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Reexamining the Protections Afforded to Solvent Shopping Center Tenants Under §365 in Light of *In re Trak Auto Corp.*

Part II

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Section 365 of the U.S. Bankruptcy Code² permits a trustee or debtor-in-possession (DIP) to assume and assign the debtor's interest in an unexpired lease. This statutory right is one of the foundational underpinnings of the Code, without which many (if not most) successful reorganizations would be impossible. Its availability is also a principal motivation for a troubled debtor to seek bankruptcy protection. Consistent with this premise, §365(f)(1) invalidates any provision of an unexpired lease or executory contract that purports to condition the right to assign such lease or executory contract upon the consent of the landlord or counterparty.³

This statutory right to assign is not unconditional, however. This is particularly true in the case of shopping center leases, as

Congress has determined that shopping center landlords and non-debtor tenants are entitled to special protections. As discussed in Part I of this article, a recent decision by the Fourth Circuit Court of Appeals, *In re Trak Auto Corp.*,⁴ gave new support to the rights of shopping center landlords under §365(b) of the Code to enforce restrictive use clauses, which will enhance the protections given to existing tenant mix and balance in their centers.⁵



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The *Trak Auto* decision was grounded in the text of §365(b)(3) and the legislative history of the Bankruptcy Reform Act of 1984 (the "1984 Amendments"). While the Fourth Circuit did not base its decision on §365(b)(3)(D) of the Code, the court's holding, and the legislative history on which that holding was based, provides new support for the statutory rights of landlords and their non-debtor tenants to preserve tenant mix and balance as conditions upon a debtor's rights to assign its leasehold interests in bankruptcy.

For a debtor to assign its interest in a shopping center lease, both lease provisions such as restrictive use clauses and tenant mix and balance within the center must be respected. Congress intended §§365(b)(3)(C) and 365(b)(3)(D) as separate and distinct requirements for assignment, designed to protect shopping

³ §365(f)(1) provides, in pertinent part, that—

Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection...

⁴ 367 F.3d 237 (4th Cir. 2004).

⁵ §365(b)(3) provides in part:

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

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement or master agreement relating to such shopping center; and

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

center landlords and non-debtor tenants alike.

What "Tenant Mix" Means

While the term "tenant mix" is not defined in the Code, courts have used the term to describe a unique combination of stores in a shopping center and the extent to which that combination reflects sufficient balance and diversity to ensure that customers will be drawn by the opportunity to satisfy all of their shopping needs within the center:

[T]he modern shopping center with its basic plan of a grouping of basically non-competitive and diversified, but interrelated, businesses designed not to serve just one need but as many needs of the consumer as is feasible within the economic framework of the shopping center.⁶



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In creating the ideal "tenant mix," competition between the stores must be carefully monitored. Allowing direct competition between businesses within a shopping center is disruptive of tenant mix where comparison shopping is not a factor.⁷ This is most clearly the case with regard to commodity products and general merchandise such as office supplies. Courts have reasoned, for example, that the presence of two stores selling general merchandise at close-out within a shopping center would divide business between stores and limit the potential tenants who would lease space at the center, because there would be fewer categories of businesses to attract customers.⁸ Similarly, the presence of two stores selling records and tapes within a single shopping center would upset tenant mix as well as breach the debtor's lease.⁹

⁶ *Almacs Inc. v. Drogin*, 771 F. Supp. 506, 507 (D. R.I. 1991) (internal quotation omitted); see, also, Goldberg, Richard, "Developments in Leasing and Tenant Mix from the Lawyer's Perspective," C410 ALI-ABA 509, 514 (1989) ("The purpose of tenant mix is to provide a complete diversity of goods and services so that shoppers may come to the shopping center and accomplish all of their consumer needs.")

⁷ See *In re TSW Stores of Nanuet Inc.*, 34 B.R. 299, 303 (Bankr. S.D.N.Y. 1983); *Brookings Mall Inc. v. Captain Ahab's Ltd.*, 300 N.W.2d 259, 263 (S.D. 1980).

⁸ See *TSW Stores*, 34 B.R. at 303.

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² 1 U.S.C. §101, et seq.

One court referred to legislative history to illustrate the rights and business expectations that are at play when a shopping center landlord and non-debtor tenants are about to be “saddled with an unattractive tenant” by the bankruptcy process:

In a real sense, a shopping center is akin to a small town...you put down business roots in a town if you believe you will fit in, you believe the town will provide security and other necessary services, you believe the town will flourish—and your business with it. If the major businesses or other institutions that draw people to town shut their doors, the town will die. If the town’s financial base shrinks, the security and other communal services will shrink, and with it the desirability of the town as a place to visit. If the neighbors with whom you are comfortable leave town, you will soon begin to look elsewhere.

