BYU Law Review

Volume 1986 | Issue 4 Article 5

11-1-1986

Assumption of Unexpired Leases Under Bankruptcy Code Section 365(d)(4)

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Assumption of Unexpired Leases Under Bankruptcy Code Section 365(d)(4)

I. Introduction

When a lessee initiates a bankruptcy proceeding or is forced into bankruptcy he must decide whether to assume or reject any unexpired leases. If a lease is assumed it becomes part of the debtor's estate, but if not assumed it reverts back to the lessor. Prior to the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act),[1] a trustee in bankruptcy (or a debtor in possession) could assume or reject an "unexpired lease [of nonresidential real property] . . . *at any time* before the confirmation of the [bankruptcy workout] plan."[2] However, section 365(d)(4) of the 1984 Act restricts the time limit allowed for assumption by requiring the trustee to "assume or reject an unexpired lease . . . *within 60 days after the date of the order for relief.*"[3] If the lease is not assumed within the 60 day period, the "*lease is deemed rejected*" and the trustee must "*immediately surrender*" the property to the lessor.[4]

Since the enactment of section 365(d)(4) three years ago, bankruptcy courts have divided on two distinct issues: (1) whether an unexpired lease should automatically terminate and revert back to the lessor if the court does not approve the trustee's assumption within the 60 day period, and (2) whether the trustee must file a formal motion to assume the lease within the 60 day period.[5]

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1. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

2. 11 U.S.C. § 365(d)(2) (1982) (emphasis added).

3. 11 U.S.C. § 365(d)(4) (1982 & Supp. II 1984) (emphasis added).

4. *Id.* (emphasis added).

5. Bankruptcy courts have diversely interpreted section 365(d)(4). First, some courts hold that judicial approval of an assumption of an unexpired lease must occur within the 60 day time period. *See, e.g., In re* House of Deals of Broward, Inc., 67 Bankr. 23 (Bankr. E.D.N.Y. 1986); *In re* Las Margaritas, Inc., 54 Bankr. 98, 99 (Bankr. D. Nev. 1985); *In re* By-Rite Distrib., Inc., 47 Bankr. 660 (Bankr. D. Utah) (*By-Rite I*), *rev'd*, 55 Bankr. 740 (D. Utah 1985) (*By-Rite II*); *cf. In re* Southwest Aircraft Servs., Inc., 53 Bankr. 805, 808-09 (Bankr. C.D. Cal. 1985) (this is an extension case, but the court quotes extensively from and agrees with *By-Rite I*); *In re* Haute Cuisine, Inc., 57 Bankr. 200, 202 (Bankr. M.D. Fla. 1986) (agrees with the reasoning in *By-Rite I*); *In re* Taynton Freight Sys., Inc., 55 Bankr. 668, 670-71 (Bankr. M.D. Pa. 1985) (agrees with reasoning in *By-Rite I*).

This note examines these two issues in light of the legislative history of the 1984 Act and the court decisions that have arisen under section 365(d)(4). Part II addresses the necessity of court approval within the 60 day period and concludes that such approval should be unnecessary. Part III addresses the necessity of a formal filing to assume and concludes that the trustee should be required to file a formal motion within the 60 day period.

II. Must Court Approval Occur Within 60 Days?

All bankruptcy courts agree that judicial approval of an assumption of an unexpired lease is an absolute requirement.[6] However, courts disagree on whether the absence of such approval within the 60 day period should necessarily result in automatic rejection of the lease and immediate surrender of the premises to the lessor.[7] The reason for this disagreement is that

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On the other hand, some courts hold that judicial approval within the 60 days is not necessary; although, they do require the trustee to file a formal motion to assume within that time. *See, e.g., In re* House of Deals of Broward, Inc., 67 Bankr. 23 (Bankr. E.D.N.Y. 1986); *In re* Burns Fabricating Co., 61 Bankr. 955, 958 (Bankr. E.D. Mich. 1986); *In re* Condominium Admin. Servs., 55 Bankr. 792, 798 (Bankr. M.D. Fla. 1985); *cf. In re* Spats Restaurant & Saloon, 64 Bankr. 442, 444 (Bankr. D. Nev. 1986) (The court did not directly address the court approval requirement because the debtor did not act to assume within the 60 day period, but *Spats* did hold that the trustee "must timely file a motion to assume [within the 60 day period] as provided by Bankruptcy Rules 6006 and 9014."); *In re* Treat Fitness Center, Inc., 60 Bankr. 878, 879-80 (Bankr. 9th Cir. 1986) (The *Treat Fitness* panel did not reach the question whether court approval must occur within the 60 days, but it stated: "The first conclusion of law, that court approval of an assumption must be obtained within the limitations of section 365(d)(4), a conclusion at odds with Judge Jenkins' decision in the *By-Rite* case . . . is not approved as unnecessary to the decision.").

