

# There's a New Bankruptcy Law in Town

By **Selinda A. Melnik**

**E**xtensive reform of the United States Bankruptcy Code was signed into law in April 2005. Most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, apply to cases filed on or after October 17, 2005, changing the landscape in significant ways at a time when airlines in particular find it increasingly difficult to avoid or reverse financial distress.

Some predict that airlines and other companies currently considering bankruptcy among their near-term options will file prior to October 17, 2005 to avoid aspects of the new law viewed as diminishing debtor leverage and options. A few of the amendments that impact airports are described briefly below. They caution airports to carefully assess the terms and terminology in their leases and other contracts, and to enhance their vigilance, from the beginning of their contractual relationships forward to preempt to the greatest extent possible unintended results.

## Shortened deadline to assume or reject leases

The time within which a debtor will have to decide whether to assume or reject a non-residential real property lease has been extended from 60 days post-bankruptcy filing to the earlier of 120 days or the entry of an order confirming a plan. Extension of the 120-day period is severely limited to an additional 90 days "for cause" upon a motion brought either by the debtor or the lessor. Any further extension may be granted only with the prior written consent of the lessor. If the deadline passes without debtor action, the lease is deemed rejected and the property must be surrendered immediately. Not surprisingly, debtor counsel are already searching for creative ways around such constraints on debtor decision-making and leverage. Among those suggested are, where possible, to seek to recharacterize the lease as a secured financing versus a "true lease" (as in the United case), and to postpone the bankruptcy filing until after preferred disposition of the majority of significant leases has been determined.

## Assumed leases may be rejected subsequently

Unfortunately for lessors, any enhanced certainty afforded by the shortened decision-making deadlines may be short-lived and hollow. The assumed lease can be rejected thereafter. Indeed, many anticipate that the pressure to decide quickly will result in "premature" assumptions later undone by the debtor or a purchaser of its assets. The administrative priority claim of a lessor under an assumed or later-rejected lease will be limited to the monetary obligations under the lease (with certain exclusions) for the two years following the later of (i) the rejection date or (ii) the date the premises are surrendered. Any remaining damages will be treated as pre-petition general unsecured claims whose recovery will be capped at the



amount of rent reserved in the lease for the greater of (i) one year or (ii) 15 percent of the remaining lease term not to exceed three years.

## Previously non-assumable leases may be assumed

Defaults under a lease must be cured before a debtor may assume it. Some courts have ruled that default of non-monetary lease obligations that are impossible to cure render the lease completely non-assumable, taking that lease out of play in the bankruptcy and enabling the lessor to re-lease the property to a third party. The 2005 amendments keep that lease in play by excusing the pre-assumption default of the non-monetary obligations, requiring post-assumption cure and compliance, and compelling compensation for any pecuniary loss resulting from the pre-assumption default.

## Might some anti-assignment provisions now be upheld?

One of the toughest pills for airports to swallow has been the Bankruptcy Code's prohibition against anti-alienation clauses, effectively writing out of airport agreements bargained-for restrictions on their assignment absent airport consent. Likely to revive litigation on this point is an amendment to Bankruptcy Code section 365(f)(1) that conditions anti-alienation clause prohibition on section 365(b). That section specifies when leases and other agreements may not be assumed, when a lessor may not be required to perform the lease pre-assumption absent compensation, as well as the minimal "adequate assurance of future performance" required to assume a shopping center lease. In significant respects, airports possess many of the characteristics of shopping centers that have justified affording shopping centers greater rights in bankruptcy than other landlords. It remains to be seen whether airports might successfully assert those rights through section 365(b), generally, as well as to enforce their contractual right to consent to assignment of airport contracts and leases. ■

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