

Legislative Highlights

House Bill Would Repeal Four Business Provisions in BAPCPA

Rep. Jerrold Nadler (D-N.Y.) and House Committee on the Judiciary Commercial Law Chairman Steve Cohen (D-Tenn.) have introduced a bill (H.R. 1942, the “Business Reorganization and Job Preservation Act of 2009”) that would repeal several provisions in BAPCPA that are perceived as having a significant, adverse effect on companies trying to reorganize under chapter 11. After the subcommittee’s recent hearing on *Circuit City* (reported in the last issue of the *Journal*), Nadler and Cohen drafted the bill to reverse several provisions, taking the law back to the pre-BAPCPA Code, as follows: (1) amending §364(d) (4) with respect to limitation on the period in which the debtor must assume or reject a nonresidential lease of real property; (2) repealing §366(c) relating to the “assurance of payment” for utility service; (3) repealing §503(b)(9) providing an administrative expense claim for the value of goods received by the debtor within 20 days before the date of the commencement of the case; and (4) restoring §546(c) relating to the reclamation of goods.

The bill was introduced on April 2 and referred to the Committee on the Judiciary. In remarks delivered by a top aide at the ABI Annual Spring Meeting that same day, Rep. Cohen stated that “Chapter 11 is becoming more like a morgue than a trauma center... Since BAPCPA’s enactment imposing a hard and fast deadline by which retailers must decide to retain their leases, very few retailers have successfully emerged from Chapter 11. This hard deadline may not provide enough flexibility for companies to reorganize in light of their unique business cycles. And this, in turn, has caused lenders to restrict credit access to Chapter 11 debtors...encouraging liquidation over reorganization, which will necessarily lead to job loss.”

Rep. Nadler agreed, stating: “In an economy as depressed as ours, we must be cognizant of the many difficulties facing American businesses and avoid placing unnecessary hurdles in their paths...the Business Reorganization and Job Preservation Act of 2009 will remove some of the obstacles now hindering struggling businesses and inject a much-needed economic boost during this time of severe recession. It’s essential that we give retailers, which are often

the job-providers of our communities, the means to reorganize and stay in business.” Landlords and lenders have the ability to lock tenants into new leases while trying to make their way through a reorganization process, which can cause a business great difficulty. The proposed changes in the bill would reinstate the flexibility that debtors had pre-BAPCPA. Of particular importance is the repeal of the maximum 210-day fixed deadline for the assumption/rejection of nonresidential real property leases. The bill reinstates the pre-BAPCPA practice of 60 days, with extensions of time for good cause.” The National Retail Federation has called for repealing the limit and returning to an earlier system, under which bankruptcy judges were allowed to extend the period indefinitely.

The real estate provision was a priority of the shopping center industry in 2005, while the reclamation provision was favored by credit managers. Both groups are expected to weigh in on the coming debate over H.R. 1942. “We’ll oppose the bill and hope that it doesn’t move forward,” said Betsy Laird, a senior vice president in the International Council of Shopping Centers’ global policy office in Washington, D.C. Reversing some of the 2005 changes isn’t a solution, Laird said in a recent interview. “Those provisions didn’t work then, that’s why they were changed,” she said. Without a time limit for retailers to cull leases, “landlords never got any certainty. Nor was there any certainty for any other retailers who might inhabit the same center,” Laird said.

Specifically, the Business Reorganization and Job Preservation Act (H.R. 1942) would make the following changes, explained herein.

Amendment of §365(d)(4): Deadline for Assuming or Rejecting Nonresidential Leaseholds

As a result of the 2005 Act, §365(d) (4) was amended to fix a firm deadline by which an unexpired lease of nonresidential real property must be assumed or rejected. If the lease is not assumed or rejected by the stated deadline, then the lease is deemed rejected and the property must immediately be surrendered to the landlord. Section 365(d)(4) permits a chapter 11 debtor to assume or reject a lease on a date which is the earlier of

the date of confirmation of a plan or the date that is 120 days after the date of the order for relief. A further extension may be granted, within the 120-day period, for an additional 90 days. Any subsequent extension can only be granted by the judge upon the lessor’s written consent. This provision was designed to remove the bankruptcy judge’s discretion to grant extensions of the time for a retail debtor to decide whether to assume or reject a lease after a maximum possible period of 210 days from the time of entry of the order of relief. Beyond that maximum period, the judge has no authority to grant further time unless the lessor has agreed in writing to the extension.

