

**THE COMMERCIAL LEASING MARKET & E-COMMERCE:  
IS E-COMMERCE CAUSING COMMERCIAL LEASES TROUBLE  
AND WHAT COULD BE DONE TO FIX IT?**

JOSEPH MUCCIO\*

*Abstract*

*The rise of electronic commerce (e-commerce) has grown at the expense of brick-and-mortar businesses. Consumers increasingly seek to purchase goods using online platforms rather than travel to a location to purchase those goods. Large retail businesses either struggle to compete with online retailers or have already implemented their own online platform for consumers. As more retailers struggle or shift their business online, retail space continues to be vacated and left empty. Commercial landlords are at a significant disadvantage when their retailer-tenants fail and enter bankruptcy proceedings because they may not receive rent payments from a tenant for some time and their leases are “stuck” in bankruptcy. Thus, landlords need more protection from the Bankruptcy Code, specifically § 365, as more tenants seek to vacate their leases voluntarily or involuntarily through bankruptcy. While the rise of e-commerce has been largely applauded, commercial landlords have been overlooked enough to implicate some form of a commercial lease pricing readjustment or eventual crash in the commercial leasing market.*

*Table of Contents*

I.	<i>Introduction</i> .....	800
II.	<i>The Commercial Leasing Market and Brick-and-Mortar Retailers</i> .....	802
	A. The Various Types of Commercial Leases.....	802
	B. The Large Size of the Commercial Leasing Market for Brick-and-Mortar Businesses .....	804
III.	<i>New Stresses on the Commercial Leasing Market from the Rise of E-Commerce</i> .....	804
	A. The History of E-commerce and its Predicted Growth .....	804
	B. Amazon .....	806
	C. How Significant Increases in Retail Bankruptcies Affect Commercial Landlords.....	808

IV.	<i>Treatment of Commercial Leases in Bankruptcy</i> .....	810
	A. Chapter 7 and Chapter 11 Bankruptcies .....	810
	B. Section 365 Provisions for Commercial Debtors .....	811
	C. The Power of the Trustee in Bankruptcy Proceedings .....	813
	D. Special Provisions for Shopping Centers.....	814
V.	<i>Bankruptcy Law’s Suboptimal Treatment of Commercial Leases</i> .....	815
	A. Section 365’s Negative Effect on Landlords .....	815
	B. Bankruptcy Law Must Adjust for the Rise of E-commerce .....	817
	C. Case Studies: RadioShack, Sports Authority, and Toys “R” Us.....	818
VI.	<i>Proposals for Reforming Bankruptcy Law’s Treatment of Commercial Leases and Policy Reform</i> .....	821
	A. Changes Within the Bankruptcy Code.....	821
	B. Federal Reserve Should Increase Interest Rates .....	825
VII.	<i>Alternatives to Bankruptcy Law Reform</i> .....	828
	A. Merger and Acquisitions Activism .....	828
	B. The “Substitution Effect” .....	829
VIII.	<i>Conclusion</i> .....	831

## I. Introduction

Consider a large retail chain that has leased space from a shopping mall. The retail chain is now bankrupt and unable to make the lease payments to its commercial landlord. As a large anchor tenant in the shopping mall, the landlord relies significantly on the ability of the large retailer to make its lease payments in addition to attracting customers to the store and the mall in general. The large retailer does not want to give up entirely and instead wishes to restructure itself. In bankruptcy, a trustee has the job of either maximizing the large retailer’s assets for the benefit of creditors or to confirm a plan of reorganization to allow the large retailer to continue operations and emerge from bankruptcy in a better position to meet its financial obligations. Under bankruptcy law, the trustee may reject, assume, or assign the lease, or executory contracts, between the large retailer and the commercial landlord.<sup>1</sup> This provision in § 365 of the Bankruptcy

<sup>1</sup> 11 U.S.C. § 365(a) (2012) (“[T]rustee, subject to the court’s approval, may assume or reject any executor contract or unexpired lease of the debtor.”).

