The Bankruptcy Code Requirement of Compliance With Lease Obligations—Does ‘‘All’’ Mean Everything?

GLENN R. SCHMITT*

I. INTRODUCTION

In 1978 Congress enacted the Bankruptcy Reform Act of 1978.1 In doing so, Congress enacted the fourth different national bankruptcy act since it first exercised its constitutional power regarding bankruptcy in 1800.2 The 1978 Act repealed the Bankruptcy Act of 18983 and was a complete substantive and administrative revision of the bankruptcy laws.4 The enactment of this legislation culminated an almost ten-year effort to completely revise the existing bankruptcy laws.5

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* B.S., Indiana State University, Terre Haute, Indiana; J.D., University of Notre Dame, Notre Dame, Indiana; associate, Thompson, Hine and Flory, Cleveland, Ohio; member, Banking, Commercial and Bankruptcy Law Committee of the Ohio State Bar Association.


3. 1978 Act, supra note 1, § 401(a).


5. This effort began when Congress created the Commission on Bankruptcy Laws of the United States in 1970 to:

   study, analyze, evaluate, and recommend changes to the Act entitled ‘‘An Act to establish a uniform system of bankruptcy throughout the United States,’’ approved July 1, 1898 (30 Stat. 544), as amended (title 11, United States Code), in order for such Act to reflect and adequately meet the demands of present technical, financial, and commercial activities.

In 1984, Congress passed a law amending the 1978 Act, known as the Bankruptcy Amendments and Federal Judgeship Act of 1984.6 The 1984 amendments were necessitated, at least in part, by the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipeline Co.7 In Marathon, the Court held that the Congressional grant of jurisdiction to the bankruptcy courts under the 1978 Act had been too broad.4 Specifically, the Court held that a bankruptcy judge's ability to decide issues relating to claims under state law was an impermissible grant by Congress of the judicial power reserved to the courts under Article III of the Constitution.9 The 1984 Act attempted to cure the constitutional defect by providing that the district courts have original and exclusive jurisdiction over all bankruptcy cases,10 that the bankruptcy court exists as a unit of the district court,11 and that bankruptcy judges serve as judicial officers of the district court.12

In curing the constitutional problems of the 1978 Act, Congress used the opportunity13 to provide substantive revisions to the Bankruptcy Code itself.14 Predominant among these amendments were

8. Id. at 70-71.
9. Id. at 84-87. U.S. Const. art. III, § 1 provides “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”
provisions "intended to remedy serious problems caused shopping centers and their solvent tenants by the administration of the Bankruptcy Code." Congress recognized three problems that existed when a shopping center tenant went into bankruptcy. The first was the potential for a long-term vacancy or partial diminution in operation of the space leased by a bankrupt tenant. The second was that the bankrupt tenant may have stopped paying rent as required under its lease. The third problem was the damage to a landlord that occurred when a bankrupt tenant assigned its leasehold interest to an entity that disrupted the balance of retail outlets in a shopping center. These "unintended consequences of the 1978 Act" were perceived to "threaten the profitability and the existence" of shopping centers and their tenants.


16. The Senate had recognized these problems earlier but had been unable to achieve passage of its proposed solutions by the House. See supra note 13. As the report accompanying the Shopping Center Protections Improvements Act of 1982 stated:

[In the years since the enactment of the 1978 Act, it has become possible for the trustee in bankruptcy, or the bankrupt himself:
(1) To fail to decide whether he wishes to assume or reject the lease for an extended period of time, and to leave the premises unused or partially unused to the detriment of the surrounding businesses and the landlord;
(2) To fail to perform his obligations under the lease when due, including the payment of rent and other charges; and
(3) To fail to assign his lease, when he does assign it, to an assignee who will use the premises as the lease requires.

When any one or more of these three situations occur, the economic health of the entire shopping center is threatened. S. 2297 strengthens the protections in the 1978 Act against these three situations to make their occurrence less likely.

S. REP. No. 527, 97th Cong., 2d Sess. 2 (1982) [hereinafter S. REP. No. 527].

17. 130 CONG. REC., supra note 15. Prior to enactment of the 1984 Amendments, the bankrupt tenant could delay its decision to assume or assign its base with its landlord until confirmation of its place or reorganization, unless the court, upon request of the landlord, required the tenant to make the decision earlier. See generally In re By-Rite Distributing, Inc., 47 Bankr. 660, 663 & n.4 (Bankr. D. Utah 1985).

18. 130 CONG. REC., supra note 15, at S8895.

19. Id.


21. Id.
In an effort to remedy the second of these problems, Congress enacted a provision as part of the 1984 amendments to the Bankruptcy Code to assist shopping center lessors. New code section 365(d)(3) provides that the trustee, or a debtor-in-possession, is required to timely perform all of the debtor’s obligations under an unexpired lease of nonresidential real property. Of course, most leases relating to commercial shopping mall properties are lengthy and complex, to say the least. The question then becomes whether Congress used the word “all” to include in the statute’s reach every one of the several different types of obligations that a shopping center lessee owes to its lessor under their lease.

The debates in Congress concerning this portion of the 1984 Act dealt primarily with requiring the debtor to remain current with respect to its monetary obligations under the lease. As discussed later, however, the fact that there was specific discussion on this point by no means precludes an interpretation that the statute was enacted to cover a broader spectrum of lease obligations. All of the reported cases to date have dealt only with a debtor’s monetary obligations under its lease. Thus, there has been no clear guidance given by Congress or the courts as to whether this Section was intended to be all encompassing or to merely require debtors to remain current on their rent payments to landlords after the commencement of a bankruptcy case. This article analyzes the legislative history of this Section of the Code, as well as the cases decided to date interpreting the Section, and argues in favor of the more expansive approach to section 365(d)—that “all” does in fact mean everything.

22. Congress’ effort to remedy the first problem resulted in the enactment of § 365(d)(4). See infra note 51. Congress attempted to remedy the third problem by amending the existing provision governing assumption and assignment of a shopping center lease. See infra note 37.

23. The Bankruptcy Code does not define “shopping center.” 2 W. COLLIER, COLLIER ON BANKRUPTCY ¶ 365.04[3] (15th ed. 1987). See also In re Goldblatt Bros., Inc., 766 F.2d 1136, 1140-41 (7th Cir. 1985) (definition of shopping center left to case-by-case interpretation but typical indicia include a master lease, fixed hours when all stores are open, common areas, and joint advertising). See also Note, Shopping Center Tenants in Bankruptcy: The Effect of the 1984 Code Amendments, 1988 U. ILL. L. REV. 725 (discussing the need for a definition of the term “shopping center”). The author suggested the following definition: “A group of commercial retail establishments operating as a unit, related by proximity, and planned to promote economic synergy through careful tenant selection.” Id. at 736.

24. See infra note 56 and accompanying text.

25. See infra notes 67-70 and accompanying text.
II. DEBTOR VS. LANDLORD

Clearly, once the bankruptcy case is commenced, the landlord and the debtor have widely divergent interests with respect to the leased premises. When the parties entered into the lease, both were relying upon the continued viability of the lessee. The fact that the lessee has now commenced the bankruptcy case indicates that its viability is, at best, somewhat less certain than at the time the lease was executed. Additionally, the relative positions of the parties will have changed as a result of the commencement of the case, considering the new powers granted to the debtor simply because it has become a debtor-in-possession. The position of each party, with particular emphasis upon the impact of Bankruptcy Code section 365(d)(3) should be examined.

A. THE LANDLORD’S VIEW

Immediately upon commencement of the bankruptcy case, the landlord’s rights with respect to its lessee are greatly diminished from


27. Prior to the enactment of the Code, the bankruptcy law was contained in the Bankruptcy Act (The Bankruptcy Statute of 1898, 30 Stat. 544 (1898), as amended). Under the Bankruptcy Act, in the case of the bankruptcy of a tenant, a shopping center lessor was generally able to protect its interests and the interests of its other tenants by enforcing lease clauses which permitted the lessor to regain control of the leased space. These lease clauses typically provided that if insolvency proceedings were initiated, the lessor could: (1) terminate the lease; (2) change the lease to a month-to-month tenancy; (3) waive or terminate an option to renew the lease; or (4) terminate the lease if the debtor was unable to maintain a certain sales volume or net worth. Although some judicial decisions raise questions regarding the enforceability of such contractual agreements, these provisions usually enable shopping centers to avoid damaging vacancies caused by the insolvency of a tenant. S. REP. No. 527, supra note 16, at 2-3; S. REP. No. 65, supra note 20, at 27; S. REP. No. 70, supra note 20, at 2-3. Congress changed this result by enacting Bankruptcy Code § 365(e)(1) which provides:

Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

what they were pre-petition. The landlord is now prohibited from commencing or continuing any action to obtain possession of the leasehold from the debtor, by operation of the automatic stay of Bankruptcy Code section 362. Additionally, the landlord is prohibited from taking any action to obtain payment of unpaid pre-petition rent owed by the debtor. Simply put, all of the rights which the landlord may have had against the lessee pursuant to the terms of their lease, or under applicable state law, have been taken away merely by the filing of the lessee's bankruptcy petition.

