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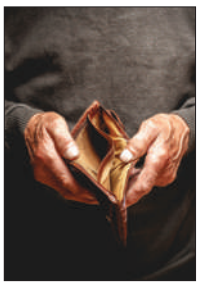

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Key Commercial Real Estate Lease Issues in Chapter 11 Cases

by Nicole Fulfree

The U.S. Bankruptcy Code provides a complex set of rules governing the rights and obligations of landlords and tenants upon the commencement of a Chapter 11 case.

While issues related to commercial real estate leases are increasingly common in Chapter 11 cases due to the uptick in filings by national retailers with significant leasehold interests, there remains a considerable lack of clarity regarding the interpretation of certain bankruptcy code provisions on commercial leases. Additionally, as a result of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) amendments[1]—which imposed more stringent statutory limitations on the time a debtor has to retain or reject its commercial leases—debtors have far less time to make key strategic decisions that will substantially impact their liquidity, their balance sheet, and their ultimate success as a Chapter 11 debtor.

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The increase in retail filings, the statutory pressure to quickly resolve lease issues, and the presence of both inter- and intra-circuit splits on issues and sub-issues under the commercial lease provisions of the bankruptcy code have rendered commercial leases one of the most heavily analyzed aspects of a debtor/tenant's Chapter 11 case. As a result of this increased focus on commercial leases, debtors devote significant resources—both pre- and post-petition—to formulating a business plan that will minimize their obligations. In large part, this analysis includes determining which jurisdiction offers the debtor the most favorable outcome with respect to its commercial lease portfolio. Reciprocally, this means that by the time a Chapter 11 case is filed, most debtors will have been working for months on a strategy aimed at minimizing landlord claims.

Familiarity with the key splits in authority that cause uncertainty regarding commercial leases in the bankruptcy context is a crucial step in maximizing a landlord's claim. This article highlights those uncertainties, such as stub rent claims, tax reimbursement claims, the calculation of rejection damages, and the existence of collateral damages, and aims to provide guidance for landlords and practitioners on how to spot these issues when drafting/reviewing commercial leases and/or preparing or evaluating proofs of claim.

Generally speaking, where a debtor/tenant rejects its contract under Section 365 of the bankruptcy code, a landlord may be entitled to file a proof of claim against the debtor for: 1) any amounts owed to the landlord that arose prior to the filing date (or, 'pre-petition'); 2) administrative expenses for the continued use and occupancy of the premises following the filing of the Chapter 11 case; 3) 'rejection damages' stemming from the termination of the lease; and 4) additional claims that do not stem from termination of the lease.

These categories, along with the key issues that arise in each context, are addressed in turn.

Pre-Petition Rent Obligations

Any outstanding rent obligations a debtor/tenant owes its landlord as of the date the debtor files its Chapter 11 petition, such as unpaid rents and other tenant fees that arose pre-petition, are classified as a general unsecured claim. A claim's classification as a general unsecured claim, as compared to an administrative claim, is a significant financial matter for both debtors and landlords since, in most Chapter 11 cases, general unsecured claims are satisfied by mere pennies on the dollar.

Post-Petition Rent Obligations

Claims for rent obligations arising post-petition are classified as administrative claims, which are entitled to prioritized treatment under the bankruptcy code, and must be paid in full in order for a debtor to confirm a plan of reorganization. Specifically, Section 365(d) of the code provides that a debtor must "timely perform all [of its] obligations...arising from and after" the petition date under any commercial lease "until such lease is assumed or rejected...."[2] Thus, once a debtor files its petition, it is required to make timely payments for obligations arising under its lease until the debtor assumes (retains) or rejects (terminates) its lease.

What is clear from Section 365(d) is that a landlord's claim for post-petition rent obligations that remain unpaid pending the assumption[3] or rejection of the relevant lease is entitled to administrative priority, regardless of the actual use and occupancy by the debtor.[4] This means a debtor's abandonment of the premises will not relieve its obligation to pay these administrative rent obligations under Section 365,[5] and the debtor will have an obligation to pay rent until the lease is rejected.[6]

What is not clear from the text of Section 365(d), however, is when a debtor's obligation is said to 'arise,' and whether such 'obligation' is one that arises 'from and after' the petition date. When discussed in generalities, the treatment of rent obligations seems relatively straightforward: A debtor's rent obligations arising pre-petition are a landlord's general unsecured claims; a debtor's rent obligations arising post-petition are a landlord's administrative claims; and a debtor's rent obligations (under Section 365(d), at least) do not extend past rejection of the lease. However, the waters of this seemingly clear framework are quickly muddied when applied in the context of accruing obligations that straddle the temporal periods governed by Section 365(d). This is particularly true where, as here, a claim's classification depends almost exclusively on the temporal period in which it is deemed to arise.

