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COVID-19 and the Rise in Commercial Real Estate Bankruptcies: The Path to Reach the Goals of Bankruptcy Code §365(D)(3)

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**COVID-19 AND THE RISE IN COMMERCIAL
REAL ESTATE BANKRUPTCIES: THE PATH TO
REACH THE GOALS OF BANKRUPTCY CODE §
365(D)(3)**

Jefferey Kirwin

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INTRODUCTION

The commercial real estate market is witnessing dramatic shifts as the COVID-19 pandemic is changing society and how it functions. People were forced out of their offices and businesses and pushed into their homes. This departure from regular life has significantly impacted commercial real estate. The cumulative economic effects put 2020 on track for the most retail bankruptcies in a decade as there were more retail bankruptcies in 2020 than the past eight years.¹ Also, one of the largest commercial real estate sectors, office space, is watching rents fall as vacancies climb.² Hotels had little or no guests in them and the pandemic has caused a significant number of people to flee traditional economic centers for smaller and more suburban areas.³ Many commercial real estate professionals continue to predict how the market will shift and react to changing economic and societal stress, but one thing is certain: commercial bankruptcies will rise as a result. Landlords and tenants who are facing the possibility of bankruptcy must prepare to protect their interests, but there is one issue standing in the way.

Title 11 of the federal Bankruptcy Code § 365(d)(3) was designed to protect landlords by requiring debtors to timely perform their obligations under the lease.⁴ This section created a great deal of confusion for landlords and tenants.⁵ The issue arises as courts take two different

¹ Melissa Repko & Lauren Thomas, *As Pandemic Stretches on, Retail Bankruptcies Approach Highest Number in a Decade*, CNBC (Aug. 3, 2020, 2:50 P.M.), <https://www.cnbc.com/2020/08/03/with-pandemic-retail-bankruptcies-approach-highest-number-in-a-decade.html>.

² David J. Lynch, *Mounting Commercial Real Estate Losses Threaten Banks, Recovery*, WASH. POST (Nov. 11, 2020), <https://www.washingtonpost.com/business/2020/11/11/commercial-real-estate-economy/>.

³ Konrad Putzier, *Covid-19, Remote Work Make Austin a Magnet for New Jobs*, WALL ST. J. (Dec. 8, 2020), <https://www.wsj.com/articles/covid-19-remote-work-make-austin-a-magnet-for-new-jobs-11607423401>.

⁴ J. Kate Stickles & Patrick J. Reilley, *Stub Rent: The Third Circuit's Decision in Goody's*, 29-8 AMER. BANKR. INST. J. 22, 22-23 (Oct. 1, 2010).

⁵ See Steve Jakubowski, *Don't Flub "Stub" Rent: Some Thoughts on Code Section 365(d)(3) from Yitzhak Greenberg*, BANKR. LITIG. BLOG 2.0 (2009), <https://www.bankruptcylitigation.blog/code-statutory-interpretation/dont-flub-stub-rent-some-thoughts-on-code-section-365d3-from-yitzhak-greenberg/> (discussing the somewhat complicated development of the case law around §365(d)(3)).

approaches to what they categorize as post-petition and pre-petition charges which greatly impact what landlords can collect.⁶ A tenant may be required to pay the landlord a different amount depending on the categorization of the particular lease-related charge.⁷ The lease-related charges involve several topics, such as: automatic stay, stub rent, real estate taxes, and the tenants right to cure.⁸ Navigating these two approaches, and the several topics, makes it difficult for both landlords and tenants to know when and what a tenant must pay. The two approaches create confusion for parties among the circuits because with the increase in bankruptcies in 2020, comes “an increase in litigation” that will likely compound such confusion among parties.⁹ Selecting one approach can simplify the bankruptcy process and increase the efficiency of courts handling the claims. “Almost undeniably, the need for simple and unambiguous bankruptcy statutes and uniform rulings throughout the country could not be greater.”¹⁰ A landlord must consider each of these concepts and the jurisdiction of the tenant’s bankruptcy claim to know what they can and cannot collect. Courts may be able to simplify these “can and cannots” by taking a uniform approach. This is especially important given the large number of landlords trying to collect from bankrupt tenants to fulfill mortgages to their lenders.

I. ANALYTICAL FRAMEWORK

This article will explore and explain the two approaches circuit courts use when § 365(d)(3) of the Bankruptcy Code is at issue and will analyze the best approach in the context of COVID-related increase in commercial tenants’ bankruptcy claims. Specifically, this article will analyze how each approach affects the parties by explaining which party is protected at the different stages, and will explain what and when a tenant must pay a landlord. This article will then describe options each party could pursue at different stages in the bankruptcy and outline how each option affects the

⁶ *Id.*

⁷ ABI, *Section 365(d)(3): More Bark or Bite?*, AM. BANKR. INST. (May 2019), <https://www.abi.org/abi-journal/section-365d3-more-bark-or-bite>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Aaron H. Stulman, *Stub Rent Under Section 365(d)(3): A Call for a United Approach*, 36 Del. J. Corp. L. 655, 656 (2011), <https://www.djcl.org/wp-content/uploads/2014/08/Stub-RENT-UNDER-SECTION-365d3-A-CALL-FOR-A-UNIFIED-APPROACxH.pdf>.

payment to the landlord. Lastly, this article will recommend courts adopt the proration approach as it is likely the best path for navigating COVID-related bankruptcies and the future.

As bankruptcy claims rise from large and complex businesses, it will be important for courts to take an approach that prevents confusion and increases efficiency. A uniform approach among circuits would support that goal. Otherwise, parties must operate in a complex framework where one party can drastically and unfairly change the circumstances.

II. BACKGROUND

A. *Snapshot of the State of Commercial Real Estate*

Prior to the COVID-19 pandemic, the outlook for the 2020 commercial real estate market was very positive as it benefited from resilient economic activity, low interest rates, and the attractiveness of real estate as an asset.¹¹ This positive outlook quickly changed as businesses were forced to shut their doors and some employees began working from home, while others were furloughed or laid off.¹² On top of this, because market forces like e-commerce were already siphoning business from real estate, physical properties were more affected by the loss of business during the pandemic.¹³ It is important to keep in mind in the context of this discussion that sectors in the commercial real estate market vary regionally because states differ on their allowance for business to operate.¹⁴ In turn,

¹¹ CBRE, *Stability amid Uncertainty 2020 U.S. Real Estate Market Outlook*, CBRE (Nov. 11, 2019), <https://www.cbre.sa/en/research-and-reports/US-Real-Estate-Market-Outlook-2020>.

¹² See Joanne Lipman, *The Pandemic Revealed How Much We Hate Our Jobs. Now We Have a Chance to Reinvent Work*, TIME (June 1, 2021, 5:45 AM), <https://time.com/6051955/work-after-covid-19/> (discussing the impact of COVID-19 on the way people work).

¹³ James Chen, *Commercial Real Estate's Coronavirus Reckoning*, INVESTOPEDIA (Nov. 16, 2020), <https://www.investopedia.com/commercial-real-estate-s-coronavirus-reckoning-5087824>.

¹⁴ See Dena Bunis & Jenny Rough, *List of Coronavirus-Related Restrictions in Every State*, AARP, <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html> (last updated Apr. 8, 2022).

this means the current state of commercial real estate varies greatly by sector, subsector, and region.¹⁵

For example, office spaces are in a precarious position as businesses have found ways for employees to do more from home, and some technology companies are even considering permanent work from home strategies.¹⁶ Research shows there was a 28.9 million square foot decline in office space occupancy in the U.S. causing office space vacancies to reach 16%.¹⁷ Additionally, over half the new leases signed in the third quarter of 2020 came from renewals of pre-existing leases, and the trend is for shorter three- to five-year terms opposed to the ten-year range.¹⁸ Carol Ryan of the *Wall Street Journal* anticipates “[f]ew businesses will commit to a new lease until they understand how remote working will change their real estate needs, so competition for tenants is intensifying.”¹⁹ However, office space is not completely written off. Some companies like Facebook are pushing ahead with new office spaces.²⁰ Furthermore, concerns of productivity loss and threats to collaboration, innovation, and workplace culture may push employers to move back into the office when allowed.²¹

Some sectors of the commercial real estate market are doing well in the midst of the downturn.²² For example, an increase in online shopping caused greater demand for e-commerce warehouses and cold storage spaces.²³ Likewise, the need for entertainment because people were more confined to home also increased the demand for streaming content, which

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ JLL, *United States Office Outlook – Q3 2020*, JLL, <https://www.us.jll.com/en/trends-and-insights/research/office-market-statistics-trends> (last updated Jan. 11, 2022).

¹⁸ *Id.*

¹⁹ Carol Ryan, *Office Landlords Will Be Squeezed by Secondhand Market*, WALL ST. J. (Jan. 2, 2021, 10:03 AM), <https://www.wsj.com/articles/office-landlords-will-be-squeezed-by-secondhand-market-11609599780>.

²⁰ Chen, *supra* note 13.

²¹ JLL, *supra* note 17.

²² Katie Warren, *These Are the Key Commercial Real-Estate Deals and Trends to Watch*, INSIDER, <https://www.businessinsider.com/the-latest-coronavirus-and-commercial-real-estate-news-2020-3> (last updated Dec 1, 2020, 11:46 AM).