Tenants locate in shopping centers based on the complementary ability of the various stores in the shopping center to draw customers.... When Saks Fifth Avenue moves out as an anchor store and John’s Bargain moves in, the small independent fashion boutiques die. When the future of the center is in doubt, a businessman-tenant does not know how to order for the next season.

The matter becomes far more crucial when the chapter 11 debtor is an “anchor store”.... Those anchor stores have been looked to as primary draws of clientele to the entire shopping center. The smaller tenants in the shopping center had generally determined to locate in that center based upon the nature of the anchor store.... A shoe store or fashion boutique depends upon the advertising and continued operation of the Saks or Marshall Fields department store (or some prompt substitute) for its continued viability.

Consider a shopping center, such as the Water Tower Shopping Center

in Chicago, that has [a] Marshall Fields Department Store and a Lord & Taylor Department Store as anchors. The “high-end” character of that shopping center is established by those stores, attractive to smaller boutiques, relatively expensive men’s clothing stores, fashion shoe stores and similar uses. Depending on the character of the anchor stores, the other tenants have entered into long-term leases. Consider what happens if one or both of those anchor stores filed chapter 11 proceedings and the leases are assigned to John’s Bargain Basement and J.C. Penney or Sears. This is not to suggest that the latter are not fine department store tenants. It is to make clear that they are department stores with a dramatically different appeal than Lord & Taylor or Marshall Fields [that could be potentially very damaging [to] the shopping center].”¹⁰

Simply put, the Code does not allow for the disruption of the existing tenant mix and balance in a shopping center or the violation of tenant exclusives that would follow a proposed lease assignment.

The Plain Language of §365(b)(3)(D) of the Code Should Be Given Effect

It has been argued that if a proposed assignment neither violates applicable provisions of the lease to be assigned, nor the provisions of other agreements related to the shopping center, the landlord and non-debtor tenants have no ability to prevent assignment of the lease under §365(b)(3)(D).¹¹ Proponents of this view contend that if non-debtor tenants whose leases do not contain exclusive right or use provisions were allowed to object to a prospective assignment on the basis of its possible effects on tenant mix and balance, such tenants would effectively have more rights in bankruptcy than they had prior to the commencement of the case, under applicable non-bankruptcy law.

On review, such an argument is evidently flawed. Requiring that a non-debtor tenant offer evidence of a lease containing exclusive right or use provisions, thereby invoking

§365(b)(3)(C), in order to avail itself of the protections afforded to tenant mix or balance under §365(b)(3)(D), improperly collapses the two subsections. Such an interpretation is contrary to the settled rule that a statute must, if possible, be construed in such fashion that no part of the statute is superfluous and every word has some operative effect.¹² As a matter of statutory construction, it makes no sense to apply §365(b)(3)(D), which requires that assumption or assignment of a lease will not disrupt any tenant mix or balance in the shopping center *only* when a landlord or non-debtor tenant can point to exclusive rights or use provisions contained in a lease, when §365(b)(3)(C) separately requires adequate assurance of future performance of use and exclusivity provisions contained in the debtor’s lease and “in any other lease.” Such a reading would render §365(b)(3)(D) wholly superfluous.

Depriving §365(b)(3)(D) of any independent operative effect is also inconsistent with certain prior case law imbuing the concept of “tenant mix” with meaning distinct from any exclusive rights or use restrictions formalized in a lease. Thus, in *In re Rickel Home Centers Inc.*, discussed in Part I of this article for a different proposition, the court effectively conducted a two-step analysis of a landlord’s objection to a proposed lease assignment.¹³ There, one of the affected landlords had argued that a proposed assignment violated tenant mix because it would cause the affected premises to remain dark for approximately six months. After first finding that the debtor’s lease contained no “going dark” provisions, the court then considered—as a distinct step in the analysis—whether that six-month period would otherwise adversely affect tenant mix or balance in the shopping center. As an evidentiary matter, based on the proposed assignee’s proffer, the court concluded that it would not.¹⁴

Legislative History Demonstrates Congressional Intent that Non-debtor Tenants Have Standing Under §365(b)(3)