Other courts allow the trustee to manifest intent to assume by any unequivocal act; he need not file a formal motion. *See, e.g., In re* Re-Trac Corp., 59 Bankr. 251, 255 (Bankr. D. Minn. 1986); *In re* 1 Potato 2, Inc., 58 Bankr. 752, 754-55 (Bankr. D. Minn. 1986); *In re* Hodgson, 54 Bankr. 688, 690 (Bankr. W.D. Wis. 1985). Several courts did not decide whether an unequivocal act, short of filing a motion, is sufficient because the debtor filed a motion to assume within the 60 days. *See, e.g., In re* By-Rite Distrib., Inc., 55 Bankr. 740, 742 n.5 (D. Utah 1985); *In re* Bon Ton Restaurant and Pastry Shop, Inc., 52 Bankr. 850, 854 (Bankr. N.D. Ill. 1985). Finally, some courts hold that an unequivocal act is not required, but the trustee must manifest his intent to assume by an informal act within the 60 day period. *See, e.g., In re* Ro-An Food Enters., 41 Bankr. 416, 418 (E.D.N.Y. 1984); *cf. In re* J.J. Mellon's, Inc., 57 Bankr. 437 (Bankr. D.C. 1985) (court implied that it would allow debtor's tender of payment on 62d day as sufficient for assumption); *In re* Curio Shoppes, Inc., 55 Bankr. 148, 152 (Bankr. D. Conn. 1985) (mailing of motion on 60th day was sufficient for assumption).

6. All cases discussed in the text and notes require court approval of the trustee's assumption decision.

7. *See supra* note 5.

section 365 is subject to more than one interpretation. Section 365(a) reads: "Except as provided . . . in subsections (b), (c), and (d) of this section, the trustee, *subject to the court's approval*, may assume or reject any . . . unexpired lease of the debtor."[8] However, section 365(d)(4) states "if the trustee does not assume or reject an unexpired lease of nonresidential real property . . . within 60 days after the date of the order for relief, . . . then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor."[9]

A strict reading of these subsections shows that subsection (d)(4) is subject to the court approval requirement imposed by subsection (a). However, subsection (d)(4) does not expressly require that court approval occur within the 60 day period; it merely requires that the trustee assume or reject within 60 days. Because subsection (d)(4) does not expressly require court approval within the 60 days, two competing interpretations have surfaced in the bankruptcy courts. First, some courts hold that the "subject to the court's approval" language of section 365(a) means that a trustee must obtain court approval before an assumption is valid. Thus, court approval must occur within the 60 day period or the lease is deemed rejected. The second interpretation views the "subject to the court's approval" language as only requiring the trustee to manifest his decision to assume in a prescribed manner within the 60 day period. Under this view, although court approval is required, it may occur after the 60 day period has run. With this approach the trustee's assumption is, in effect, subject to defeasance by the bankruptcy court.

The first court to interpret section 365(d)(4) was the Bankruptcy Court for the District of Utah in *In re By-Rite Distributing, Inc.*, (*By-Rite I*).[10] *By-Rite I* gave birth to the first of the two interpretations and disallowed the debtor's assumption of several unexpired leases because court approval of the assumption did not occur within 60 days. *By-Rite I* noted that assumption, as contemplated by section 365(d)(4), consists of three elements:

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8. 11 U.S.C. § 365(a) (1982) (emphasis added).

9. 11 U.S.C. § 365(d)(4) (1982 & Supp. II 1984).

10. 47 Bankr. 660 (Bankr. D. Utah), *rev'd*, 55 Bankr. 740 (D. Utah 1985). Although reversed, an examination of *By-Rite I* is relevant because several courts have followed it without questioning its analysis. *See supra* note 5.

> (1) a conscious and deliberate decision on the part of the debtor in possession or trustee to assume . . .
> (2) the ability, as determined by the Court after notice and a hearing, to satisfy the cure, compensate, and adequate assurance requirements [and] . . .
> (3) a manifestation of judicial approval of the bankruptcy court.[11]

The court analogized section 365(d)(4) to "a time bomb that begins ticking relentlessly and irresistibly upon entry of the order for relief."[12] In other words, if all three of the preceding elements are not satisfied within 60 days after entry of the order for relief, the lease is deemed rejected and must immediately be surrendered to the lessor.

By-Rite I felt that this strict interpretation of subsection (d)(4) was necessitated by the interplay of two Bankruptcy Rules (6006 and 9014), prior case law, considerations of bankruptcy policy, and the legislative history of section 365. Although *By-Rite I* was subsequently overruled by the federal district court for the district of Utah in *By-Rite II*[13] about one-third of the jurisdictions continue to adhere to the *By-Rite I* rationale.[14] Accordingly, the next section of this note analyzes the *By-Rite I* rationale and concludes that *By-Rite I* misapplied section 365(d)(4).