While the landlord's short-term rights have been considerably altered, the commencement of the case has also operated to greatly modify the landlord's long-term rights as well. At the time of contracting for the lease, the lease term set forth a period of time during which the corresponding rights and obligations of the parties were to remain in place. Most likely, this lease term had some impact upon

28. Bankruptcy Code § 362 sets forth the provisions of the automatic stay as follows:

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. § 78eee(a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.


29. Id.
the other substantive provisions of the lease. The most common example is a trade-off of lower monthly rent for a longer-term lease obligation. Because the lessee has now become a debtor-in-possession, it possesses the right to reject this lease at any time, leaving the landlord with only a pre-petition, unsecured claim for damages. In most cases, the amount that the landlord will ultimately realize on this claim will be less than it would have realized had there been no bankruptcy and the lessee breached the lease. Perhaps more importantly, the debtor has the ability to assume its lease with the landlord and then assign that lease to a third party. The landlord will then

30. A debtor in possession has all of the rights and powers and must perform all of the functions and duties of a bankruptcy trustee. 11 U.S.C. § 1107 (1988). Unless the court on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor’s business. 11 U.S.C. § 1108 (1988).

31. The trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor. 11 U.S.C. § 365(a) (1988).

32. 2 W. COLLIER, COLLIER ON BANKRUPTCY ¶ 365.08 (15th ed. 1987). The rejected lease is deemed to have been breached immediately prior to the commencement of the case. 11 U.S.C. § 365(g)(1) (1988). See also In re 1 Potato 2, Inc., 58 Bankr. 752, 755 (D. Minn. 1986).

33. The Code expressly allows assignment of executory contracts and unexpired leases. 11 U.S.C. § 365(f) (1988). Of course, in order to assign an executory contract or unexpired lease, the trustee must first assume it.

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee cures, or provides adequate assurance that the trustee will promptly cure, such default; compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease for any actual pecuniary loss to such party resulting from such default; and provides adequate assurance of future performance under such contract or lease. 11 U.S.C. § 365(b)(1) (1988). The provisions of this section only apply if there has been a default under the lease. These requirements do not apply to a default under the lease which is due to violation of “ipso facto” clauses—provisions relating to insolvency or financial condition of the lessor—commencement by the lessor of a case in bankruptcy, or the appointment of a trustee or custodian. 2 W. COLLIER, COLLIER ON BANKRUPTCY ¶ 365.04[1] (15th ed. 1987).

When there has been no default under the lease, the provisions of § 365(b) do not apply. However, the trustee must still provide adequate assurance of future performance. See 11 U.S.C. § 365(f)(2) (1988). In addition, any assignment will be subject to the terms of the lease. In re TSW Stores of Nanuet, Inc., 34 Bankr. 299, 304 (Bankr. S.D.N.Y. 1983). The lessor may also require a deposit or other security from the assignee tenant in order to secure performance of the debtor’s obligations under the lease substantially the same as the lessor would require upon leasing the property to a similar tenant. See 11 U.S.C. § 365(l).
have to deal with that third party as if it were the contracting party. As most shopping center lessors have created a mix of tenants that they feel will best meet the demands of the likely patrons of the shopping center, the possibility of a new tenant not falling within the landlord's planned mix of tenants will be a cause of great concern for the landlord. The Bankruptcy Code does grant certain protections to the landlord to prevent abuse by the debtor of the assignment privilege, but this provision has been broadly construed and, some

35. The tenant mix has been called "essential to the success of all shopping centers, regardless of their size." Roswick & McEvily, Use Clauses In Shopping Center Leases: The Effect On The Tenant's Bankruptcy, 14 REAL ESTATE L.J. 3, 7 (1985). As the House response to the 1978 Act stated:

A shopping center is often a carefully planned enterprise, and though it consists of numerous [sic] individual tenants, the center is planned as a single unit, often subject to a master lease or financing agreement. Under these agreements, the tenant mix in a shopping center may be as important to the lessor as the actual promised rental payments, because certain mixes will attract higher patronage of the stores in the center, and thus a higher rental for the landlord from those stores that are subject to a percentage of gross receipts rental agreement.


In fact, some types of tenants are charged less rent per square foot of store space because they traditionally bring in more traffic to the shopping center. If a new tenant does not conform to the use clause applicable to the old tenant, this drawing power may be reduced causing damage to the other tenants in the shopping center. See S. REP. No. 527, supra note 16, at 14; S. REP. No. 65, supra note 20, at 39; S. REP. No. 70, supra note 20, at 14.

36. 11 U.S.C. § 365(a)(3)(A), (B). The Code requires the trustee to give adequate assurances of future performance in order to assume an executory contract or unexpired lease which is in default. 11 U.S.C. §§ 365(b)(1), 365(f)(2). The Code places a further burden on the trustee if the unexpired lease is of real property in a shopping center. Bankruptcy Code § 365(b)(3) provides:

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the
may argue, does not grant the landlord much protection at all.\textsuperscript{37}

Between the short-term and long-term concerns of the landlord is a type of intermediate concern—that is, what will the effect of the lessee's bankruptcy have upon the landlord and its shopping mall during the first few months of the lessee's reorganization? It is this period of time, between the commencement of the case and the debtor's decision to assume or reject the lease, that is a type of provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.


37. Prior to the 1984 Act, the Bankruptcy Code only required that when a debtor sought to assume and assign a lease it need only assure that the lease provisions would not be "substantially" breached by the assignee tenant and that the tenant mix of the shopping center would not be "substantially" disrupted by the assignment of the lease to the new tenant. 130 CONG. REC., supra note 15, at S8895. The Senate reports accompanying the 1982 Act, the 1983 Omnibus Act, and the 1983 Improvements Act noted, "In practice, the qualification of the required assurances by the term 'substantially' has led trustees or debtors-in-possession in some instances to ignore those lease clauses, and, consequently, has permitted the disruption of the delicate interrelationships of the shopping center's tenant mix." S. REP. No. 527, supra note 16, at 13; S. REP. No. 65, supra note 20, at 39; S. REP. No. 70, supra note 20, at 14.

The Senate reports noted that this section of the Code had "been interpreted in a way which ... frustrated the Congressional intent." S. REP. No. 527, supra note 16, at 13; S. REP. No. 65, supra note 20, at 38-39; S. REP. No. 70, supra note 20, at 13-14. Examples of the type of interpretation of the section which led to the revisions in the 1984 Act can be found by an examination of In re U.L. Radio Corp., 19 Bankr. 537 (Bankr. S.D.N.Y. 1982). In Radio Corp., the court held that the congressional policy behind the adequate assurance provisions was to give lessors the benefit of the bargain. Id. at 543. The court then held that courts need not force debtors to comply with every lease term in order to give lessors the benefit of the bargain. Id. The court held that in order to prevent a debtor's assignment of its lease to an assignee that would operate in a manner inconsistent with the use clause in the debtor's lease, the landlord would have to demonstrate that "actual and substantial detriment would be incurred by him if the deviation in use was permitted." Id. at 544. See also In re Tech HiFi, Inc., 49 Bankr. 876 (Bankr. D. Mass. 1985) (assignment from electronics store to leather goods store approved); In re Lisbon Shops, Inc., 24 Bankr. 693 (Bankr. E.D. Mo. 1982) (court allowed debtor to conduct going-out-of-business sale, prohibited by the use clause, prior to assignment of the leasehold). As a result of these perceived abuses, the 1984 Act deleted the term "substantially" in Bankruptcy Code § 365(b)(3)(C) and (D). See 1984 Act, supra note 6, § 365. Even so, interpretation of this section obviously is affected by the proclivities of the bankruptcy judge hearing the case.
“twilight zone” for the landlord. Certainly if the lessee had fallen behind in its rent payments prior to its filing of the bankruptcy, there would be little to suggest that the debtor would voluntarily resume these payments post-petition, especially considering the fact that the automatic stay prevents the landlord from taking action against the debtor for this earlier failure. The failure of a tenant to make its monthly rental payments, especially should that tenant be one of the few “anchor tenants” in a mall, may have disastrous effects upon the landlord’s ability to pay its own bills. The landlord will most likely have its own debt service payments to make each month to the lender that financed the construction of the shopping mall itself—payments which the landlord expects to make out of the rents it receives from a fully leased and operational mall. Additionally, the landlord will have certain other monthly expenses, such as costs for maintenance, security, and advertising, all of which it expects to recoup through assessments to each of its tenants. To the extent that a tenant is unwilling to pay its proportionate share of the cost of these benefits, the landlord will have to make up the difference out of its own pocket or will be forced to pass the cost on to other mall tenants.\textsuperscript{38}

