

## **The Commercial Landlord / Lessor's Guide to The Bankrupt Tenant**

The commercial landlord is increasingly faced with non-paying tenants who file bankruptcy. The following is a simple outline of the procedure for getting paid and getting possession of the property.

1. The Automatic Stay. If the lease term is still running when the tenant files bankruptcy, the lease is part of the estate and all landlord actions are stayed. That means the landlord can take no action without an order from the court. To obtain "relief from stay", the landlord must show that it is not "adequately protected" or that the property is not necessary for an effective reorganization. Adequate protection can include cash payments for the use of the property, a lien on other property, or the equivalent.

2. The Trustee Decides. The bankruptcy trustee has 120 days to assume or reject the lease. If the trustee assumes the lease, the lease continues, and the trustee is then obligated under its terms. The trustee must "cure" defaults under the lease, or provide "adequate protection." Adequate protection can mean a cash deposit, pre-paid rent, a lien on other property, or anything else the judge agrees protects the landlord.

3. Rent after filing, before the Trustee Decides. During this period the trustee must timely perform all the tenant's obligations as they come due. "Timely" may take on a new meaning, however, where the estate does not have immediate cash to pay the rent, but must raise it through liquidation of assets. Nonetheless, the rent accruing during this period is a *priority administrative claim*, and is likely to get paid ahead of most other unsecured creditors.

The trustee may want to assume the lease if it is below market, and the trustee can sublet it for a profit; or, if the trustee seeks to continue the tenant's business as an ongoing concern. Otherwise, the trustee will reject the lease.

If the premises holds substantial personal property which must be liquidated, the trustee has several options. It can maintain the lease to allow liquidation; it can remove the property to another storage location for sale; or it can reject the lease and hire an auction company to either enter a short-term rental deal with the landlord pending the auction, or remove the property to its auction yard.

4. Rejection of the Lease. Once the trustee rejects the lease, it is out of the bankruptcy estate, and the landlord regains possession.

5. **Filing Your Claim.** The landlord will receive notice from the court of the deadline to file claims. The landlord's claim will consist of the pre-filing rent (a general unsecured claim), as well as rent for the period from filing until the trustee rejects the lease, a priority administrative claim under 11 U.S. Code section 507(a)(2). Secured and priority claims get paid before unsecured claims. Unsecured claims may not be paid at all.

6. **Getting Paid.** Except for petty cash transactions, it is unlikely that a landlord will get paid until the entire case is complete, and the bankruptcy judge approves the trustee's accounting.