A. Bankruptcy Rules 6006 and 9014

Bankruptcy Rule 6006, which was promulgated in 1983 to outline the assumption procedure for unexpired leases,[15] directs that proceedings to assume unexpired leases be governed by Bankruptcy Rule 9014.[16] Rule 9014 requires that "relief [i.e. an assumption determination] shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought."[17] Under the approach developed in *By-Rite I*,[18] all three elements of Rule 9014—mo-

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11. *Id.* at 669.
12. *Id.* at 670.
13. *In re* By-Rite Distrib., Inc., 55 Bankr. 740 (D. Utah 1985).
14. *See supra* note 5.
15. *See* S. REP. No. 989, 95th Cong., 2d Sess. 59, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3787, 5845; H.R. REP. No. 595, 95th Cong., 1st Sess. 348-49, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6305.
16. BANKR. R. 6006.
17. BANKR. R. 9014.
18. The *By-Rite I* approach is taken by the courts requiring judicial approval within

tion, reasonable notice, and a hearing—must occur within the 60 day period[19] because of the "simple and unambiguous" language of the rule.[20]

However, this approach fails to recognize that Rule 9014 does not set a time limit on the occurrence of court approval. According to the advisory notes, Rule 6006 simply "provides a procedure for obtaining court approval" and by referring to Rule 9014 only requires "a motion to be brought for the assumption" of an unexpired lease.[21] Consequently, once a motion is brought, as evidenced by the advisory notes, the express language of the rules has been satisfied; and although a hearing is still necessary, it is not mandatory that it occur within the 60 day period.

B. Prior Case Law — In re Kelly Lyn Franchise Co.

The pre-amendment decision *In re Kelly Lyn Franchise Co.*[22] was another factor that led *By-Rite I* to conclude that court approval within 60 days is necessary. In *Kelly,* the court found that even under the 1978 Bankruptcy Act judicial approval was required before allowing the assumption or rejection of an unexpired lease.[23] *By-Rite I* reasoned that since "an assumption of an executory contract 'can only be effected through an express order of the court,' "[24] then '[a]ny assumption or rejection of an unexpired lease is devoid of validity without the court's approval.' "[25] If an assumption of an unexpired lease is devoid of validity without the court's approval, then certainly a trustee cannot assume a lease until it is approved by the court.

By-Rite I's reliance on *Kelly* is not wholly without merit even though *Kelly* is a pre-amendment decision. In *Kelly,* the court set a deadline for the debtor's assumption or rejection of the lease.[26] On the last day of the deadline, the debtor unsuc-

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the 60 day period.

19. 47 Bankr. at 669-70.

20. *Id.* at 668.

21. BANKR. R. 6006 advisory committee's note.

22. 26 Bankr. 441 (Bankr. M.D. Tenn. 1983).

23. *Id.* at 444.

24. *In re* By-Rite Distrib., Inc. 47 Bankr. 660, 667 (Bankr. D. Utah), *rev'd,* 55 Bankr. 740 (D. Utah 1985) (quoting 2 L. KING, COLLIER ON BANKRUPTCY § 365.03, at 365-21 (15th ed. 1982)); *see Kelly,* 26 Bankr. at 445.

25. 47 Bankr. at 667 (quoting Frank C. Videon, Inc. v. Marple Publishing Co., 20 Bankr. 933 (Bankr. E.D. Pa. 1982)).

26. 26 Bankr. at 444. Previously, in chapter 11 proceedings, no statutory time limit existed for assumption of unexpired leases. But, for all practical purposes, the deadline set in *Kelly* is similar to the time limit found in section 365(d)(4). The only dissimilarity

cessfully tendered his rent to the landlord. Once in court, the debtor argued that his "tendering of . . . rent, manifested an actual assumption of the lease" because assumption "can be accomplished by implication."[27] The court disagreed because the debtor had not obtained the requisite court approval.[28] The court stated:

> This case provides a classic example of why assumption by action should be disapproved and the Code requirement of court approval strictly enforced. By agreed order and misunderstanding, the parties herein have managed to create great confusion requiring multiple court hearings, delay and uncertainty. All of this could have been avoided upon a single, properly noticed hearing on the application of some party to assume or reject this lease.[29]

Kelly further concluded that simply because a time limit has been placed "on the debtor does not remove the Code requirement that the court review the debtor's decision and order the assumption or rejection."[30] *By-Rite I* reasoned that since section 365(d)(4) and *Kelly* are similar in that they both put a time limit on the debtor's assumption, and since *Kelly* required court approval to occur within the court established time period, then court approval must also occur within the time period set by section 365(d)(4).

The *By-Rite I* court failed to correctly read *Kelly*. A close examination of *Kelly* reveals that the court was more concerned with eliminating assumption by surprise than with regulating the timing of court approval. *Kelly* suggested the following procedure as proper for assumption:

> [T]he debtor's election to assume or reject an executory contract should be in [an] unconditional and unambiguous form filed with the court and served upon the affected party and other parties in interest. . . . The election should incorporate a request for the court's approval and should be heard by the court at the *earliest opportunity*.[31]

The purpose of the court approval requirement then, according

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is the lack of an automatic termination provision.

