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The Controversy Continues Over Whether the Time for Assumption or Rejection
of Integrated Nonresidential Real Property Leases and Other Contracts Should be
Governed by Bankruptcy Code Section 365(d)(2) or Section 365(d)(4)'s Shorter Period

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Subject to certain exceptions, [section 365\(a\) of the Bankruptcy Code](#) authorizes the trustee or debtor in possession to reject or assume executory contracts or unexpired leases of the debtor, subject to bankruptcy court approval.¹ The concept of rejecting executory contracts under the Bankruptcy Code is based on the principle that a trustee in bankruptcy or debtor in possession might opt to renounce title to burdensome property in furtherance of the goal of gaining a fresh start.² [Section 365](#) attempts to balance this bankruptcy objective of successfully reorganizing and rehabilitating the debtor, with the nondebtor counterparty's right to receive the benefit of its original contractual bargain.³

Particularly, pursuant to [section 365\(d\)\(2\) of the Bankruptcy Code](#), executory contracts, unexpired residential real property leases, and unexpired personal property leases may generally be assumed or rejected any time before confirmation of the debtor's plan, absent a court order granting a request by the nondebtor counterparty to shorten such time.⁴ There are also specific rules under [section 365\(d\)\(4\) of the Bankruptcy Code](#) governing the timing for the assumption or rejection of nonresidential real property leases in cases in which the debtor is the lessee, which require that assumption or rejection by the debtor-lessee generally be within 120 days after the date of entry of the order for relief or the date of entry of an order confirming the plan.⁵

A question arises when a debtor-lessee is party to agreements that integrate nonresidential real property leases with contracts, such as franchise agreements. While many franchise agreements are generally considered executory contracts and governed by the timeframe for assumption or rejection set forth in [section 365\(d\)\(2\)](#), where there is an integrated executory contract and nonresidential real property lease, the language of the statute can create a conflict. Specifically, the lack of a specific provision in the Bankruptcy Code governing the timing for assumption or rejection of integrated executory agreements highlights a tension in the Bankruptcy Code as to which timeframe should apply. Is a debtor subject to the timing set forth in [section 365\(d\)\(2\)](#), or the stricter and more abbreviated timing of [section 365\(d\)\(4\)](#)?

This question, which has garnered little attention by the courts since the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), was most recently addressed by the Court of Appeals for the Seventh Circuit (the "Seventh Circuit") in *A&F Enterprises, Inc. II v. International House of Pancakes Franchising LLC (In re A&F Enterprises, Inc. II)*.⁶ Specifically, in *A&F Enterprises*, the Seventh Circuit recognized that there are "powerful arguments" in favor of applying [section 365\(d\)\(2\)](#)'s longer timeframe to an integrated agreement. This decision marks the first time a court of appeals has addressed this question, and is only the second time the issue has ever been addressed in the post-BAPCPA era.

On one hand, application of the broader timeframe in [section 365\(d\)\(2\)](#) to integrated agreements, as suggested by the Seventh Circuit, may be viewed as frustrating the Congressional intent of the BAPCPA amendment to [section 365\(d\)\(4\)](#). That amendment set a bright line rule limiting the time a debtor-lessee has to assume or reject a nonresidential real property lease. Now, instead of courts applying the rule provided by [section 365\(d\)\(4\)](#) enacted by BAPCPA, a debtor-lessee may be subject only to the [section 365\(d\)\(2\)](#) requirement that it assume or reject an integrated contract prior to confirmation of its plan. Conversely,

the application of the shorter timeframe in [section 365\(d\)\(4\)](#) may frustrate Chapter 11's primary goal of effectuating a successful reorganization, by requiring a debtor-lessee to assume or reject an entire integrated agreement within a very short time after commencement of the case. This potentially impacts the debtor's ability to maximize the value of its estate. This issue is further compounded when franchise agreements are at play, since such agreements often represent a franchisee-debtor's most valuable asset. If the debtor is compelled to quickly reject the unexpired nonresidential real property lease, the entire integrated agreement would be terminated if [section 365\(d\)\(4\)](#) were the applicable provision, and the value of the underlying franchise agreement would also likely decrease dramatically.

Clearly, there is no easy answer here. Either [section 365\(d\)\(2\)](#) must be applied to a nonresidential real property lease, or [section 365\(d\)\(4\)](#) must be applied to an executory contract that would otherwise be governed by [section 365\(d\)\(2\)](#). Did the Seventh Circuit in *A&F Enterprises* get it right?