Code (§ 365, the Code, the Bankruptcy Code) creates enormous power for trustees and bankruptcy judges to greatly affect the commercial leases between large retailers and commercial landlords in a bankruptcy proceeding.<sup>2</sup> The effect of a trustee's rejection of an executory contract—a contract where both parties have an obligation that still needs to be performed—deprives the non-debtor party of the right to seek specific performance, and allows the non-debtor party to seek an unsecured rejection damages claim.<sup>3</sup>

Now, consider the rise of e-commerce and its effects on brick-and-mortar businesses and their commercial leases. In 2017 alone, retail companies announced 7,000 stores were closing across the United States, a new record for yearly store closings.<sup>4</sup> The retail sector alone had roughly 662 bankruptcy filings in 2017, up thirty percent from the previous year.<sup>5</sup> Shopping mall landlords have been panicking in recent years with the rise of e-commerce because another few years of retail store closings could push “hundreds of low-performing shopping malls to the brink of death.”<sup>6</sup> Some major retail stores have already announced hundreds of store closings in 2018, including Walgreens, Ascena Retail Group (Ann Taylor, Loft, Dress Barn), Rue 21, Teavana, Gap Inc., Toys “R” Us, and Vitamin World.<sup>7</sup> Consequently, experts have no doubt that retail stores (and their commercial leases) are in danger for the foreseeable future.<sup>8</sup>

---

<sup>2</sup> *See id.*

<sup>3</sup> *See* 11 U.S.C. § 365(b) (2012) (discussing the general power of the trustee, which determines whether or not a landlord's lease will be assumed or rejected).

<sup>4</sup> Chris Isidore, *Retail's Toughest Year: A Record for Store Closings*, CNN MONEY (Dec. 27, 2017, 8:42 AM), <http://money.cnn.com/2017/12/26/news/companies/retail-toughest-year-store-closings/index.html> [perma.cc/N6YR-JY62] (“Store closing announcements more than tripled to about 7,000 . . .”).

<sup>5</sup> *See* Hayley Peterson, *A Tsunami of Store Closings is About to Hit the US – and It's Expected to Eclipse the Retail Carnage of 2017*, BUS. INSIDER (Jan. 1, 2018, 8:20 AM), <http://www.businessinsider.com/store-closures-in-2018-will-eclipse-2017-2018-1> [http://perma.cc/RFB2-GEKL] (referring to a study by Cushman & Wakefield that the number of retail stores expecting to close in 2018 will outnumber 2017).

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> Caletta Crawford, *Cushman & Wakefield's Retail Predictions for 2018 Are Not What You Want to Hear*, SOURCING J. (Jan. 10, 2018, 4:38), <https://sourcingjournalonline.com/retail-apocalypse-2018-cushman-wakefield-prediction> [https://perma.cc/22P7-ZL6N].

This note examines the commercial leasing relationship between § 365 and commercial landlord's with struggling brick-and-mortar tenants due to the continuing rise of e-commerce. Part II will discuss background information, including the different types of commercial leases and brick-and-mortar businesses. Part III explores how the rise of e-commerce is affecting the commercial leasing market, as well as e-commerce's residual effect on commercial landlords. Part IV will introduce bankruptcy concepts, specifically § 365 and the powerful parties that affect commercial leases in bankruptcy. Part V will argue that current bankruptcy law is not optimal for commercial leases. Parts VI and VII will discuss proposals, grounded in bankruptcy law as well as other avenues to further assist the commercial leasing market. If lawmakers continue to disregard the rapid demise of the brick-and-mortar business, while celebrating e-commerce, a commercial lease crisis may occur, including a readjustment of the pricing of commercial leases with lasting effects on landlords. In order to prevent this, further actions within the Bankruptcy Code should be considered along with pre-bankruptcy safeguards to assist the distressed commercial leasing market.

## ***II. The Commercial Leasing Market and Brick-and-Mortar Retailers***

### **A. The Various Types of Commercial Leases**

While commercial leases take many forms, there are generally five major types of commercial leases: (i) the percentage lease, (ii) the net lease, (iii) the double net lease, (iv) the triple net lease, and (v) the fully serviced net lease (gross lease).<sup>9</sup> The percentage lease is the most common for retail businesses and shopping malls because it allows the landlord to capture some of the sales and profits of its tenants when the tenants' businesses are doing well.<sup>10</sup> Generally, percentage leases have a provision that has a minimum amount of rent due per month, usually

---

<sup>9</sup> Nathan A. Canova, *Greening the Traditional Commercial Lease: Building a Case for Sustainable Commercial Real Estate through Economically Profitable Green Leases*, 61 *DRAKE L. REV.* 883, 900 (2013); Neil S. Hecht, *Variable Rental Provisions in Long Term Ground Leases*, 72 *COLUM. L. REV.* 625, 658–60 (1972) (discussing percentage leases).