27. *Id.*
28. *Id.*
29. *Id.* at 446.
30. *Id.*
31. *Id.* at 446 (emphasis added).

to *Kelly*, is to prohibit "assumption or rejection of a lease by surprise, confusion or the inartful drafting of an agreed order setting a deadline."[32] Since these problems can be alleviated by filing and serving a motion to assume upon the affected parties, the reason for requiring court approval within the established time limit is satisfied. Once a motion has been filed, *Kelly* requires only that a court hearing occur at the "*earliest opportunity*." If this "earliest opportunity" occurs outside the established time limit, due to a congested court calendar or otherwise, the court will not likely penalize the debtor since its concerns of assumption by surprise or confusion are alleviated.

C. *Considerations of Bankruptcy Policy*

By-Rite I also implies that the 60 day court approval or automatic rejection interpretation is proper because of significant policy considerations.[33] The purpose of the 1984 amendments to section 365 was to "strengthen the protections [afforded] . . . shopping centers under the Bankruptcy Code."[34] Prior to 1978, the Bankruptcy Code permitted lessors to enforce ipso facto clauses permitting them to terminate a lease if a lessee initiated a bankruptcy proceeding.[35] These clauses were made unenforceable by the Bankruptcy Reform Act of 1978 (1978 Act).[36] As a result, courts were directed "to be sensitive to the rights of the nondebtor party to . . . unexpired leases."[37] The courts were to "insure that the trustee's performance under the . . . lease [gave] the . . . [lessor] the full benefit of his bargain."[38] The 1978 Act failed in this respect.[39] According to a prominent lessor, one of the most oppressive problems faced by lessors during this period of insolvency resulted "from the failure of the [1978] Code [in chapter 11 cases] to require the trustee to accept or reject [an] unexpired lease within a specified time limit."[40] Ex-

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32. *Id.* at 447.

33. *See In re* By-Rite Distrib. Inc., 47 Bankr. 660, 664-66 (Bankr. D. Utah), *rev'd*, 55 Bankr. 740 (D. Utah 1985) (The court quotes extensively from the legislative history attempting to show that Congress intended to benefit lessors and tenants of shopping centers because of the unjust hardships they had suffered.).

34. S. REP. No. 65, 98th Cong., 1st Sess. 32 (1983) [hereinafter S. REP.].

35. Finn v. Meighan, 325 U.S. 300, 303 (1945).

36. 11 U.S.C. § 365(e) (1982).

37. S. REP., *supra* note 34, at 30.

38. *Id.*

39. *Id.* at 32, 35.

40. *Bankruptcy: The Shopping Center Protection Improvement Act of 1982: Hear-*

tended periods of time, often six months to a year, passed without the lessor knowing the disposition of his lease.[41]

These delays caused substantial hardship to both lessors and tenants of shopping centers,[42] because "shopping center tenants and their leases are unique in their interdependence."[43] A mutuality of interest exists among the individual tenants[44] because each tenant relies upon the other for customer traffic. As a result of this interdependence, "the bankruptcy of one tenant [especially a main tenant] will seriously affect the other tenants."[45] This interdependence, coupled with the fact that leases usually contain anchor' clauses . . . commit[ting] the tenant to a lease term only so long as another designated tenant remains in the shopping center,"[46] make it imperative that the lessor quickly regain possession of the premises so that it may be re-let before other tenants suffer serious financial losses.[47] These considerations had significant influence upon *By-Rite I*'s determination that court approval of an assumption must occur within the 60 day period. Requiring court approval within that period established an outer limit on the time that may lapse before the lessor regains possession of the premises, and sixty days appears to be short enough to give the lessor most of the protection he desires.

However, by focusing strictly on the lessors' concerns, *By-Rite I* overlooked the general proposition that "bankruptcy courts are courts of equity and cannot blindly ignore the impact of a formalistic application of statutory bankruptcy provisions."[48] *By-Rite I*'s application of section 365(d)(4) allows for an automatic formalistic termination of a lease at the end of the

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ings on S. 2297 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 24 (1982) [hereinafter *Shopping Center*] (statement of Wallace R. Woodbury, an attorney and chairman of the board of a 60-year-old real estate development, brokerage, and management firm).

41. *Id.* at 21, 72 (statements of Wallace R. Woodbury and Nathan B. Feinstein).

42. *Id.* at 55 (statement of Howard C. Oliver).

43. S. REP., *supra* note 34, at 33.

44. Note, *Shopping Center Tenant Bankruptcies: A Better Balance of Opposing Interests*, 5 CARDOZO L. REV. 183, 187 (1983).