Would amend §365(d)(4) to establish a 60-day deadline or, alternatively, such additional time as the bankruptcy court for cause (within such 60-day period) fixes, by which an unexpired lease of nonresidential real property must be assumed or rejected. If the lease is not assumed or rejected by the stated deadline or the fixed term of the court, then the lease is deemed rejected and the property must immediately be surrendered to the landlord.

Amendment to §366: Utility Service

Would repeal changes to §366 of the Code so that a utility company may not discontinue service to a company solely on the basis that it filed for bankruptcy relief, even if the company owes for services rendered prebankruptcy. Nevertheless, the utility company may discontinue service 20 days after the debtor files for bankruptcy relief if the debtor does not provide “adequate assurance of payment, in the form of a deposit or other security.” Prior to the 2005 Act, a chapter 11 debtor often could meet this requirement by ensuring that the unpaid amount of any postpetition obligations for service provided by the utility would be accorded as an administrative expense priority without the debtor having to post a cash deposit. The 2005 Act added new requirements as set forth in §366(c). This provision required the debtor to provide either a cash deposit, letter of credit, certificate of deposit, surety bond, prepayment of utility consumption or other form of security that is mutually agreed upon between the debtor and the utility. Section 366(c) explicitly provides

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that an administrative expense priority may not constitute adequate assurance of payment. Although the court may modify the amount of such assurance of payment, §366(c) prohibits the court from considering the fact that the debtor, before filing for bankruptcy, was not required to provide a deposit or that the debtor, before filing for bankruptcy, had timely paid the utility for service provided. As a result, in large chapter 11 reorganizations with various utility providers, §366 can impose major cash demands, which divert funds from operations. The bill strikes §366(c).

Amendment to §503(b): Allowance of Administrative Expenses

Under the Bankruptcy Code, creditors are entitled to be paid in accordance with a hierarchical order of payment priorities. Accordingly, after payment of secured claims, those creditors that hold claims for administrative expenses are entitled

to be paid ahead of all other creditors, including priority creditors (*e.g.*, certain tax claims) and general unsecured creditors. Administrative expenses in a chapter 11 case typically consist of the actual and necessary costs incurred to facilitate the debtor's reorganization, such as attorney's fees and postpetition wages earned by the debtor's employees. A debtor must pay these expenses as they come due, but no later than the effective date of the reorganization. The 2005 Act amended the Bankruptcy Code to add §503(b)(9) to accord administrative expense priority to a vendor for the value of goods received by the debtor within the 20-day period preceding the bankruptcy filing. Prior to the 2005 Act, the vendor would have had a general unsecured claim for such goods. Particularly for an inventory-dependent retailer, §503(b)(9) can result in a substantial capital expenditure that may impact on their

ability to reorganize. The bill strikes §503(b)(9).

Section 2(4) Amendment to §546(c): Limitations on Avoiding Powers.

Under bankruptcy law prior to the 2005 Act, a vendor generally had the right under §546(c) to reclaim goods shipped to a debtor within 10 days of the debtor's receipt of such goods (or within 20 days, if the 10-day period expired after the debtor filed for bankruptcy relief), under certain conditions. The 2005 Act amended §546(c) to lengthen the applicable time periods for reclamation from 10 days to 45 days from when the debtor received the goods (or if the 45-day period expires after the commencement of the case, the vendor 20 days after the bankruptcy case is filed to demand reclamation). The bill restores §546(c) to the form it was in prior to the enactment of the 2005 Act. ■