Bankruptcy, a Landlord's Perspective
Part 3: The Landlord's Rights if the Lease is Assumed
By Camille J. Iurillo and Sabrina C. Beavens

In order to assume a lease, the debtor must: (1) obtain court approval; (2) if there has been a default under the terms of the lease, cure or provide adequate assurance of a prompt cure of the default; (3) compensate, or provide adequate assurance that the debtor will promptly compensate the landlord for any actual pecuniary loss to the landlord as a result of the default; (4) provide adequate assurance of future performance of the lease. 11 U.S.C. § 365(a); 11 U.S.C. § 365(b)(1)(A-C). To follow is a discussion of select issues commonly faced when dealing with a debtor who chooses to assume the lease.

Curing Defaults

In order to assume the lease, the debtor must cure pre and post-petition defaults. *In re Handy Andy Home Imp. Centers, Inc.*, 196 B.R. 87, 93 (Bankr. N.D. Ill. 1996). Defaults under a lease may include both monetary and non-monetary defaults. As to monetary defaults, courts have interpreted this provision as requiring something less than an immediate cash payment but have not established a bright-line rule for how long a debtor may have to cure. *Compare In re Yokley*, 99 B.R. 394 (Bankr. M.D. Tenn. 1989) (a period of two years to cure on a nonresidential lease was held not prompt); *In re Coors of North Mississippi, Inc.*, 27 B.R. 918 (Bankr. N.D. Miss. 1983) (period of three years to cure under beer distributorship agreement was held sufficiently prompt.) Similarly, courts have not required non-monetary defaults to be cured before assuming leases. *In re Bankvest Capital Corp.*, 360 F.3d 291, 301-02 (1st Cir. 2004) (Equipment lease case where court did not require cure for non-monetary default prior to assumption.)

Pecuniary Losses: Attorneys Fees

One of the largest expenses incurred by landlords as a result of a tenant's bankruptcy filing is attorneys' fees. Generally speaking, the statutory requirement that the debtor compensate the landlord for actual pecuniary losses includes payments for attorneys' fees if the lease contains a requirement for reimbursement of attorneys' fees in the event of a breach of the lease.

The majority rule is that 11 U.S.C. § 365(b)(1)(B) does not provide an independent right for the recovery of attorneys fees associated with the default under an assumed lease; instead entitlement to attorneys fees is dependent on the terms of the lease and state law. *In re Shangra-La Inc.*, 167 F.3d 843, 849 (4th Cir. 1999) and cases cited. *But see, In re Westworld Community Healthcare, Inc.*, 95 B.R. 730 (Bankr. C.D. Cal. 1989) (Court held that 11 U.S.C. § 365(b)(1)(B) provides for an independent right of compensation for attorneys fees associated with a default of an assumed lease. The holding was subsequently rejected in *Lacey v. Westside Print Works*, 180 B.R. 557, 564 (B.A.P. 9th Cir. 1995)). Attorneys' fees qualify as actual pecuniary losses when state law would recognize them as such. *In re Shangra-La Inc.*, 167 F.3d at 850, *citing In re Ryan's Subs, Inc.*, 165 B.R. 465, 467 (Bankr. W.D. Mo. 1994).

In Florida, in the absence of contractual or statutory liability, attorneys' fees incurred by plaintiffs are not recoverable as an item of damages. *Stinson v. Feminist Women's Health Center, Inc.*, 416 So.2d 1183 (Fla. 1st DCA 1982). Further, attorneys' fees provisions must be strictly construed and each claim which gives rise to a fee claim should be assessed individually. *Bay Lincoln-Mercury Dodge, Inc. v. Transouth Mortg. Corp.*, 531 So.2d 1027 (Fla. 1st DCA 1988).

However, a court could deny the request for attorneys' fees if the landlord chose to hire a bankruptcy attorney only to monitor the bankruptcy. *In re Best Products Company, Inc.*, 148 B.R. 413 (Bankr. S.D.N.Y. 1992). From a business point of view, the inability to recover fees incurred for monitoring a bankruptcy could cause damage to the landlord in excess of those fees if, for example, a deadline is missed or a pleading is filed which is prejudicial to the class of creditor's the landlord is in but the landlord does not object. Accordingly, it is simply not worth the risk to avoid the minor expense of monitoring a case.

What is Adequate Assurance?

The requirement of providing adequate assurance of future performance under the lease is not a mathematic formula and does not require the debtor to guarantee future performance. Instead, the debtor must merely demonstrate that rent will be paid and its other obligations under the lease will be met. *In re Prime Motor Inns, Inc.*, 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994) (The assurance of future performances is adequate if performance is likely [i.e. more probably than not]; the degree of assurance necessary falls short of an absolute guaranty); *In re THW Enterprises, Inc.*, 89 B.R. 351, 357 (Bankr. S.D.N.Y. 1988) ("the test is not one of guaranty, but simply whether it appears that the rent will be paid and other obligations met."); *In re R.H. Neil, Inc.*, 58 Bankr. 969, 971 (Bankr. S.D.N.Y. 1986) (court looked at evidence of profitability such as demonstrated reductions in operating cost, payroll, and inventory, coupled with an increase in sales and found that the debtor provided adequate assurance in that there was "a firm commitment to make all payments and at least a reasonably demonstrable capability to do so.").

Contrary to initial projections, this Article will include four parts. The remaining alternative is when the tenant attempts to assign the lease. Accordingly, next month's article will include a discussion of the landlord's right when the tenant assigns the lease and the authors' final thoughts on negotiating with tenants and protections for landlords when doing business with a financially distressed tenant.

Camille J. Iurillo recently formed Iurillo & Associates, P.A. She is currently the a member of the Board of Directors of the St. Petersburg Bar Foundation, Chair of the St. Pete Bar Foundation's Annual Gala Fund Raiser and Chair of the St. Petersburg Bar Association's Membership Committee.

Sabrina C. Beavens is an associate at Iurillo & Associates, P.A. Ms. Beavens an active member of the St. Petersburg Bar Association's Young Lawyers Section and is the current Executive Director of the Barney Masterson Inn of Court.

Ms. Iurillo and Ms. Beavens practice primarily in the areas of Creditors' Rights, Individual and Corporate Bankruptcy, Commercial and General Civil Litigation.