Case law interpreting Section 365(d) of the bankruptcy code has developed into two schools of thought: 1) the 'billing date approach,' which provides that a debtor/tenant's obligation under a lease arises when the legally enforceable duty to perform arises under that lease;[7] and 2) the 'accrual approach,' which provides that a tenant's obligation arises when the landlord has a claim (*i.e.*, a right to payment), even if that right to payment is unmatured. Put

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more succinctly, "[t]he Billing-date method views the billing date on the lease as the date that determines whether rent is pre-petition (general unsecured claim) or post-petition (administrative claim). The [accrual] method, on the other hand, treats rent as having accrued each day of the month regardless of the date rent is due."[8] Two types of lease obligations that have been most controversial are a debtor's 'stub rent' obligations, and a debtor's real estate tax obligations.

Stub rent is rent owed to a landlord for the debtor's use and occupancy of the property between the petition date and the date the first post-petition rent payment becomes due.[9] For example, if a lease requires the advance payment of rent on the first of each month, and the debtor/tenant skips its Sept. 1 rent payment (a common practice just prior to a bankruptcy filing) and files its petition on Sept. 16, the period between Sept. 16 and Sept. 30 is the stub rent period.

Since Section 365(d)(3) requires a debtor to pay obligations "arising from and after" the petition date, courts such as the Third Circuit, that have adopted the billing date approach, take the position (using the example above) that the debtor's legally enforceable obligation under the lease to pay stub rent for the month of September arises pre-petition, on Sept. 1. And, therefore, the entirety of September rent constitutes a pre-petition claim and the debtor has no obligation to pay any rent for September under Section 365(d)(3).[10] Courts that use the accrual approach, such as the Second Circuit, take the position that Section 365(d)(3) requires the debtor to make a *pro rata* payment on account of the portion of the monthly rent obligations that accrued post-petition. Using the example above, accrual-approach courts would require the debtor to pay half of September's rent (or, the entirety of stub rent) representing the rent that accrued during the post-petition period from Sept. 16 to Sept. 30.

Similarly, a debtor/tenant's obligation to reimburse its landlord for real estate taxes attributable to the leased property may cover, for example, a year-long period. Under most commercial leases, however, the debtor's legal obligation to reimburse its landlord is payable only once or twice annually. Thus, in billing date jurisdictions where a debtor/tenant's reimbursement obligation matures post-petition and prior to rejection, a debtor will be required to pay the reimbursement obligation as an administrative expense, notwithstanding that the landlord's liability for the taxes accrued, in large part, pre-petition.[11] To the contrary, in accrual-approach jurisdictions, a debtor/tenant's Section 365(d)(3) tax reimbursement obligations are limited to the portion of the tax bill that accrued post-petition.[12]

While claims like stub rent and reimbursable tax expenses may seem inconsequential, in the context of a large retailer's Chapter 11 case these obligations often amount to millions of dollars. In *Sports Authority, Linens Holding Company*, and *Circuit City*, for example, the debtors each reported in excess of $20 million in stub rent obligations alone.[13] Moreover, the differences between the billing date and the accrual approaches can significantly alter the determination of whether the claims (or a portion thereof) are treated as general unsecured claims, administrative claims, or unrecoverable under Section 365(d)(3).

The variables at play under Section 365(d) of the bankruptcy code—including the date the obligation is payable under the lease, the timing of the bankruptcy filing in relation thereto, and the manner in which the relevant court approaches the issue—make it difficult for landlords to evaluate and predict their potential exposure with any certainty. Courts have noted that depending on the variables in any particular case, there is potential for a windfall in either direction (both in favor of and against landlords).[14]

As noted above, the Third Circuit has adopted the billing date approach, holding "an obligation arises under a lease for the purposes of § 365(d)(3) when the legally enforceable duty to perform arises under that lease."[15] Thus, when negotiating with tenants that may file a bankruptcy petition within the Third Circuit, landlords must be cognizant of the risks of a potential windfall to the debtor/tenant. However, as the *Montgomery Ward* Court pointed out, there is "room for strategic behavior on the part of landlords and tenants,"[16] which is covered *infra*.