The landlord will have other concerns beyond not receiving the rent it has expected to receive. As mentioned above, the landlord has leased space to a variety of lessees\textsuperscript{39} in an effort to obtain a “tenant

\textsuperscript{38} The closing of a major tenant also can substantially increase the costs of the other tenants. Many shopping center leases today provide for \textit{pro rata} payment of common area costs on the basis of percentage of leased space. The closing of a major tenant will substantially reduce the amount of leased space, thus increasing the percentage of all remaining tenants. This will cause their common area charge to be increased on a \textit{pro rata} basis.


\textsuperscript{39} A successful shopping center is typically the result of sophisticated planning and a very delicate balance of merchants. Tenants are chosen on the basis of their business image and use, an analysis and evaluation of the market demands of the area, and an examination of the financial capacity and business experience of the particular tenant in relation to the potential customers to be served. A well-planned project with a balanced mix of stores maximizes the potential benefits to the landlord and tenants as well as to the community served.

Id. at 3 (testimony of Wallace R. Woodbury, Chairman, Woodbury Corp., representing the International Council of Shopping Centers). \textit{See also Bankruptcy Reform: Hearing Before the Subcomm. on the Courts of the Senate Comm. on the Judiciary,}
mix,” which the landlord expects will appeal to the anticipated patrons of the shopping center.40 The choice of tenants takes into consideration the needs of the surrounding community and the appeal of the stores, as a whole, to a broad segment of the population.41 The landlord hopes, and in fact expects, that patrons who visit the shopping center to shop at one store will also shop at neighboring stores due to their high visibility and close proximity to the original store.42 In essence, a shopping mall is a department store with each tenant in the mall serving as one of the departments.43 This interrelationship of stores, the “one-stop shopping concept,” is central to the popularity of large shopping centers today.44

98th Cong., 1st Sess. 354 (1983) (testimony of Irvin B. Maizlish, President of Leo Eisenberg & Co., Kansas City, Missouri, on behalf of the International Council of Shopping Centers) [hereinafter 1983 Hearings].

40. What makes this type of operation desirable is the fact that experience has shown that a combination of tenants (‘tenant mix’) that is well designed to serve the ‘trade area’ of a shopping center will have a symbiotic effect on business in the center that will benefit all of the tenants. 1982 Hearings, supra note 38, at 26; 1983 Hearings, supra note 39, at 358 (prepared text of Wallace R. Woodbury).

“This is true not only for large shopping centers, but also for small centers where independent merchants depend upon one another to attract customers from whom they mutually benefit.” 1982 Hearings, supra note 38, at 27; 1983 Hearings, supra note 39, at 359.

41. Tenants are chosen on the basis of their business use, their type of operation, the market they will cater to (age grouping, financial status, etc.), financial viability, and business experience. . . . A well planned project will have a percentage of ready-to-wear merchants, shoe stores, [and] food establishments. . . . A center so planned is protective of the tenants, and the landlord, and satisfies as well the needs of the community to which it usually contributes considerable tax dollars. 1982 Hearings, supra note 38, at 27; 1983 Hearings, supra note 39, at 358-59.

42. “What makes this type of operation possible is the understanding by all concerned that the commercial success of the enterprise depends on the finished product functioning as a unit, presenting to the public a single face.” 1982 Hearings, supra note 38, at 26; 1983 Hearings, supra note 39, at 355 (testimony of Irvin B. Maizlish).

43. 1982 Hearings, supra note 38, at 3.

44. In a shopping center, the public benefits from the convenience and efficiency of ‘one-stop’ shopping and frequently from the direct competition among the retail merchants who are tenants of the shopping center. The commercial success of the enterprise depends on the ability of all of the tenants to function as one entity. The shopping center is defined by its ‘tenant mix’ which is carefully designed to serve a ‘trade area’ and to draw sufficient customers from that trade area to support the rents paid by the
Of obvious detriment to this concept is a store which is no longer open for business. The closed store cannot draw customers from, or send customers to, neighboring stores. If the closed store is one of the shopping center's anchor tenants, the resulting disruption in traffic flow can be substantial. If the closed store is the only anchor tenant, as in some strip malls, the results can be devastating to the other tenants. Even if the closed store is not an anchor tenant, a tenant's closure can still have a serious negative effect on the adjacent stores because of the carefully planned mix and placement of stores in the shopping center. In addition to the reduced traffic flow, the closed

tenants.

S. REP. No. 527, supra note 16, at 8; S. REP. No. 65, supra note 20, at 33; S. REP. No. 70, supra note 20, at 8.

45. See 130 CONG. REC., supra note 15, at S8894; see also S. REP. No. 527, supra note 16, at 12.

The vacancy of any tenant space for an extended period of time can seriously disrupt an entire shopping center. During [the] time [it takes a trustee or debtor-in-possession to assume or reject a lease], the other tenants of a shopping center may be affected dramatically. The closing of even a single store in a shopping center may substantially reduce the revenues and increase the costs of the other tenants. Their revenues are reduced because the closing of a store in a shopping center, especially a major store, reduces the traffic flow through the shopping center.

S. REP. No. 527, supra note 16, at 11-12; see also 1982 Hearings, supra note 38, at 27 ("Customer traffic is reduced not only by the decreased supply of products or services, but also by the less pleasant atmosphere caused by boarding up a portion of the shopping center.").

46. "Where the vacant space is that of an anchor store, the effect on the shopping center and its other tenants can be devastating." S. REP. No. 527, supra note 16, at 11; see also 1983 Hearings, supra note 39, at 386 ("smaller tenants in the shopping center [have] generally determined to locate in that center based upon the nature of the anchor store") (testimony of Nathan B. Feinstein, Esq., of Cohen, Shapiro, Polisher, Shiekman & Cohen, Philadelphia, Pennsylvania).

47. See 1982 Hearings, supra note 38, at 136 ("In strip centers with only one major tenant, the closing of such a tenant generally has a substantial damaging effect on all of the stores.") (statement of the National Retail Merchants Association).

48. Id. at 4 ("The vacancy of any tenant space for an extended period of time can seriously disrupt not only the neighboring tenants, but the entire shopping center") (testimony of Wallace R. Woodbury); Id. at 136 ("In a regional shopping center with more than one major tenant, the reduction in traffic can have a negative effect on all of the tenants. This damage often is even more serious for the stores adjacent to the unoccupied space.") (statement of the National Retail Merchants Association). See also 1983 Hearings, supra note 39, at 349-50 (testimony of Irvin B. Maizlish that the bankruptcy of an anchor tenant, a large discount record chain, directly caused the bankruptcy of a store adjacent to it, a stereo equipment store, which was heavily dependent on the anchor tenant to create sufficient customer traffic into its store).
store can also be an unsightly distraction from the mall’s appearance which may cause a further reduction in patrons at the shopping center.49

Perhaps an even greater detriment to the landlord is the store which is open only part of the time, is only partially stocked, or carries only a portion of the product line to which its customers have become accustomed. A store such as this, or worse yet, one which has begun carrying a different product line altogether, might prove to be even more disruptive than a store which has closed. Finally, a tenant that is not fulfilling its other lease obligations such as cooperative advertising, promotion, and compliance with sign restrictions, may detract from the carefully cultivated atmosphere created by the landlord and place a further burden on the landlord and its fellow tenants.