I. History and Development of Section 365

1. The Bankruptcy Code of 1978

The predecessor to [Bankruptcy Code section 365](#), section 70(b) of the Bankruptcy Act of 1898, as amended in 1938, provided in part:

The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within 60 days after the adjudication or within thirty days after the qualification of a trustee, whichever is later, but the court may for cause shown extend or reduce the time.⁷

Under the case law applying the provision of the former Bankruptcy Act, the trustee or the debtor in possession had a “reasonable” time to decide whether to accept or reject an executory contract or unexpired lease.⁸ To implement this, the Supreme Court subsequently issued Bankruptcy Rule 607, which required court approval for the assumption of executory contracts and leases, but failed to provide any procedures for the rejection of contracts and leases.⁹ As a result of the “confusion and uncertainty” that arose whenever a bankruptcy case involved executory contracts and unexpired leases,¹⁰ Congress enacted section 365 in the Bankruptcy Code of 1978.¹¹

The Bankruptcy Code of 1978 did not prescribe any deadlines for the assumption and rejection of leases and contracts, and the resulting ambiguity led to various problems.¹² For instance, the extensive time afforded to the debtor in possession oftentimes led to valuable commercial property being left in a state of partial operation or vacancy,¹³ particularly since the debtor in possession was not required to comply with the terms of the lease during this period of limbo while the trustee had to decide whether to assume or reject.¹⁴ As a result of the detrimental impact this had on lessors who wanted their bargained for rights to be respected, lessors lobbied Congress intensely for amendments to the 1978 provisions, which ultimately resulted in the 1984 amendments to the Bankruptcy Code.¹⁵

2. The Bankruptcy Amendments and Federal Judgeship Act of 1984

The Bankruptcy Amendments and Federal Judgeship Act of 1984 enacted section 364(d)(4) in the Bankruptcy Code, setting forth the timeline for assuming or rejecting unexpired leases of nonresidential real property.¹⁶ The 1984 amendments marked the first time that Congress distinguished between residential and nonresidential real property. The resulting revisions required debtors to assume or reject leases of nonresidential real property within 60 days of the bankruptcy petition date, with the option to obtain an extension from the court for 60 additional days.¹⁷ Despite these amendments made to the Bankruptcy Code in 1984, all other executory contracts and residential real property leases remained subject to the time limits set by [section 365\(d\)](#)

(2), such that debtors had until the confirmation of a plan to determine whether to assume or reject contracts and leases of that type.¹⁸

In large part, the amendments, colloquially known as the “Shopping Center Amendments,”¹⁹ differentiated between types of leases in order to address problems caused by long-term vacancy or partial operation of space by a tenant debtor. Often the property was located in a shopping center, and if it was operating at partial capacity, or was vacant, there would be a subsequent reduction in customers who shopped in the neighboring nondebtor tenants' premises during this time.²⁰ Additionally, the new, shorter deadline for a debtor-lessee to assume or reject nonresidential real property leases assuaged the cost incurred by nondebtor landlords that continued to provide services — use of the property, utilities, and security — without current payment by a debtor-tenant that has not yet decided whether to assume or reject the lease.²¹

At the time Congress enacted the amendments, the Bankruptcy Code faced increasing criticism that the Bankruptcy Code had a debtor bias. Critics argued that debtors had too much control over the reorganization process and could use the bankruptcy process to drag out a reorganization to the detriment of the creditors.²² Debtors were perceived as being protected from the creditors for months, and some bankruptcy judges apparently were willing to extend deadlines without any consequence.²³

Conversely, some bankruptcy courts criticized the 60-day time limit applicable to nonresidential real property leases as a “time bomb that begins ticking relentlessly and irresistibly” upon entry of the order for relief.²⁴ Despite the short deadline, the “cause” requirement necessary to extend the 60-day deadline was “watered down” and was often satisfied upon no more than a “minimal evidentiary showing by the debtors.”²⁵

3. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) was enacted into law. BAPCPA provided for significant revisions to the Bankruptcy Code and, in particular, further amended [section 365\(d\)](#) and the treatment of unexpired nonresidential real property leases where the debtor is the lessee.²⁶ Similar to the 1984 amendments, the corporate restructuring revisions represented a response to caselaw that “interpret[ed] certain key provisions of chapter 11” that “had become disproportionately pro-debtor, to the detriment of creditors' rights.”²⁷

The BAPCPA amendment to [section 365\(d\)](#) eschewed judicial discretion in favor of a bright-line rule limiting the time for assumption or rejection by a debtor-lessee of a nonresidential real property lease.²⁸ Specifically, BAPCPA amended [section 365\(d\)\(4\)](#) to increase the initial period in which the trustee or debtor in possession, as the lessee, must assume or reject the applicable unexpired lease from 60 days to 120 days, but then further restricted the court's power to extend such period for any additional time.²⁹ Now, a court may only grant a one time 90-day extension upon a motion by the trustee, the debtor in possession or the nondebtor lessor evidencing cause.³⁰ Significantly, BAPCPA did not change [section 365\(d\)\(2\)](#)'s time periods for the assumption or rejection of other types of contracts or leases.³¹

