



International Council of Shopping Centers

ISSUE PAPER

Bankruptcy

- The 2005 bankruptcy reforms have provided critical protection for shopping centers, solvent retailers and local communities.
- The certainty created by BAPCPA is needed now more than ever.
- Any additional risk to shopping center owners may add to the financial crisis they are currently facing.

Position: ICSC opposes efforts to amend the reforms that were passed in the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). These reforms provide ample time for retail chains to develop a plan for how they will manage their leases once they file for bankruptcy. They also allow shopping center landlords to manage the economic hit and better protect other retailers in the center.

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Background: In the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Congress amended the Bankruptcy Code to address an abuse that adversely affected shopping center owners and others in favor of retailers filing for bankruptcy. Prior to this reform, bankruptcy judges routinely extended the deadline indefinitely on a retail debtor's decision to assume or reject a lease. This indefinite extension created a prolonged uncertainty that was unfair to the landlord and surrounding retailers, as the party filing for bankruptcy often left their stores closed for long periods of time, negatively affecting the entire shopping center.

Section 365(d)(4) of BAPCPA clarified the timetable for disposition of a lease, enabling the shopping center to find a new tenant, if necessary, and in a timely fashion. Debtors now must decide whether to assume or reject their leases within 120 days after filing for bankruptcy. A judge can extend this period for an additional 90 days upon the motion of the trustee or owner "for cause." Additional extensions can occur with the prior written consent of the shopping center owner.

Current Activity: A small group of activist bankruptcy attorneys, law professors and other "bankruptcy professionals" argue that the 210-day deadline has caused an uptick in retail liquidations, leading the House Judiciary Subcommittee on Commercial and Administrative Law to hold hearings about the effect of BAPCPA reforms. On April 2, 2009, Rep. Jerrold Nadler (NY-8) introduced H.R. 1942, the Business Reorganization and Job Preservation Act of 2009, which would roll back the 210-day deadline.

Rationale: BAPCPA created opportunities for merchants to provide new jobs, contribute to the local tax base and serve consumers with new ventures based upon sound business plans. A return to the uncertainty of the pre-2005 law would harm the economy by preventing communities from moving forward with new business and job creation.

Furthermore, lenders understand that retail tenants and shopping center owners are dependent on each other's financial success. In today's tight credit environment, the certainty provided by BAPCPA is especially critical. Without it, a lender may decide that a retailer's insolvency and lingering empty space increases the credit risk of the shopping center and tighten the lending terms to a point that the owner is also forced into bankruptcy. BAPCPA provides greater certainty for all parties involved and allows the shopping center to have its retail spaces filled, benefitting solvent retailers in the shopping center and the community at large.

Summary: ICSC believes that the reforms achieved under BAPCPA provide critical stability in the retail environment. These reforms allow shopping center landlords to mitigate economic harm from the bankruptcy by protecting other retailers and preserving shopping options that benefit the local community. ICSC opposes efforts to amend these commonsense provisions.