Obviously, for these reasons, a shopping mall landlord would argue for an expansive interpretation of Bankruptcy Code section 365(d)(3) in order to require that the debtor perform each and every obligation of its lease with the landlord, as if the bankruptcy had not occurred. To require the landlord to continue to allow the debtor to do business and receive the benefits of the landlord’s property is unfair if the landlord is not properly and adequately compensated. Thus, the landlord views as unfair the debtor’s right to receive the benefits of the current services provided by the landlord as well as the benefits received by being part of the tenant mix, without compensating the landlord for the value of that benefit. The landlord would also assert that not only should it be compensated, but it should not be harmed by the continued existence of the debtor upon the leased premises. For that reason, the landlord would argue that the debtor should be required to conduct its operation in accordance with the terms of the lease, one which the landlord has drafted to further its concept for that particular shopping mall.

B. THE DEBTOR’S VIEW

As might be expected, the debtor-lessee sees things from quite a different perspective. Certainly, the most important concern of the debtor is to reorganize its business.50 Part of the reorganization process


50. See NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984) (policy of Chapter 11 is to permit successful rehabilitation of debtors); In re Little Creek Dev. Co., 779 F.2d 1068, 1071 (5th Cir. 1986) (bankruptcy clothes debtor with the
will include decisions as to which executory contracts and unexpired leases are of benefit to the debtor and which are not. The Bankruptcy Code recognizes that the debtor will need some time to make these decisions and allows the debtor sixty days within which the decision must be made.\(^{41}\) In order to grant the courts maximum flexibility in presiding over a reorganization, Congress provided that bankruptcy courts could extend this period for cause shown.\(^ {52}\) Prior to making a decision whether to reject, assume and retain, or assume and assign a lease, however, the debtor may view requirements that it comply with all of the various lease obligations set forth in the lease to be a hindrance to its successful reorganization. The debtor will feel that concentrating all of its activities in the evaluation and restructuring of its business is in its best interest. Requiring the debtor to expend administrative time and to incur costs to comply with the many different provisions of a commercial shopping center lease may be viewed as an impediment to the debtor's reorganization efforts. Additionally, a debtor that is a party to many different leases in many different locations, such as a national retail chain, may be adversely affected by the requirement of remaining current on all of its many

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\(^{41}\) In a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor. 11 U.S.C. § 365(d)(4) (1988). This provision was also added to the Bankruptcy Code by the 1984 amendments. 1984 Act, supra note 6, § 362(a). See also supra note 17 and accompanying text. For a full discussion of the operation of this section, see Note, Assumption of Unexpired Leases Under Bankruptcy Code Section 365(d)(4), 1986 B.Y.U. L. REV. 1121.

leases, not to mention the immediate financial drain of having to remain current on its many rent payments.

Requiring a debtor to remain current on its post-petition rental obligations may require the use of valuable cash which the debtor may believe can be put to better use in the restructuring of the debtor's business. The debtor may be unwilling to expend needed funds to pay the rent at locations which it may believe are only marginally of value, or not of value at all. If the debtor is considering rejecting the leases relating to these locations, it most likely would not want to spend any more money on the location. Few debtors would argue that they should be entitled to remain indefinitely in possession of their leasehold premises without paying rent; most would concede that the landlord is entitled to receive compensation for the debtor's use of the landlord's premises. However, debtors would argue that granting the landlord an administrative expense claim for the reasonable rental value of the property protects the landlord's interests yet enables the debtor to have more flexibility in its restructuring operations.

III. Bankruptcy Code Section 365(d)(3)

In order to resolve some of the conflict between these two positions, Congress enacted section 365(d)(3) as part of the 1984 Act. This provision requires the debtor-lessee to timely perform all of its obligations under an unexpired lease of non-residential real property. With these two differing perspectives in mind, considera-

53. See supra notes 30-37 and accompanying text.
54. See S. REP. No. 527, supra note 16, at 10 (“[t]he bill strikes the proper balance between the interests of the solvent tenants of a shopping center and its insolvent tenants.”); see also S. REP. No. 65, supra note 20, at 35; S. REP. No. 70, supra note 20, at 10.
55. 1984 Act, supra note 6, § 362.
56. The trustee shall timely perform all the obligations of the debtor, except those specified in § 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding § 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's
tion should be given to an examination of the types of lease obligations commonly found in shopping center leases and a review of the legislative history surrounding the enactment of Bankruptcy Code section 365(d)(3), as well as the reported cases which have interpreted this Section to date.


The versions of this provision in the 1982 Act, the 1983 Omnibus Act, and the 1983 Improvements Act, were virtually identical to the language of § 365(d)(3) as well as to each other. It appears that the analysis portion of the three reports was simply used each time, given that Senate Report Number 70, which reports on Senate Bill 549 which was introduced in 1983, contains what appears to be a typographical error in the first sentence, a reference to Senate Bill 2297. This bill was introduced in the second session of the 97th Congress, in 1982, and was the subject of Senate Report Number 527.

In each of the earlier bills the proposed language was intended to be engrafted onto Bankruptcy Code § 365(a). The 1982 Act would have added the following language to § 365(a):

The trustee shall timely perform all the obligations of the tenant, arising from and after the date of the order for relief, upon an unexpired lease (including payment of the rent and other charges specified in such lease) until such lease is assumed or rejected notwithstanding the provisions of section 503 of this title. For cause shown, the court may extend the time for performance of any obligation of rent or other charges due upon an unexpired lease pursuant to the provisions of section 108(b) of this title.

Acceptance of such performance shall not constitute a waiver or relinquishment of the lessor’s rights under the lease or under this title.

1982 Act, supra note 13, § 2.

The 1983 Omnibus Act and the 1983 Improvements Act would have added the following language to section 365(a):

The trustee shall timely perform all the obligations of the tenant arising from and after the date of the order for relief, under an unexpired nonresidential lease (including payment of the rent and other charges specified in such lease) until such nonresidential lease is assumed or rejected, notwithstanding the provisions of section 503 of this title. For cause shown, the court may extend the time for performance of any obligation of rent or other charges due upon an unexpired lease pursuant to the provisions of section 108(b) of this title. Acceptance of such performance shall not constitute a waiver or relinquishment of the lessor’s rights under the lease or under this title.


The difference between the 1982 act and the 1983 acts was that the later versions made it clear that the proposed Statute would not apply to residential real property leases.
A. RENTAL OBLIGATIONS

The most obvious lease obligation, and perhaps the most important to any landlord, is the debtor's obligation to pay rent on its leasehold. The term "rent" in a shopping center lease context is perhaps best considered as an all-inclusive term for more than one monetary obligation under the terms of a lease. The debtor commonly has an obligation to pay a fixed or guaranteed minimum monthly rental amount. Also, a shopping center lease will likely provide for the payment of "percentage rent." This rental fee is based upon a fixed percent of, or formula applied to, the gross receipts of the debtor's business at the leased location, calculated on a monthly, quarterly, or annual basis. In addition, the debtor is likely to be obligated to pay its share of "common area charges." The landlord charges these fees to all of its tenants to meet the costs of utilities, taxes, upkeep, snow removal, and other obligations incurred by the landlord with respect to the public areas of the shopping center. In the usual case, common area charges are assessed to all tenants proportionately, based upon the amount of square footage of their premises in relation to the entire retail area of the shopping center. Given the fact that the landlord must provide use of its property, utilities, and custodial and security services to the debtor following the commencement of the case, one can readily see that the landlord, unique among all of the debtor's other creditors, is greatly interested

57. 1982 Hearings, supra note 38, at 26; 1983 Hearings, supra note 39, at 358. 58. Id. 59. Bankruptcy Code § 365(d)(4) provides:
Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease. 11 U.S.C. § 365(d)(4) (1988).
This Section has been interpreted to require the lessor to provide services or supplies under the lease regardless of whether the debtor was in default under the lease pre-petition. 2 W. Collier, Collier on Bankruptcy ¶ 365.04[4] (15th ed. 1987). 60. 130 Cong. Rec., supra note 15, at S8895. [The requirement of providing services to a tenant in bankruptcy] presents a hardship to a landlord who may not receive rent for several months and is unable to gain control of his premises. We are not aware of any other
in obtaining as many of the rental payments as possible. 61

Courts have been quick to compel a debtor to remain current in its rental payments under a shopping center lease. 62 Although the settled rule prior to the 1984 amendments was that a "debtor was liable only for the reasonable value of the use and occupancy of the leasehold," 63 courts have given that argument short shrift following the enactment of the 1984 provisions. 64 Under these cases, a debtor is required to pay its landlord the full monthly rental payment provided for in its lease. 65 Although courts have been silent up to the date of this writing concerning common area charges, it is safe to assume that these charges would be included in the package of court-enforced obligations known as "rent." Likewise, percentage rental payments would also be included in rent. However, due to the very nature of percentage rental payments—they are based upon the amount of income generated during a certain period of time at a certain store location—this requirement may be of little benefit to the landlord. Obviously, if the debtor is doing little or no business at the landlord's location, there will be few, if any, proceeds upon which to generate the percentage rental payment. Thus, even should case precedent suggest that percentage rental payments must be made under the Code, the landlord will be able to take little solace in this requirement.

