THE SECTION 365(C)(1)(A) DEBATE: "ACTUAL" OR "HYPOTHETICAL"?
A CIRCUIT-BY-CIRCUIT LOOK

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Circuit	Test Used	Most Recent Case	Seminal Case(s)
First (*Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico*)	ACTUAL	*In re GlycoGenesys, Inc.*, 352 B.R. 568, 576 (Bankr. D. Mass. 2006) (exclusive patent license was held to be assumable and assignable to assignee where license agreement expressly permitted assignment subject to certain restrictions).	*Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608 (1st Cir. 1995); *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997), *abrogated on other grounds by Hardemon v. City of Boston*, 1998 WL 148382 (1st Cir., Apr. 6, 1998).
Second (*Vermont, New York, Connecticut*)	UNDECIDED (*but leaning toward alternative theory resembling* ACTUAL)	*In re Footstar*, 323 B.R. 566, 570-72 (Bankr. S.D.N.Y. 2005) ("actual" test is consistent with plain meaning of §365(c)(1)); *In re Adelphia Communications Corp.*, ___ B.R. ___, 2007 WL 64128 at *3 (Bankr. S.D.N.Y., Jan. 11, 2007) (affirming the holding in *Footstar*).	[NO CASE ON POINT] "[W]here there is no controlling Second Circuit authority, [the Bankruptcy Court for the Southern District of New York] follows the decisions of other bankruptcy judges in this district in the absence of clear error. But to say that the *Footstar* decisions should be followed under that standard would be faint praise here. In this Court's view, Judge Hardin's analysis in those decisions was plainly correct." *Adelphia*, ___ B.R. ___, 2007 WL 64128 at *3 n.13.
Third (*Pennsylvania, Delaware, New Jersey, Virgin Islands*)	HYPOTHETICAL	*In re Allentown Ambassadors, Inc.*, ___ B.R. ___, 2007 WL 316674 at *22 (Bankr. E.D. Pa., Feb. 5, 2007) ("applicable law" did not excuse non-debtor party from "accepting performance or rendering performance to"	*Matter of West Electronics, Inc.*, 852 F.2d 79 (3d Cir. 1988); *Cinicola v. Scharffenberger*, 248 F.2d 110, 121 (3d Cir. 2001) ("[I]f a contract could not be assigned under applicable nonbankruptcy law, it may not be assumed or

		assignee within meaning of 11 U.S.C. §§ 365(c)(1) and (e)(2)); *see also In re Golden Books Family Entertainment, Inc.*, 269 B.R. 300, 309-11 (Bankr. D.Del. 2001) (extending hypothetical test to nonexclusive copyright licenses).	assigned by the trustee").
Fourth (*West Virginia, Virginia, Maryland, North Caroline, South Carolina*)	HYPOTHETICAL	[NO CASE ON POINT MORE RECENT THAN *Sunterra;* earlier decisions include *In re Neuhoff Farms, Inc.*, 258 B.R. 343, 350 (Bankr. E.D. N.C. 2000) ("The literal language of § 365 (c)(1) is … said to establish a 'hypothetical test': a debtor in possession may not assume an executory contract over the nondebtor's objection if applicable law would bar assignment to a hypothetical third party"); *In re Catron,*158 B.R. 629, 635 (E.D. Va. 1993), *aff'd* 25 F.3d 1038 (4th Cir. 1994) (the court read "§ 365(c)(1)(A) literally as stating a hypothetical test").]	*In re Sunterra Corp.*, 361 F.3d 257 (4th Cir. 2004).
Fifth (*Texas, Louisiana, Mississippi*)	UNDECIDED (*but leaning toward* ACTUAL)	[NO CASE ON POINT MORE RECENT THAN *Mirant*; *but see In re Cajun Elec. Power Co-op., Inc.*, 230 B.R. 693 (Bankr. M.D. La. 1999); *In re Lil' Things, Inc.*, 220 B.R. 583 (Bankr. N.D. Tex. 1998); *In re Hartec Enters., Inc.*, 117 B.R. 865, 871-73 (Bankr. W.D. Tex. 1990), *judgment vacated on other grounds*, 130 B.R. 929 (W.D. Tex. 1991) (adopting "actual test" and allowing debtor to assume otherwise nonassumable government contract).]	*In re Mirant Corp.*, 440 F.3d 238 (5th Cir. 2006) (interpreting § 365(e)(2) instead of § 365(c)(1) but adopting "actual" test; court held that *ipso facto* provision was not protected by § 365(e)(2) exception).

