

# Shopping for Solutions During a Pandemic: Retail Bankruptcy in the COVID-19 Era

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1

## RoadMap

- The Debtors' Duty to Timely Perform Lease Obligations
- Section 365(d)(3) Pre-COVID
- Section 365(d)(3) During COVID
- The Debtors' Duty to Timely Assume/Reject
- Pre-COVID Challenges with § 365(d)(4)
- COVID Challenges with § 365(d)(4)
- What's Next?



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## The Debtors' Duty to Timely Perform Lease Obligations

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- Prior to 1984: landlords had no explicit protection for rent payments and instead were left to assert administrative expense claims under § 503(b)(1) or obtain relief from the stay to evict
- After 1984: The trustee shall timely perform all the obligations of the debtor, except those specified in § 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding § 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

11 U.S.C. § 365(d)(3).

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## The Debtors' Duty to Timely Perform Lease Obligations

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- Often referred to as an "administrative expense," but some courts instead refer to it as a special category of payment entitled to priority over all other administrative expenses
  - See *In re Child World Inc. v. Campbell/Mass. Trust* (*In re Child World, Inc.*), 161 B.R. 571 (S.D.N.Y. 1993); *In re Duck-wall-ALCO Stores Inc.*, 150 B.R. 965 (D. Kan. 1993)

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4

## The Debtors' Duty to Timely Perform Lease Obligations

- Courts consistently hold that obligations under § 365(d)(3) are due regardless of whether the rent would otherwise meet the test for an admin. expense
  - See *In re Leather Factory* (citing *In re Pac.-Atl. Trading Co.*, 27 F.3d 401, 405 (9th Cir. 1994)) – “[C]laims arising under § 365(d)(3) are entitled to administrative priority even when they may exceed the reasonable value of the debtor’s actual use of the property.”
  - *In re Cardian Mortgage Corp.* (citing *In re Va. Packaging Supply Co.*, 122 B.R. 491, 494 (Bankr. E.D. Va. 1990) – “[O]bligations arising under a lease of nonresidential property after the petition is filed but before rejection of the lease are governed by the terms of the lease are not subject to the requirements under § 503(b)(1).”
- Obligations arguably include *all* monetary obligations, including common-area maintenance charges, taxes, and percentage rent
  - See *In re Ames Dep’t Stores, Inc.*, 150 B.R. 107, 108–09 (Bankr. S.D.N.Y. 1995).

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## Section 365(d)(3) Pre-COVID

- § 365(d)(3) provides that “[t]he court may extend, for cause, the time for performance of [nonresidential real property lease obligations] that arises within 60 days after the order for relief, but the time for performance shall not be extended beyond such 60-day period.”
- The legislative history provides that, “[t]he 60-day grace period is indented to give the trustee time to determine what lease obligations the debtor has and to locate the cash to make the required payments in exceptionally large or complicated cases.”
  - *In re Mr. Gatti’s, Inc.*, 164 B.R. 929 (Bankr. W.D. Tex. 1994) (internal citation omitted).

6

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