]hen parties say that breach of a provision would result in termination or rescission of the contract, they make clear that the provision is material." *Weinstein Co.*, 997 F.3d at 508 (citing LORD, *supra* note 87, § 63:3). Covenants, on the other hand, address the parties' obligations and "typically are not a natural place to look when determining *which* of those obligations the parties consider to be material." *Id.*

89. *See Weinstein Co.*, 997 F.3d at 507–08 (emphasizing the word "if" beginning the relevant provision and defining a condition precedent as "an event whose occurrence triggers an obligation" (citing Pac. Emps. Ins. Co. v. Glob. Reinsurance Corp. of Am., 693 F.3d 417, 430 (3d Cir. 2012))). The court elaborated on this distinction further, stating, "[I]f the remaining obligations in the contract are mere conditions, not duties, then the contract cannot be executory for purposes of § 365." *Id.* (alteration in original) (quoting *In re* Columbia Gas Sys. Inc., 50 F.3d 233, 241 (3d Cir. 1995)).

90. *See* Moore, *supra* note 7, at 587–88 (explaining the consequences if the contract is non-executory). The author explains that finding that a contract is non-executory may entitle the other party to specific performance and its damages may be entitled to administrative priority status. *Id.* However, if there are no remaining obligations for the debtor, the contract will likely be considered executory under either the Countryman or functional test. *Id.*

91. *See* Westbrook & White, *supra* note 41, at 481–82 (noting that the Countryman test has become a "monster that its creator . . . would not recognize"). The authors explain that that this outdated test is "troublesome" when applied to modern contracts, specifically citing options contracts, intellectual property licenses, and LLC operating agreements, all of which are central issues to many entertainment contracts and bankruptcy disputes. *Id.* at 482.

92. *See id.* at 493–94 (explaining that the 1978 Bankruptcy Code required court approval to assume or reject contracts). The authors note that this change "obviated the most important benefit of the executoriness test." *Id.* at 493. Despite the Code removing "provability" from executory contract analysis, courts con-

these authors note there is ample case law claiming that non-executory contracts cannot be rejected as well as the opposite conclusion, that they cannot be assumed.[93] However, these authors make an important distinction, noting that although it appears executoriness is irrelevant when only the debtor has a remaining duty, assumption should at least be considered and "mere claims" should be analyzed under § 502.[94]

Ultimately, while the Countryman material breach test is well-equipped to resolve simple contract disputes in bankruptcy contexts, it may not provide the best solution to more nuanced contracts, which are becoming more and more common in the entertainment industry. This case provides a perfect example of a complex contract that exposes the Countryman test's limitations.

The Third Circuit ought to have adopted the functional approach as described by Westbrook and White above. Despite some reservations,[95] this approach would have provided greater flexibility in this case, allowing for a full cost-benefit analysis instead of merely declaring the contract is not executory because "material performance" is not present on both sides.[96]

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tinued to "expand the application of the material breach test to more and more kinds of contracts." *Id.* at 494.

93. *See id.* at 498 ("Some courts have held that contracts that are 'non-executory' simply 'ride-through.' As one court put it, they 'survive the bankruptcy case unaffected.'" (quoting *In re* Access Beyond Technologies, Inc., 237 B.R. 32, 41 (Bankr. D. Del. 1999))).

94. *See id.* at 489 n.44 (suggesting that "mere claims" should be treated under § 502 rather than § 365 because they are non-executory). Under the Westbrook and White approach, "the executive's right to money is the equivalent of an account receivable," not an executory contract, resulting in treatment under § 502 rather than § 365. *Id.* at 489 n.4, app. 545–46 (describing the solution to *In re* Exide Techs., 378 B.R. 762 (Bankr. D. Del. 2007) under Westbrook and White's approach). The authors do concede that it is still plausible to analyze debtor-only or mere claims as executory contracts, but they state that they should almost always be rejected. *Id.* at 489 n.44. An issue arises, however, if the trustee assumes a debtor-only contract and benefits from being paid administrative expenses. *Id.* The authors explain the consequences of analyzing a contract under § 502 compared to § 365 but note that this approach causes worry among lawyers for inadvertent assumptions. *Id.* The authors further note that executoriness is irrelevant to a contract where only the debtor has a remaining duty, but assumption should "at least be considered" for any remaining "mere claims." *Id.* at 511.