The BAPCPA amendment to [section 365\(d\)\(4\)](#) represented a major departure from the pre-BAPCPA version of the statute. Commentators differed on whether the change to [section 365\(d\)\(4\)](#) represented a positive move forward for the Bankruptcy Code. At least one commentator has argued that [section 365\(d\)\(4\)](#) under BAPCPA strikes “a better balance concerning relations between retailers and their landlords.”³² Before BAPCPA, debtors would petition the court continuously for additional time extensions on nonresidential leases. “[L]andlords were left in limbo as debtors often died a slow and inevitable death” because debtors were able to continually petition the court for extensions on nonresidential real property leases.³³ However, other commentators have disagreed, finding that BAPCPA afforded too much power to the landlord lessors, thereby imposing serious burdens on retailers, consumer debtors, and other small businesses.³⁴

II. The Problem of the Integrated Franchise Agreement

The 2005 BAPCPA amendments to the timing requirements for certain unexpired real property leases magnified a conflict in statutory interpretation that arises in cases in which the debtor is a lessee and franchisee, where nonresidential property leases are integrated with other contracts (e.g., franchise agreements). The language of [section 365\(d\)\(2\)](#) provides that debtors may assume or reject a franchise agreement until confirmation, while the language of [section 365\(d\)\(4\)](#) is unambiguous that the debtor-lessee has no more than 210 days³⁵ to assume or reject the unexpired lease, subject to an extension by a court order for 90 days. Generally, because franchisees are required to assume or reject integrated franchise arrangements in their entirety, it is difficult for a court to apply the plain language of both [Bankruptcy Code section 365\(d\)\(2\)](#) and [section 365\(d\)\(4\)](#). The resulting question is, therefore, what Bankruptcy Code provision should be applied to an integrated executory contract and unexpired nonresidential real property lease?

A. *In re FPSDA I, LLC*

The 2005 BAPCPA amendment to [section 365\(d\)\(4\)](#) appears to have been eroded at least in part by a 2011 case decided by the Bankruptcy Court for the Eastern District of New York, *In re FPSDA I, LLC* (“FPSDA”). That decision highlights the important question whether the [section 365\(d\)\(4\)](#) deadlines should apply to nonresidential real property leases that are integrated with other contracts, most significantly, franchise agreements.³⁶

FPSDA operated several “quick-serve” restaurant franchises in New York and Maryland.³⁷ It entered into franchise agreements and nonresidential real property leases to operate each franchise.³⁸ Notably, the franchise agreements set forth the location of the franchise unit, and the franchisees simultaneously entered into various nonresidential real property leases for such locations.³⁹ Each lease was subject to the franchise agreement remaining in full force and effect; if the franchise agreement was terminated, the franchisor could also terminate the lease.⁴⁰ After negotiations ended between FPSDA and the franchisors regarding a potential refinancing of the agreements, FPSDA filed a Chapter 11 petition. Once in bankruptcy, FPSDA sought to extend the [section 365\(d\)\(4\)](#) deadline beyond the 90 day extension afforded in [section 365\(d\)\(4\)\(B\)](#).⁴¹ FPSDA argued that if they were compelled to assume or reject the real property leases before making a determination on the franchise agreements, “then the subsequent breach of any assumed lease will result in substantial additional postpetition administration liabilities” which would prejudice the debtors’ bankruptcy estates and its creditors.⁴² When the franchisor objected, FPSDA filed a motion seeking, in part, a determination that it had until confirmation of a plan to assume or reject the leases pursuant to [section 365\(d\)\(2\)](#).⁴³

The Bankruptcy Court for the Eastern District of New York held that the leases and franchise agreements were integrated, and therefore, did not need to be assumed or rejected within the short period prescribed by [section 365\(d\)\(4\)](#).⁴⁴ Specifically, the court ruled that franchisor-landlords lose the protections of [section 365\(d\)\(4\)](#) when they are parties to executory contracts that are entirely integrated with underlying leases.⁴⁵ Thus, debtors were not bound by the 120/210-day time limit for assumption or rejection of any such leases, but instead had until confirmation to assume or reject both the contract and the lease, pursuant to [section 365\(d\)\(2\)](#).⁴⁶

In support of its holding in *FPSDA*, the court relied on *In re Harrison*,⁴⁷ a pre-BAPCPA case that addressed the applicability of [section 365\(d\)\(2\)](#) and [section 365\(d\)\(4\)](#)⁴⁸ to petroleum product franchisees.⁴⁹ In *Harrison*, Shell Oil Company sought to compel the debtor to surrender two nonresidential real properties covered by leases that were executed contemporaneously with gas station agreements, because the debtor did not assume or reject the leases within the time provided in [section 365\(d\)\(4\)](#).⁵⁰ The court concluded that the lease and associated petroleum dealer agreement formed one controlling agreement between the parties, and therefore held that [section 365\(d\)\(4\)](#) was inapplicable.⁵¹