Rejection Damages

Calculating a Landlord's Rejection Damages Claim

A landlord's claim for damages resulting from the termination of a lease of real property is commonly referred to as its rejection damages claim. A landlord's rejection damages claim—a general unsecured claim pursuant to Section 502(g)[17] of the bankruptcy code—is typically comprised of lost rent, rent-like payments, and other damages arising from a tenant's termination of its lease.[18] A landlord's rejection damages are determined and calculated in accordance with the terms of the debtor's lease and applicable state law.[19] A landlord must "prove and substantiate the claim as to both the incidence and the measure of damages, because Section 502(b)(1) independently provides for disallowance of the landlord's claim...if the claim 'is unenforceable against the debtor...under any agreement or applicable law.'"[20]

Thus, a landlord must determine the gross amount of rent that could potentially be due under the lease—sometimes referred to as lost future rent. In addition to the amounts due for fixed monthly rent, a majority of commercial leases contain provisions that pass

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on to the tenant additional payment obligations, including those related to taxes, insurance, common area maintenance, utilities, maintenance, interest, and legal fees. Disputes over whether a particular charge is characterized as 'rent' are resolved by looking to applicable state law. While lost rent and rent-like payments are typically discernible from the face of the lease, courts are divided on how to determine which other types of obligations may or may not "result from termination" of a lease. This concept is discussed in more detail *infra*.

Importantly, the calculation of rejection damages assumes the landlord has suffered damages. Since landlords typically have a duty to mitigate damages resulting from the debtor's rejection,[21] if the landlord has or can relet the premises at a higher rent, it generally will have no Section 502(b)(6) claim.[22] If a landlord partially mitigates the damages, the benefits of such mitigation reduce the landlord's damage calculation before the Section 502(b)(6) cap (discussed below) is applied.[23] Once the landlord has determined its damages,[24] and then reduced from that amount any applicable mitigation of its potential damages, the rejection damages cap must be applied.

Calculating the Rejection Damages Cap

Section 502(b)(6) provides a method for calculating a ceiling on a landlord's rejection damages claim, and provides that a landlord's rejection damages claim must be disallowed to the extent it exceeds that statutory cap. The New Jersey District Court has stated that the purpose of the rejection damages cap is to "compensate a landlord for the loss suffered upon termination of a lease, while not permitting large claims for breaches of long-term leases to prevent other general unsecured creditors from recovering from the estate."[25] This statutory cap is calculated in each particular case as follows:

> (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –
> (i) the date of the filing of the petition; and
> (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
> (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates.[26]

Although, from a plain reading of the statute, it appears that subsection (B) of 11 U.S.C. § 502(b)(6) is intended to be part of the calculation of the rejection

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damages cap, it appears that most courts and commentators interpret the calculation of the rejection damages cap as based solely on subsection (A). Separately, subsection (B) is interpreted as an allowance of a landlord's general unsecured claim for any amounts due under the lease as of the petition date.[27] As a leading treatise, *Collier on Bankruptcy*, explains, if a debtor/tenant is delinquent on obligations under the lease as of the petition date, "that amount is allowed as an amount 'due' under such lease under section 502(b)(6)(B) and is not subject to the limitation of [subsection (A)]."[28] To be clear, neither claims for unpaid pre-petition rent obligations[29] nor claims for unpaid post-petition rent obligations[30] are subject to the Section 502(b)(6) cap.

In calculating the rejection damages cap, courts are divided over the proper interpretation of the term '15 percent' in Section 502(b)(6)(A). Some courts read the statute to mean 15 percent of the remaining time[31] under the lease, while others interpret the statute to mean 15 percent of the remaining rent[32] that would have become due under the lease. Some courts have stated that the rent approach is more equitable because it allows landlords to recover damages based upon the parties' bargained-for rent increases under the terms of the lease.[33] Other courts have noted that the time approach "better serves the economic forces that Congress was trying to address when it enacted the landlord damage cap" in the bankruptcy code, pointing out Congress recognized it is equitable to limit landlords' claims.[34]

Although some cases and commentators have referred to the rent approach as the 'majority' view,[35] within the past five years courts appear to be adopting the time approach in increasing numbers.[36] While the Third Circuit has not ruled on this question, *in dicta*, it has endorsed the time approach: "a landlord creditor is entitled to rent reserved from the greater of (1) one lease year or (2) fifteen percent, not to exceed three years, of the remaining lease term."[37]

In 2015, the Delaware Bankruptcy Court issued the first written decision in the district interpreting Section 502(b)(6)'s "time" versus "rent" question. Judge Kevin J. Carey found that the reference in Section 502(b)(6) to 15 percent must be interpreted as a measurement of the remaining time under the lease. Moreover, in 2014, the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 suggested in its final report and recommendations that the calculation of the rejection damages cap should be clarified consistent with the time approach.[38]

To determine the maximum allowable amount of a landlord's claim resulting from the termination of a lease of real property, courts adopting the time approach will take the steps outlined below.

Step One—To determine the date from which the calculations in Section 502(b)(6) are measured (the reference date), identify which event occurred first: 1) the petition date, or 2) the date on which the landlord repossessed or the debtor surrendered the property. This is the reference date.

