

## “I’ll Be Back . . . Probably”: The Terminator’s Conundrum

Article By:

Kelly E. Singer

---

A recent decision in the [\*In re RMH Franchise Holdings\*](#) bankruptcy case pending in the District of Delaware highlights the importance of complying with a contract’s termination provision **before** the contract counterparty files for bankruptcy.

In *RMH*, Applebee’s Restaurants LLC and Applebee’s Franchisor LLC (collectively, “Applebee’s”) entered into 160 pre-petition franchise agreements (the “Franchise Agreements”) with the Debtors. The Franchise Agreements, among other things, granted the Debtors the right to use the Applebee’s name, food recipes, operating methods, and restaurant style, in exchange for a monthly royalty fee and a percentage of gross sales. The Franchise Agreements were governed by Kansas law.

The Franchise Agreements provided Applebee’s with the right to terminate the agreements immediately upon written notice to the Debtors if, among other reasons, there was an uncured default. In June 2017, the Debtors stopped making royalty payments due under the Franchise Agreements. Applebee’s sent a letter to the Debtors on September 20, 2017 (the “September Letter”) demanding payment of the past-due amounts within 90 days, or the applicable Franchise Agreements would be terminated on the 91<sup>st</sup> day. The Debtors did not cure the payment default within the 90-day period, but the parties engaged in discussions to seek a resolution.

Before the 90-day cure period expired, Applebee’s sent a letter to the Debtors in December 2017 (the “December Letter”) that extended the cure period for an additional 30 days. The December Letter “expressly reserve[d] all of [Applebee’s] rights with respect to any and all remedies at law or in equity, under the [Franchise Agreements] . . . [and] [n]either [the December Letter] nor any action taken or not taken by Applebee’s . . . shall be deemed to be a waiver of Applebee’s right to any remedies.” Importantly, the December Letter extending the cure period did not mention termination of the Franchise Agreements like the September Letter did.

The parties continued discussions to seek a resolution. Applebee’s sent multiple cure extension letters similar in substance to the December Letter. These subsequent cure extension letters did not mention termination like the September Letter did. On April 25, 2018, Applebee’s sent the Debtors a forbearance letter, which specifically stated that Applebee’s would “forbear from taking any further actions against [the Debtors] or the [restaurants] . . . until May 8, 2018.” The letter further stated that “it is not an extension of the cure periods referred to in the prior [letters], which have already expired.”

The Debtors filed chapter 11 petitions on May 8, 2018 (the “Petition Date”). That same day, and without knowledge of the bankruptcy filings, Applebee’s sent the Debtors (1) another forbearance letter that agreed to delay “enforcing its termination rights” until May 20, 2018, and also advised the Debtors that the cure period had expired, and (2) a separate letter to the Debtors terminating the Franchise Agreements for Arizona and Texas effective April 27, 2018. Applebee’s further filed a complaint against the Debtors in the United States District Court for the District of Kansas.

Applebee’s subsequently filed an adversary proceeding against the Debtors seeking a declaratory judgment that the Franchise Agreements terminated pre-petition. The parties filed cross motions for summary judgment on the issue.

The bankruptcy court recognized that termination of a contract under Kansas law requires that termination be “clear and unambiguous and convey an unmistakable purpose to rescind or forfeit the agreement” and that a right to terminate “will be strictly construed.” Applebee’s asserted that the Franchise Agreements terminated pre-petition on April 27, 2018, when the final cure period had expired. Applebee’s argued that the termination provision in the September Letter had been preserved through each of the subsequent cure extensions. The Debtors, however, argued that the cure extensions after the September Letter did not mention termination of the Franchise Agreements, and that the forbearance letter specifically delayed Applebee’s termination rights until the Petition Date. Accordingly, the Debtors argued, that termination of the Franchise Agreements never occurred pre-petition, and that the Franchise Agreements are thus executory contracts that are property of the Debtors’ estates.

The Court disagreed with Applebee’s. Applebee’s did not specifically include the termination language contained in September Letter in the subsequent cure extensions. In short, there was not a “clear and unambiguous” termination that “convey[ed] an unmistakable purpose to rescind or forfeit” the Franchise Agreements. Furthermore, the first forbearance letter “reflects Applebee’s commitment to delay pursuing all of its rights under the Franchise Agreements—including termination.” The Court thus found that Applebee’s did not terminate the Franchise Agreements pre-petition, and that the Franchise Agreements constituted property of the Debtors’ estates as of the Petition Date.

Situations like this sometimes present non-debtor counterparties with a conundrum – does the non-debtor party send a termination notice or does it keep termination an option and negotiate a resolution? In a situation where there are ongoing negotiations, the non-debtor party may not want to terminate. It is not until a bankruptcy event that definitive termination may be the more preferred strategy to prevent the non-debtor party from being tied up in a bankruptcy scenario. Regardless of the strategy a non-debtor party chooses, this case presents an interesting lesson concerning contractual remedies and enforcement of those remedies. Whether or not the law of a particular jurisdiction requires “clear and unambiguous” termination like the law of Kansas, it is good practice to be explicit, at all times, when a party has terminated a contract.

© Copyright 2025 Squire Patton Boggs (US) LLP

---

National Law Review, Volume VIII, Number 275

Source URL: <https://natlawreview.com/article/i-ll-be-back-probably-terminator-s-conundrum>