The court in *FPSDA* stated that, while the *Harrison* court was applying an old version of [section 365\(d\)\(4\)](#)⁵² to a distinct type of franchising arrangement,⁵³ the *Harrison* court's decision ultimately rested on the “integrated nature of the franchise agreement,” and was therefore applicable to *FPSDA*.⁵⁴

In *FPSDA*, the purported rationale was that holding otherwise would frustrate the purpose of Chapter 11 by inhibiting a debtor's opportunity to effectuate a reorganization resulting in a consequent loss of value to the debtors' estate, to the detriment of all the debtor's creditors.⁵⁵ Accordingly, the court concluded it was both reasonable and appropriate that the more generous deadline set forth in [section 365\(d\)\(2\)](#) apply to an integrated agreement that is treated as one controlling agreement.⁵⁶

While the 1984 and 2005 BAPCPA amendments both sought to mitigate a perceived pro-debtor bias in Chapter 11 reorganizations, the court in *FPSDA* was concerned that adhering to the timing in [section 365\(d\)\(4\)](#) would generate the opposite result. Indeed, the court observed if the [section 365\(d\)\(4\)](#) deadline were to apply to the franchise-lease agreement, a dual franchisor and landlord would have “superior power” to determine the course and outcome of the debtor's reorganization by forcing the debtor to prematurely decide whether to assume or reject an integrated franchise arrangement simply by refusing to extend the time.⁵⁷ Additionally, the court noted that because the franchise agreements represented the most valuable assets of the bankruptcy estate, the [section 365\(d\)\(4\)](#) deadline would serve the interests of the franchisor, which would not benefit any of the debtor's other creditors.⁵⁸ Finally, the court also noted that an assumption of the lease would necessarily require the debtor to cure all defaults under the franchise agreement, turning the franchisor-landlord's unsecured claims into postpetition administrative expenses.⁵⁹ This too would give the franchisor great power and advantage over similarly situated unsecured creditors.⁶⁰

Notably, the *FPSDA* court stated explicitly that its decision applied only to the leases directly linked to a franchise agreement.

B. *In re A&F Enterprises, Inc. II*

On February 7, 2014, in *In re A&F Enterprises, Inc. II*,⁶¹ the Seventh Circuit addressed this question whether [section 365\(d\)\(2\)](#) or [section 365\(d\)\(4\)](#) is applicable to an integrated executory contract and unexpired nonresidential real property lease. As noted above, this decision marks the first time a court of appeals has addressed this question, and is only the second time the issue has ever even been addressed in the post-BAPCPA era.

A&F Enterprises was a Chapter 11 debtor (“A&F”) that managed and operated several International House of Pancakes (“IHOP”) franchises.⁶² To operate the IHOP franchises, A&F entered into franchise agreements and corresponding building and equipment leases⁶³ all of which contained cross-default provisions.⁶⁴ A&F was only allowed to use the leased buildings for IHOP restaurants and was not allowed to assign the leases to any third parties.⁶⁵ A&F was also prohibited from assuming the franchise contracts without assuming the leases, because the franchise agreements automatically expire if A&F lost the right to occupy the leased buildings.⁶⁶

While the parties agreed on the general effects of this arrangement, they disputed whether the agreements should be viewed as a single integrated contract or as separate-but-interrelated contracts.⁶⁷ As a result, both the franchise agreement and underlying lease must be assumed or rejected together.⁶⁸

IHOP took the position that A&F did not assume the leases within 120 days after the entry of the order for relief, in accordance with [section 365\(d\)\(4\)](#), and that since A&F did not seek any extensions of such allotted timeframe under the Bankruptcy Code⁶⁹ the leases were deemed rejected by A&F upon the expiration of the 120-day period.⁷⁰ However, A&F maintained

that the leases were part of a “larger franchise arrangement” and, therefore, that the “more generous” requirements of [section 365\(d\)\(2\)](#) applied to the agreements at issue.⁷¹

The parties litigated the issue in the Bankruptcy Court for the Northern District of Illinois, and the franchisor-lessor IHOP prevailed on the merits in that court.⁷² The Bankruptcy Court deemed the leases rejected and the franchise agreements expired upon the expiration of the 120-day period pursuant to [section 364\(d\)\(4\)](#).⁷³ A&F appealed the decision to the District Court for the Northern District of Illinois and sought a stay pending appeal of the order that deemed the leases rejected.⁷⁴ A stay was denied by both courts on the basis that there were no exceptions for “leases tied to franchises” and, therefore, A&F was unlikely to succeed on the merits.⁷⁵ A&F subsequently filed an appeal to the Seventh Circuit seeking review of the District Court's order denying the stay and moved for an emergency stay. Notably, the issue before the Seventh Circuit was not whether [section 365\(d\)\(2\)](#) or [section 365\(d\)\(4\)](#) applied specifically to the agreements at issue but, rather, whether the District Court order that A&F's leases were deemed rejected should be stayed pending appeal.⁷⁶