²³ *Id.*

caused a surge in demand for studio space and data centers.²⁴ Similarly, people turned to food delivery as an alternative to eating out which led to the rise of the use of “ghost kitchens.”²⁵ However, not all brick-and-mortar restaurants could survive the huge demand for food delivery and either struggled or closed down entirely as a result of not being able to serve customers on location.²⁶ Additionally, the pandemic had a big impact on health services creating a surge in demand for laboratory spaces and related health service spaces.²⁷

Although various commercial sectors are in different states of health, none have been hit as hard as retail. Research shows there is a rise of vacant retail space because of a surge in retail tenant bankruptcies and store closures.²⁸ Like the rest of the commercial real estate industry, the retail sector is functioning at different levels. Businesses selling essential goods and products such as electronics and home-improvement materials, were in demand, while traditional retail business, such as department stores, struggled without the regular customer traffic.²⁹ For example, seventeen major retailers declared bankruptcy including: J.Crew, Nieman Marcus, and Lord & Taylor.³⁰ Malls have been the most impacted retail property type and smaller shopping centers continue to lose smaller local tenants.³¹ Simeon Siegal, a Business Management Office (BMO) analyst, remarks retail chains have closed thousands of stores and since “no retailer ever announces one round of store cuts—it’s always the precursor to a store bleed.”³² As a result, mall landlords have been seeking bankruptcy

²⁴ *Id.*

²⁵ See Sunny Kim, *Covid Accelerated the Rise of Ghost Kitchens*, CNBC, (Jan. 15, 2021, 8:16 AM) <https://www.cnbc.com/2021/01/15/how-covid-accelerated-the-rise-of-ghost-kitchens.html>. Ghost kitchens are defined as, “cooking facilities that produce food only for delivery and takeout with no dine-in areas.” *Id.*

²⁶ Warren, *supra* note 22.

²⁷ *Id.*

²⁸ JLL, *supra* note 17.

²⁹ Warren, *supra* note 22.

³⁰ Retail Dive Team, *The Running List of 2020 Retail Bankruptcies*, RETAIL DIVE, <https://www.retaildive.com/news/the-running-list-of-2020-retail-bankruptcies/571159/> (last updated Feb. 5, 2021).

³¹ *Id.*

³² Suzane Kapner, *Retail Chains Shed Its Stores, but it Isn't Good for Business*, WALL ST. J. <https://www.wsj.com/articles/retail-chains-shed-stores-but-it-isnt-good-for-business-11605436204?st=2r9u7j8bm1us9kw> (last updated Nov. 16, 2020, 7:24 AM).

protection as retail staples, like J.C. Penny, continue to file for bankruptcy themselves.³³

Current retail-industry issues partly stem from pre-pandemic problems which only increases the likelihood that more bankruptcies will continue even post-pandemic. E-commerce has battered the retail sector as more and more customers choose to shop online rather than travel to a store.³⁴ At the start of the pandemic, the retail industry lost over 2 million jobs, with the only shopping choice for consumers being e-commerce.³⁵ However, retail is expected to continue to sustain heavy losses even as customers return to in-store shopping post-pandemic.³⁶ E-commerce has, at times, topped brick-and-mortar stores for market share.³⁷ Although retail is suffering losses it is not likely to disappear completely. Retail stores still offer advantages like customer service, the ability to inspect items, and the chance to obtain more information about the product.³⁸ One factor that may cause even more bankruptcies is the change in attitude from lenders and banks. Early in the pandemic, lenders allowed rent deferrals to owners, but more lenders are starting to demand payment.³⁹ Banks are considering seizing properties in foreclosures, while some mall

³³ Esther Fung, *Malls File for Bankruptcy or Shut their Doors as Pandemic Pain Spreads*, WALL ST. J., <https://www.wsj.com/articles/malls-file-for-bankruptcy-or-shut-their-doors-as-pandemic-pain-spreads-11605013664> (last updated Nov. 10, 2020, 7:50 PM).

³⁴ Suzanne Kapner & Sarah Nssaeur, *Coronavirus Finishes the Retail Reckoning That Amazon Started*, WALL ST. J., https://www.wsj.com/articles/coronavirus-finishes-the-retail-reckoning-that-amazon-started-11589459920?mod=article_inline (last updated May 14, 2020, 12:07 PM).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Kate Rooney, *Online Shopping Overtakes a Major Part of Retail for the First Time Ever*, CNBC, https://www.cnbc.com/2019/04/02/online-shopping-officially-overtakes-brick-and-mortar-retail-for-the-first-time-ever.html?__source=sharebar%7Cemail&par=sharebar (last updated Apr. 2, 2019, 2:34 PM).

³⁸ Susan Ward, *Brick and Mortar Stores vs Online Retail Sites*, BALANCE SMALL BUS. <https://www.thebalancesmb.com/compare-brick-and-mortar-stores-vs-online-retail-sites-4571050> (last updated Mar. 24, 2021).

³⁹ Esther Fung, *Lenders Cracking Down on Mall Owners Behind on the Mortgage*, WALL ST. J. (Oct. 27, 2020, 8:00 AM), https://www.wsj.com/articles/lenders-cracking-down-on-mall-owners-behind-on-the-mortgage-11603800000?cx_testId=3&cx_testVariant=cx_22&cx_artPos=1#cxrecs_s.

owners are suing retailers claiming the retailers have the financial ability to pay rent but are choosing not to.⁴⁰ The market almost appears to be eating itself alive because “[e]very step of the way, everyone is fighting each other to see who will take the loss.”⁴¹ Tenants need to pay rent so landlords can pay lenders. As the lenders at the top begin asking for payment, bankruptcies may rise even more, furthering the need for an efficient Chapter 11 bankruptcy process.

B. *The Bankruptcy Code and its Goals*

The Bankruptcy Code is designed to create a remedy that gives debtors the best chance at recovery by providing paths for liquidation or reorganization of the debtor’s business and its assets.⁴² The code tries to accomplish its core policy with broader policies of administrative efficiency, transparency, and fairness among the parties in bankruptcy proceedings.⁴³ Uniform and consistent application of the code across the circuits is essential to reach its overarching policy goals.⁴⁴ Uniformity and consistency facilitates efficient reorganization and prevents strategic forum shopping by debtors.⁴⁵ Chapter 11 bankruptcy is a form of bankruptcy that provides a business carrying debt the ability to reorganize its business affairs to create a profitable business.⁴⁶ Almost all businesses are eligible for Chapter 11 protection including: corporations, partnerships, natural persons, and commercial entities.⁴⁷ This chapter is a tool for debtors to ensure the continued existence of their business by providing an efficient process to reallocate the debtor’s assets and encourage cooperation rather than competition among debtors and

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Gary P. Spencer Jr., *A Simple Solution for Stub Rent? How Proposed Changes to the Treatment of Stub Rent Could Lead to Unforeseen Consequences*, 36 REV. BANKING & FIN. L. 915 (2016) (stating that states have their own bankruptcy rules, further complicating the need for uniformity).

⁴³ *Id.* at 948.

⁴⁴ *Id.*

⁴⁵ *Id.* at 947.

⁴⁶ *Id.* at 935; *Chapter 11 – Bankruptcy Basics*, U.S. COURTS, https://www.cnbc.com/2019/04/02/online-shopping-officially-overtakes-brick-and-mortar-retail-for-the-first-time-ever.html?__source=sharebar%7Cemail&par=sharebar (last visited Apr. 14, 2022) [hereinafter *Chapter 11*].

⁴⁷ Spencer Jr., *supra* note 42, at 928; *Chapter 11*, *supra* note 46.

creditors.⁴⁸ In the commercial real estate context, the general scenario involves a debtor-tenant who is under unsustainable lease obligations that slow Chapter 11 cases.⁴⁹

While the Code provides debtors protections from creditors so they can reorganize, Chapter 11 balances the scales between creditors and debtors by providing various protections for commercial landlords when their tenants file for bankruptcy.⁵⁰ The protections include: the ability to collect unpaid rent and tenant fees, charges for continued occupancy of the property, and claims for damages related to rejection of the lease after filing for bankruptcy.⁵¹ Although landlords are given statutory means to collect lease obligations from tenants, they still may suffer substantial losses if they do not create an effective collection strategy.⁵² Additionally, landlords face the risk of loss because their ability to collect rent and enforce lease obligations can be avoided by strategic tenants.⁵³ In the typical commercial real estate bankruptcy case, the debtor-tenant who has stopped paying rent stays in possession of the premises after filing, so the landlord cannot relet the space and collect rent from a paying tenant.⁵⁴ Commercial landlords may not receive unpaid lease obligations during the continued occupation, unless they effectively use the Code.⁵⁵

Debtor-tenants are able to avoid obligations and rent owed to the landlord through first-day motions and protections afforded to them in the Bankruptcy Code.⁵⁶ First-day motions are motions made by the debtor-tenants to the bankruptcy court on the first day of filing for bankruptcy.⁵⁷ Often, the debtor-tenant's goal is to conserve liquidity heading into

⁴⁸ Spencer Jr., *supra* note 42, at 945.

⁴⁹ See American Bankruptcy Institute, *Chapter 11 "101" Bankruptcy Issues for Landlords and Tenants*, AM. BANKR. INST. J., <https://www.abi.org/abi-journal/bankruptcy-issues-for-landlords-and-tenants> (last visited Feb 15, 2021).

⁵⁰ See Stulman, *supra* note 10, at 672.

⁵¹ Spencer Jr., *supra* note 42, at 917.