<sup>10</sup> See Hecht, *supra* note 9, at 658–60.

based on the amount of square feet of space.<sup>11</sup> The percentage provision is triggered when the retail store grosses a pre-determined amount of sales in the lease agreement that the landlord and tenant negotiated.<sup>12</sup> Once the retail store hits that pre-determined amount of sales, the retail store must then pay the landlord a certain percentage of the sales.<sup>13</sup>

For example, a landlord and tenant can negotiate a lease for \$10,000 per month, which was calculated on the amount of square feet for the rentable space. The lease agreement has an additional provision that entitles the landlord to five percent of the tenant's gross sales over \$500,000. Thus, once the tenant has \$500,000 in sales, the percentage provision is triggered. If the tenant finishes the month with \$600,000 in sales, the landlord will receive an additional \$30,000 in rent for that given month. Thus, a percentage lease can provide significant value for a commercial landlord.

The net lease, double net lease, and triple net lease, all involve traditional rent payments, plus the tenant will pay additional overhead costs such as tax, insurance, maintenance, and utilities.<sup>14</sup> In a single net lease, the tenant only pays one extra expense in addition to rent, such as taxes.<sup>15</sup> In a double net lease, the tenant will pay two expenses, such as taxes and insurance.<sup>16</sup> In a triple net lease, the tenant will pay maintenance expenses, insurance, and taxes.<sup>17</sup> Landlords would prefer the triple net lease, but based on the negotiating power of the tenant, the two parties may come to a different lease agreement that better suits their needs. The fully serviced lease requires the landlord to endure the full costs of the lease, such as maintaining restrooms, lobbies, and elevators, but the cost of base rent is greater than other types of leases for the tenant.<sup>18</sup>

---

<sup>11</sup> Ben O'Grady, *How Percentage Rent Works in Commercial Real Estate Leases*, PROP. METRICS (Jan. 16, 2014), <https://www.propertymetrics.com/blog/2014/01/16/percentage-rent/> [perma.cc/9T9Q-KXGS].

<sup>12</sup> *Id.* (referring to the moment when the percentage provision is triggered as the "breakpoint").

<sup>13</sup> *Id.* (clarifying that if the "breakpoint" is not reached, the landlord does not benefit from the triggering provision).

<sup>14</sup> Canova, *supra* 8, at 900.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Fully-Serviced Lease*, CENTURY 21, <https://www.century21.com/glossary/definition/fully-serviced-lease> [<https://perma.cc/2K4S-Z956>] (last visited May 1, 2019).

### **B. The Large Size of the Commercial Leasing Market for Brick-and-Mortar Businesses**

“Brick-and-mortar” can be defined as “relating to or being a traditional business serving customers in a building as contrasted to an online business.”<sup>19</sup> Although a significant portion of retail shopping has moved to online platforms, brick-and-mortar stores still exist and are where most shopping still occurs.<sup>20</sup> In 2017 alone, \$86.95 billion dollars flowed into projects to build new commercial buildings.<sup>21</sup> Even though many retailers are focusing on online platforms to grow their business and reach more customers, retail rents “in many cities globally remain sky high.”<sup>22</sup> As retailers expand their physical presence, landlords will be seeking to rent out more new and expensive commercial spaces to brick-and-mortar retailers.<sup>23</sup> As brick-and-mortar businesses adjust to the rise of e-commerce, the growth of commercial retail leasing space in the future is not ideal.

### **III. New Stresses on the Commercial Leasing Market from the Rise of E-Commerce**

#### **A. The History of E-commerce and its Predicted Growth**

E-commerce, which consists of business transactions occurring over the internet, began in the 1970s through electronic data exchanges, and became more popular in Europe in the early 1980s.<sup>24</sup> The first official online e-commerce transaction took place in 1994,

---

<sup>19</sup> *Brick-and-mortar*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/brick-and-mortar> (last visited May 1, 2019).