95. *See* Westbrook & White, *supra* note 41, at 518 n.184 (admitting that there is well-founded concern for the authors' approach based on contracts being potentially overlooked).

96. *See supra* note 41 and accompanying text (detailing the steps a court should consider and emphasizing the importance of leaving the "net benefit" analysis to the parties); *see also* Westbrook & White, *supra* note 41, at 520 n.192 (explaining that the Countryman definition requires the court to involve itself in "unnecessary legal quandaries" (quoting *In re* Seymour, 144 B.R. 524, 529 (Bankr. D. Kan. 1992); *In re* Weinstein Company Holdings LLC, 997 F.3d 497, 506 (3d Cir. 2021)). Westbrook and White specifically provide an analogy to a hospital being run "for the benefit of the staff, not the patients," to emphasize that the concerns of overlooking contracts are outweighed by the potential uniformity of the system. Westbrook & White, *supra* note 41, at 518 n.184. The analogy demonstrates that

The first step of the functional approach analysis is to determine whether there are "some obligations that remain to be performed" to determine whether the contract is executory under common law.[97] The court in this case recognized that both TWC and Cohen had remaining obligations.[98] However, because Cohen's obligations were deemed "immaterial," the court summarily decided that the contract is not executory.[99] Under the Westbrook and White definition, though, these contracts are executory under common law.[100] The next step is simple and already answered by the brief analysis in this paragraph; a court must review the Cohen agreement to make sure there is at least some obligation on both sides so that the unperformed obligations of the debtor are not just a "mere claim" against the estate held by Cohen.[101] Although Cohen's remaining contract obligations are not as weighty as TWC's remaining obligations, this part of the test is satisfied because there is some obligation.[102]

The third and fourth steps of this analysis are also relatively straightforward if the actions of the debtor are to be viewed as acting rationally.[103] The debtor wanted to maximize the value of the contract for the estate, but that simple calculation is clouded because the debtor and the buyer of

although the test proposed may not be perfect and some contracts may be overlooked, the increase in "litigation and business planning" required to address every contract under the old test would be detrimental to the clients. *Id.*

97. *See* Westbrook & White, *supra* note 41, at 489.

98. *See Weinstein Co.*, 997 F.3d at 506–07.

99. *Id.* at 507 ("A closer look at *Cohen's remaining obligations* confirms our suspicions—they are all ancillary after-thoughts in a production agreement. . . . Also immaterial is *Cohen's obligation* to indemnify TWC against third-party claims . . . . *This obligation*, however, is not a 'significant undertaking' . . . ." (emphasis added) (citations omitted)).

100. *See supra* note 41 and accompanying text (explaining the Westbrook and White test).

101. *See* Westbrook & White, *supra* note 41, at 489 (explaining that if just a "mere claim" remains, the contract does not need to be treated under § 365 because "there is nothing left to do except payment and discharge through the bankruptcy process . . . ."). If there is simply a mere claim remaining, then § 502 is the correct provision under the Westbrook and White approach, and no further analysis is needed. *Id.*

102. *See id.* (noting that although there could be a debate about whether only a mere claim exists, it is more likely that the Westbrook and White steps two and three conclude there is at least "some obligation" remaining). In fact, the *Weinstein Co.* court agrees, holding that TWC had material obligation remaining, while Cohen's remaining obligations were immaterial. *Weinstein Co.*, 997 F.3d at 507; *see also supra* notes 81–85 and accompanying text (discussing the court's reasoning behind these holdings).