45. S. REP., *supra* note 34, at 33. This is a serious problem because "[s]hopping centers comprise the major sector of retail trade in the United States." Note, *supra* note 44, at 183. In 1981, 15,000 shopping centers had one or more tenants involved in bankruptcy. This represents nearly 65 percent of all shopping centers. S. REP., *supra* note 34, at 33.

46. S. REP., *supra* note 34, at 34.

47. *See Shopping Center*, *supra* note 40, at 14-16.

48. Ehrlich, *The Assumption and Rejection of Unexpired Real Property Leases Under the Bankruptcy Code—A New Look*, 32 BUFFALO L. REV. 1, 55 & n.144 (1983).

60 day period without regard to any equities involved.[49] Even when ipso facto clauses were permitted by the Code, *Queens Boulevard Wine & Liquor Corp. v. Blum* held that they will not be enforced if "compelling equitable and policy considerations" oppose enforcement.[50] In *Queens Boulevard* the debtor signed a lease containing an ipso facto clause permitting the lessor to terminate the lease after initiation of bankruptcy proceedings. Queens Boulevard subsequently became insolvent, and the lessor sought to have the lease terminated because he received an offer to lease the premises at a higher rent. To defeat application of the ipso facto clause, *Queens Boulevard* applied a balancing test[51] and held that the court "must consider not only the interests of the landlord but also those of the debtor and its creditors."[52] If termination would result in a windfall to the lessor and deny the debtor's estate an asset necessary to its continued viability, the termination clause should not be upheld.[53] A "time bomb" approach, like that applied in *By-Rite I,* does not allow for any balancing of interests. Such an approach "severely cripple[s] prospects of reorganization" and also favors the lessor in "derogation of other creditors."[54]

For instance, if a debtor, after careful evaluation of the estate, decides that an assumption of a lease is essential for effective reorganization, he will file a motion to assume the lease. Once a motion is filed, the debtor can do nothing more to effect the assumption. At this point in time, usually 30 or more days have lapsed since the debtor petitioned for relief.[55] Thus, the court now has less than 30 days to schedule a hearing, review the debtor's decision, and order the approval. If the debtor is misfortunately located in a jurisdiction where bankruptcy courts are busy, his otherwise valid assumption may be denied simply be-

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49. *By-Rite I* stated that subsection (d)(4) operates like a "time bomb that begins ticking relentlessly and irresistibly upon entry of the order for relief." *In re* By-Rite Distrib., Inc., 47 Bankr. 660, 667 (Bankr. D. Utah), *rev'd,* 55 Bankr. 740 (D. Utah 1985). According to *By-Rite I,* just as a time bomb explodes, without cognizance of who may be injured when its time has lapsed, so does a lease expire, without cognizance of the equities involved when the 60 days have run.

50. 503 F.2d 202, 206 (2d Cir. 1974).

51. *See* Ehrlich, *supra* note 48, at 50 (for a discussion of this balancing test).

52. 503 F.2d at 206.

53. *Id.* at 206-07.

54. Brief of Appellant *By-Rite Distributing, Inc.*, at 22, *In re* By-Rite Distrib., Inc., 55 Bankr. 740 (D. Utah 1985) (NC-85-0055J); *see also* Ehrlich, *supra* note 48, at 47.

55. *See infra* notes 64-69 and accompanying text.

cause the court could not schedule a hearing within the remaining 30 days.

Even if the debtor decides against reorganization, an assumption of the lease may still be in the best interest of the estate because often the debtor has made significant improvements to the leasehold property. This increased value could be recaptured for the estate by an assignment of the remaining lease. The money received could then be used, without depriving the lessor of the benefit of his bargain, to pay claims of other creditors. The lessor is not harmed because he receives the compensation he originally bargained for in the lease. But, again, if the debtor is located in a jurisdiction prevalent with bankruptcies, the entire value of the leasehold may go to one creditor, the lessor, in derogation of all other creditors because of a congested court calendar.

The foregoing policy consideration has been an important impetus in prompting courts to reject *By-Rite I*'s interpretation of subsection (d)(4). A majority now follows the rationale established in *In re Condominium Administrative Services*:[56]

> Clearly, the Court calendar and the entry of orders are matters which are exclusively within the control of the Court. A debtor in possession . . . should not be thwarted in its attempt to reorganize because in any given case, the Court is unable to schedule the required hearing or enter an order within the 60 days. Thus, while this Court recognizes that the Congress clearly intended to accelerate the process in order to protect a certain class of creditors, it cannot accept the proposition that matters which are clearly outside the control of the Debtor should operate to work a forfeiture of an otherwise assumable lease.[57]

Requiring otherwise would certainly lead to anomalous results[58] by "putting the trustee's success or failure in the hands of chance."[59] This is a result not intended by Congress.

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56. 55 Bankr. 792 (Bankr. M.D. Fla. 1985). This was the second court to interpret section 365(d)(4).

