

Table of Contents

Overview.....	1
Chapter One: Pre-Bankruptcy Strategies	5
I. Pre-Petition Termination of the Lease.....	6
A. Introduction.....	6
B. The Concept of “Termination” Pertaining to Real Estate Leases.....	6
C. Strategy Pointers: Risks and Benefits from Termination	11
1. <i>General</i>	11
2. <i>Starting the Cap on Damages</i>	11
3. <i>The Importance of a Notice of Default</i>	12
4. <i>The Need for State Court Judgment/Barrier to Reviving Terminated Lease</i>	12
II. Challenging the Termination of the Lease as a Fraudulent Conveyance.....	14
A. Cases Holding that Lease Termination Is a Fraudulent Conveyance	14
B. Cases Holding that Lease Termination Is Not a Fraudulent Conveyance..	17
III. Pre-Petition Rent Payments as Preferences	19
A. Introduction.....	19
B. Cases Finding Rent Payments to Be Avoidable Preferences	19
Chapter Two: The Debtor’s Obligations to the Landlord Prior to Assumption or Rejection of the Lease	23
I. Introduction.....	24

II. The Debtor’s Duty to Timely Perform Its Lease Obligations Pending Assumption or Rejection 25

 A. Rationale for the Rule..... 25

 B. The Duty to Perform Lease Obligations Is Independent of the Standards for Administrative Claims 27

 C. The Contrary View on Post-Petition Lease Obligations 30

 D. What Is an “Obligation” under the Lease?..... 30

 E. When Does an Obligation Arise? “Proration” vs. “Performance” 31

 1. *The Proration (or Accrual) Rule*..... 32

 2. *The Billing Date or Performance Rule: The “Bright Line” Test*..... 36

 3. *Stub Period Rent Under the Billing-Date Rule*..... 39

 4. *Strategic Considerations Regarding the Billing-Date Rule*..... 42

 F. Does a Landlord Have a “Super Administrative” Claim for Post-Petition Obligations? 43

 1. *Majority View: Landlord’s Rent Claims Do Not Have Super-Priority over Other Administrative Claims* 44

 2. *Minority View: Landlord’s Rent Claims Do Have Super-Priority over Other Administrative Claims* 47

 3. *Strategic Considerations*..... 49

 G. Remedies for Noncompliance with Tenant’s Duty to Timely Perform Its Obligations Under the Lease 50

Chapter Three: Lease Assumption 55

I. Introduction 56

II. Time Period for Assumption 58

 A. § 365(d)(4)(A) 58

B. Time to Seek Extension Under BAPCPA: Sword of Damocles	58
C. Strategic Considerations	60
III. Legal Standards for Assumption.....	60
A. Lease Not in Default.....	60
B. Assuming a Lease that Is in Default	61
C. Debtor’s Obligation to Cure Non-Monetary Defaults as a Condition of Assumption.....	62
1. <i>Prior Law: Debtor Cannot Assume Lease if Non-Monetary Defaults Cannot Be Cured</i>	63
2. <i>Post-BAPCPA: Debtor Does Not Have to Cure Non-Monetary Defaults to Assume Lease</i>	65
IV. Procedural Issues in Assumption.....	66
A. Assumption Requires Motion and Order	66
B. Bankruptcy Rule 6006(a).....	67
C. Bankruptcy Rule 9014.....	67
D. Assumption Can Only Be Achieved Through Express Court Order.....	68
E. The Contrary View: Assumption Without a Motion and Court Order	69
F. Assignment of Leases Other than Shopping Centers	70
G. Assignment of Shopping Center Leases.....	72
H. Assignment Through Sale of Designation Rights	74
I. The “Ride Through” Problem.....	76
Chapter Four: Lease Rejection.....	81
I. Introduction.....	82
II. Legal Grounds for Rejection; Business Judgment Rule.....	83

- III. Consequences of Rejection on Third Parties:
 - Rejection as Termination..... 84
 - A. One View: Rejection Is Effective as Termination in Chapter 11
and Subleases Are Terminated..... 84
 - B. A Second View: Rejection Is a “Breach” Only and Does Not
Extinguish Rights of Subtenants or Mortgagees 90
 - C. Strategic Considerations 93
- IV. Rejection Requires Affirmative Court Action
Unless Lease Is Deemed Rejected 94
 - A. Cases Supporting View that Rejection Requires Court Order 94
 - B. Cases Supporting View that Rejection Can Be Retroactive —
Generally to Date of Motion 96
 - C. Retroactive Rejection to Petition Date: Entry of Order
as Part of First-Day Motions..... 98
 - D. Strategic Considerations 100

**Chapter Five: Calculating the Landlord’s
Lease-Rejection Damages Claim 103**

- I. The Landlord’s Claim for Lease-Rejection Damages..... 104
- II. The Pre-Petition Claim: Unpaid Rent Due on Petition Date 105
 - A. Introduction..... 105
 - B. Statutory Authority: § 502(b)(6)(B)..... 105
 - C. One View: No Limit on Pre-Petition Damages 106
 - D. Contrary Rule: Limit on Pre-Petition Damages 108
- III. Landlord’s Claim for Future Unpaid Rent Resulting from
Rejection/Termination: The Statutory Cap on “Rent” Claims .. 110
 - A. The 15 Percent or One-Year Cap 110

1. <i>Rent Measurement Method</i>	112
2. <i>Term Measurement Method</i>	112
B. Discounting to Present Value	115
C. Strategic Considerations	115
IV. The Cap on a Landlord’s Damages Based on Whether a Claim Is “Rent” or “Collateral” Damages	116
A. The Notion of “Rent Reserved”: Two Different Views on “Cap”	116
B. One View: Future Rent Claim Is Capped by Definition of “Rent Reserved”	116
C. A Second View: The Cap Only Applies to Future Rent, and Other Damages Are Not Subject to Any Cap	117
D. The Delaware and New York Views on Non-Rent Claims	120
V. Removal, Environmental and Repair Obligations: Are They Rejection Claims?	123
VI. Application of the Cap on Damages to Third-Party Guarantors.....	126
VII. Letters of Credit and the Statutory Cap	128
A. Introduction.....	128
B. The Independence Theory	128
C. Letters of Credit: Application to Cap on Damages with Excess Returned	129
D. Strategic Considerations	137
E. Letters of Credit: Application Where Debtor Assumes Lease	139
F. Drafting Suggestions.....	140
VIII. Damages Following Assumption.....	141

Glossary of Bankruptcy Terms Used in this Guide 143

Table of Authorities 149