103. *See* Westbrook & White, *supra* note 41, at 489 (explaining that since an obligation remains other than a mere claim, the Westbrook and White test then asks, "will the net benefit to the estate from the performance by both parties (assumption) exceed the net benefit from the estate's breach of the contract and payment of the breach (rejection) claim in fractional amounts (BD$)?").

the contract did not believe it to be executory at all.[104] Therefore, the buyer did not consider that it would have to pay the $400,000 owed under the contract on pre-petition defaults.[105] It is reasonable to believe that an additional $400,000 liability on this contract would not have been too large an impediment to stop the transaction due to the sheer size of the transaction.[106] Therefore, the contract is executory under the common law definition because there are remaining obligations, those obligations are mutual, and assumption would benefit the estate.[107]

VII. IMPACT

This alternative analysis would have an immediate effect on this case and the litigants therein, but it also has a wide-ranging impact on how all contracts in bankruptcy are viewed. The most poignant effect is that Cohen would be entitled to full payment of his $400,000 claim instead of being paid on a pro rata basis as an unsecured claimant.[108] Further, all of the other work-made-for-hire contracts in this case would be fully paid on any missed payments as well.[109]

Looking beyond this particular case, if the Westbrook and White test was adopted, creditors and debtors would have more opportunities to analyze contracts and more flexibility to reject those contracts if they are not beneficial to the estate, even if the obligations are not "material." If the court had analyzed the case by applying Westbrook and White's analysis rather than Countryman's, the debtor would not be forced to choose between assuming or rejecting the contract, regardless of how "foolproof" the court imagines the decision to be.[110]

While adopting Westbrook and White's approach could ease some of the tension in determining whether a contract is executory or not, it

104. *See Weinstein Co.,* 997 F.3d at 502 (emphasizing the importance of determining if the contract was executory). Under step four of the Westbrook and White test, the trustee must choose a course of action that provides net benefit to the estate, but this decision is complicated when the parties are unsure or in disagreement about when a contract is executory. *See* Westbrook & White, *supra* note 41, at 498–99.

105. *See Weinstein Co.,* 997 F.3d at 502 (explaining that the disagreement about the determination if the contract is executory or not is crucial to the parties' decision making process).

106. *See* Order Approving Amendment to Asset Purchase Agreement at Exhibit 1 at 2, *In re* Weinstein Company Holdings, LLC, Case No. 18-10601 (Bankr. D. Del. 2018) (amending the purchase price to be paid by Lantern Entertainment, LLC from $310 million to $289 million). The size of this transaction and the amended price suggests that the parties are willing to negotiate on price given changing litigation and business conditions.

107. *See supra* notes 97–106 and accompanying text (providing the framework for the Westbrook and White analysis of the Cohen Agreement).

108. *See supra* notes 81–89 and accompanying text.

109. *See supra* notes 65 and 81–89 and accompanying text.

110. *See In re* Weinstein Company Holdings LLC, 997 F.3d 497, 504 (3d Cir. 2021).

would require a bit of statutory maneuvering. Additionally, there may still be lingering issues within the Westbrook and White approach, such as how the code treats non-executory contracts.[111] While it may be difficult to break away from decades of "well[-]developed case law," and not a perfect solution, adopting a uniform approach to executory contract analysis can alleviate some of the more confusing portions of entertainment bankruptcies.[112]

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111. *See* Pottow, *supra* note 28, at 1440 (explaining that the executoriness debate seeks to eliminate the grey area when disagreements arise about whether a contract is executory or not). Pottow, however, is skeptical that this resolves all issues, explaining that when a contract is deemed non-executory under either the Countryman or Westbrook and White approach, the litigation simply ends "without any rigorous working-through of the consequences." *Id.*

112. *See id.* at 1448–49 (explaining that Westbrook and White sought to essentially eliminate the executoriness part of the equation and focus on § 365(a)). Despite the ABI Commission Expert Group's belief that "well[-]developed case law on executoriness" outweighed the points made by Westbrook and White, the test has failed to provide the "guidance" to parties and courts that was expected. *Id.* Therefore, a uniform approach will alleviate tension and make this process easier for courts as well as parties struggling with disagreements about executory contracts.