Since a debtor's rejection of a lease is deemed to be a breach of the lease that occurred immediately preceding the bankruptcy filing,[39] when the landlord has not repossessed the leased premises or accepted a surrender prior to bankruptcy, the calculation of the unsecured claim will begin on the petition date.[40] The obligation to pay rent and the computation of the rejection damages cap will begin at an earlier date if the debtor surrendered the premises pre-petition. A determination of what constitutes surrender is made under state law.[41]

Step Two—Starting from the reference date, determine the remaining lease term. Compute 15 percent of the total remaining lease term. If the result is a term less than three years, that result is the term. If the result is a term greater than three years, the term is deemed to be three years.

Step Three—Determine which is greater: 1) one year, or 2) the term. The greater of the two is the greater term.

Step Four—Determine the rent reserved under the lease for the greater term. The result is the rejection damages cap.

While it is clear that base rent constitutes rent reserved,[42] the issue of whether additional rent-like obligations such as those related to taxes, insurance, common area maintenance, utilities, interest, and legal fees constitute rent reserved for purposes of calculating the Section 502(b)(6) rejection damages cap is less straightforward.

As pointed out by the Delaware Bankruptcy Court, the designation of items as 'additional rent' under a lease does not, on its own, render those items 'rent reserved' under the lease. Thus, while an item like attorneys' fees might be included in the definition of additional rent under a particular lease (rendering those fees subject to the Section 502(b)(6) cap), such additional rent is not necessarily rent reserved for purposes of the calculation under Section 502(b)(6).[43]

In assessing whether a charge constitutes rent reserved, the New Jersey District Court and other courts within the Third Circuit have applied the three-part test enumerated in *Kuske v. McSheridan,*[44] which provides that: 1) the charge must: (a) be designated as 'rent' or 'additional rent' in the lease; or (b) be provided as the tenant's/lessee's obligation in the lease; 2) the charge must be related to the value of the property or the lease thereon; and 3) the charge must be properly classifiable as rent because it is a fixed, regular or periodic charge.[45]

Thus, regular monthly charges relat-

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ing to the 'value' of the premises, such as insurance, real estate taxes, and common area maintenance fees, are typically deemed rent reserved.[46] Other charges, which vary in accordance with the operations of the tenants, such as service charges and reletting costs, even where provided for in the lease, may not be included in rent reserved.[47]

In *PPI Enterprises*, the court held that although attorneys' fees and late payments were designated as additional rent under the lease, they did not constitute rent reserved under the *McSheridan* test because the obligations were neither "relate[d] to the value of the property" nor "fixed, regular or periodic charges."[48]

In *Fifth Ave. Jewelers*, the court held that even where a lease contains a provision for post-petition interest, it cannot be included as rent reserved because, as of the petition date, claims for post-petition interest constitute an "unmatured interest," which is a type of claim that is expressly disallowed under 11 U.S.C. § 502(b)(2).[49]

Landlords should note, however, that the Delaware Bankruptcy Court has expressed that strict compliance with the *McSheridan* test is not always required.[50] In *Filene's Basement*, Judge Carey noted: "To be clear, I do not find it necessary here to apply the three-part *McSheridan* test, *in toto*, but I do agree that to be properly classifiable as 'rent reserved,' a charge must be fixed, regular, or periodic."[51]

Step Five—Determine the allowable rejection damages claim and offset any security deposit.

A landlord's *allowable* rejection damages claim is calculated by limiting its actual, proven rejection damages to the rejection damages cap from step four. Finally, any security deposit held by a landlord must be deducted from its allowable rejection damages claim.[52] If a landlord's security deposit exceeds its allowable rejection damages claim, the excess must be returned to the debtor.[53]

Collateral Damages

To the extent a landlord's claim is not for: 1) pre-petition rent obligations, 2) post-petition rent obligations, or 3) obligations stemming from lease termination (and, therefore, does not stem from the termination of the lease), courts are divided on whether the landlord is entitled to assert a separate and additional 'collateral damages' claim that is not subject to the Section 502(b)(6) cap.

Courts on both sides of the collateral damages issue agree that where a landlord's claim stems directly from the termination of the lease, the claim is subject to the Section 502(b)(6) cap. However, the courts diverge where a landlord's claim does not stem from the termination of the lease. One group of courts takes the position that this fourth category of landlord damages does not exist because even where a claim does not directly stem from lease termination, it is part and parcel of a landlord's rejection damages claim (and is, therefore, subject to the statutory cap). The other group of courts takes the position that a landlord's collateral damages may be asserted as a claim separate and apart from its rejection damages claim (which is not subject to the Section 502(b)(6) cap).[54]