In deciding whether to grant the stay, the Seventh Circuit analyzed A&F's likelihood for success on the merits and, in so doing, provided some insight into the application of [section 365\(d\)](#) to integrated franchisor-franchisee contractual arrangements. Ultimately, the Seventh Circuit held that the stay should be allowed because A&F demonstrated a likelihood of success on the merits and because the potential harm to A&F, if the stay was denied, outweighed the potential harm to IHOP if the stay was granted.⁷⁷ The Seventh Circuit stated that if the franchise agreement and underlying lease were distinct contracts, [section 365\(d\)\(2\)](#) and [section 365\(d\)\(4\)](#) would be applied to each, respectively.⁷⁸ However, upon recognizing that the agreements were “inseparable,” one time limit or the other would control both.⁷⁹ The Seventh Circuit recognized that one result “permits something the [Bankruptcy] [C]ode forbids (assuming a lease beyond 120 days) while the other result prevents something the [Bankruptcy] [C]ode permits (assuming a franchise agreement beyond 120 days).”⁸⁰ The Seventh Circuit ultimately concluded that “[t]his is a distinction without a difference, however, because a legal entitlement is lost either way: Either franchisees lose the right to assume franchise agreements at any time before confirmation of a plan, or lessors lose the right to have their leases assumed or rejected within 120 days.”⁸¹

The Seventh Circuit was “provisionally persuaded,” pending further briefing, that A&F's argument that [section 365\(d\)\(2\)](#) should be applied to the integrated contracts at issue had “substantial merit” because the premise behind Chapter 11 reorganization is to give debtors a full opportunity to reorganize, and provisions that limit the opportunity to do so, such as [section 365\(d\)\(4\)](#), are the exception.⁸² The Seventh Circuit also referred to the *In re FPSDA* decision that held on “nearly identical facts” that [section 365\(d\)\(4\)](#) was inapplicable to “a lease that is so tightly connected to a franchise agreement.”⁸³ Notably, the Seventh Circuit recognized that the question at hand did “not have a clear-cut answer” and, consequently, it was forced to rest its decision on whether to grant the stay primarily on the balance of potential harms. Ultimately, the Seventh Circuit was persuaded that A&F had “more to lose” than IHOP and entered a stay pending final disposition of A&F's appeal.⁸⁴

III. The Impact on Bankruptcy Policy and Goals

The courts in both *FPSDA* and *A&F Enterprises* interpreted and applied the Bankruptcy Code to a particular set of facts that BAPCPA seemingly may not have contemplated. The results may be viewed by some practitioners as somewhat awkward in that they arguably weaken the timing requirements for nonresidential real property leases under [section 365\(d\)\(4\)](#).⁸⁵ As both courts noted, holding the debtors to [section 365\(d\)\(4\)](#)'s earlier deadline would have had a deleterious effect on the respective debtor's abilities to successfully reorganize. Nevertheless, it remains troubling to some that the current relationship between [sections 365\(d\)\(2\)](#) and [\(d\)\(4\)](#), and their application in cases such as *FPSDA* and *A&F Enterprises*, obfuscates important policy goals of the Bankruptcy Code in the post-BAPCPA era. It is axiomatic that the purpose of Chapter 11 is to provide the debtor with an opportunity to effectuate a successful reorganization and obtain a recovery for the benefit of all the debtor's creditors.⁸⁶ If a debtor is required to assume or reject an integrated contract pursuant to the shorter period in [section 365\(d\)\(4\)](#), the ability for

such debtor to reorganize may be hindered⁸⁷ and recovery for the debtor's creditors other than the franchisor may consequently be diminished. The franchise agreements in *FPSDA* and *A&F Enterprises* required that the franchise be operated at a specific location identified in the lease, and that if the underlying lease agreement was deemed rejected pursuant to [section 365\(d\)\(4\)](#), the franchise agreements “would be worthless.”⁸⁸ Additionally, if the time frame in [section 365\(d\)\(4\)](#) was applicable to the unexpired lease, a debtor ostensibly would be required to assume or reject the franchise agreement prematurely and perhaps before it even has a full opportunity to attempt to reorganize its business and re-negotiate with its creditors.