57. *Id.* at 798; *see In re* Burns Fabricating Co., 61 Bankr. 955, 958 (Bankr. E.D. Mich. 1986); *In re* By-Rite Distrib., Inc., 55 Bankr. 740, 745 (D. Utah 1985); *In re* Bon Ton Restaurant and Pastry Shop, Inc., 52 Bankr. 850, 853 (Bankr. N.D. Ill. 1985).

58. *Bon Ton Restaurant*, 52 Bankr. at 853.

59. *Burns Fabricating*, 61 Bankr. at 957.

D. Legislative History

The legislative purpose of section 365(d)(4) is to protect shopping center tenants and their lessors from extended vacancies by forcing the trustee to make a quick assumption decision.[60] According to *By-Rite I*, any construction of subsection (d)(4) that allows court approval to occur outside the 60 day time period "defeat[s] the obvious intent of Congress and add[s] delay and uncertainty to lease assumption decisions."[61] However, Congress was not concerned whether court approval occurred within the 60 day time limit; rather, it was concerned with remedying the "serious problems caused shopping centers and their solvent tenants . . . [by] the long-term vacancy or partial operations of space by . . . bankrupt tenant[s]."[62] Senator Hatch concluded that the Shopping Center Bankruptcy Amendments "would lessen the[se] problems . . . by requiring that the trustee *decide* whether to assume or reject [a] nonresidential real property lease within 60 days after the order for relief."[63]

Before relying too heavily on Congress' use of the word "*decide*" it must be determined whether making a decision is by itself capable of speeding up the assumption or rejection of an unexpired lease. The evidence indicates that it is; because, prior to the 1984 amendments, in a chapter 11 proceeding it was rare for one to get a determination of an assumption "within 6 months, and 9 months to 1 year [was] normative."[64] The average time for court determination of an assumption, since the 1984

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60. *Shopping Center, supra* note 40, at 10 (statement of Senator Heflin). Although this is the purpose of subsection (d)(4), it is applicable to all assumptions of nonresidential real property leases.

61. *In re* By-Rite Distrib., Inc., 47 Bankr. 660, 670 (Bankr. D. Utah), *rev'd*, 55 Bankr. 740 (D. Utah 1985).

62. H.R. CONF. REP. No. 882, 98th Cong., 2d Sess. 598 (1984) (remarks of Senator Hatch); S. REP., *supra* note 34, at 30, 35; *see Shopping Center, supra* note 40, at 14-16.

63. H.R. CONF., *supra* note 62, at 599 (remarks of Senator Hatch) (emphasis added). Nathan B. Feinstein said that one of the changes he felt the proposed amendments would bring is that the debtor would have to "make a *decision* on whether he will assume or reject the lease within 60 days of a filing of a petition." *Shopping Center, supra* note 40, at 72 (statement of Nathan B. Feinstein—a partner at Cohen, Shapiro, Polisher, Shiekman & Cohen—Mr. Feinstein was representing The International Council of Shopping Centers) (emphasis added). "In all but the most complicated reorganization cases 60 days should be a sufficient period to make this *determination*. Even in large reorganization cases, the debtor presumably knows his own business and understands the value of his assets well enough to make such *decisions* in 60 days." S. REP., *supra* note 34, at 37-38 (emphasis added).

64. *Shopping Center, supra* note 40, at 72 (statement of Nathan B. Feinstein).

amendments, has now been reduced to 85 days.[65] Landlords are presently, even under the majority interpretation, receiving a judicial determination of their assumption decisions in one-third of the pre-amendment normative time. Thus, the majority position is in line with congressional intent, because even with the "adoption of the proposed amendment to Section 365(d)(1), it is apparent that 90 days or more will be entailed before a vacation of the premises is effected."[66]

The minority (*By-Rite I*) position actually conflicts with congressional intent because it only gives the trustee approximately 35 days in which to make his or her determination.[67] Allowing only 35 days, especially in a complex case would "unduly tax the trustee, who must also calculate assets and debts, determine creditors and file schedules. . . . The result would likely be that trustees would routinely file for extensions of the sixty-day period, leading to the very evil that section 365(d)(4) was meant to cure—costly delay."[68] Even with simple leases, deciding whether to assume or reject is often difficult and time consuming.[69]

The majority position is further strengthened by an examination of cases arising under section 365(d)(1)—a section virtually identical to section 365(d)(4)—dealing with assumption of unexpired leases in chapter 7 cases. For example, in *In re Avery Arnold Construction Inc.*,[70] the trustee's attorney advised the landlord's attorney, before expiration of the 60 day period, that the trustee intended to assign the lease; but the court did not approve the assumption within that period. Nevertheless, the assumption was upheld because " 'assumption' may precede 'ap-

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65. Twenty-five days is the average time that has lapsed before courts have heard the debtor's motions. *See, e.g., In re* Treat Fitness Center, Inc., 60 Bankr. 878, 890 (Bankr. 9th Cir. 1986); *In re* By-Rite Distrib., Inc., 55 Bankr. 740, 741 (D. Utah 1985); *In re* Southwest Aircraft Servs., Inc., 53 Bankr. 805, 807 (Bankr. C.D. Cal. 1985). Assuming, the trustee is dilatory and files a motion to assume on the 60th day, the court on the average will hear the motion by the 85th day. The range in time for hearing the motion is from 1 to 30 days.