In *McSheridan,*[55] which sides with the first group, the court held that rejection of a lease "results in the breach of each and every provision of the lease, including covenants, and § 502(b)(6) is intended to limit the lessor's damages resulting from the rejection." Similarly, in *Foamex International, Incorporated,*[56] the Delaware Bankruptcy Court relied on *McSheridan* in holding that landlords are entitled to one claim, subject to the Section 502(b)(6) cap, for all pre-petition and post-petition breaches of the lease and any resulting damages. However, in *El Toro*, the Ninth Circuit overruled, in part, the *McSheridan* decision, finding "[t]o the extent that *McSheridan* holds section 502(b)(6) to be a limit on tort claims other than those based on lost rent, rent-like payments or other damages directly arising from a tenant's failure to complete a lease term, it is overruled."[57]

In *Filene's Basement*, Judge Carey noted his agreement with the Ninth Circuit's narrow interpretation of Section 502(b)(6) in *El Toro*, holding "[t]he statute does not prevent a landlord from asserting a separate claim for damages that do not directly arise from termination of the lease."[58] As distinguished from a rejection damages claim, "collateral damages are likely to bear only a weak correlation to the amount of rent: A tenant may cause a lot of damage to a premises leased cheaply, or cause little damage to premises underlying an expensive leasehold."[59]

Courts that accept the concept of collateral damages have allowed landlords to file a separate, uncapped claim for attorney fees and costs from a pre-petition arbitration regarding lease default.[60] Collateral damages have also been allowed where a debtor/tenant caused $23 million in damages by leaving one million tons of wet clay "goo," mining equipment and other materials on the leased property after rejecting the lease, and asserted a claim under theories of waste, nuisance, trespass and breach of contract.[61] On the contrary, the *McSheridan* Court found that "damages flowing from the failure of a debtor/tenant to perform future routine repairs or pay utility bills" are not collateral damages and are, thus, subject to the rejection damages cap.

For landlords of debtor/tenants in the Delaware Bankruptcy Court, Judge Carey's endorsement of the concept of separate collateral damages is a positive development. Under the *Filene's Basement* decision, a landlord can seek to categorize claims that do not directly stem from termination as collateral damages to avoid the application of the rejection damages cap to those collateral damages, thereby maximizing its recovery. The collateral damages claim, like

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the rejection damages claim, is a general unsecured (and not an administrative) claim.

Recommendations

Where debtor/tenants file a bankruptcy petition in a 'billing date' jurisdiction like the Third Circuit, they can manipulate the filing date to create a windfall in their favor by rendering stub rent a prepetition claim in its entirety. However, cases within the Third Circuit have held that although an administrative claim for stub rent is unavailable in billing date jurisdictions under Section 365(d)(3), a landlord may alternatively have an allowed administrative claim under Section 503(b) for the debtor's use and occupancy of the premises during the stub rent period as an actual and necessary expense of preserving the estate. Thus, in a billing date jurisdiction, landlords should utilize *Sportsman's Warehouse* and *Goody's Family Clothing* as alternative methods to attempt to classify stub rent as an administrative claim.

While the treatment of a debtor's tax expense obligations in a billing date jurisdiction might result in a favorable windfall for the landlord, like in *Montgomery Ward*, it can also result in a windfall in favor of the debtor. Landlords can limit the unpredictability of obligations such as reimbursable tax expenses by including an estimate of such additional obligations to the rent as defined in the lease, and providing for a true-up mechanism upon receipt of the applicable tax or other invoice. This tactic will produce in a more predictable result that is akin to how the claim would be treated in an accrual jurisdiction.

A landlord will maximize its claim under Section 502(b) by increasing the obligations that qualify as rent reserved under the lease. Designating additional obligations of the tenant, such as maintenance, repairs, attorneys' fees, interest, and tax expenses, as additional rent under the lease and, if possible, tying those items to the value of the property, and charging for them regularly, will increase the rent reserved under the lease, thereby increasing the rejection damages cap.

Judge Carey's statements in *Filene's Basement,* which endorse a relaxed version of the *McSheridan* test for rent reserved, can be utilized by landlords to try to increase the rejection damages cap.

Notwithstanding that the time approach to the Section 502(b)(6) cap calculation was adopted in the *Filene's Basement* decision and endorsed in the American Bankruptcy Institute's Commission Report and in Third Circuit *dicta*, the most recent case from the District of New Jersey has adopted the rent approach. Since the rent approach generally results in a higher recovery for landlords than the time approach does, landlords involved in New Jersey cases should calculate their claims using the rent approach, if favorable.

Retail debtors may be interested in negotiating consensual lease amendments that are favorable for both the landlord and the debtor. Additionally, landlords should look into the possibility of forming *ad hoc* groups to conduct negotiations with the to-be debtor prior to a bankruptcy filing in an attempt to obtain concessions or reach a consensual agreement. For example, in hhgregg's Chapter 11 cases, the landlords and debtors reached an agreement that provided for stub rent to be paid in full if the landlords agreed their claims would be subject to the accrual approach instead of the billing theory approach.[62] Similarly, although *Sports Authority* filed its petitions in a billing date jurisdiction on the second day of the month (one day after rent was due and skipped), it reached a deal with creditors to pay 85 percent of stub rent claims.