⁵² David R. Kuney, *Bankruptcy Issues Affecting Retail Leases*, AM. COLL. OF REAL EST. LAW., 1, https://cdn.ymaws.com/acrel.site-ym.com/resource/collection/7A2228B1-48B5-4A4A-8D8B-AA61DB77752F/Kuney-S09-Bankruptcy_Issues_Affecting_Retail_Leases.doc (last visited Feb 15, 2021).

⁵³ *Id.* at 1.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 4.

⁵⁷ *Id.* at n.2.

bankruptcy, so the debtor-tenant will try and motion to restrict the landlord's abilities to collect.⁵⁸ The motions range from restricting the debtor-tenants right to sell off assets, to shortening the landlord's collection period.⁵⁹ A landlord's ability to act to prevent loss is further limited by "automatic stay."⁶⁰ Upon filing for Chapter 11 protection, automatic stay is immediately triggered, without need for notice, preventing all creditors from pursuing any collection actions.⁶¹ Landlords are unable to evict or otherwise affect the debtor-tenants continued use.⁶² Furthermore, landlords may still face financial loss when bankruptcy ends because debtor-tenants may be able to avoid owing past obligations to landlords along with current obligations.⁶³

C. *Bankruptcy Code § 365(d)(3)*

Bankruptcy Code § 365(d)(3) was implemented to quell the uncertainties faced by landlords. It states, in part, "the trustee shall timely perform all the obligations of the debtor . . . arising from and after the [petition date] under any unexpired lease of nonresidential real property, until such lease is assumed or rejected."⁶⁴ Section 365(d)(3) was added to the Code in 1984 "to ameliorate the perceived inequity" faced by landlords who "were often forced to make their property available to a debtor[-tenant]... without receiving adequate compensation in return under § 503(b)(1)."⁶⁵ Before 1984, landlords were forced to seek payment and other lease obligations by petitioning the bankruptcy court to designate

⁵⁸ See Stulman, *supra* note 10, at 659.

⁵⁹ Kuney, *supra* note 52, at 4.

⁶⁰ *Id.* See Julia Kagan, *Automatic Stay*, Investopedia, https://www.cnbc.com/2019/04/02/online-shopping-officially-overtakes-brick-and-mortar-retail-for-the-first-time-ever.html?__source=sharebar%7Cemail&par=sharebar (last updated Aug. 19, 2021) (defining automatic stay). Kagan defines an automatic stay as, "a provision in the [U.S. Bankruptcy Code] that temporarily prevents creditors, collection agencies, government entities, and others from pursuing debtors for money they owe." *Id.*

⁶¹; Kagan, *supra* note 60.

⁶²; Kagan, *supra* note 60.

⁶³ See Spencer Jr., *supra* note 42.

⁶⁴ 11 U.S.C § 365(d)(3).

⁶⁵ Joel H. Levitin & Richard A. Stieglitz Jr., *The Ticket to Solving the Stub Rent Dilemma*, AM. BANKR. INST. J., https://www.cahill.com/publications/published-articles/000065/_res/id=File1/The (last visited Feb. 20, 2021).

these obligations as administrative expenses.⁶⁶ To qualify as an administrative expense, the obligation had to be the “actual, necessary costs and expenses of preserving the estate.”⁶⁷ Courts interpreted this language narrowly, which placed the significant burden on the landlord to prove: (1) that the expense was actual and necessary to preserve the debtor’s rights, and (2) that the bankruptcy estate benefitted if the landlord were to recover the obligations an administrative expenses.⁶⁸ Rather than assessing the value of the debtors use and occupancy by looking at the lease to determine if the expense benefitted the estate, courts used their discretion in a case-by-case basis.⁶⁹ Even if the courts allow the landlord to collect administrative expenses, the landlord might lose because the Code does not specify when such obligations must be paid.⁷⁰ The petitioning process lengthened the entire bankruptcy process and critically limited a landlords ability to collect obligations owed to them by debtor-tenants.⁷¹ Landlords could also be forced to provide ongoing services without payments by debtor-tenants; and, as a result, some landlords raised the rent for common area expenses shared by other tenants to make up the costs.⁷²

Further, § 365(d)(3) eliminated the discretionary role judges provided by requiring timely payments of rent and other lease obligations upon the bankruptcy filing date until the assumption or rejection of a lease.⁷³ In other words, it requires the debtor-tenant to remain current on lease obligations until they assume or reject the lease.⁷⁴ Landlords’ claims for post-petition lease obligations are given administrative priority, meaning, claims for rent and lease obligations are paid before claims made by general unsecured creditors.⁷⁵ A debtor-tenant cannot complete its reorganization plan with the court and leave bankruptcy until the plan

⁶⁶ *Id.*

⁶⁷ 11 U.S.C § 503(b)(1).

⁶⁸ Levitin & Stieglitz, *supra* note 65.

⁶⁹ *Id.*

⁷⁰ Jones Day, *Stub Rent Claims Entitled to Administrative Priority*, JONES DAY (Jan./Feb. 2009), <https://www.jonesday.com/en/insights/2009/02/stub-rent-claims-entitled-to-administrative-priority> (last visited Feb 18, 2021).

⁷¹ *Id.*

⁷² Spencer Jr., *supra* note 42, at 927.

⁷³ Levitin & Stieglitz, *supra* note 65, at 1.

⁷⁴ *Id.*

⁷⁵ Day, *supra* note 70.

includes the full payment of all administrative claims.⁷⁶ Although landlord claims are given administrative priority, § 365(d)(3) does not require the debtor-tenant to pay for the use and occupancy of the property up until the bankruptcy suit.⁷⁷ Rather, the debtor-tenant is only required to timely comply with the obligations set forth in the lease the parties entered into, so payment of the contract rent is owed until judicial approval of rejection or assumption.⁷⁸ Unpaid rent and lease obligations, post-petition, are administrative expenses entitled to payment before unsecured claims.⁷⁹ The section is expected to simplify and ameliorate the treatment of landlords claims in Chapter 11, providing them with timely payment of rent owed after the debtor-tenant files for bankruptcy.⁸⁰ Without the above protections, the landlord would have to provide utilities and other services free of charge.⁸¹

Whether a claim is classified as administrative priority or a general unsecured claim is important for landlords looking to collect from a debtor-tenant.⁸² Generally, a landlord may be entitled to file a claim against the debtor-tenant for amounts owed to the landlord pre-petition, administrative expenses for the continued use of the property post-petition, damages coming from the rejection of the lease, and additional claims stemming from termination of the lease.⁸³ A pre-petition charge is any unpaid or unperformed obligation owed to the landlord as of the date the debtor files its Chapter 11 petition.⁸⁴ Pre-petition charges are often unpaid rent, tenant fees, and obligations under the lease that came due before debtor-tenant filed for bankruptcy.⁸⁵ Charges due pre-petition are classified as a general unsecured claim, *not* an administrative claim, which may cause significant losses for landlords who may only recover “pennies on the dollar” when collecting amongst all other creditors.⁸⁶ In contrast, post-petition charges are claims for lease obligations that are owed after

⁷⁶ Day, *supra* note 70.

⁷⁷ *Id.*

⁷⁸ *Id.* at 4.

⁷⁹ See Spencer Jr., *supra* note 42, at 953.

⁸⁰ Jones Day, *supra* note 70.

⁸¹ Spencer Jr., *supra* note 42, at 924 n.41.

⁸² *Id.* at 935.

⁸³ *Id.*

⁸⁴ Nicole Fulfree, *Key Commercial Real Estate Lease Issues in Chapter 11 Cases*, N.J. LAW., 9 (Feb. 2019), <https://www.lowenstein.com/media/4829/fulfree.pdf>.

⁸⁵ *Id.* at 9.

⁸⁶ *Id.*

the debtor-tenant files for bankruptcy.⁸⁷ Post-petition charges are classified as administrative claims which grants them priority against other creditors' claims.⁸⁸ In other words, administrative claims are fulfilled first before any unsecured claim is satisfied.⁸⁹ As well as with priority, administrative claims must be paid in full for a debtor to confirm reorganization.⁹⁰ Generally, once a debtor files for bankruptcy, § 365(d)(3) requires them to make timely payments owed to the landlord according to the lease until the lease is rejected.⁹¹

Uniformity is important for the Bankruptcy Code because it expedites the bankruptcy process.⁹² Given the surge in bankruptcies, with more likely to follow, efficiency is paramount for the business tenants and landlords so they have the best chance to continue operating.⁹³ Although it is clear unpaid post-petition rents are given administrative priority regardless of the use and occupancy of the property, ambiguity remains over when an obligation "arises" and whether an obligation arises from or after the petition date.⁹⁴ The key language in the statute is "'arising from and after' the petition date"⁹⁵ The debtor-tenants statutory requirement depends on whether the obligation "arose" after the petition and before the judicial ratification of rejection.⁹⁶ Although courts agree on what the statute was designed to accomplish, the ambiguity over the statutory language has caused significant confusion across the circuits.⁹⁷

The lack of uniformity and inconsistent treatment throughout the circuits runs opposite to the Bankruptcy Code's goals.⁹⁸ Debtor-tenants seeking to conserve liquidity by not paying landlords can use manipulative

⁸⁷ Upsolve Team, *What Is Post-Petition Debt?*, UPSOLVE, <https://upsolve.org/learn/post-petition-debt/> (last updated Mar. 28, 2022).

⁸⁸ Fulfree, *supra* note 84, at 9.