Moreover, the BAPCPA amendments to [section 365\(d\)](#) intended to provide clarity, consistency, and predictability to reorganization proceedings. Indeed, Congress's intention was to establish a rules-based framework for the treatment of nonresidential real property leases.⁸⁹ The act's bright-line rules regarding the assumption or rejection of unexpired leases under [section 365\(d\)\(4\)](#) were intended to limit judicial deference or “interference” with the Chapter 11 process.⁹⁰ However, in the context of franchisee reorganizations, Congress's intent can be viewed as frustrated because courts are now required to make “value based judgments”⁹¹ based on ideas of equity and fairness.⁹²

FPSDA and *A&F Enterprises* highlight the uncertainty that continues to exist when a franchisee seeks to reorganize in a Chapter 11 case.⁹³ In instances where a franchisee subject to an integrated franchise arrangement files a Chapter 11 petition, it is common for the franchise agreements to be the franchisee-debtor's most important assets.⁹⁴ Consequently, rights of the creditors and parties-in-interest to such reorganization efforts could be significantly affected by a requirement that the debtor assume or reject the entire integrated agreement as required by [section 365\(d\)\(4\)](#). While the Seventh Circuit has provided some insight as to how a higher court may address the question whether the longer deadlines for assumption and rejection contained in [section 365\(d\)\(2\)](#) should apply to integrated agreements, in the absence of clear statutory authority or a decision on the merits, judges will continue to navigate through statutory language.

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Footnotes

1 [11 U.S.C.A. § 365\(a\)](#).

2 3 Collier on Bankruptcy ¶365.LH (16th ed. 2014).

- 3 Robert J. Verga, [Section 365 Versus 362: Applying the Automatic Stay to Prevent Unilateral Termination in a Bankruptcy Setting](#), 61 *Fordham L. Rev.* 935, 962 (1993) (citing *H.R. Rep. No. 95-595 at 220* (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6179–80).
- 4 11 U.S.C. § 365(d)(2).
- 5 11 U.S.C. § 365(d)(4)(A). Prior to its expiration and upon a showing of cause, the court may grant a one-time 90-day extension of this 120-day period upon a motion by the trustee or lessor.
- 6 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 765, 59 Bankr. Ct. Dec. (CRR) 21, 71 *Collier Bankr. Cas.* 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).
- 7 11 U.S.C.A. § 110(b) (1976) (repealed 1978).
- 8 See *In re United Cigar Stores Co. of America*, 89 F.2d 3, 6 (C.C.A. 2d Cir. 1937) (“A trustee in bankruptcy is entitled to a reasonable opportunity to determine whether to adopt or reject an executory contract.”); *In re Chicago Rapid Transit Co.*, 129 F.2d 1, 7 (C.C.A. 7th Cir. 1942) (“The earlier equity cases made the period within which election to reject might take place subject to the relative test of reasonableness, considering the facts and circumstances in the particular case.”).
- 9 Gregory G. Hesse, [A Return to Confusion and Uncertainty as to the Effective Date of Rejection of Commercial Leases in Bankruptcy: A Critical Analysis of Revco and Joseph C. Spiess Company](#), 9 *Bankr. Dev. J.* 521, 525 (1992).
- 10 Gregory G. Hesse, [A Return to Confusion and Uncertainty as to the Effective Date of Rejection of Commercial Leases in Bankruptcy: A Critical Analysis of Revco and Joseph C. Spiess Company](#), 9 *Bankr. Dev. J.* 521, 524 (1992).
- 11 Section 365(a) provided “Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C.A. § 365(a) (1988) (repealed 2005).
- 12 11 U.S.C.A. § 365(a) (1988).
- 13 Jeffrey S. Battershall, [Commercial Leases and Section 365 of the Bankruptcy Code](#), 64 *Am. Bankr. L.J.* 329 (1990) (citing *S. Rep. No. 97-527*).
- 14 Jeffrey S. Battershall, [Commercial Leases and Section 365 of the Bankruptcy Code](#), 64 *Am. Bankr. L.J.* 329 (1990).
- 15 Gregory G. Hesse, [A Return to Confusion and Uncertainty as to the Effective Date of Rejection of Commercial Leases in Bankruptcy: A Critical Analysis of Revco and Joseph C. Spiess Company](#), 9 *Bankr. Dev. J.* 521, 525 (1992).
- 16 11 U.S.C.A. § 365(d)(4) (1988) (repealed 2005) (“[I]n a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property within such additional as the court, for cause, within such 60 day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.”).
- 17 11 U.S.C.A. § 365(d)(4) (1988).
- 18 11 U.S.C.A. § 365 (1988) (repealed 2005).
- 19 Pub L. No. 98-353, 98 Stat. 333.
- 20 130 Cong. Rec. S8891, S8894–95 (daily ed. June 29, 1984) (statement of Sen. Hatch), reprinted in 1984 U.S.C.C.A.N. 590, 598–99.
- 21 1984 U.S.C.C.A.N. 590, 598.
- 22 David A. Skeel, Jr., *Doctrines and Markets: Creditors' Ball: The “New” Corporate Governance in Chapter 11*, 152 *U. Pa. L. Rev.* 917, 920 (2003).
- 23 Lynn M. LoPucki, [The Trouble with Chapter 11](#), 1993 *Wis. L. Rev.* 729, 747 (1993).