1982 Hearings, supra note 38, at 33-34.

61. One court has described the shopping center lessor's position as being "like an involuntary extender of unsecured credit." In re Dieckhaus Stationers of King of Prussia, Inc., 73 Bankr. 969, 973 and n.2 (Bankr. E.D. Pa. 1987) (emphasis in original).

62. See In re Rare Coin Galleries of America, Inc., 72 Bankr. 415, 416 (Bankr. D. Mass. 1987) ("[T]he command of 365(d)(3) that the trustee shall 'timely' perform the rent obligation means that the trustee must pay the rent as it becomes due."); In re S&F Concession, Inc., 55 Bankr. 689, 691 (Bankr. E.D. Pa. 1985) ("[t]he clear language of 365(d)(3) mandates that the trustee immediately pay all postpetition rent and remain current on future rent payments as they become due").


65. Once the lease is rejected, whether by the debtor under Bankruptcy Code § 365(a) or automatically under Bankruptcy Code § 365(d)(4), the requirements of § 365(d)(3) no longer apply. Some courts have held that after rejection, should the debtor remain on the premises, the landlord is entitled to an administrative expense claim but that it is not automatically calculated at the rental amount set forth in the lease. See, e.g., In re Gillis, 92 Bankr. 461, 465 (Bankr. D. Haw. 1988). In light of the abuse which Congress perceived in enacting the 1984 Act, see supra notes 15-21 and accompanying text, it can be argued that courts should assess an administrative rent claim against the debtor based on the rental rate set forth in the rejected lease.
if there is little or no revenue upon which to calculate its percentage.

The legislative history to Bankruptcy Code section 365(d)(3) clearly indicates that Congress intended the debtor-lessee to remain current on its basic rental payments. When statements were made by legislative leaders of both houses in support of the 1984 Act, Senator Hatch spoke in terms of requiring debtors to "pay their rent . . . ." Equally clear is that Congress intended debtors to pay their common area charges; specific reference was made to this obligation in the report. The legislative history does not make specific reference to percentage rent. However, as Congress did not detail what it meant by its use of the term "rent," to include percentage rent in the scope of this term is not inappropriate. In fact, as the legislative history is not very sophisticated in its discussion of what would be required of a debtor under section 365(d)(3), it is logical to assume that Congress either intended all of the different types of rent to be included within the meaning of that term, or it did not really consider the issue at all. In either case, because basic (or minimum) rent and percentage rent are actually two parts of one type of obligation, the payment of each should be enforced under section 365(d)(3).

B. OTHER LEASE OBLIGATIONS

Bankruptcy Code section 365(d)(3) requires the debtor to perform all of its obligations arising under any unexpired lease of nonresidential real property. But does "all" really mean everything? As


67. 130 CONG. REC., supra note 15, at S8895. See also S. REP. No. 527, supra note 16, at 13; S. REP. No. 65, supra note 20, at 38; S. REP. No. 70, supra note 20, at 13.

68. Selected statements by the legislative leaders of the 1984 Act are collected at 1984 U.S. CODE CONG. & ADMIN. NEWS 576.

69. 130 CONG. REC., supra note 15, at S8895.

70. Senator Hatch's remarks indicated that under the 1984 Act the debtor would be required to pay "rent, common area, and other charges . . . ." 130 CONG. REC., supra note 15, at S8895. The reports accompanying the 1982 Act, the 1983 Omnibus Act, and the 1983 Improvements Act, speak only in terms of requiring the debtor to pay "rent and other charges." S. REP. No. 527, supra note 16, at 13; S. REP. No. 65, supra note 20, at 38; S. REP. No. 70, supra note 20, at 13. It is doubtful that there was any distinction intended by these two differing phrases.

71. See S. REP. No. 527, supra note 16, at 12-13; S. REP. No. 65, supra note 20, at 38; S. REP. No. 70, supra note 20, at 13.

72. 11 U.S.C. § 365(d)(3) (1988). The Section allows the court to extend the time for performance of any obligation that arises within 60 days after the entry of the order for relief. The court may not extend the time for performance beyond the 60-day period. Id.
previously mentioned, every case decided under this Section of the Bankruptcy Code, as of the date of this writing, dealt with the debtor's monetary obligations to its shopping center landlord. As has also been seen, an analysis of the legislative history accompanying the 1984 amendments gives little enlightenment to just how inclusive Congress intended this Section of the Code to be. During the remarks of the legislative leaders of the 1984 Act in the House and Senate, Senator Hatch described what was to become section 365(d)(3). He noted the hardship which befalls a shopping center lessor when a lessee fails to pay its rent. He then explained that the 1984 Act amending the Code, would ensure payment of rent and common area charges by requiring a debtor to perform all obligations under its lease at the time set forth in the lease. However, the Senator's comments did not indicate just how broad this Section of the Code was intended to be. Senator Hatch seemed to understand the Statute to be most applicable to forcing debtors to pay their rent. However, his use of the term "obligations" when first referring to the Statute's general operation, as contrasted to his use of the term "rent" when illustrating a specific obligation, indicates that he understood and intended the terms to have different meanings. Hence, "rent" was not the only "obligation" to which the Statute applied.

The legislative history to the Shopping Center Protections Improvements Act of 1982, which included a provision similar to present section 365(d)(3), is of little help. The Senate noted that "[during the time the trustee is deciding whether to assume or reject the lease, the trustee frequently does not meet the lease obligations, such as paying rent or other charges." Although the

73. 130 Cong. Rec., supra note 15, at S8895.
74. Id.
75. Id.
76. In fact, it can be argued that the statute is not to be broadly interpreted. Senator Hatch noted that this Section was a response to the problem of bankrupt tenants that had vacated space in a shopping center but had not yet decided whether to assume or reject the lease and were not paying rent and common area charges. Id. at S8895. Of course, if Congress was only interested in making sure that debtors made their rental payments, it could have drafted the section to say just that. Instead, it required the trustee, and thus alternatively the debtor-in-possession, to perform all lease obligations. Its use of the term "obligations" therefore suggests that more than just the payment of rent and common area charges is required.
77. Id.
79. The legislative history to that portion of the 1983 Omnibus Act, as well as the legislative history to the 1983 Improvements Act, both of which sought to enact
report seemed to imply that obligations other than monetary ones were also not being satisfied, the only examples of unfulfilled lease obligations were "rent and other charges." Thus, the balance of the short section of the report speaks only in terms of damages to the landlord and other tenants due to the debtor's failure to pay its monetary obligations. In addition, when explaining that the forerunner of that portion of what is now section 365(d)(3), which allows the court to extend the time for performance of any obligation arising under the lease, the report states that this provision allows for extension of the time for the payments of rent and other charges. Clearly this would suggest that "obligations" means "rent and other charges." In the next sentence of the report, however, the Senate explained, "Such an extension could be granted where a trustee is unfamiliar with the operation of the debtor's business and there is no reason to question his legal duty to pay rent or other charges or perform other obligations under the lease." The use of the disjunctive "or" in this sentence, and the use of the phrase "rent or other charges" followed by a reference to "or . . . other obligations," suggest that the term "obligation" does not only mean "rent and other charges."

similar language as that contained in the 1982 Act, is almost identical to the legislative history of the 1982 Act. See, e.g., S. REP. No. 527, supra note 16; S. REP. No. 65, supra note 20; S. REP. No. 70, supra note 20.