Landlords should be prepared for the negative consequences resulting from the treatment of their rent claims in the various jurisdictions, and take those factors into consideration when initiating contract negotiations.

When evaluating their claims, landlords should consider whether they are in a jurisdiction (such as Delaware) that acknowledges a landlord's right to file a separate, additional claim for collateral damages. In those jurisdictions, landlords with claims (besides those for prepetition and post-petition rent obligations) that arguably do not stem from the debtor's termination of the lease should assert a separate claim for collateral damages. Successfully asserting a collateral damages claim will maximize a landlord's prospects of recovery, since collateral damages are not subject to the rejection damages cap. ⚖

Endnotes

1. Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), a debtor/lessee was given 60 days from the petition date to decide whether to retain or reject its commercial leases. Because this time limit was viewed as overly burdensome, courts freely granted extensions 'for cause' that often deferred the need for a debtor to strategize regarding its leases until it was ready to confirm a plan of reorganization. Post-BAPCPA, a debtor/lessee under a commercial real property lease is now subject to a strict statutory limit under which it must assume or reject the lease within 210 days from the petition date (120 days as of right and 90 additional days, for cause shown). 11 U.S.C. § 365(d)(4).
2. 11 U.S.C. § 365(d)(3).
3. While a debtor has a right to assume or reject a commercial lease, this article focuses on rejection.
4. *In re CHS Elecs., Inc.*, 265 B.R. 339, 341 (Bankr. S.D. Fla. 2001).
5. *In re Iron-Oak Supply Corp.*, 169 B.R.

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416-419 (Bankr. E.D. Cal. 1994).