- 24 [In re By-Rite Distributing, Inc.](#), 47 B.R. 660, 670, 12 Bankr. Ct. Dec. (CRR) 1082, 12 Collier Bankr. Cas. 2d (MB) 253, Bankr. L. Rep. (CCH) P 70320 (Bankr. D. Utah 1985), order rev'd on other grounds, 55 B.R. 740, 14 Collier Bankr. Cas. 2d (MB) 460, Bankr. L. Rep. (CCH) P 70971 (D. Utah 1985).
- 25 American Bankruptcy Institute Legislative Symposium, Panel on Legislative Impediments — New Administrative Expenses, Shortened Time Periods, and Other BAPCPA Changes: Should BAPCPA Be Rolled Back? (2009), available at: <http://ls09.abi.org/legislative-impediments.pdf>.
- 26 Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-08, 119 Stat. 23 (2005).
- 27 American Bankruptcy Institute Legislative Symposium, Panel on Legislative Impediments — New Administrative Expenses, Shortened Time Periods, and Other BAPCPA Changes: Should BAPCPA Be Rolled Back? (2009), available at: <http://ls09.abi.org/legislative-impediments.pdf>.
- 28 The post-BAPCPA version of [Section 365\(d\)\(4\)](#) provides:
- (A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—
- (i) the date that is 120 days after the date of the order for relief; or
- (ii) the date of the entry of an order confirming a plan.
- (B) (i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.
- 29 3 Collier on Bankruptcy ¶1365.05[3][b] (16th ed. 2010).
- 30 11 U.S.C.A. § 365(d)(4) (2014).
- 31 11 U.S.C.A. § 365(d)(2).
- 32 American Bankruptcy Institute 28th Annual Spring Meeting, BAPCPA Rollback as a Cure for Unsuccessful Reorganizations? Not so Fast! (2009) (statement of Todd J. Zywicki, Professor, George Mason School of Law).
- 33 American Bankruptcy Institute 28th Annual Spring Meeting, BAPCPA Rollback as a Cure for Unsuccessful Reorganizations? Not so Fast! (2009) (statement of Todd J. Zywicki, Professor, George Mason School of Law).
- 34 See, e.g., Circuit City Unplugged: Why Did Chapter 11 Fail to Save 34,000 Jobs?: Hearing before the H. Comm. on the Judiciary, 111th Cong. (2009) (stating BAPCPA's impact on retailers can also be seen on other small businesses and restaurants.).
- 35 The 210 days includes the initial 120 days afforded by section 364(d)(4)(A), and one additional extension of 90 days if cause is shown.
- 36 [In re FPSDA I, LLC](#), 450 B.R. 392, 65 Collier Bankr. Cas. 2d (MB) 918 (Bankr. E.D. N.Y. 2011), leave to appeal denied, 470 B.R. 257 (E.D. N.Y. 2012).
- 37 FPSDA, 450 B.R. at 394.
- 38 FPSDA, 450 B.R. at 397 (“It is undisputed ... that each of the ... leases and the corresponding franchise agreements constitute an integrated agreement.”).
- 39 FPSDA, 450 B.R. at 394–95.
- 40 FPSDA, 450 B.R. at 395.
- 41 FPSDA I, 450 B.R. at 395.
- 42 FPSDA, 450 B.R. at 396.
- 43 FPSDA, 450 B.R. at 395.

- 44 FPSDA, 450 B.R. at 400–01.
- 45 FPSDA, 450 B.R. at 401.
- 46 FPSDA, 450 B.R. at 401.
- 47 *In re Harrison*, 117 B.R. 570, 573, 20 Bankr. Ct. Dec. (CRR) 1384, Bankr. L. Rep. (CCH) P 73575 (Bankr. C.D. Cal. 1990).
- 48 In *Harrison*, the time to assume or reject contracts was subject to [section 365\(d\)\(4\)](#) as incorporated by The Bankruptcy Amendments and Federal Judgeship Act of 1984. [11 U.S.C.A. § 365\(d\)\(4\) \(1988\)](#) (repealed in 2005). Under that version of the statute, the debtor had 60 days from the petition date to assume or reject the unexpired nonresidential real property lease. *Id.*
- 49 *Harrison*, 117 B.R. at 572.
- 50 *Harrison*, 117 B.R. at 572.
- 51 *Harrison*, 117 B.R. at 573.
- 52 [11 U.S.C.A. § 365\(d\)\(4\) \(1988\)](#) (repealed 2005).
- 53 In 1978 Congress enacted the Petroleum Marketing Practices Act, designed to protect motor fuel dealers from arbitrary or discriminatory termination of their franchises by prohibiting franchisors from terminating a franchise except in accordance with the statute's provisions. [15 U.S.C.A. § 2802 \(1978\)](#).
- 54 FPSDA, 450 B.R. at 399–400.
- 55 FPSDA, 450 B.R. at 400.
- 56 FPSDA, 450 B.R. at 400.
- 57 FPSDA, 450 B.R. at 400.
- 58 FPSDA, 450 B.R. at 401.
- 59 PSDA, 450 B.R. at 400.
- 60 PSDA, 450 B.R. at 400.
- 61 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).
- 62 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 765, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).
- 63 IHOP leased the buildings from third parties and subleased them to A&F.
- 64 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 765, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014),
- 65 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).
- 66 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 767, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).
- 67 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).
- 68 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766–67, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014) (citing *In re FPSDA*, 470 B.R. at 266–72 (discussing two ways to characterize these arrangements,