80. S. REP. No. 527, supra note 16, at 12. See also S. REP. No. 65, supra note 20, at 38; S. REP. No. 70, supra note 20, at 13.

81. The version of the Statute as contained in the 1982 Act, the 1983 Omnibus Act, and the 1983 Improvements Act each contained the parenthetical phrase "including the payment of rent and other charges specified in the lease" immediately after stating the debtor's duty to fully perform all lease obligations. See supra note 56. Because the parenthetical phrase, an example of the types of obligations to be performed, seems to completely describe all of the debtor's monetary obligations under the lease, one is led to interpret the Statute to include in its reach other types of obligations i.e., non-monetary obligations.

82. S. REP. No. 527, supra note 16, at 12-13. See also S. REP. No. 65, supra note 20, at 38; S. REP. No. 70, supra note 20, at 13.

83. S. REP. No. 527, supra note 16, at 13. The forerunner of § 365(d)(3) expressly allowed the court to extend the time for payment of rent or other charges for 60 days. See supra note 56. Present § 365(d)(3) allows the court to extend the time for performance of "any obligation" for 60 days. Id. There is no evidence to suggest that in 1982 the Senate was attempting to limit the courts to only extending the time to perform monetary obligations. Perhaps the better view is that by 1984 the Senate recognized that the tenant's lease obligations included more than just the payment of money.

As noted above, courts have given little guidance as to the proper interpretation of this Section when one considers that all of the reported cases to date deal with the lessee's monetary obligation to the landlord. One court has noted that "[t]he command of [the section] is clear and unambiguous" and that the Section "means exactly what it says."\(^{85}\) While some might find this court's language helpful, it actually begs the question as to what the debtor must do under the Statute and what the debtor is not required to do.

IV. THE STATUTE'S REACH

Clearly, had Congress intended to limit the reach of section 365(d)(3) to only monetary obligations, rent, and common area charges, it could have drafted the statute accordingly. Instead the Section requires that all obligations of the debtor be performed. The Statute's language does not limit its reach to monetary obligations alone. Likewise, there are no affirmative indications in the legislative history that this result was intended. Although it appears that requiring the debtor to pay its rent was uppermost in Congress' collective mind in passing section 365(d)(3), the form in which the Section was passed leads to the conclusion that Congress intended that lease obligations other than monetary ones also be enforced. In short, "all" was intended to mean everything. But what does everything entail?

At a minimum, section 365(d)(3) should require a debtor to remain open and to maintain its usual hours of operation as provided for in its lease. By requiring the debtor to remain open, the Statute ensures that at least some revenue will be generated from which the percentage rent calculation can be made. Perhaps just as important to the landlord is the fact that the public will not find a dark store in its shopping center. The hours of operation of the debtor's premises is often a very important provision of the pre-petition lease which the landlord and the debtor negotiated.\(^{86}\) Clearly, if the debtor operates the premises on a reduced schedule or is closed certain days of the

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86. 1982 Hearings, *supra* note 38, at 73 (testimony of Nathan B. Feinstein, Esq.). Mr. Feinstein testified that prior to the enactment of Bankruptcy Code § 365(d)(4), some debtors used the spectre of a store unoccupied for an indefinite time as a means to extort landlords into buying out the subject lease by paying money to the debtor to reject the lease. *Id.*
week, customers who make a trip to the shopping center expecting the debtor's store to be open during the same hours of operation as the remaining tenants will be disappointed. In addition, customers who go to a local shopping center merely to browse are less likely to patronize a mall with a store which is not always open during mall hours. As previously noted, this effect upon the shopping center's traffic pattern can be detrimental to the landlord's other tenants, which rely on usual traffic patterns in the mall to bring in a portion of their customers. This, in turn, has a further damaging effect on the landlord in the form of reduced percentage rental payments received from its other tenants. Interpreting section 365(d)(3) to require debtors to maintain the hours of operation called for in their lease will prevent this damage.

Section 365(d)(3) should also be interpreted to require that the debtor maintain a full stock of its usual selection of merchandise in its store. Certainly, the merchandise a potential tenant offers is a prime consideration in the shopping center lessor's decision to include the potential tenant in the tenant mix of a particular mall. Should a debtor begin to sell a limited selection of merchandise, or a lesser quality of merchandise than it had prior to the commencement of its bankruptcy, this tenant mix would be disrupted. The legislative history specifically notes that the amendments to section 365(b)(3) require "strict compliance with the provisions of use clauses in shopping center leases and prohibit any changes in the use of the tenant's space not permitted by the use clause." 87 Of course, this provision places the requirement of compliance with use clauses upon the new assignee tenant. However, if Congress was concerned with the effect of the new tenant upon the tenant mix and the new tenant's compliance with the lease's use clauses, 88 it was certainly also concerned with preventing


Retail merchants in shopping centers depend upon the operation of a carefully chosen mix of stores, all contributing to the success of the entire shopping center. If shopping center tenants especially major tenants, are not operating their stores, are not paying charges necessary for the upkeep of the shopping center or are using their space in ways not provided for in the lease and which disrupt the tenant mix, the financial health of all of the
the bankrupt tenant from doing harm to the tenant mix prior to assumption and assignment of the lease by ceasing to comply with the use clause in its lease. Accordingly, it is appropriate to interpret section 365(d)(3) to require debtors to continue to comply with these use clauses prior to assumption or rejection.

Additionally, section 365(d)(3) should be interpreted to require a debtor to comply with the advertising requirements of its lease. Perhaps most importantly, the debtor should be prohibited from advertising in a manner inconsistent with the lease clause, whether it be by size and location of signs in and about the store location or the content of the signs. Failure to require the debtor to maintain the standards dictated by its lease may cause a significant disruption in the type of atmosphere which the landlord wishes to maintain, and which is beneficial to the other tenants. Further, debtors should be required to comply with the affirmative advertising obligations of the lease, to the extent practicable. Clearly, courts should not attempt to indicate to a debtor exactly how to advertise its business by dictating the language, frequency, and medium of the advertisement. At a minimum, however, courts can require the debtor to assist the landlord in preparing and paying for joint advertising which the landlord performs on behalf of the shopping center as a whole.

The debtor should also be required to maintain the standards of appearance required under its lease, unless to do so would become unduly burdensome. As the landlord has included these requirements in an effort to foster a uniform appearance throughout the shopping center, allowing a tenant to disregard these standards is unfair to others who look to this uniform appearance to add to the atmosphere of the shopping center. Finally, under the lease, the landlord or its management company may be permitted to set certain standards of operation to apply to all tenants. Again, to the extent reasonable, the debtor should be required to comply with these provisions. It is unfair to all the tenants to begin to operate in a different manner solely due to the commencement of the bankruptcy case because the other tenants in the shopping center and, more importantly, the patrons of the mall expect the operations of the tenants of the shopping center to be uniform in some ways.

V. REMEDIES FOR VIOLATION

Having examined what section 365(d)(3) should require of a debtor-lessee, the remedies available to the landlord if the debtor does
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not comply with the provision should be explored. It may be the case that as of the petition date, or shortly thereafter, the debtor will close its store in the shopping center. Although clearly a violation of the Section, what is the landlord's remedy? Section 365(d)(3) does not expressly provide any remedy for breach of its provisions. 89

A. COURT-ORDERED PERFORMANCE

In attempting to fashion a remedy, should the bankruptcy court require the debtor to reopen its store? This remedy may prove to be impractical, at best. If the debtor has already laid off its employees at its location it may be difficult, if not impossible, to locate a sufficient number of qualified workers to operate the store on demand. This situation is analogous to forced performance of personal service contracts, which the Bankruptcy Code does not permit. 90 The courts have realized that it is difficult to force someone to do something against his will, especially when the act requires drive and initiative to be properly performed. The landlord's best remedy in this situation is to move the court to limit the time within which the debtor may assume or reject the underlying lease of the non-operating store, and order the debtor to make an immediate decision. 91 As the

89. In re Southwest Aircraft Services, Inc., 831 F.2d 848, 853 (9th Cir. 1987), cert. denied, City of Long Beach v. Southwest Aircraft Services, Inc., 487 U.S. 1206 (1988) (the Section does not expressly state what consequences follow from a debtor's violation of its terms); In re Dieckhaus Stationers of King of Prussia, Inc., 73 Bankr. 969, 973 (Bankr. E.D. Pa. 1987) (the Code provides no express remedy for a trustee's failure to comply with his obligations under the Section); In re Wedtech Corp., 72 Bankr. 464, 475 (Bankr. S.D.N.Y. 1987) (no absolute remedy for violation of § 365(d)(3) which must be applied in every case).