6. *CHS Elecs.,* 265 B.R. at 341.
7. *In re Montgomery Ward Holding Corp.* (*Montgomery Ward*), 268 F.3d 205, 207 (3d Cir. 2001).
8. Aaron H. Stulman, Stub Rent Under Section 365(d)(3): A Call for a Unified Approach, 36 *Del. J. Corp. L.* 655 (2011).
9. *In re Goody's Family Clothing Inc.*, 610 F.3d 812, 815 (3d Cir. 2010) (stub rent is the amount due a landlord for the period of occupancy and use between the petition date and the first post-petition rent payment).
10. Where billing date jurisdictions render stub rent a pre-petition claim, landlords in some cases have been able to recover stub rent as an administrative claim under Section 503(b)(1). *See In re Sportsman's Warehouse, Inc.*, 436 B.R. 308, 310 (Bankr. D. Del. 2009) ("Although an administrative claim for stub rent cannot be allowed under section 365(d)(3), the landlord may have an allowed administrative claim under section 503(b) for the debtors' use and occupancy of the premises during the stub rent period as an actual and necessary expense of preserving the estate"); *In re Goody's Family Clothing, Inc.*, 392 B.R. 604, 612 (Bankr. D. Del. 2008), *aff'd*, 401 B.R. 656 (D. Del. 2009), *aff'd sub nom. In re Goody's Family Clothing Inc.*, 610 F.3d 812 (3d Cir. 2010), and *abrogated by In re Sportsman's Warehouse, Inc.*, 436 B.R. 308 (Bankr. D. Del. 2009).
11. *Montgomery Ward*, 268 F.3d at 207.
12. *In re Learningsmith, Inc.*, 253 B.R. 131, 134 (Bankr. D. Mass. 2000).
13. *In re Linens Holding Co.,* No. 08-10832(CSS), 2009 WL 2163235 (Bankr. D. Del. June 12, 2009); *In re Circuit City Stores Inc.,* 447 B.R. 475 (Bankr. E.D. Va. 2009) ("The unpaid Stub Rent for Advance Leases is approximately $20 to $25 million").
14. *In re 1/2 Card Shop, Inc.*, 2001 Bankr. LEXIS 988, at *8 (Bankr. E.D. Mich. March 7, 2001).
15. *Montgomery Ward*, 268 F.3d at 207.
16. *Id.* at 212.
17. 11 U.S.C. § 502(g).
18. *In re El Toro Materials Co., Inc.,* 504 F.3d 978 (9th Cir. 2007).
19. *In re Conston Corp., Inc.*, 130 B.R. 449, 453 (Bankr. E.D. Pa.1991) (computing a landlord's damages under state law, and then applying § 502(b)(6)'s limit).
20. 4 *Collier on Bankruptcy* 502.03 (16th 2018).
21. *See In re Bob's Sea Ray Boats, Inc.*, 143 B.R. 229, 231 (Bankr. D.N.D. 1992).
22. 4 *Collier on Bankruptcy* 502.03 (16th ed. 2018).
23. *See In re PPI Enters. (U.S.) Inc.*, 324 F.3d 197, 208 n.17 (3d Cir. 2003) ("The landlord retains a duty to mitigate the tenant's breach, but any mitigation of damages secured by re-letting the premises will offset only the landlord's overall potential recovery, and does not affect the § 502(b)(6) cap."); *Iron–Oak*, 169 B.R. at 420 (Bankr. E.D. Cal. 1994) (the calculation of total rejection damages, before application of the cap, takes mitigation into account).
24. Assuming the landlord has proven and substantiated the claim as to both the incidence and the measure of damages. *See* 11 U.S.C. § 502(b).
25. *In re New Valley Corp.*, No. CIV. A. 98-982, 2000 WL 1251858, at *9 (D.N.J. Aug. 31, 2000) (citation omitted).
26. 11 U.S.C. § 502(b)(6).
27. *See PPI Enters.* ("Under § 502(b)(6), a landlord-creditor is entitled to rent reserved from the greater of (1) one lease year or (2) fifteen percent, not to exceed three years, of the remaining lease term. The cap operates from the earlier of the petition filing date or 'the date on which [the] lessor repossessed or the lessee surrendered, the leased property.' The landlord also retains a claim for any unpaid rent due under such lease prior to the earlier of those dates."). Note that the reference in this sentence to the petition date assumes the property was not surrendered prior to the petition date. While 'petition date' could more accurately be replaced with the term 'reference date' as it is defined below, reference to the term 'petition date' is intended to clarify the concept for readers.
28. 4 *Collier on Bankruptcy* 502.03 (16th ed. 2018).
29. *Id.* ("There is no limit on amounts owing under the lease as of the petition date.").
30. *Id.* ("Any unpaid administrative rent will also not be subject to the limitation.").
31. *In re Connectix Corp.,* 372 B.R. 488, 491-93 (Bankr. N.D. Cal. 2007) (following the 'time' approach); *Iron–Oak.*, 169 B.R. at 420 (same); *In re Heller Ehrman LLP*, 2011 WL 635224, at *4 (N.D. Cal. Feb. 11, 2011) (same), *In re Blatstein*, 1997 WL 560119, at *14-15 (E.D. Pa. Aug. 26, 1997) (finding that "the 15% applies to 'time' remaining [on the lease]"); *In re Shane Co.*, 464 B.R. 32, 39 (Bankr. D. Colo. 2012) ("Fifteen percent of the remaining term of the lease is plainly a reference to an amount of *time* not money." (emphasis in original)); *In re Ace Elec. Acquisition, LLC*, 342 B.R. 831, 833 (Bankr. M.D. Fla. 2005) ("The 15 percent limitation of 11 U.S.C. 502(b)(6) speaks in terms of time, not in terms of rent...."); *In re Peters*, 2004 WL 1291125, at *6 n.20 (Bankr. E.D. Pa. 2004) (same); *In re Allegheny Int'l*, 136 B.R. 396, 402-3 (Bankr. W.D. Pa. 1991) (finding that the 15 percent cap applied to "the next succeeding term remaining on the lease"), *aff'd*, 145 B.R. 823, 827-28 (W.D. Pa. 1992).

