



LOWENSTEIN BANKRUPTCY LOWDOWN

Lowenstein Bankruptcy Lowdown Video 24 – Ownership of Social Media Accounts in Bankruptcy: Implications of the Vital Pharmaceuticals Case

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Nicole Fulfree: Today we'll be talking about a recent decision from the Vital Pharmaceuticals Chapter 11 cases, which addressed a really interesting new issue that's becoming more and more relevant with the rise of influencer marketing: whether a former executive's social media accounts created while he was employed by the debtor company are property of the estate. The Bankruptcy Court found that the social media accounts in question were in fact property of the Debtor's estate.

Erica G. Mannix: Because Florida law, which governed the issue in *Vital*, did not have any statutory guidance on ownership of digital assets, the Bankruptcy Court deployed a new framework for determining ownership of the rights to social media accounts and bankruptcy, which analyzed three factors:

- 1) a documented property interest;
- 2) control over access to the account; and
- 3) the use of the account.

For the first factor, the Bankruptcy Court held that an agreement that documents a property interest in the social media accounts creates a rebuttable presumption in favor of the party with a documented interest.

For the second factor, the *Vital* court determined that the presumption created by a documented property interest could be rebutted by evidence of control over access to the account.

Evidence of control includes, for example, if one party has exclusive power to access the account, of course, excluding the social media platform itself.

Nicole Fulfree: Now, if a party established both contractual ownership and exclusive control over the social media accounts, that party would be the conclusive owner. But in the absence of a conclusive determination using the first and second factor, as was the case and *vital*, the framework requires the Court to look at the use of the account.

In considering the third factor, the Bankruptcy Court look to a multifactor

test with respect to how the account was actually used, and the Court found the record showed that the use of social media has always been integral to the company's marketing strategy, the accounts were created by employees, the account names contain the company's brand name, and a large majority of the posts were some form of marketing of the company's brand and products.

Erica G. Mannix: In affirming the Bankruptcy Court's decision, the District Court agreed that the Bankruptcy Court hit the nail on the head with the new test it created, highlighting some of the novel issues that are likely to come about as a result of the drastic change in landscape in the social media universe in recent years.

Companies and employees alike should consider the importance of documenting any property interests they may have in social media accounts, via agreements or otherwise, and ensuring the control over such accounts demonstrates the proper party with the ownership rights.

As always, thanks for tuning into the [Lowenstein Bankruptcy Lowdown](#). We hope you'll join us again soon.