Remarkably little attention has been paid to date to the legislative history of §365(b)(3) as it relates to non-debtor tenants. While courts and parties often cite to a line

⁹ *Brookings Mall*, 300 N.W.2d at 263. See, also, *Warmack v. Merchants Nat’l. Bank of Fort Smith*, 612 S.W.2d 733 (Ark. 1981) (substitution of a savings and loan that already had a facility in the shopping center in question, for a drive-in bank, would harm tenant mix in the center); cf. *In re Sun TV and Appliances Inc.*, 234 B.R. 356 (Bankr. D. Del. 1999) (the presence of competing stores within a mall created an appropriate tenant mix, since there were no competing malls nearby in which customers could compare prices, and the expense of the items sold made it likely that customers would not buy without comparing prices at more than one store first). In the leading case on tenant-mix issues, the court noted that in essence the statutory term “mix” focuses on the inclusion or exclusion of a store in the array or mix of mall stores. *In re Federated Dep’t. Stores Inc.*, 135 B.R. at 943.

¹⁰ *Federated Dep’t. Stores*, 135 B.R. at 943-46, quoting *Bankruptcy Reform: Hearing Before the Subcommittee on Courts of the Senate Committee on the Judiciary on Shopping Center Tenancy Amendments*, 98th Cong., 1st Sess. 381-91 (1983) (Statement of Nathan B. Feinstein).

¹¹ Parties to a proposed transaction raised this argument in a recent case in which the authors represented a non-debtor tenant seeking to challenge the assignment of a debtor’s lease to a competitor made pursuant to a designation rights order. The bankruptcy court rejected the non-debtor’s view, and the district court affirmed with little analysis of the issue under §365(b)(3)(D). *Staples Inc. v. Montgomery Ward LLC (In re Montgomery Ward LLC)*, 307 B.R. 782 (D. Del. 2004).

¹² *United States v. Nordic Village Inc.*, 503 U.S. 30 (1992); accord, *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655, 1661 (2003); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 (1993).

¹³ See 240 B.R. 826 (D. Del. 1998), *appeal dismissed*, 209 F.3d 291 (3d Cir.), cert. denied sub nom., *L.R.S.C. v. Rickel Home Ctrs. Inc.*, 531 U.S. 873 (2000).

¹⁴ *Id.* at 834-35; see, also, *Federated Dep’t. Stores*, 135 B.R. at 945 (protecting tenant mix by statute where debtor’s own lease contains no effective exclusives or other use restrictions). In a footnote, the court noted that if the assignee’s efforts to sublet excess space that was not to be used by the assignee were unduly protracted, leaving that portion of the store to remain dark for an unreasonable period of time, “the landlord can seek the appropriate redress at that time.” *Rickel Home Ctrs.*, 240 B.R. at 835 n. 6.

or two from the House and Senate reports, there exists a rich and largely unmined store of material in the legislative history, including frequently cited testimony by shopping industry experts. This testimony was quoted extensively in the resulting committee reports in support of congressional findings that action must be taken to protect the interests of solvent non-debtor tenants as well as landlords. These concerns, which were nascent at the time of enactment of the Bankruptcy Reform Act of 1978, culminated in passage of the 1984 Amendments, which gave us §365(b)(3) in its current form. Not only does the plain language of §365(b)(3) in no way restrict its application to landlords, to the exclusion of non-debtor tenants, but the relevant legislative history strongly suggests that Congress intended that non-debtor tenants have standing pursuant to §365(b)(3).

As a threshold matter, the legislative history clearly reflects Congress' solicitous attitude towards shopping center interests generally. Thus:

A shopping center is often a carefully planned enterprise, and though it consists of numerous individual tenants, the center is planned as a single unit, often subject to a master lease or financing agreement. Under these agreements, the tenant mix in a shopping center may be as important to the lessor as the actual promised rental payments, because certain mixes will attract higher patronage of the stores in the center and, thus, a higher rental for the landlord from those stores that are subject to a percentage of gross receipts rental agreement.¹⁵

The need to protect solvent shopping center tenants from the possibly devastating ripple effects of a debtor's bankruptcy manifested itself in early discussions leading to the enactment of the 1978 Act:

[Adequate assurance] ought to be in terms of a reasonable assurance... that the assignment or assumption of a lease will not breach other clauses in other tenants' leases or in the lender's agreements, and a reasonable assurance that an assumption or an assignment of a lease *will not disturb the tenant mix* generally.¹⁶