⁸⁹ *Id.*

⁹⁰ Kuney, *supra* note 52, at 5.

⁹¹ *See* 11 U.S.C. § 365.

⁹² *See* Spencer Jr., *supra* note 42, at 947–48.

⁹³ Deb Gordon, *Bankruptcy in America: Tracking Commercial and Personal Filings by State*, MONEYGEEK, <https://www.moneygeek.com/coronavirus/states-most-coronavirus-bankruptcies/> (last updated June 1, 2021).

⁹⁴ Fulfree, *supra* note 84, at 9.

⁹⁵ *Id.* at 10 (quoting 11 U.S.C. § 365(d)(3)).

⁹⁶ *Id.* at 9.

⁹⁷ *Id.*

⁹⁸ *See* Spencer Jr., *supra* note 42, at 947.

filing practices, such as: filing in a venue that gives them the greatest chance of preserving capital, thus limiting payouts to landlords.⁹⁹ Landlords have no control and therefore will likely be forced to take pennies on the dollars for the obligations owed to them in the lease.¹⁰⁰ Debtor-tenants can use manipulative filing practices because “[a] corporate debtor has a wide range of venue options, which include its place of incorporation, the location of its principal assets, and its principal place of business.”¹⁰¹ Furthermore, the non-uniformity contradicts the bankruptcy code’s goal of treating similarly situated creditors equally. Administrative priority claims reduce the payouts to other unsecured creditors, so the differing approaches use of administrative priority puts landlords equal to other unsecured creditors or above them.¹⁰² The jurisdictional split also allows a varying range of treatment for landlords.¹⁰³ For example, a landlord in a proration jurisdiction does not need to claim non-bankruptcy remedies as much as landlords in billing date jurisdictions need to.¹⁰⁴ A tenant can predict which approach the court will use, preventing payouts for landlords.

Tenant bankruptcies come in different sizes and significance.¹⁰⁵ Bankrupt tenants can be small businesses with a single location or a large retailer with hundreds of stores.¹⁰⁶ Manipulative filing practices especially affect commercial landlords with high value properties and retail landlords with large profits that house one large retail tenant.¹⁰⁷ For large retailers and landlords with high value real estate, one month’s rent can mean hundreds of thousands of dollars, and when added to the other obligations under the lease, landlords can lose out on large sums of money originally owed to them.¹⁰⁸ A uniform approach aligns with bankruptcy goals as it expedites bankruptcy cases. Uniformity encourages the Bankruptcy

⁹⁹ *Id.* at 946.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 948.

¹⁰² *Id.*

¹⁰³ *Id.* at 952.

¹⁰⁴ *Id.*; discussion *infra* Section IV.

¹⁰⁵ Kuney, *supra* note 52, at 1.

¹⁰⁶ *Id.*

¹⁰⁷ Spencer Jr., *supra* note 42, at 919.

¹⁰⁸ Victoria Vron, *Stub Rent Debate Continues: Another Jurisdiction Adopts the Billing Date Approach*, WEIL RESTRUCTURING (Mar 24, 2014), <https://restructuring.weil.com/administrative-expenses/stub-rent-debate-continues-another-jurisdiction-adopts-the-billing-date-approach/>.

Code's goals of fairness, transparency, and administrative efficiency.¹⁰⁹ These goals are better met with one approach because manipulative practices, such as those discussed above, usually work to the detriment of the landlord and reduce the payout for other unsecured creditors.¹¹⁰ The negative effects of manipulative practices contrasts with the fairness and balancing the interests of the parties involved. Rather, the debtor-tenant can strategically operate upon filing to which the landlord has no defense.¹¹¹

Section 365 is designed to protect landlords by "requiring debtors to timely perform their obligations arising under a lease pending the assumption or rejection of the lease."¹¹² Stated again, one of Congress's goal in enacting § 365 and its amendments, was to reconcile the interests of debtors and collectors.¹¹³ Among the landlords' means for recovery include: seeking relief from automatic stay, requesting administrative claims, and attempting to recover rent due.¹¹⁴ The focus is on the period following the bankruptcy petition filing date through the date when the lease is assumed or rejected.¹¹⁵ Tenants who file for bankruptcy often exert strong efforts to create a strategy that minimizes their obligations. The major obligations impacted by the categorization are charges related to stub rent, automatic stay, real estate taxes, and cure.¹¹⁶ The circuits are split on what date they consider to be post-petition, so what a landlord can collect depends on the circuit.¹¹⁷ The split has led debtor-tenants to use manipulative filing practices to limit the obligations they owe to the landlord.¹¹⁸

¹⁰⁹ Spencer Jr., *supra* note 42, at 948.

¹¹⁰ See Spencer Jr., *supra* note 42 at 957.

¹¹¹ *Id.*

¹¹² See Stickles & Reilley, *supra* note 4, at 22.

¹¹³ Spencer Jr., *supra* note 42, at 925.

¹¹⁴ *Id.* at 926.

¹¹⁵ Kevin Newman et al., *Retail Bankruptcies Raise Collection Questions for Landlords*, BARCLAY DAMON LLP 1 (Dec. 2, 2019, 4:42 PM), <https://www.barclaydamon.com/webfiles/Law360Kevin%20NewmanNic%20FerlandScott%20Fleischer12219REPRINTPERMISSION.pdf>.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1–2.

¹¹⁸ Fulfree, *supra* note 84, at 14.

D. *Obligations*

Although automatic stay is present in all Chapter 11 bankruptcy cases, it does have important implications in the commercial real estate context. An automatic stay comes into effect immediately upon the debtor-tenant's filing with the court—without a need for a court order to enforce the stay's protections.¹¹⁹ The goal of the stay is to prevent creditors from collecting pre-petition debts or seeking to obtain the property, thereby dismantling a business that may be able produce profit after the business is restructured.¹²⁰ Automatic stay also ensures equality of distribution among creditors where there is no priority (commercial landlords may be just one of several creditors seeking to recoup from one business).¹²¹ Section 362(a) and (b) of the Bankruptcy Code provide a long list of actions prevented by automatic stay and exceptions to such prevented actions.¹²² One exception commercial landlords can use is in “single-asset real estate bankruptcy cases involving less than \$4 million in secured debt.”¹²³ Generally in such cases, creditors will argue the debtor is not trying to reorganize, so it is unfair to prevent the landlord from recovering because of market risk.¹²⁴ Debtor-tenants often attempt to wait for the market to improve, enhance their value, or delay the tax effect of foreclosure.¹²⁵ A commercial landlord in a single-asset case is able to obtain relief, unless the debtor tenant “has filed a reorganization plan that has a reasonable prospect for confirmation or begins paying monthly interest to the secured creditor at a market rate of interest by no later than [ninety] days after the bankruptcy filing.”¹²⁶

Obtaining relief from automatic stay is not simply waiting for the court to decide if the reorganization plan satisfies the standard.¹²⁷ The commercial landlord must time the motion for relief from the automatic stay according to worsening financial condition, but not before the court may reject it for being unreasonably early.¹²⁸ The commercial landlord

¹¹⁹ Ayer et al., *Chapter 11 - "101", An overview of the Automatic Stay*, 22-19 AMER. BANKR. INST. J. 16, 22–23 (Dec. 2003).

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *See* 11 U.S.C. § 362(a)–(b).

¹²³ Ayer et al., *supra* note 119, at 71.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

requesting relief then has the burden of proving the debtor tenant's equity in the property.¹²⁹ Courts strongly look down upon violating automatic stay and may punish the commercial landlord who attempts to recover obligations; thus, landlords must not seek recovery prior to being granted relief to avoid being treated as bad actors by courts.¹³⁰

E. *Stub Rent*

A commercial tenant agrees to many obligations when it contracts with a landlord. The most controversial obligation of a tenant in bankruptcy is stub rent.¹³¹ The common scenario where § 365(d)(3) and stub rent are featured is when rent is due on the first of the month and the debtor tenant files sometime later in that month without paying the rent due on the first of the month.¹³² As previously mentioned, tenants are strapped for cash and looking to preserve as much liquidity as possible, so oftentimes they will stop paying rent before filing for bankruptcy.¹³³ Stub rent is the “amount due to a [commercial] landlord for the period of use and occupancy between the petition date and the first post[-]petition rent payment date”¹³⁴ The controversy at issue here, centers around whether stub rent arises prior to the petition date. If so, the debtor-tenant need not pay stub rent.¹³⁵ Courts are therefore deciding whether stub rent is a pre-petition or post-petition charge, which greatly affects a landlords' probability of recovering the amount owed to them during the stub period because post-petition charges are paid immediately.¹³⁶ The size of the claim for stub rent may dictate whether it is litigated.¹³⁷ Often, stub rent claims will be economically viable with larger tenants where unpaid rent exceeds litigation costs.¹³⁸ Stub rent is also significant for commercial landlords who lease many properties to the same debtor tenant.¹³⁹ Months of rent for multiple locations could mean millions of dollars are at stake, especially for national chains.¹⁴⁰ The stub rent process often requires that

¹²⁹ Ayer et al., *supra* note 119, at 71.

¹³⁰ *Id.* at 72.

¹³¹ Vron, *supra* note 108.

¹³² See Spencer, *supra* note 42, at 928–29.

¹³³ *Id.* at 935.

¹³⁴ *Id.* at 918 (quoting Vron, *supra* note 108).

¹³⁵ See Vron, *supra* note 108.

¹³⁶ See Fulfree, *supra* note 84, at 9–10.