66. *Shopping Center, supra* note 40, at 82 (statement of Nathan B. Feinstein). Assuming a court denied an assumption on the 85th day, the lease would then be terminated and the trustee would have to "immediately surrender" the premises to the lessor. The only time delay involved would be that required to move the lessee out.

67. *See supra* note 65.

68. *In re* By-Rite Distrib., Inc., 55 Bankr. 740, 745 (D. Utah 1985).

69. *See* Ehrlich, *supra* note 48, at 7, 16 ("Compelling an early decision is akin to requiring that the trustee use a crystal ball.").

70. 11 Bankr. 34 (Bankr. S.D. Fla. 1981).

proval' and, therefore, there is no requirement that the approval occur within the 60 day period."[71]

Congress knew how the courts were interpreting the 60 day requirement in chapter 7 proceedings and yet still chose to adopt the almost identical language of section 365(d)(1) for section 365(d)(4).[72] Had Congress disagreed with that interpretation, it certainly would have reworded the amendment.

In light of the foregoing analysis it appears that the proper interpretation of section 365(d)(4) "contemplates two distinct actions, one by the trustee . . . and one by the court. The trustee assumes or rejects, and the court approves."[73] The assumption is "in effect, subject to defeasance by the court. But the trustee's act of assuming the lease is complete for purposes of section 365(d)(4) before the trustee ever obtains court approval."[74]

III. Methods of Assumption

The courts allowing judicial approval to occur beyond the 60 day period disagree as to how the trustee is to manifest his intent to assume. Some courts allow assumption by informal acts such as oral notice.[75] Other courts require the trustee to clearly communicate his intention to assume in an unequivocal manner.[76] Other courts, rejecting both approaches, require the trustee to file a formal motion to assume within the 60 day period.[77]

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71. *Id.* at 35; *see In re* Price Chopper Supermarkets, Inc., 19 Bankr. 462, 466 (Bankr. S.D. Cal. 1982).

72. "[T]he proposed amendments, would apply the same rule we now have in chapter 7 cases to the chapter 11 cases." *Shopping Center, supra* note 40, at 73 (statement of Nathan B. Feinstein). "The new section 365(d)(4) adopts almost exactly the wording of former section 365(d)(1). . . . Logically then, the manner in which motions to assume were treated under former section 365(d)(1) is relevant to how cases under the new section should be resolved." *In re* Burns Fabricating Co., 61 Bankr. 955, 957-58 (Bankr. E.D. Mich. 1986).

73. *In re* By-Rite Distrib., Inc., 55 Bankr. 740, 742 (D. Utah 1985).

74. *Id.* at 743.

75. *In re* Ro-An Food Enters., 41 Bankr. 416, 418 (E.D.N.Y. 1984); *cf. In re* J.J. Mellon's, Inc., 57 Bankr. 437 (Bankr. D.C. 1985) (court implied that it would allow the debtor's tender of payment on 62d day as sufficient for assumption); *In re* Curio Shoppes, Inc., 55 Bankr. 148, 152 (Bankr. D. Conn. 1985) (mailing of motion on 60th day was sufficient for assumption).

76. *In re* Re-Trac Corp., 59 Bankr. 251, 255 (Bankr. D. Minn. 1986); *In re* 1 Potato 2, Inc., 58 Bankr. 752, 754-55 (Bankr. D. Minn. 1986); *By-Rite*, 55 Bankr. at 742 n.5; *In re* Hodgson, 54 Bankr. 688, 690 (Bankr. W.D. Wis. 1985).

77. *In re* Treat Fitness Center, Inc., 60 Bankr. 878, 879 (Bankr. 9th Cir. 1986); *In re* House of Deals of Broward, Inc., 67 Bankr. 23 (Bankr. E.D.N.Y. 1986); *In re* Burns

This section of the note analyzes the various positions courts have taken with respect to methods of assumption, and explains why the proper method requires filing a motion to assume and giving notice to affected parties within the 60 day period.

In *In re Ro-An Food Enterprises,* the court held that a "[t]rustee can assume [an] unexpired lease by action less formal than the *Rule 9014 provision for a motion for court approval.*"[78] The court based this decision upon previous judicial interpretations of section section 70(b) of the old Bankruptcy Act, because it felt that the language of Rule 9014 was nearly identical to that of section 70(b).[79] The irony of the court's holding is that while it admits that Rule 9014 requires a motion for court approval, it ignores this and bases its decision upon cases decided before Rule 9014 was enacted.[80]

Ro-An cites *In re Avery Arnold Construction Inc.,*[81] to support this holding; but the *Arnold* court would have required more had Rule 9014 been promulgated. The *Arnold* court stated: "Although the trustee's informal handling of this significant transaction meets the minimum requirements of the Code, it should not serve as a model to anyone."[82] The court then proceeded to outline what it believed to be the proper procedure for assumption—the assumption ought to be in an "unambiguous written form filed with [the] court and served upon the affected party."[83] The procedure *Arnold* outlined is precisely what Rule 9014 requires. Had 9014 been in effect, the court apparently would have demanded compliance.