After courts began to interpret the provisions of the 1978 Act, it became evident that the protection of non-debtor tenants must be made more explicit in light

of the fact that “[t]he interdependence among the tenants of a shopping center means that the bankruptcy of one tenant will seriously affect the other tenants....”¹⁷ The following testimony illustrated the need to protect non-debtor tenants:

Tenants locate in shopping centers based on the complementary ability of the various stores in the shopping center to draw customers.... These *multifarious symbiotic relationships* in the shopping center are in peril whenever any tenant suffers financial hardship or fails.... The continued vitality of those relationships and the businesses in the center depends on the system our bankruptcy policies create to swiftly fill vacancies and *fairly acknowledge the interest of remaining solvent tenants*.¹⁸

Wallace R. Woodbury, whose testimony was favorably cited in the report of the Senate Judiciary Committee, testified on another occasion as to the “symbiotic, interdependent nature of a shopping center” as “a delicate balance of merchants.” Woodbury noted that “the success of a shopping center, and thus all of its tenants, is based in large part on its ‘tenant mix.’” He used the example of “the assignment of a lease to a tenant in the same business as other existing tenants” as the type of thing that would constitute “the use of any tenant space for purposes other than those contemplated by the shopping center and its other tenants and provided for in a master lease or other agreement” and could thus cause a shopping center's operations to be “seriously impaired.”¹⁹

Thus, the legislative history leading to the enactment of the 1984 Amendments reveals the inadequacies of prior law and explains Congress's intent when removing the word “substantially” from the text of each of §§365(b)(3)(C) and (D). The Judiciary Committee report reflects that:

[T]hese provisions...have not functioned as originally intended by Congress. Under the Bankruptcy Code, the shopping center and *its solvent tenants* may suffer serious economic harm or even business failure if the bankrupt tenant closes its store for an extended period of time or assigns its lease to a business which does not conform to the lease's use clause thus dis-

rupting the shopping center's tenant mix.... By making effective [the provisions that Congress intended to provide shopping centers and their tenants in the 1978 Act], the bill strikes the proper *balance between the interests of the solvent tenants of a shopping center and the insolvent tenants*.²⁰

Senate leaders urged the beneficial effect of requiring that any lease clause be adhered to by deleting the word “substantially” from the statute. For example, Sen. Hatch (R-Utah) stated that “[i]t is especially important that...the tenant mix not be disrupted” and offered that passage of the 1984 Amendments would decrease the likelihood that the Code would “add to the economic distress of retail merchants in shopping centers.”²¹

§365(b)(3)(D) Raises the Inference that a Non-debtor May Be Afforded Better Treatment in Bankruptcy than It Would Receive Under Applicable Non-bankruptcy Law

As outlined in Part I of this article,²² prior to the *Trak Auto* decision, restrictive-use clauses were routinely struck as anti-assignment provisions, leaving landlords—and their non-debtor tenants—without recourse under §365(b)(3)(C). *Trak Auto's* ruling that restrictive use clauses must be honored supplies a much-needed corrective. Based on *Trak Auto*, it is clear that a non-debtor may protect its own tenant exclusives by invoking the protection of §365(b)(3)(C), relying on contractual rights embedded in its lease.

Outside bankruptcy, however, a non-debtor tenant may not have a right to object to a proposed use of the lease to be assigned, if and to the extent that the landlord did not have a right to preclude that change in use. Accordingly, such a tenant may not be able to invoke §365(b)(3)(C), which appears to be predicated on the existence of prior contract rights.

Even assuming, *arguendo*, that a non-debtor tenant would not have the right, outside bankruptcy, to prevent the proposed use of a leasehold to be assigned by a neighboring tenant, *the unambiguous language of §365(b)(3)(D) creates such a right when the neighboring tenant seeks the protection of the Code*.

²⁰ *Omnibus Bankruptcy Improvements Act of 1983, Report from the Committee of the Judiciary*, S. Rep. No. 98-65, at 33-35 (1983) (emphasis added).

²¹ 130 Cong. Record D684, S6088, S6091, 98th Cong., 2d Sess. (May 21, 1984) (Remarks by Hon. Orrin Hatch); *accord*, 130 Cong. Record S8895-96, Cong. 2d Sess. (June 29, 1984) (Remarks by Hon. Robert Dole).

²² See “Reexamining the Protections Afforded to Solvent Shopping Center Tenants Under §365 of the Bankruptcy Code in Light of *In re Trak Auto Corp.*, Part I,” which appeared in last month's *ABI Journal*.