¹³⁷ See Spencer, *supra* note 42, at 935.

¹³⁸ *Id.* at 936.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

landlords to ask the court to compel payment of stub rent for the month upon the landlord's learning of the tenant's bankruptcy petition filing.¹⁴¹ Courts will then determine whether stub rent should be paid immediately as an administrative claim or treated as a general, unsecured claim to be paid later.¹⁴² Most courts rarely grant requests for immediate payment of administrative claims, which forces the landlord to bear the risk of not receiving full payment of their claim.¹⁴³ The stub rent jurisdictional split exists because courts interpret the meaning of certain words in the statute differently.¹⁴⁴ Billing-date courts interpret the statute as unambiguous, while proration courts believe the statute is ambiguous; thus, legislative intent, policies, equity, and the underlying purpose of the Bankruptcy Code must be considered.¹⁴⁵

This ambiguity in determining stub rent comes from the statute's use of the words "obligation" and "arises."¹⁴⁶ The Third Circuit, in *In re Goody's Family Clothing, Inc.*, determined "obligation" within § 365 was unambiguous because an obligation is "something that one is legally required to perform under the terms of the lease."¹⁴⁷ The unambiguous interpretation leads billing-date courts to conclude rent must be paid in full under the lease.¹⁴⁸ Some proration courts determine "obligation" to be a claim, and not an obligation owed to the landlord.¹⁴⁹ Courts also differ on how they interpret "arising from and after the order for relief under any unexpired lease of nonresidential real property . . . of this title."¹⁵⁰ Courts differ on whether an obligation arises every day, on a pro rata basis, or on the first day when billed.¹⁵¹ Billing-date courts conclude the obligation arises when payment is due, which is generally the first of the month.¹⁵²

¹⁴¹ Brian D. Huben, *About the Rent . . . § 365, Stub Rent, and the Billing Date and Proration Rules*, 30 SHOPPING CTR. LEGAL UPDATE, no. 2, 2010, at 17–18, https://katten.com/files/18586_Huben_ShoppingCenterLU_AboutRent.pdf (last visited Feb 18, 2021).

¹⁴² *Id.*

¹⁴³ Lehan, Saydah & Allen, *infra* note 167.

¹⁴⁴ Stulman, *supra* note 10, at 661.

¹⁴⁵ *Id.* at 663.

¹⁴⁶ *Id.* at 664–65.

¹⁴⁷ *In re Goody's Family Clothing, Inc.*, 392 B.R. 604, 609 (Bankr. D. Del. 2008).

¹⁴⁸ Stulman, *supra* note 10, at 667–68.

¹⁴⁹ *Id.* at 664.

¹⁵⁰ *Id.* at 665 (quoting 11 U.S.C. § 365(d)(3)).

¹⁵¹ *Id.*

¹⁵² *Id.*

Proration courts view these obligations as arising every day, and consider "arise" and the surrounding modifiers ambiguous.¹⁵³

III. CURRENT STATE OF THE LAW

A. *The Billing-Date Approach*

The billing-date approach uses the due date of rent under the lease to determine whether stub rent arises pre-petition or post-petition.¹⁵⁴ If the lease states rent is due on the first of the month and the debtor-tenant files during that month but after the first, proponents of this approach argue the rent was pre-petition because it was due and payable on the first, before the petition.¹⁵⁵ Therefore, stub rent arises pre-petition and classified as a general, unsecured claim not subject to immediate payment because stub rent is not considered an obligation arising from and after the petition date.¹⁵⁶ Stated generally, the courts applying the "billing date" approach reason that the landlord is not entitled to priority for "stub rent" payments for periods following the petition date.¹⁵⁷ Courts favor this approach because it is a simple and clear bright line rule that leaves no ambiguity for either party.¹⁵⁸

In *Montgomery Ward*, Montgomery Ward Holding Corporation executed a lease with CenterPoint Properties Trust requiring it to pay for two obligations.¹⁵⁹ Montgomery Ward subsequently filed for bankruptcy in the middle of a month, missing payment for that month, and remained in use and occupancy of the premises.¹⁶⁰ The court followed the "billing date" approach because it reasoned § 365(d)(3) clearly intended to require parties to comply with the lease obligations.¹⁶¹ The court further argued "any reading . . . for such proration would be inconsistent with what would

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 667.

¹⁵⁵ *Id.* at 667–68. See Ira L. Herman, *Understanding Landlord's Risks in Tenant Bankruptcy*, LAW 360 (Apr. 13, 2015, 11:35 AM), <https://www.law360.com/article/s/641057/understanding-landlord-s-risks-in-tenant-bankruptcy>.

¹⁵⁶ Herman, *supra* note 155.

¹⁵⁷ See *id.*

¹⁵⁸ See *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 208 (3rd Cir. 2001) (noting in its analysis the importance of avoiding ambiguity).

¹⁵⁹ *Id.* at 207.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 209.

appear to be the fundamental tenant of the text—that is terms of the lease that determine the obligation and when it arose.”¹⁶² The holding further exemplifies the “billing date” approach, providing if the petition is filed after the rent is due, none of the rent must be timely paid to the landlord.¹⁶³ Supporters of the approach believe providing a debtor with cash on hand at the beginning of bankruptcy meets the goal of amendments to the bankruptcy code.¹⁶⁴

Recognizing potential flaws in the approach, the *Montgomery Ward* court offered the opportunity for strategic behavior by debtor-tenants seeking to preserve liquidity.¹⁶⁵ In response, the court possibly shifted the blame onto Congress, stating “[m]oreover, strategic behavior even in the area of tax reimbursement can be constrained by forethought and careful drafting.”¹⁶⁶ The *Montgomery Ward* court went further by providing three solutions to the inconsistent outcomes of the approach.¹⁶⁷ Although only in the footnote to the case, the solutions provided evidence of the flaws of the approach but also strategies that may be used by the parties.¹⁶⁸ The first suggested solution inched toward proration by treating the rent as an obligation arising each day rather than on the billing date.¹⁶⁹ This solution provided that the entire month’s rent would be due each day, so a debtor-tenant would have to pay the entire month’s rent because it would arise every day after the petition date.¹⁷⁰ The second solution called for landlords to use grace periods so that rent became due at the end of the period.¹⁷¹ Grace periods would continue the problems of the billing-date approach by allowing strategic filings.¹⁷² Finally, the court

¹⁶² *Id.*

¹⁶³ See generally *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 210-11 (3rd Cir. 2001).

¹⁶⁴ See Herman, *supra* note 155.

¹⁶⁵ See *In re Montgomery Ward*, 268 F.3d 205, at 212 (discussing potential strategies of both debtor-tenants and landlords).

¹⁶⁶ *Id.*

¹⁶⁷ Robert L. Lehane, Gilbert R. Saydah Jr & Heather E. Allen, *Stub Rent and the Way Around Montgomery Ward*, AM.BANKR. INST. J., file:///C:/Users/Hugh%20Jass/Downloads/Stub-Rent-and-the-Way-Around-Montgomery-Ward%20(3).pdf (last visited Feb 19, 2021).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Lehane, Saydah, & Allen, *supra* note 167.

suggested that the lease can create obligations upon an event of default.¹⁷³ This solution would require the debtor-tenant to pay the entire rent plus a penalty.¹⁷⁴ The solutions are merely dicta, but it adds several new arguments to the already split code.¹⁷⁵

Critics of the billing date approach point out several flaws that parties can take advantage of.¹⁷⁶ Some critics note the billing-date approach contradicts the goal of § 365(d)(3), which was to relieve the burden from landlords of filing administrative expense claims and grant them immediate payment or post-petition obligations.¹⁷⁷ Other critics note the debtor-tenant can manipulate the code by not filing until after the rent is due, intentionally making the rent for the month pre-petition, thereby preventing the landlord from timely being paid under post-petition rules.¹⁷⁸ Stated differently, “because debtors control when they file the petition, they can consistently treat landlords worse than any other post-petition creditor by creating unsecured pre-petition claims to their own benefit.”¹⁷⁹ Similarly, landlords can also influence the approach by manipulating when the bills are due so they can receive immediate payment of stub rent.¹⁸⁰ Furthermore, landlords’ control of the rent price and priority of payment runs counter to the fundamental principle of bankruptcy of treating all similarly situated customers equally.¹⁸¹

Landlords may not be at a complete loss if debtor-tenants limit their recovery under the billing-date approach.¹⁸² Section 503(b)(1) allows administrative claims for “the actual, necessary costs and expenses of preserving the estate.”¹⁸³ As previously stated, § 503(b)(1) claims are not entitled to administrative priority like § 365(d)(3) claims because of its order that claims be paid “timely.”¹⁸⁴ Although the claim for payment may only be given a general unsecured claim, it does provide another avenue

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *See generally* Spencer Jr., *supra* note 42.

¹⁷⁷ *See generally* Lehane, Saydah & Allen, *supra* note 167.

¹⁷⁸ *See generally* Stulman, *supra* note 10.

¹⁷⁹ *Id.* at 669.

¹⁸⁰ *Id.* at 668.

¹⁸¹ *Id.*

¹⁸² *See* Stickles & Reilley, *supra* note 4, at 22–23.

¹⁸³ 11 U.S.C. § 503(b)(1).