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32. *See New Valley*, 2000 WL 1251858, at *11-12 (following the rent approach); *In re Andover Togs, Inc.*, 231 B.R. 521, 540-41 (Bankr. S.D.N.Y. 1999) (same); *In re Today's Woman of Fla., Inc.*, 195 B.R. 506, 507–8 (Bankr. M.D. Fla. 1996) (same); *In re Gantos, Inc.*, 176 B.R. 793, 795–96 (Bankr. W.D. Mich. 1995) (same), *In re Fin. News Network, Inc.*, 149 B.R. 348, 351 (Bankr. S.D.N.Y. 1993) (same); *In re Communicall Central, Inc.*, 106 B.R. 540, 544 (Bankr. N.D. Ill. 1989) (same).
33. *In re Gantos, Inc.*, 176 B.R. 793, 795–96 (Bankr. W.D. Mich.1995); *see also New Valley*, 2000 WL 1251858 at *11-12.
34. *In re Filene's Basement, LLC*, No. 11-13511 (KJC), 2015 WL 1806347, at *7 (Bankr. D. Del. April 16, 2015).
35. *See Connectix*, 372 B.R. at 491 (noting the rent approach is "sometimes referred to as the 'majority' view"); 4 *Collier on Bankruptcy* (15th rev. ed.) at ¶ 502.03[7][c] (acknowledging the rent method appears to be the majority view).
36. *See Filene's Basement,* 2015 WL 1806347, at *4 (noting an approximate even split among courts adopting the rent approach and the time approach).
37. *PPI Enters.* 324 F.3d at 207; *see also Filene's Basement*, 2015 WL 1806347, at *7.
38. American Bankruptcy Institute Commission to Study the Reform of Chapter 11, ISBN: 978–1–937651–84–8, Section V.A.6, pp. 129–30 (2014).
39. *Fin. News Network*, 149 B.R. at 350.
40. *See* 11 U.S.C. § 502(b)(6)(A)(i).
41. *In re Conston Corp.*, 130 B.R. 449, 455 (Bankr. E.D. Pa. 1991).
42. *Id.*
43. *See In re PPI Enters. (U.S,), Inc.,* 228 B.R. 339, 348-49 (Bankr. D. Del. 1998).
44. *Kuske v. McSheridan (In re McSheridan),* 184 B.R. 91, 91 (9th Cir. B.A.P. 1995) *overruled in part by In re El Toro Materials Co., Inc.,* 504 F.3d 978 (9th Cir. 2007).
45. *New Valley*, 2000 WL 1251858, at *14; *see also Fifth Ave. Jewelers, Inc. v. Great E. Mall, Inc. (In re Fifth Ave. Jewelers, Inc.)*, 203 B.R. 372, 381 (Bankr. W.D. Pa. 1996) (applying *McSheridan* test for 'rent reserved' under 502(b)(6) calculation).
46. *In re Fifth Ave. Jewelers, Inc.*, 203 B.R. 372, 381 (Bankr. W.D. Pa. 1996); *see also In re Andover Togs, Inc.*, 231 B.R. 521, 540-42 (Bankr. S.D.N.Y. 1999).
47. *Fifth Ave. Jewelers,* 203 B.R. at 381.
48. *See PPI Enters.,* 228 B.R. at 348-49.
49. *Fifth Ave. Jewelers,* 203 B.R. at 381; *see also* 4 *Collier on Bankruptcy* P 502.03 (16th 2018) ("Section 502(b)(2) provides that a claim is disallowed to the extent that 'such claim is for unmatured interest.' Thus, section 502(b)(2) prohibits payment of post-petition interest on pre-petition unsecured claims, including claims for pre-petition taxes.").
50. *Filene's Basement*, 2015 WL 1806347, at *12.
51. *Id.*
52. *See PPI Enters.*, 324 F.3d at 208 ("Once the § 502(b)(6) calculation is complete, the prevailing view...favors deduction of a security deposit from the § 502(b)(6) cap of a landlord's claim.").
53. H.R. Rep. No. 595, 95th Cong., 1st Sess. 353-54 (1977).
54. *See Filene's Basement,* 2015 WL 1806347, at *9 ("If the Additional Claims resulted from the termination of the lease, they are subject to the statutory cap. If the claims do not arise as a result of the lease termination, then the claims may be asserted separately against the Debtors.").
55. *McSheridan,* 184 B.R. at 102.
56. *See In re Foamex Int'l, Inc.,* 368 B.R. 383, 393-94 (Bankr. D. Del. 2007).
57. *El Toro*, 504 F.3d at 981-82.
58. *Filene's Basement,* 2015 WL 1806347, at *10; *see also In re Energy Conversion Devices, Inc.*, 483 B.R. 119 (Bankr. E.D. Mich. 2012) (recognizing that the landlord could assert separate damage claims).
59. *Filene's Basement,* 2015 WL 1806347, at *9 (*citing El Toro*, 504 F.3d at 980).
60. *See Kupfer v. Salma* (*In re Kupfer*), 526 B.R. 812 (N.D. Ca. 2014).
61. *El Toro*, 504 F.3d at 981-82.
62. *See Final Order (I) Authorizing Debtors In Possession To Obtain Post-Petition Financing Pursuant To 11 U.S.C. §§ 105, 362, 363, and 364, (II) Granting Liens and Superpriority Claims To Post-Petition Lenders Pursuant To 11 U.S.C. §§ 364 and 507; and (III) Authorizing The Use Of Cash Collateral And Providing Adequate Protection To Pre-petition Secured Parties and Modifying The Automatic Stay Pursuant To 11 U.S.C. §§ 361, 362, 363, and 364* at 61, *In re hhgregg, Inc., et al.,* Case No. 17-01302 (RLM) (Bankr. S.D. Ind. May 2, 2017), ECF No. 923 ("The Stub Rent shall be paid to the Consenting Landlords...regardless of whether the DIP Lenders have been paid in full. Acceptance of the Stub Rent Settlement shall also be a consent by the Consenting Landlords to agree and adopt for all purposes in these cases the so-called 'proration' or 'per-diem' rule for the treatment of lease obligations (rather than the so-called 'billing theory') and, therefore, post-petition lease obligations under section 365 of the Bankruptcy Code shall be pro-rated on a daily basis.").

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