¹⁵ H.R. Rep. No. 595, 95th Cong., 1st Sess. 348-49 (1977).

¹⁶ *Bankruptcy Reform Act of 1978: Hearings before the Subcommittee on Improvements in Judicial Machinery of the Judiciary*, Committee on the Judiciary, S. 2266, 95th Cong., 1st Sess., at 732 (1977) (Testimony of Sylvan Cohen) (emphasis added).

¹⁷ *Omnibus Bankruptcy Improvements Act of 1983, Report from the Committee on the Judiciary*, S. Rep. No. 98-65, at 33-35 (1983).

¹⁸ *Id.*, quoting hearings on S. 2297 before the Subcommittee on Courts of the Senate Judiciary Committee, 97th Cong. 2d Sess. (1982) (Testimony by Nathan B. Feinstein) (emphasis added).

¹⁹ *Bankruptcy: the Shopping Center Protection Improvement Act of 1982: Hearing before the Subcommittee on Courts of the Committee on the Judiciary of the U.S. Senate*, S. 2297, at 27-28 (1982) (Statement of Wallace R. Woodbury).

Such a notion may strike non-bankruptcy practitioners as anomalous, but it is firmly grounded in the statute and Supreme Court precedent. As a first principle, the legal, equitable and contractual rights of a party affected by a debtor's bankruptcy are determined *under the Code*.²³ Article I, §8, of the U.S. Constitution gives Congress broad latitude to effect changes in contract and property rights.²⁴ Thus, the general rule that property interests are determined as a function of state or other non-bankruptcy law does not apply when a federal interest—such as those interests embodied, *inter alia*, in the statutory language of the Code—requires a different result.²⁵

Indeed, bankruptcy law is replete with examples of situations where a party may obtain better treatment in a debtor's bankruptcy case than it would receive outside of bankruptcy.²⁶ From the beginning of a case, a party obtains access to the debtor's financial information, data that may not otherwise be made public if the debtor is an individual or non-public corporation.²⁷ Post-filing, a non-debtor party may examine the debtor at the meeting of creditors and equity-holders without the need to incur the cost of commencing a lawsuit and conducting discovery that would be required under non-bankruptcy law.²⁸ Other examples abound. While most other parties' actions against the debtor or property of the bankruptcy estate are stayed at the moment of the filing of the bankruptcy petition,²⁹ a select few are permitted to proceed with their claims or causes of action notwithstanding the bankruptcy filing.³⁰ That may afford such favored parties a relatively better position *vis-à-vis* other parties in interest that it would not have had absent the bankruptcy filing and imposition of the automatic stay.

Throughout the administration of the bankruptcy case, parties are able to avoid burdensome non-bankruptcy law requirements or standards.³¹ Parties in a debtor's bankruptcy case may also gain priority of payment to which they would

²³ *Solow v. PPI Enters. (U.S.) Inc. (In re PPI Enters. (U.S.) Inc.)*, 324 F.3d 197, 205 (3d Cir. 2003) (claim capped by §502(b)(6) is not impaired for voting purposes because creditors' rights are determined under the Code); *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 517, *reh'g denied*, 305 U.S. 668 (1938) (enumerating instances where bankruptcy modifies and affects property rights, including, *e.g.*, directing the marshalling of liens, impliedly reasoning that Congress has authority under the Constitution to place junior lienors in a relatively better position in bankruptcy than they would occupy at state law).

²⁴ See *Wright v. Union Central Life Ins. Co.*, 304 U.S. at 517.

²⁵ Cf. *Burner v. United States*, 440 U.S. 48, 55 (1979).

²⁶ *But, cf. Cincicola v. Scharffenberger*, 248 F.3d 110, 120 n.10 (3rd Cir. 2001) (citing pre-Code legislative history outside the shopping-center context).

²⁷ 11 U.S.C. §107(a).

²⁸ 11 U.S.C. §343(a) (“debtor shall appear and submit to examination under oath at the meeting of creditors under §341(a)”) (emphasis added).

²⁹ 11 U.S.C. §362(a).