¹⁸⁴ *See* 11 U.S.C. § 365(d)(3).

for landlords to collect.¹⁸⁵ Where landlords are trying to collect as much as they can to pay their obligations, any amount is beneficial if no claim is entitled administrative priority. The court in *In re Goody's Family Clothing Inc.*, ruled that § 365(d)(3) carved out requirements from § 503, but did not preclude recovery of § 503 claims when landlords may also recover from § 365(d)(3) claims.¹⁸⁶ The *Goody* case consisted of the typical scenario of debtor-tenants remaining in use of the premises while trying not to pay out stub rent owed to landlords.¹⁸⁷ Although the debtor-tenants argued that the billing-date approach ruled out § 503(b)(1) claims, the court noted the legislative intent was to include them.¹⁸⁸ The *Goody* court also noted the statutory language of “notwithstanding” meant both claims could be charged at the same time.¹⁸⁹ The court further stated that “[r]elieving a landlord under [§] 365(d)(3) of burdensome administrative procedures, however, does not foreclose that landlord’s ability to use the more burdensome procedures to recover outside the scope of [§] 365(d)(3).”¹⁹⁰ The court’s decision echoes congressional intent of providing landlords adequate compensation by giving them the ability to timely collect.¹⁹¹ The court followed the language of the statute and legislative goals to provide landlords with a means of being paid the rent they are owed.¹⁹²

B. *The Proration Approach*

The proration approach, adopted by the Seventh and Tenth Circuits, treats rent as having accrued each day; in other words, the stub rent is prorated from petition date through the end of the month.¹⁹³ Therefore, the debtor-tenant owes the landlord rent for the number of days in the month that followed the petition date.¹⁹⁴ For example, if the petition date is on the eleventh of February, the debtor-tenant is required to timely pay the landlord seventeen days-worth of rent as an administrative

¹⁸⁵ See Stickles & Reilley, *supra* note 4, at 22–23.

¹⁸⁶ See Stickles & Reilley, *supra* note 4, at 23 (discussing *In re Goody's Family Clothing, Inc.*, 401 B.R. 656 (D. Del. 2009)).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *In re Goody's Family Clothing Inc.*, 610 F.3d 812, 817 (3d Cir. 2010).

¹⁹¹ *Id.* See Stulman, *supra* note 10, at 659–60.

¹⁹² Stickles & Reilley, *supra* note 4, at 22.

¹⁹³ Stulman, *supra* note 10, at 670.

¹⁹⁴ *Id.* at 670–71.

priority.¹⁹⁵ The rent for the remaining pre-petition days are classified as unsecured claims and may or may not be paid at the end of the case.¹⁹⁶ Debtor-tenants filing for bankruptcy in accrual jurisdictions often follow the advantageous strategy of waiting as long as they can after the missed payment to file their bankruptcy petitions.¹⁹⁷ If a debtor-tenant petitions for bankruptcy, they will lose the property without the protection of automatic stay.¹⁹⁸ The strategy is advantageous for the debtor-tenant because the longer they wait to file, the fewer days will follow the petition date in the first month of bankruptcy.¹⁹⁹ The strategy is advantageous for the debtor-tenant because the longer they do not file, the less days will follow the petition date in the first month of bankruptcy, therefore, lessening the number of days that are prorated and entitled to administrative priority.²⁰⁰ Delaying the immediate charges provides the debtor-tenant with more liquidity.²⁰¹ Although debtor-tenants can try to game the proration approach, landlords typically favor the proration approach over the billing-date approach.²⁰² Proration approach proponents contend their method achieves the most fair and uniform results because it “produce[s] consistent results by affording both commercial landlords and tenants the opportunity to get what they bargained for under the pre-petition lease—use and occupancy for a mutually agreed upon rate.”²⁰³

Advocates for proration also point out the approach prevents one party from obtaining a windfall by determining what the lease obligations would be per day, regardless of the day the rent is due.²⁰⁴ Windfalls are possible under the billing-date approach because automatic stay prevents the landlord from removing or restricting the use of the property, so tenants benefit from operating at the expense of the landlord.²⁰⁵ Debtors control the petition date and what they do with the property, which allows them to opt for a windfall at the landlord’s expense. In addition, critics argue landlords are also able to obtain windfalls because they set the date that

¹⁹⁵ See Spencer Jr., *supra* note 42, at 930–31.

¹⁹⁶ *Id.* at 951.

¹⁹⁷ Herman, *supra* note 155.

¹⁹⁸ *Id.*

¹⁹⁹ Spencer Jr., *supra* note 41, at 949–50.

²⁰⁰ Vron, *supra* note 108.

²⁰¹ *See id.*

²⁰² Spencer Jr., *supra* note 42, at 960.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 956.

rent is due, and less strategic tenants will file on the billing date, giving landlords full administrative priority.²⁰⁶

The Sixth Circuit disagrees with the landlord windfall analysis purported by proration courts. In *In re Koenig Sporting Goods, Inc.*, the court stated the billing-date approach did not provide windfalls because only the debtor can control what the landlord is entitled to because they decide when they file their petition.²⁰⁷ The *Koenig* case presents the classic fact pattern of the debtor filing for bankruptcy after rent was due.²⁰⁸ Here, Koenig Sporting Goods entered into a ten-year lease where they were required to pay rent on the first of the month.²⁰⁹ On the eighteenth of the month, Koenig filed for bankruptcy, requiring the court to decide how much was owed to the landlord.²¹⁰ The court noted that the purpose of § 365(d)(3) was to prevent parties from being left in doubt.²¹¹ However, the court says nothing regarding how the debtor control works towards debtor windfalls.²¹² Additionally, the proration approach avoids the “absurd scenario in which strategic forum selection and timing can result in” mass savings by the debtor-tenant.²¹³ The proration approach also fulfills the goal of § 365(d)(3) of protecting landlords because it does not force them to be involuntary creditors, which removes any priority they have for recouping lease obligations.²¹⁴

C. Real Estate Taxes

Real estate taxes, along with stub rent, can be considered pre-petition or post-petition depending upon the jurisdiction.²¹⁵ In proration courts, real estate taxes are considered to be post-petition obligations which landlords can collect from debtor-tenants.²¹⁶ The taxes are collectible as they accrue post-petition but pre-rejection, regardless of their

²⁰⁶ *Id.* at 961.

²⁰⁷ *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 989–90 (6th Cir. 2000).

²⁰⁸ *Id.* at 987.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 987–88.

²¹¹ *Id.* at 989.

²¹² *Id.*

²¹³ Spencer Jr, *supra* note 42, at 961 (internal quotation marks ommitted).
See also Stulman, *supra* note 10, at 672.

²¹⁴ Stulman, *supra* note 10, at 671–73.

²¹⁵ Newman et al., *supra* note 115, at 3.

²¹⁶ *Id.*

billing date.²¹⁷ The billing-date approach considers the “actual date” specified in the lease (not the billing date).²¹⁸ However, in the case where the tenant is obligated to reimburse the landlords real estate taxes paid to the city, the due date for the reimbursement will specify whether the tax is a post-petition obligation.²¹⁹ Parties who plan ahead for this rule can set themselves up for a better chance at either receiving timely post-petition obligations as a landlord or paying only at the end as the debtor-tenant.²²⁰ The water is murky where the tenant directly pays the real estate taxes to the city, in which case, the terms of the lease and tax invoice are considered to determine whether the charge is a post-petition obligation of the debtor-tenant.²²¹ In *In re Handy Andy Home Improvement Centers Inc.*, the court addressed whether a debtor-tenant must “reimburse [the] landlord in full for pre-petition real estate taxes that were billed to the debtor[-tenant]” post-petition.²²² The court’s reasoning hung on the congressional intent to prevent landlords from becoming involuntary creditors.²²³ The court also contended that the Bankruptcy Code is meant to give landlords priority over general unsecured creditors because debtor-tenants are provided “goods and services on an unsecured basis” after the petition date.²²⁴ Furthermore, the court noted possible strategic advantages that it hoped to quell, noting a different judgment would allow a landlord to delay the reimbursement bill when bankruptcy is imminent to prove they have priority.²²⁵ Some courts often prorated taxes according to the period which they were due.²²⁶

²¹⁷ *Id.*

²¹⁸ *Id.* Jurisdictions following billing-date approach are sometimes considered “performance date.” *Id.*

²¹⁹ *Id.* at 3–4.

²²⁰ *Seventh Circuit Holds that Pre-Petition Taxes Billed Post-Petition Are Not Entitled to Priority Payment*, AM. BANKR. INST. J. (Nov. 1, 1998), <https://www.abi.org/abi-journal/seventh-circuit-holds-that-pre-petition-taxes-billed-post-petition-are-not-entitled-to>.

²²¹ Newman et al., *supra* note 115, at 3–4.

²²² *Id.* (discussing *In re Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125 (7th Cir. 1998))

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Herman, *supra* note 155.