but concluding that the choice of characterization doesn't affect whether § 365(d)(4)'s time limit applies)). Additionally, two contracts which are essentially inseparable should generally be viewed as a single indivisible agreement between the parties. See, e.g., *In re Braniff, Inc.*, 118 B.R. 819, 844 (Bankr. M.D. Fla. 1989); *In re Wagstaff Minnesota, Inc.*, 2012 WL 10623 (D. Minn. 2012), appeal dismissed, 8th Circuit (12-1202 & 12-1204) (June 27, 2012); See also *U.S. v. Bethlehem Steel Corp.*, 315 U.S. 289, 298, 62 S. Ct. 581, 86 L. Ed. 855, 1942 A.M.C. 1213 (1942) (“Whether a number of promises constitute one contract or more than one is to be determined by inquiring whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.”)

69 *A&F Enterprises*, 742 F.3d at 765.

70 *A&F Enterprises*, 742 F.3d at 765.

71 *A&F Enterprises*, 742 F.3d at 765.

72 *A&F Enterprises*, 742 F.3d at 765.

73 *A&F Enterprises*, 742 F.3d at 765.

74 *A&F Enterprises*, 742 F.3d at 765.

75 *A&F Enterprises*, 742 F.3d at 765.

76 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 765, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014). The standard for granting a stay pending appeal is the same as for granting a preliminary injunction: (i) likelihood of success on the merits; (ii) the irreparable harm to each side if the stay is granted or denied; (iii) and whether the public interest favors one side or the other.

77 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 770, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).

78 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 767, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).

79 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 767, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).

80 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 767, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).

81 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 767, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).

82 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 768, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).

83 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 767–68, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).

84 *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 770, 59 Bankr. Ct. Dec. (CRR) 21, 71 Collier Bankr. Cas. 2d (MB) 11, Bankr. L. Rep. (CCH) P 82581 (7th Cir. 2014).

85 Jeffrey A. Wurst & Michael S. Amato, *Treatment of Franchise Leases under § 365(d)*, 30 Am. Bankr. Inst. J. 46 (July 2011).

86 See *A&F Enterprises*, 742 F.3d at 768; *FPSDA*, 450 B.R. at 400.

87 Indeed, some critics argue that section 364(d)(4) by itself, as amended by BAPCPA, has had a devastating effect on the ability of retailers to successfully reorganize. American Bankruptcy Institute Legislative Symposium, *Restructuring the Bankruptcy Code: Remediating BAPCPA's Retail Missteps* (2009), available at: <http://ls09.abi.org/sites/default/files/Legislative%20Impediments.pdf>

(“The fixing of an immutable deadline for the assumption of commercial real estate leases has dealt a knockout blow to prospective retail reorganizations.”).

88 [FPSDA, 450 B.R. at 400.](#)

89 Kara J. Bruce, Rehabilitating Bankruptcy Reform, 13 Nev. L. Rev. 174, 191 (2012).

90 Kara J. Bruce, Rehabilitating Bankruptcy Reform, 13 Nev. L. Rev. 174, 191 (2012) (“BAPCPA’s amendments have replaced careful debtor-creditor balances with bright-line approximations.”).

91 Kara J. Bruce, Rehabilitating Bankruptcy Reform, 13 Nev. L. Rev. 174, 191 (2012) (citing Kathleen Sullivan, [The Justices of Rules and Standards](#), 106 Harv. L. Rev. 22, 57 (1992)).

92 See [In re FPSDA I, LLC, 450 B.R. at 400](#) (“In considering the purpose of the Bankruptcy Code and the equities of the situation, it is reasonable and appropriate that a debtor’s time to assume or reject integrated agreements that are treated as one controlling agreement to be subject to the more generous deadline for executory contracts.”).

93 There is a currently a status hearing schedule for April 22, 2014 in the A&F Enters., Inc. adversary proceeding. See A&F Enters., Inc. II v. IHOP Franchising LLC (In re A&F Enters., Inc. I), No. 13-3192, ECF No. 46. Additional briefing on the merits should be forthcoming.

94 A&F Enterprises, 724 F.3d at 765 (“[The Debtors’] primary assets are 17 separate IHOP franchise agreements and the corresponding building and equipment leases.”); [FPSDA, 450 B.R. at 394](#) (“The Debtors’ most significant assets consist of the separate franchise agreements entered into ...”).

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