Sixth (*Michigan, Ohio, Kentucky, Tennessee*)	UNDECIDED	*In re Lucre*, 339 B.R. 648 (Bankr. W.D. Mich. 2006) (declining to extend *Mirant* where non-debtor party only sought to lift stay to determine whether it could withhold performance because of debtor's pre-petition breach, not terminate executory contract); *see also In re Cardinal Indus., Inc.*, 116 B.R. 964, 979 (Bankr. S.D. Ohio 1990) ("the hypothetical test … is clearly not appropriate under § 365(c)(1)).	[NO CASE ON POINT] *But see In re Magness*, 972 F.2d 689 (6th Cir. 1992) (Chapter 7 trustee was prohibited from assuming golf membership in country club, where trustee had actual intent to assign, country club objected to assignment, and applicable state law excused country club from accepting performance from or rendering performance to person other than debtor).
Seventh (*Wisconsin, Illinois, Indiana*)	UNDECIDED	[NO CASE ON POINT, *but see Sable v. Morgan Sangamon Partnership*, 280 B.R. 217, 220 (N.D. Ill. 2002) (where applicable law excused nondebtor from accepting performance from or rendering performance to person other than debtor, *ipso facto* provision in partnership agreement that dissolved partnership upon general partner's filing for bankruptcy was held valid, and chapter 7 trustee could only assign financial interest in general partnership because partnership had been dissolved).]	[NO CASE ON POINT] *But see Matter of Midway Airlines, Inc.*, 6 F.3d 492, 496 (7th Cir. 1993) (where lease provision expressly allowed assumption and assignment, nondebtor's objection "[lost] all force").
Eighth (*North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Missouri, Arkansas*)	UNDECIDED (*but leaning toward* ACTUAL)	*Matter of GP Exp. Airlines, Inc.*, 200 B.R. 222, 231-33 (Bankr. D.Neb. 1996) (applying actual test and finding that applicable law barring assignment of certain airline contracts did not prevent debtor from assuming contracts); *Matter of Daugherty Const., Inc.*, 188 B.R. 607 (Bankr. D.Neb. 1995).	[NO CASE ON POINT]

Ninth (*Washington, Oregon, California, Montana, Idaho, Nevada, Arizona, Alaska, Hawaii*)	HYPOTHETICAL	*In re Hernandez*, 285 B.R. 435, 441 (Bankr. D. Ariz. 2002) (reluctantly holding that *Catapult* controlled and therefore precluded debtor from assuming exclusive patent license); *In re N.C.P. Marketing Group, Inc.*, 337 B.R. 230, 234-36 (D. Nev. 2005) (extending holding in *Catapult* to trademarks); *cf. In re JZ, LLC*, ___ B.R. ___, 2006 WL 3782988 at *2-5 (Bankr. D. Idaho, Dec. 21, 2006) (where debtor neither assumes nor rejects executory contract, the contract "rides through" the bankruptcy).	*In re Catapult Entm't, Inc.*, 165 F.3d 747 (9th Cir. 1999).
Tenth (*Wyoming, Utah, Colorado, Kansas, Oklahoma, New Mexico*)	UNDECIDED	[NO CASE ON POINT]	[NO CASE ON POINT]
Eleventh (*Alabama, Georgia, Florida*)	UNDECIDED	*In re Quantegy, Inc.*, 326 B.R. 467 (Bankr. M.D. Ala. 2005) (citing *Catapult*, debtor was not prohibited from assuming and assigning trademark and patent agreements to the extent consistent with the agreements' limited assignment clauses, notwithstanding "applicable law" that prohibited assignment); *but see In re James Cable Partners, L.P.*, 154 B.R. 813, 815 (M.D. Ga. 1993), *aff'd on other grounds*, 27 F.3d 534 (11th Cir. 1994); *In re Fastrax, Inc.*, 129 B.R. 274, 277 (Bankr. M.D. Fla. 1991) (explicitly rejecting hypothetical test); *see also In re Travelot Co.*, 286 B.R. 447 (Bankr. S.D. Ga. 2002) (executory contract	*In re James Cable Partners, L.P.*, 27 F.3d 534, 537 n.6 (11th Cir. 1994) (appearing to adopt hypothetical test as per *West Electronics*, even while acknowledging that district court below adopted actual test, but not reaching the issue because no "applicable law" excused city from accepting performance from entity other than debtor).

		did not grant debtor non-exclusive trademark license so as to preclude debtor from assuming contract).	
District of Columbia	UNDECIDED	[NO CASE ON POINT]	[NO CASE ON POINT]

*Special thanks go to Cooley Godward Kronish associate Brian Byun for his extensive help in preparing this chart. In addition, a great deal of material in the chart was graciously furnished by Cooley Godward Kronish partners Jay R. Indyke and Richard S. Kanowitz, and associate Brent Weisenberg, from their article in the April 2007 issue of the Journal of Bankruptcy Law and Practice, "Ending the 'Hypothetical' vs. 'Actual' Test Debate: A New Way to Read Section 365(c)(1)," 16 J. BANKR. L. & PRAC. 2 Art. 2 (2007).