D. *Cure*

Although dealt with in a previous part of the Bankruptcy Code, cure affects the pre- and post-petition obligations of a debtor-tenant, so they must be considered.²²⁷ Landlords and tenants must be weary of cure because it is the debtor-tenant's obligation to cure defaults in the lease; the amounts due that are not payable under the billing-date approach or proration approach are due in the cure amount.²²⁸ It is important for a landlord to "preserve the right to collect what may come due in the future, such as reconciliations of previously billed charges . . . and to seek indemnification from the debtor as set forth in the lease."²²⁹ The cure amount can be pennies on the dollar if most of the obligations were considered pre-petition.²³⁰ Cure is provided with all other creditors, so it is important for landlords to try and get as much of their charges categorized as post-petition as possible.²³¹

E. *Pre- and Post-Petition with Assumption and Rejection*

Bankruptcy Code § 365(d)(3) requires landlords and tenants to carefully plan their moves beyond pre-petition and post-petition costs.²³² The Code states, "[t]he trustee shall timely perform all the obligations of the debtor . . . arising from and after the [petition date] under any unexpired lease of nonresidential real property, until such lease is assumed or rejected."²³³ At first glance, the Code generally allows the debtor to assume or reject any unexpired lease, but it gets more complicated.²³⁴ Generally, if a debtor-tenant rejects the lease, the landlord may request a rejection damage claim.²³⁵ Furthermore, if the debtor-tenant is in default

²²⁷ Newman et al., *supra* note 115, at 4.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See Spencer Jr., *supra* note 42, at 932.

²³¹ *Id.* at 931.

²³² See generally 11 U.S.C. § 365(d)(3).

²³³ 11 U.S.C. § 365(d)(3).

²³⁴ See John D. Ayer, Michael L. Bernstein, & Johnathon Friedland, *Bankruptcy Issues for Landlords and Tenants*, AM. BANKR. INST. J. 1 (Oct. 2004), https://www.kirkland.com/siteFiles/kirkexp/publications/2381/Document1/Friedland_Bankruptcy%20Issues%20for%20Landlords.pdf (noting, "[t]he problem debtors often face is that they don't know what decision will maximize value until well into the chapter 11 case, and yet the deadline to assume or reject comes early in the case.>").

²³⁵ *Id.*

at the time of petition, the debtor must reject unless they can prove they can cure the default.²³⁶ Trouble comes when defining if the agreement between the landlord and debtor tenant is a lease.²³⁷ Courts apply a form-over-title approach and decide if an agreement is a lease by how it operates and not by what it is called.²³⁸ The lease must also be unexpired or the bankruptcy court cannot enforce any judgement upon it.²³⁹

Pre- and post-petition costs factors in when a debtor-tenant assumes or rejects an unexpired lease.²⁴⁰ If the debtor-tenant assumes the lease, they may remain in possession of the property, but the lease is then characterized as a post-petition obligation which the landlord has a priority claim in.²⁴¹ However, if the debtor tenant rejects the unexpired lease, the landlord has no claim, and the debtor tenant must give up possession.²⁴² Rejection, however, gives the landlord a rejection damage claim which is a pre-petition unsecured claim that is put together with other unsecured creditors.²⁴³ The landlord's recoverable amount is limited, unlike the other creditors, to one year's rent, but they are not entitled to it automatically.²⁴⁴ However, the limit only applies to future rent, while unpaid post-petition rent is an administrative priority.²⁴⁵ While the rejection or assumption matter is pending with the court, the landlord must also comply with its obligations under the lease or risk breaching automatic stay.²⁴⁶

The rejection analysis does not end there. Some courts apply retroactive rejection, allowing the tenant to shorten the period during which post-petition charges may accrue.²⁴⁷ Retroactive rejection is another

²³⁶ *Id.*

²³⁷ *See id.* (discussing how courts interpret lease agreements and noting, “[l]ook out for those agreements denominated as leases that are subject to ‘recharacterization’ as something else—perhaps a sale of the property dressed up as a lease, or a secured lending transaction. Bankruptcy courts are not bound to treat a transaction as a ‘lease’ just because it says it is one.”).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 2.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Herman, *supra* note 155.

way tenants can prey on landlords who do not take proper due diligence.²⁴⁸ A debtor-tenant may request the bankruptcy court to authorize them to reject the lease at an earlier date than previously rejected or assumed.²⁴⁹ This strategic move allows debtor-tenants to lessen their post-petition damages after-the-fact by reducing the amount of post-petition days.²⁵⁰ Therefore, the landlord has the right to immediately collect a portion of obligations that could add up to a significant amount.²⁵¹

It is possible to erase any prior administrative priority by retroactively rejecting the lease on the petition date.²⁵² Courts, once again, are divided over retroactive rejection, the determinate factor being how they read the statute.²⁵³ The literal reading of the statute states the landlord's priority is only effective upon rejection.²⁵⁴ Some courts, like the one in *In re Worths Stores Corp.*, find retroactive rejection orders improper because they render rejection orders meaningless and prevent a party's right to be heard.²⁵⁵ Section 365(d)(3) was created, in part, to rid courts of the discretion to severely limit landlords' claims; however, granting courts the equitable power to allow retroactive rejection all but erases the statute.²⁵⁶ Retroactive rejection renders the statute meaningless because § 365(d)(3) was created with the goal of providing landlords adequate compensation for unpaid obligations that arise post-petition.²⁵⁷ Retroactive rejection can potentially erase all post-petition charges, therefore, only giving landlords the right to unsecured pre-petition claims.²⁵⁸

²⁴⁸ See *id.* ("Retroactive rejection can be an effective tool in a tenant's arsenal because, if the lease is rejected retroactive to the petition filing date, the landlord loses its right to collect rent under Section 365(d)(3).").

²⁴⁹ Kuney, *supra* note 52, at 16.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* ("[I]f the debtor makes rejection retroactive to the first day of the case, then the debtor may have effectively eliminated all post-petition rental obligations, and thus eliminated all administrative priority.").

²⁵³ *Id.* at 16–17.

²⁵⁴ See 11 U.S.C. § 365(d)(3).

²⁵⁵ Kuney, *supra* note 52, at 16 (discussing *In re Worths Stores Corp.*, 135 B.R. 112 (Bankr. E.D. Mo. 1991)).

²⁵⁶ See Herman, *supra* note 155.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

Landlords have some means of protection and should employ them to ensure the best chance of recovering rent.²⁵⁹ A landlord should require a security deposit which makes them a secured creditor, giving them a greater chance of recovery upon the tenants filing of bankruptcy.²⁶⁰ To avoid automatic stay, the landlord can require the tenant to post a letter of credit and require the bank to honor the letter, which ensures a landlord will recover.²⁶¹

F. *Strategies for Landlords*

Landlords have several significant strategies they can implement to gain the greatest chance of recovery for all obligations they are entitled to. In a billing-date approach, the landlord should attempt to classify stub rent as an administrative claim.²⁶² Further, although a debtor-tenant's tax obligations may result in a windfall for the landlord in the billing-date approach, the same is also true for the debtor-tenant.²⁶³ A landlord should limit this unpredictability of obligations by including an estimate of obligations owed to them.²⁶⁴ This strategy will not only lead to a more predictable result, but it will also lead to claims being treated in a similar manner as the accrual method.²⁶⁵ Additionally, landlords can further increase recovery by expanding what qualifies as rent received.²⁶⁶ This can be done by:

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 . . . [to] increase . . . the rejection damages cap.²⁶⁷

²⁵⁹ See Spencer Jr., *supra* note 42, at 918.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² See Fulfree, *supra* note 84, at 14.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* ("This tactic will produce in a more predictable result that is akin to how the claim would be treated in an accrual jurisdiction.").

²⁶⁶ *Id.*

²⁶⁷ *Id.*

Prior to bankruptcy, a landlord should attempt to reach an agreement that will provide terms favorable to them upon a bankruptcy.²⁶⁸ The billing-date approach allows for a degree of gamesmanship among the parties, and landlords should use it to their advantage if the legislature or courts will not settle the circuit split.²⁶⁹

Landlords under the billing-date approach may also seek rent that is payable as an administrative expense under § 503(b)(1).²⁷⁰ A landlord must motion to obtain payment and also demonstrate that the stub rent they are motioning for provided the debtor-tenant an actual benefit.²⁷¹ Landlords must look to *Goody*, where the court reasoned the burden was satisfied because the debtor tenant was conducting sales on the property.²⁷² The standards for conferring a benefit are not always clear, and occupancy does not always create an actual expense that benefits the debtor tenant.²⁷³ Landlords can meet the burden of proof, but they are not guaranteed the full amount requested.²⁷⁴ The *Goody* court also reasoned: “[w]hen a debtor occupies post-petition non-residential space it leases, that § 365(d)(3) provides when the rent obligation arises does not erase when lessors may make § 503(b)(1) claims for the value conferred post-petition by the occupancy.”²⁷⁵

G. *Strategies for Debtor-Tenants*

Debtor-tenants, like landlords, have some significant advantages in the billing-date approach that can help them retain cash during the bankruptcy case.²⁷⁶ In certain cases, a debtor should not assume the lease because § 365 requires the debtor to “cure, compensate, and provide adequate assurance of performance for any loss resulting for the initial

²⁶⁸ See generally Spencer, Jr., *supra* note 42, at 935–36.

²⁶⁹ See *id.* at 936.

²⁷⁰ See Barbra R. Parlin, *Goody Goody: Third Circuit Affirms Stub Rent Can Be an Administrative Expense Claim*, HOLLAND & KNIGHT (Oct. 26, 2010), <https://www.hklaw.com/en/insights/publications/2010/10/goody-igoodyi-third-circuit-affirms-stub-rent-can>.

²⁷¹ *Id.*

²⁷² *Id.* (discussing *In re Goody’s Family Clothing, Inc.*, 392 B.R. 604 (Bankr. D. Del. 2008)).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *In re Goody’s Family Clothing Inc.*, 610 F.3d 812, 818 (3d Cir. 2010).

