

## Borders Bankruptcy May Pose Difficult Legal Issues for Landlords

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February 16, 2011

Today's announcement that the Ann Arbor-based Borders Bookstore filed for bankruptcy protection in New York comes as no surprise, especially to corporate retail landlords. The who's who list of Grade A tenants that have filed since 2008 (KB Toys, Blockbuster, Circuit City, Hollywood Video, Mervyns) has forced landlords to brush up on their bankruptcy law. Borders announced as part of its filing its intent to close up to 30% of its 600 stores nationwide, with some closings happening as early as this weekend. The filing will have significant effect on parties that support Borders' business, including publishers, trade vendors and, most importantly, landlords. Here are some of the basics that can apply to a corporate landlord when a retail tenant like Borders files for bankruptcy:

- Corporate leases can be (and are) rejected under U.S. bankruptcy law. The deadline by which a retail debtor needs to decide on which leases it is keeping and which ones it is rejecting is 120 days after the filing of the bankruptcy (and can only be extended once for an additional 90 days for "cause"), but the rejection can be done much sooner.
- Rejection means that the debtor terminates the contract as of the day prior to the bankruptcy filing, and all rejections damage claims are computed as of that date. Assumption of the lease means that the debtor must cure any defaults incurred by the debtor prior to the assumption (such as unpaid rent and CAM charges).
- A landlord's rejection claim for future rent is capped so as to not consume all other unsecured claims against the bankruptcy estate. The cap is complicated to recite ("rent reserved by such lease...for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease....") and even more difficult to apply due to differing bankruptcy court opinions interpreting the statute.
- A retail debtor has to "timely perform" all obligations owed after its bankruptcy filing on a commercial lease prior to deciding whether to assume or reject the lease. But a bankruptcy court can extend the time of payment or performance of any such obligations (like paying rent) for a 60 day period after the bankruptcy filing. Unpaid post-petition lease obligations may also qualify as "administrative expenses" that are higher in repayment priority to other types of creditor claims in bankruptcy.

These are just some of the basic issues that can re-define the landlord/tenant relationship once a tenant files bankruptcy. Even more troublesome is the trend in recent mega-retail cases of debtors imposing operating procedures and rules as part of their "first-day orders" that significantly change the rights and allowances of landlords. Corporate landlords are often blitzed with first-day papers at the onset of a retail bankruptcy and do not engage in the appropriate due diligence to ascertain whether their rights have been impacted. By the time they receive a notice from the retail debtor of the rejection of their lease, the landlord's rights may have been severely compromised by orders entered by the bankruptcy court months ago.

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Each retail tenant bankruptcy poses different issues. Landlords need to retain experienced bankruptcy counsel to analyze their rights and risks in a tenant's bankruptcy.

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