90. Bankruptcy Code § 365(c)(1)(A) provides:
The trustee may not assume or assign any executory contract or unexpired lease of debtor, whether or not such contract or lease prohibits or restricts assignments of rights or delegation of duties, if applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession whether or not such contract, or lease, prohibits or restricts assignments of rights or delegation of duties.


This Section prohibits the trustee or debtor-in-possession from attempting to assume and assign a personal service contract. In re Compass Van & Storage Corp., 65 Bankr. 1007, 1010 (Bankr. E.D.N.Y. 1986); In re TIA Carrere, 64 Bankr. 156, 158 (Bankr. C.D. Cal. 1986). However, this Section's reach includes more than personal service contracts. See, e.g., In re NITEC Paper Corp., 43 Bankr. 492, 497-98 (S.D.N.Y. 1984) (power contract not assignable under New York law); In re Braniff Airways, Inc., 700 F.2d 935, 943 (5th Cir. 1983) (lease of airport terminal space).

91. The court may limit the time within which an executory contract or lease
debtor has altered the status quo contemplated by the Code—that the debtor will continue to operate until it makes its decision to assume or reject the lease—it does not seem inappropriate to require the debtor to immediately make that decision.

B. LEASE REJECTION

Is it permissible for the landlord to consider the lease rejected by the debtor’s action in closing the store? The answer given by the courts appears to be no. One court has held that, given the fact Congress included a forfeiture provision in section 365(d)(4), also enacted as part of the 1984 Act, had it wished to put a similar provision in section 365(d)(3), it would have done so. Unfortunately, although this court’s analysis of the language of the Statute is correct, the result it reaches removes the teeth from the Section. Clearly, a shopping center tenant that is no longer operating in its leasehold should not be permitted to simply fail to comply with the provisions of that Section of the Code. Certainly, if the Section is to have any force at all, tenants must be forced to comply with it in its entirety. Accordingly, courts should make compliance with the terms of the Section to be a prerequisite to a debtor’s exercise of its statutory right to assume and assign the lease in the future. Compliance with the Section should also be a condition of any extension of the time within

must be assumed or rejected. See In re Wedtech Corp., 72 Bankr. 464, 475 (Bankr. S.D.N.Y. 1987); see also In re Orvco, Inc., 95 Bankr. 724, 727 (Bankr. 9th Cir. 1989) (“a bankruptcy court has the discretion to order the immediate surrender of the leased premises if a debtor fails to make the required payments.”).

92. The trustee’s failure to assume or reject an unexpired lease of non-residential real property within 60 days from the date of the order for relief, unless that period is extended by the court, results in an automatic termination. 11 U.S.C. § 365(d)(4) (1988).


94. One court has held that “in light of the legislative history, [the § 365(d)(3)] requirement was intended both as mandatory and [a] prerequisite to assumption.” In re Condominium Administrative Services, Inc., 55 Bankr. 792, 799 (Bankr. M.D. Fla. 1985). Another court has been more forceful in its interpretation of this section. See In re Tandem Group, Inc., 60 Bankr. 125, 127 (Bankr. C.D. Cal. 1986) (the only logical inference that can be drawn from § 365(d) is that to preserve the ability to assume the lease, the debtor or trustee must perform all of these obligations during the 60 day period and during any court authorized extension). For a somewhat different analysis see In re DeSantis, 66 Bankr. 998, 1004 (Bankr. E.D. Pa. 1986) (compliance with lease provisions is a prerequisite to continuation of the automatic stay).
which the debtor may assume or reject the lease.\textsuperscript{95} Without this interpretation, debtors will be far less inclined to comply with the Section's provisions. This result is made even more evident in light of the fact that some courts have held that the remedy for a violation of the Section is merely an administrative expense claim without priority, equal to the past-due rent.\textsuperscript{96}

Some might argue that section 365(b)(1)(A), which requires all defaults to be cured by the debtor upon assumption of the lease,\textsuperscript{97} provides a means to allow assumption of leases in default even absent compliance with section 365(d)(3).\textsuperscript{98} This argument, however, again removes all incentive to comply with the Section's requirement of current performance of all lease obligations.\textsuperscript{99} After all, why would a debtor comply with the Section when it could choose not to and simply cure all defaults prior to assumption of the lease? As discussed above,\textsuperscript{100} not requiring the debtor to comply with the lease terms during the period within which it has to assume or reject the lease will diminish the value of the tenancy to potential assignees, should the debtor choose to assume and assign the lease, or to potential new tenants, should the debtor choose to reject the lease. Additionally, this interpretation places the risk of rejection on the landlord, who is further "in the hole" as each month goes by, prior to rejection or assumption, with no rent paid by the debtor. This result would place an added burden on the landlord to acquiesce in the debtor's choice.

\textsuperscript{95} The debtor has 60 days within which to decide whether to assume or reject its lease, or the lease will be deemed automatically rejected. 11 U.S.C. § 365(d)(4) (1988). See also supra note 51 and accompanying text.

\textsuperscript{96} See In re Orvco, 95 Bankr. 724, 728 (Bankr. 9th Cir. 1989); In re Granada, Inc., 88 Bankr. 369, 373 (Bankr. D. Utah 1988); In re Dieckhaus Stationers of King of Prussia, Inc., 73 Bankr. 969, 973 (Bankr. E.D. Pa. 1987).


\textsuperscript{98} It is also doubtful that there could be any real "cure" for violation of the non-monetary lease provisions. The result of breach of these provisions, decreased foot traffic in the shopping center, diminution in the reputation and character of the mall, and difficulty in renting space in the shopping center in the future, is perhaps of such a nature as to be incurable. Of course, some would say that, at the very least, all damages can be reduced to a monetary amount, a position with which this author does not agree, because a payment of monetary damages in this instance does not fully meet the spirit of the Code's cure provision.

\textsuperscript{99} As previously noted, the Section provides that the court may extend the time for performance of any obligation arising within the 60-day period after the case is commenced, but not beyond that 60-day period. See supra note 72. It is clear then, that Congress contemplated that the Section would require current performance of lease obligations.

\textsuperscript{100} See supra notes 38-49 and accompanying text.
of a potential assignee, one upon which the landlord might otherwise not look favorably but for the even less-favorable possibility that the debtor will reject the lease instead and render the landlord’s pre-petition unpaid rent arrearage an unsecured claim against the debtor\(^1\) instead of a fully secured, paid claim. Although the Code gives the choice of rejection or assumption to the debtor,\(^2\) it should not be interpreted to require the landlord to finance this choice. Equally clear is the fact that if the debtor finds retention of the lease to be advantageous and intends to assume the lease and keep it, it seems only fair that the debtor be required to continue to operate under the terms of that lease prior to assumption. The proper result then, upon the debtor’s vacating of a leasehold, is to hold that the debtor has lost the ability to assume the lease and that the landlord is entitled to a court order deeming the lease rejected.

Because a debtor that has vacated its leased premises cannot assume the lease due to its failure to comply with section 365(d)(3), it has little choice but to reject the lease. Thus, while this writer is hesitant to suggest the creation of “judge-made law,” it seems that, in order for this Section to be effective, shopping center lessors must be able to obtain a rejection of the lease and recover the leasehold premises so that it may be leased to a new tenant. Perhaps, in order to prevent abuse, courts should require the lessor to file a motion to deem the lease rejected and provide for a hearing on the motion on short notice.\(^3\) Whatever the procedure utilized, in order to uphold the policy behind the Statute, courts must provide a means whereby lessors can quickly obtain possession of the leasehold upon a lessee’s vacating the leasehold premises.