²⁷⁶ Spencer Jr., *supra* note 42, at 917.

default.²⁷⁷ To assume the lease, the debtor-tenant is required to pay all pre- and post-petition rents that are due.²⁷⁸ The debtor-tenant should also strategically time when they file for bankruptcy. Although the business may be under attack by creditors, the longer the debtor-tenant holds out in a billing-date jurisdiction, the less immediate payments they will have to make to the landlord.²⁷⁹ Debtor-tenants should also request to retroactively reject the lease at the end of the case.²⁸⁰ Retroactive rejection allows the debtor-tenant to pay as if they rejected the lease much earlier, allowing them to pay much less immediately as a post-petition obligation.²⁸¹

IV. THE WAY FORWARD

A. *The Proration Approach Meets Current and Future Needs*

The Bankruptcy Code should uniformly adopt the proration approach moving forward. The current mass of bankruptcies occurring over short periods will cause an abnormal rise in bankruptcy court litigation which furthers the need for a faster system.²⁸² The goal of balancing the interests of both parties is especially necessary because both landlords and tenants need capital to survive.²⁸³ Many landlords likely have obligations to developers and lenders, while tenants have obligations to landlords for the continued occupancy of the property.²⁸⁴ Although moratoriums have been set in place, and even extended, the bill will eventually become due, and many businesses will not be in a position to pay because many have suffered a sharp drop in business.²⁸⁵ An expeditious bankruptcy process is especially needed now, but it was also the congressional intent in adopting § 365(d)(3).²⁸⁶ The statute included the word “timely” so landlords would be paid quickly, rather than at the end of the case along with the general unsecured creditors.²⁸⁷ Congress enacted § 365(d)(3) in light of § 503(b)(1) because § 503(b)(1) was a

²⁷⁷ *Id.* at 932.

²⁷⁸ *See supra* Section IV.

²⁷⁹ *See* Kuney, *supra* note 52, at 16.

²⁸⁰ *Id.* at 16

²⁸¹ Herman, *supra* note 155.

²⁸² *See* Kapner & Nasseur, *supra* note 34.

²⁸³ *See* Fung, *supra* note 39.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *See* Spencer Jr., *supra* note 42, at 947–48.

²⁸⁷ *See* 11 U.S.C. § 365(d)(3).

cumbersome and time-consuming process.²⁸⁸ Under § 365(d)(3), proving something was “actual and necessary” is no longer needed for landlords to get paid for the same charge.²⁸⁹ It is clear the legislature was trying to speed up the process for a bankruptcy case, but the billing date approach and retroactive rejection frustrate the process.²⁹⁰ Both the landlord and tenant can manipulate the necessity to pay post-petition claims, increasing the amount of litigation from the losing side.²⁹¹

The billing-date approach also frustrates the policy of the bankruptcy process and the other congressional reasons for the implementation of the statute.²⁹² First, the policy of leveling the interests between debtors and landlords is severely hurt by the billing-date approach.²⁹³ This is because the intent behind the statute was to provide adequate compensation for landlords when tenants were not paying rent and their claims were only general unsecured claims that were not entitled to immediate compensation.²⁹⁴ Additionally, manipulative filing practices, like strategically filing on a date that limits payment to landlords, is also opposite of Congress’s intent.²⁹⁵

The proration approach is the best path forward because of the current uptick in bankruptcies and for the future when the market recovers.²⁹⁶ The record number of bankruptcies will cause a lot more of bankruptcy litigation.²⁹⁷ Courts need to uphold the tenets of the Code, but also reach their goal of administrative efficiency so businesses and landlords can continue to operate. The proration approach best accomplishes that need because it provides landlords with at least some of the payment owed to them and gives them the possibility of later

²⁸⁸ See discussion *supra* Section IV.B (discussing the reasons for implementing §365(d)(3)).

²⁸⁹ Jones Day, *supra* note 70.

²⁹⁰ Kuney, *supra* note 52, at 16.

²⁹¹ See Spencer Jr., *supra* note 41 at 973.

²⁹² See discussion *supra* Section IV.A (discussing the billing-date approach generally).

²⁹³ See discussion *supra* Section IV.A (discussing the billing-date approach generally).

²⁹⁴ See Herman, *supra* note 155.

²⁹⁵ See Spencer Jr., *supra* note 42, at 946. See also discussion *supra* Section III.C.

²⁹⁶ See discussion *supra* Section III (discussing the potential impact of COVID-19 on bankruptcies).

²⁹⁷ Repko & Thomas, *supra* note 1.

recovering the rest.²⁹⁸ The approach also balances the interests of the parties because it does not completely help the creditor or debtor.²⁹⁹ The debtor will only have to provide some of the rent immediately, but retain the rest to help them reorganize.³⁰⁰ The approach also prevents one party from taking advantage of the other.³⁰¹ Debtor tenants cannot as easily file on a certain date that prevents them from having to pay landlords solely because the due date in the lease allowed them to.³⁰² Landlords who have lenders asking for money may not survive if that were the case. The future is never predictable, but with the current approaches used, many businesses may have an extended period in litigation and therefore have a hard time paying the required debts, hurting the chances businesses have at survival.

V. CONCLUSION

The current state of the commercial real estate market is volatile and unpredictable because of the market stress created by COVID-19.³⁰³ While some sectors are thriving because consumers need new technology to work and live at home, others, like retail stores, are suffering because many were closed for a long period of time.³⁰⁴ Malls have been the most impacted, and small shopping centers continue to lose customers.³⁰⁵ Lenders are beginning to crack down on mall landlords, so landlords need as much capital as they can get to stay afloat.³⁰⁶

²⁹⁸ See discussion *supra* Section IV.B (discussing the proration approach).

²⁹⁹ See discussion *supra* Section IV.B (discussing the proration approach).

³⁰⁰ Stulman, *supra* note 10. See discussion *supra* Section IV.B (discussing the proration approach).

³⁰¹ Spencer Jr. *supra*, note 42, at 960. See discussion *supra* Section IV.B (discussing the proration approach).

³⁰² Stulman, *supra* note 10. See discussion *supra* Section IV.B (discussing the proration approach).

³⁰³ See discussion *supra* Section III.A (discussing the impact of COVID-19).

³⁰⁴ See discussion *supra* Section III.A (discussing the impact of COVID-19).

³⁰⁵ See discussion *supra* Section III.A (discussing the impact of COVID-19).

³⁰⁶ See Fung, *supra* note 33.

The Bankruptcy Code was designed to balance the interests of creditors and lenders. The Code seeks to provide fairness, transparency, and administrative efficiency to both parties as a way of expediting judicious results.³⁰⁷ Section 365(d)(3) was designed to rectify wrongs being committed against landlords by providing them adequate capital.³⁰⁸ Before § 365(d)(3), landlords had to go through a cumbersome and time-consuming process that often made their claims for unpaid obligations owed to them analogous to general unsecured creditors.³⁰⁹ This often meant they were getting pennies on the dollar for lease obligations both parties contracted into.³¹⁰ Section 365(d)(3) gave landlords timely compensation by giving some of their claim's administrative priority.³¹¹ For administrative priority, the charge had to arise from or after the petition date; the petition date being the date the debtor-tenant files for bankruptcy.³¹²

Circuits were—and are—split on what they classify as “arising from and after” the petition date.³¹³ Some courts apply the billing-date approach which uses the rent due date on the lease to determine the post-petition obligations.³¹⁴ Billing-date courts found that if the obligation was due on the first of the month, but the tenant filed later, none of the rent for that month was granted administrative priority as a post-petition charge.³¹⁵ Critics rightly point out that the approach is subject to manipulative filing practices by both parties which runs counter to the purposes of the bankruptcy code and congressional intent in enacting § 365(d)(3).³¹⁶

Courts applying the proration approach treat rent as accruing each day, prorating regardless of when the obligation is due.³¹⁷ The amount of days leading up to the petition date were granted administrative priority,

³⁰⁷ See discussion *supra* Section III.B. (discussing the Bankruptcy Code generally).

³⁰⁸ See discussion *supra* Section III.C (discussing § 365(d)(3)).

³⁰⁹ See discussion *supra* Section III.C (discussing § 365(d)(3)).

³¹⁰ See discussion *supra* Section III.C (discussing § 365(d)(3)).

³¹¹ See discussion *supra* Section III.C (discussing § 365(d)(3)).

³¹² See discussion *supra* Section III.C (discussing § 365(d)(3)).

³¹³ See discussion *supra* Section III.C (discussing § 365(d)(3)).

³¹⁴ See discussion *supra* Part IV.A (discussing the billing-date approach).

³¹⁵ See discussion *supra* Part IV.A (discussing the billing-date approach).

³¹⁶ See discussion *supra* Section III.C (discussing § 365(d)(3)).

³¹⁷ See discussion *supra* Section IV.B (discussing the proration approach).

while the rest of days were given the status.³¹⁸ Proponents justly argued the proration approach led to more equitable results because it avoided windfalls, absurd results, and prevented manipulative filing practices.³¹⁹ Therefore, the proration approach better adapted to the goals of the bankruptcy code and congressional intent.

The obligations of stub-rent, real estate taxes, cure, and retroactive rejection all must be taken into consideration when determining the best way forward. They all have unique characteristics that affect what the landlord can collect from a debtor tenant. Landlords and debtor-tenants are both in need of capital in the current real estate market. The courts can best balance the interests of both with the proration approach.

³¹⁸ See discussion *supra* Section IV.B (discussing the proration approach).

³¹⁹ See discussion *supra* Section IV.B (discussing the proration approach).