³⁰ 11 U.S.C. §362(b).

not be entitled under applicable non-bankruptcy law.³²

The chapter 11 confirmation process often affords parties better treatment than they would have had under non-bankruptcy law. For instance, in certain circumstances, an unsecured deficiency claim may be converted to a fully secured claim.³³ A party who obtains a lien superior to that of another party through a chapter 11 plan may retain its priority position notwithstanding failure to perfect its interest under applicable state law.³⁴

Even reclamation creditors, whose claims may be wiped out pursuant to the Uniform Commercial Code (UCC) by the existence of an inventory lender's floating lien, have been accorded better treatment under the Code than under state law.³⁵

In summary, whether or not a solvent tenant's exclusivity provisions could be enforced outside of bankruptcy is only one part of the inquiry, and certainly not the end of the analysis. Solvent tenants negotiate leases in the shadow of the Code, including §365(b)(3)(D), which specifically mandates that there can be no assignment of a lease in bankruptcy that disrupts tenant mix or balance in a shopping center.

Conclusion

As discussed in Part I of this article, the *Trak Auto* decision has made it less likely for landlords and—by a logical extension—non-debtor tenants to be stuck with an unwanted tenant. In essence, *Trak Auto* upheld the contract rights of non-debtors in connection with a proposed assignment of a shopping center lease in a debtor's bankruptcy case. Restrictive clauses will no longer be invalidated unless they are so unreasonably restrictive as to constitute *de facto* anti-assignment clauses of the type requiring operating under a specified trade name (as suggested by legislative history cited by the *Trak Auto* court) or requiring assignment only to a non-existent candidate

³¹ See, *e.g.*, 11 U.S.C. §363(g) (sale free and clear of rights of dower or curtesy); *In re Trans World Airline Inc.*, 322 F.3d 283 (3rd Cir. 2003) (sale of assets free and clear of airline employees' successor liability claims); *Woskob v. Woskob (In re Woskob)*, 305 F.3d 177 (3rd Cir. 2002), *cert. denied*, 123 S. Ct. 1762 (2003) (state law providing for the automatic dissolution of a partnership preempted upon the filing of a bankruptcy petition by general partner); *In re Fed. Fountain Inc.*, 165 F.3d 600 (8th Cir. 1999), (*en banc*) (validity of nationwide service of process in bankruptcy).

³² See, *e.g.*, *In re Westmoreland Coal Co.*, 213 B.R. 1 (Bankr. D. Colo. 1997) (court applies bankruptcy law to determine a claim's priority and treatment in the bankruptcy process); 3 *Collier on Bankruptcy* ¶364 (“[i]f a lien authorized under [11 U.S.C. §]364(c) is one which, absent bankruptcy, must be perfected by filing or recording to be valid against or gain priority over liens or interests, such action should not be necessary as long as the bankruptcy case is extant”).

³³ 11 U.S.C. §1111(b)(2).

³⁴ See *Gen. Elec. Capital Corp. v. Dial Bus. Forms Inc. (In re Dial Bus. Forms Inc.)*, 283 B.R. 537 (BAP 8th Cir. 2002) (confirmed plan governs priority of liens notwithstanding state law requirements).

³⁵ 11 U.S.C. §546(c); see, *e.g.*, *In re Diversified Food Serv. Distrib. Inc.*, 130 B.R. 427, 430 (Bankr. S.D.N.Y. 1991) (reclaiming creditor prevented from enforcing its interest due to another creditor's superior status is entitled to administrative expense claim); *In re Roberts Hardware Co.*, 103 B.R. 396, 399 (Bankr. N.D.N.Y. 1988) (same); *but, see In re Primary Health Sys. Inc.*, 258 B.R. 111, 117 (Bankr. D. Del. 2001) (*contra*).

for a non-existent use (as suggested by *Rickel*).

In Part II of this article, we have shown that the statutory text of §365(b)(3), as well as the legislative history of §365, express a clear legislative intent to protect the interest of non-debtor tenants and shopping center landlords from the possibly devastating ripple effects of a debtor's bankruptcy. Thus, a non-debtor tenant may protect its reasonable expectations, formed at the time of joining the shopping center community or even thereafter, by objecting to a proposed assignment of a debtor-tenant to a lease to which it is not a party, even absent a basis for such an objection under applicable non-bankruptcy law. Non-debtor tenants have standing to utilize the tools specifically made available by Congress to effectuate such objections. First, §365(b)(3)(C) allows a non-debtor tenant to challenge a proposed assignment that violates restrictions or exclusivity provisions in the non-debtor's lease. Second, even if a proposed assignment does not violate any such provision, the non-debtor tenant should consider utilizing the protections of §365(b)(3)(D) specifically crafted by the legislature to ensure that tenant mix and balance in a shopping center will not be disrupted by the assignment of a debtor's leasehold interests. ■

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