Some of the courts, having rejected assumption by informal acts, require assumption by an "unequivocal act."[84] These courts fail to explain why the unequivocal act is not limited to filing a formal motion as required by Rule 9014.[85] Two problems exist

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Fabricating Co., 61 Bankr. 955, 958 (Bankr. E.D. Mich. 1986); *In re* Spats Restaurant & Saloon, 64 Bankr. 442, 444 (Bankr. D. Nev. 1986); *In re* Condominium Admin. Servs., 55 Bankr. 792, 798 (Bankr. M.D. Fla. 1985).

78. 41 Bankr. 416, 418 (Bankr. E.D.N.Y. 1984) (emphasis added).

79. *Id.*

80. *See id.*

81. 11 Bankr. 34 (Bankr. S.D. Fla. 1981). For a discussion of *Arnold, see supra* text accompanying notes 70-71.

82. *Id.* at 35.

83. *Id.*

84. *See supra* note 76 and accompanying text.

85. *See In re* Re-Trac Corp., 59 Bankr. 251, 255 (Bankr. D. Minn. 1986); *In re* 1 Potato 2, Inc., 58 Bankr. 752, 754-55 (Bankr. D. Minn. 1986); *In re* Hodgson, 54 Bankr. 688, 690 (Bankr. W.D. Wis. 1985).

with the "unequivocal act" requirement. First, what one party views as an unequivocal act, the other may view as a mere suggestion that an assumption may occur in the future.[86] Limiting the act to the filing of a motion to assume would not only reduce uncertainty among the parties, it would also free courts from the "morass of attempting to judge the meaning and import of the conduct and conversations of the parties."[87] Second, the "unequivocal act" requirement leads to the same delay the amendments were designed to avoid. Since this test requires the courts to determine, on a case-by-case basis, whether the trustee has manifested his intent to assume by an unequivocal act, litigation necessarily will arise. Because of this increased litigation the court dockets will become congested; consequently, lessors will have a longer wait before receiving a judicial determination of the trustee's assumption decision.

In addition, allowing the trustee to manifest his intent to assume by an unequivocal act implies that the trustee need not file a motion to assume within the 60 day period. Thus, the burden for completing the assumption, in all practicality, shifts back to the lessor[88] because the trustee may file whenever he pleases. This leaves the non-debtor party in the same position he was before the Code was amended, because he now has to bring a motion—in those cases where the trustee is dilatory in filing a motion—to compel the trustee to obtain the requisite court approval.

IV. Conclusion

All bankruptcy courts agree that judicial approval of an assumption of an unexpired lease is an absolute requirement under section 365(d)(4), but they disagree on whether the failure to obtain such approval within the 60 day period should necessarily result in automatic termination and rejection of the lease. After examining the interplay of Bankruptcy Rules 6006 and 9014, prior case law, considerations of bankruptcy policy, and

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86. *In re* Hodgson, 54 Bankr. 688, 689 (Bankr. W.D. Wis. 1985).

87. *In re* Treat Fitness Center, Inc., 60 Bankr. 878, 879 (Bankr. 9th Cir. 1986).

88. Before the Bankruptcy Code was amended the landlord usually had to file a motion to compel the trustee to assume, because "there [was] no time limit specified requiring the trustee to release jurisdiction over an unwanted leasehold." *Shopping Center, supra* note 40, at 5 (statement of Wallace R. Woodbury); *see also In re* By-Rite Distrib., Inc., 47 Bankr. 660, 664 (Bankr. D. Utah), *rev'd*, 55 Bankr. 740 (D. Utah 1985) ("[t]he 1984 Amendments reallocated the burden" to the lessee).

the legislative history of section 365(d)(4), this note concludes that there is no need or requirement for court approval to occur within the 60 day period.

Since court approval within the 60 day period should not be required, it becomes imperative that courts follow the procedure for assumption outlined in Bankruptcy Rules 6006 and 9014 to insure that the lessor knows within a reasonable time the status of his lease. These Bankruptcy Rules require the trustee to file a formal motion to assume within the 60 day period. Requiring a formal motion within that period eliminates the problems courts have in determining whether an informal act has amounted to an assumption. In addition, it accomplishes the congressional goal of reducing hardships on lessors; because if a motion is filed within the 60 day period, most lessors will know within 85 days after the date of the order for relief whether the lease is assumed or rejected. If rejected, the lease will be immediately surrendered to the lessor to use as he sees fit.

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