C. INJUNCTIVE RELIEF

Suppose instead that the debtor has not closed its leasehold, but is still violating the lease provision in some manner. What is the

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101. See Collier, supra note 32; see also text accompanying note 32.
102. See supra note 31 and accompanying text.
103. The procedure for assumption, rejection, and assignment of executory contracts and unexpired leases is set forth in Bankruptcy Rule 6006. Section (c) of that rule allows the court to set the hearing on the issue of assumption or rejection as it deems appropriate. See also Bankruptcy Rule 9014 (requiring reasonable notice and a hearing in matters to which it applies); Bankruptcy Code § 102(a) (defining “notice and a hearing” to mean “such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances”). Cf. Bloom & Singer, The Revised Section 365: Lessor’s Panacea?, 63 Am. Bankr. L.J. 199, 201 (1989) (courts have differed as to the necessity of the debtor filing a formal motion to assume a lease of non-residential real property).
landlord’s remedy? As in the case where the store had been entirely closed, the landlord may move the court to reduce the period within which the debtor must assume or reject the lease.\textsuperscript{104} However, this result may not be in the landlord’s best interest. In shortening the period in which the debtor has to decide whether to assume or reject its lease with the landlord, it may force the debtor to improvidently reject a lease which could prove to be profitable. Worse yet, in an attempt to get some value out of the lease, the debtor may assign the lease to a tenant who meets the requirement of adequate assurance of future performance required by the Code\textsuperscript{105} but proves to be a less-profitable tenant than the reorganized debtor. Given the fact that the landlord’s primary interest is to have compliance with its lease terms, perhaps its best course of action is to request the court to issue an order requiring the debtor to immediately cure its post-petition lease defaults and comply with the terms of the lease.\textsuperscript{106} To ensure the debtor complies with section 365(d)(3), the court should issue an order in the nature of an injunction.\textsuperscript{107} If the landlord wishes to put teeth into the court’s order, it might request that the court engraft a “drop-dead” provision in its order. Under the “drop-dead” provision, the

\textsuperscript{104} The court may limit the time within which an executory contract or lease must be assumed or rejected. See \textit{In re Wedtech Corp.}, 72 Bankr. 464, 475 (Bankr. S.D.N.Y. 1987); see also \textit{In re Orvco, Inc.}, 95 Bankr. 724, 727 (Bankr. 9th Cir. 1989) (“a bankruptcy court has the discretion to order the immediate surrender of the leased premises if a debtor fails to make the required payments.”); \textit{supra} text accompanying note 91.


\textsuperscript{106} “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the [Bankruptcy Code].” 11 U.S.C. § 105(a) (1988).

\textsuperscript{107} The Bankruptcy Rules provide that in order to obtain injunctive relief, a party must commence an adversary proceeding by filing a complaint with the court. Bankruptcy Rule 7001.

Bankruptcy Rule 7065 provides that Federal Rule of Civil Procedure 65, dealing with injunctive relief, applies in adversary proceedings. In order to grant an injunction, the court must find that the party seeking the injunction has a substantial likelihood of success on the merits, is suffering an irreparable injury, that the injunction would not cause substantial harm to others, and that the injunction would serve the public interest. \textit{In re A. Tarricone, Inc.}, 77 Bankr. 430, 433 (Bankr. S.D.N.Y. 1987). \textit{See also In re Freckles, Inc.}, 60 Bankr. 6, 7 (Bankr. E.D.N.Y. 1986). Due to the procedural delay caused by the provisions of Bankruptcy Rule 7001, and the burden of proof which must be met to obtain a true injunction, the landlord should seek relief through a motion to compel the debtor to comply with the terms of its lease with the landlord brought pursuant to Bankruptcy Code §§ 105 and 365.
debtor's failure to cure its prior post-petition lease defaults, or to comply prospectively with its lease obligations, would result in an automatic rejection of the lease. Given the court’s power to shorten the time within which the debtor must decide to assume or reject its leases, the use of a "drop-dead" provision, which would be issued after a hearing on the landlord's motion, would alleviate the problems of a policy of automatic rejection due to a debtor's failure to comply with section 365(d)(3). The landlord's ability to obtain the leasehold premises within a short time after any continued failure by the debtor would provide an impetus for the debtor to comply with the provisions of its lease with the landlord, while giving the landlord an insurance policy against any future breach by the debtor.

D. ADMINISTRATIVE EXPENSE CLAIM

As discussed above, compliance with section 365(d)(3) should be a mandatory requirement for a debtor's assumption and assignment of its lease under the Code. But what if the debtor continues to fail to comply with this Section and ultimately rejects the lease, or has its case converted to a Chapter 7 liquidation? The Bankruptcy Code does not specifically provide for the payment of unpaid section 365(d)(3) obligations as an administrative expense. However, the

108. See supra note 91.
109. See supra note 94.
110. Generally, a debtor's rejection of an unexpired lease, which had not previously been assumed, gives rise to a claim for a breach of the lease deemed to have occurred immediately before the date of filing of the petition. 11 U.S.C. § 365(g) (1988). Bankruptcy Code § 502(g) provides for the allowance of this claim subject to the constraints of § 502(b)(6). The lessor's claim for damages due to breach of the lease is separate and distinct from an administrative expense claim for the lessee's failure to comply with § 365(d)(3). In re National Oil Co., 80 Bankr. 525, 527 (Bankr. D. Colo. 1987).
111. For the provisions relating to conversion of a Chapter 11 reorganization to a Chapter 7 liquidation see 11 U.S.C. § 1112 (1988).
112. Bankruptcy Code § 507(a) provides that of all priority claims, administrative claims are entitled to be paid first. Bankruptcy Code § 503(b) lists the type of claims which may be allowed as administrative expenses:
After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—
(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;
(B) any tax—
(i) incurred by the estate, except a tax of a kind specified in section 507(a)(7) of this title; or
majority of courts have held that, in such a case, the lessor is entitled to an administrative expense claim against the bankrupt estate.113 Some courts have held, however, that this claim is only entitled to share pro rata with all other administrative expense claims.114 Unfor-

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or

(E) a custodian superseded under section 543 of this title, and compensation of the services of such custodian;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.


Unfortunately, this interpretation does not ensure that these types of claims will always be paid in full, as sufficient funds to pay all administrative claims may not be available in all cases. Given the fact that the requirement of continued performance of lease obligations is expressly set forth in the Code, claims arising from breach of that provision should be given a first priority administrative claim status and allowed by the bankruptcy court without the necessity for notice and a hearing unless objections are filed to the claim. This interpretation will foster compliance with the Section, as well as ensure that lessors will be compensated for being placed in a position of having to extend services to the debtor without obtaining any security to guaranty payment for those services.

VI. Conclusion

Given the problems which existed in shopping center tenant bankruptcies prior to the enactment of the 1984 amendments to the Bankruptcy Code and the broad language of the provisions Congress enacted to remedy these problems, the proper conclusion as to the interpretation of Bankruptcy Code section 365(d)(3) is that Congress intended it to be all encompassing in its scope. As such, shopping center lessees in bankruptcy should be required to fully comply with all provisions contained in their pre-petition leases with shopping center landlords. The provisions enforced should not be limited solely to monetary obligations. Rather, these obligations, as well as those relating to hours of operations, merchandise, employees, advertising, and use of the leasehold premises, should also be enforced.

In order to foster compliance with the Code, bankruptcy courts must take steps to require debtors to comply with their lease terms.

115. This status can be achieved by the court entering an order requiring the debtor or the trustee to immediately pay the allowed administrative expense claim. Of course, this "super priority" status can only be maintained if a trustee is not allowed to recover the payment at a later point in time e.g., after the case is converted to Chapter 7. See In re Dieckhaus Stationers of King of Prussia, Inc., 73 Bankr. 969, 973 (Bankr. E.D. Pa. 1987) (court's order directing immediate payment of landlord's claim held subject to trustee's right to later seek recovery of all or part of payment in the event all other administrative expense claimants are not paid in full).


117. See also supra notes 59-61 and accompanying text.
In order to prevent post-petition breaches, courts should order immediate payment of any past due post-petition rent, utilize prospective orders of compliance when appropriate, deny debtors' requests to extend the time for assumption or rejection of leases when these debtors are not complying with the Code, and deny debtors' motions to assume leases which have been breached post-petition. When debtors continue to fail to comply with their leases, courts should shorten the time for assumption or rejection of the leases in question, deem leases rejected when appropriate, and allow lessors a first priority administrative expense claim for damages due to the debtors' actions. Strict interpretation of the Code, coupled with a lack of tolerance by the courts for debtors' Code violations, will ensure the problems Congress intended to remedy by enacting Bankruptcy Code section 365(d)(3) will occur infrequently and that, when they do occur, they will not seriously harm shopping center lessors.