<sup>20</sup> Gary Lee, *Why 90 Percent of Sales Still Happen in Brick and Mortar Stores*, RETAIL TECH. REV. (Oct. 17, 2017), <https://www.retailtechnologyreview.com/articles/2017/10/17/why-90-percent-of-sales-still-happen-in-brick-and-mortar-stores>.

<sup>21</sup> For a discussion of statistics and facts regarding commercial property in the United States, see STATISTA, <https://www.statista.com/topics/1073/commercial-property/> (last visited Oct. 28, 2018).

<sup>22</sup> *See id.*

<sup>23</sup> *See id.*

<sup>24</sup> *See The History of Ecommerce: How Did it All Begin?*, MIVA (Oct. 26, 2011), <https://www.miva.com/blog/the-history-of-ecommerce-how-did-it-all-begin/> [perma.cc/P7GQ-LCJJ].

involving the selling of a compact disc from one friend to another.<sup>25</sup> From the mid-1990s to the 2000s, bookstores began to utilize e-commerce and eventually larger retailers followed.<sup>26</sup> Amazon, EBay, PayPal, and Zappos all began operation within this timeframe and as more consumers began to make purchases online, these companies grew significantly.<sup>27</sup> Purchasers enjoyed the ability to shop from home—and eventually to shop from the palm of their hands, which led to the immense popularity of e-commerce.<sup>28</sup>

In 2017, e-commerce accounted for thirteen percent of U.S. retail sales and is projected to account for seventeen percent of all U.S. retail sales by 2022.<sup>29</sup> E-commerce transactions are higher in some retail industries than in others. For example, in 2017 twenty percent of retail apparel sales occurred in e-commerce.<sup>30</sup> Meanwhile, e-commerce sales for the grocery industry were only two percent.<sup>31</sup> According to a statistical study from Statista.com, retail e-commerce sales have been increasing rapidly in recent years and will continue to grow at a fast pace.<sup>32</sup> In 2014, \$1.3 trillion worldwide was spent on e-commerce retail sales.<sup>33</sup> In 2017, that figure grew to \$2.3 trillion in sales worldwide.<sup>34</sup> By 2021, retail sales are expected to grow to almost \$5 trillion worldwide, more than doubling the amount in 2017.<sup>35</sup> This

---

<sup>25</sup> See *id.* (discussing the distinction between the first transaction online compared to the first transaction over the Internet).

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> See Daniel Keyes, *E-Commerce will Make up 17% of All US Retail Sales by 2022— and One Company is the Main Reason*, BUS. INSIDER (Aug. 11, 2017, 11:12 AM), <http://www.businessinsider.com/e-commerce-retail-sales-2022-amazon-2017-8> [<https://perma.cc/P6X4-8MZG>].

<sup>30</sup> Steve Dennis, *E-Commerce May Be only 10% of Retail, But that Doesn't Tell the Whole Story*, FORBES (Apr. 9, 2018, 1:49 PM), <https://www.forbes.com/sites/stevendennis/2018/04/09/e-commerce-fake-news-the-only-10-fallacy/#1678009639b4> [[perma.cc/W7D4-74NN](https://perma.cc/W7D4-74NN)].

<sup>31</sup> See *id.*

<sup>32</sup> For a chart of past e-commerce growth and future projected e-commerce growth, see *Retail E-commerce Sales Worldwide from 2014 to 2021 (in Billion U.S. Dollars)* STATISTA, <https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/> (last visited Aug. 17, 2018).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (“In 2017, retail e-commerce sales worldwide amounted to 2.3 trillion US dollars . . .”).

<sup>35</sup> *Id.* (“[E]-retail revenues are projected to grow to 4.88 trillion US dollars in 2021.”).

study shows how rapid the rise of e-commerce is worldwide and how consumers' affinity for e-commerce will only continue to grow as well.<sup>36</sup>

## B. Amazon

Amazon is a major driver in the rise of e-commerce.<sup>37</sup> An astounding eighty-three percent of adults in the U.S. purchased an item from Amazon online in 2016.<sup>38</sup> Furthermore, in 2016, Amazon accounting for forty-three percent of all online retail sales, and that amount has continued to grow.<sup>39</sup> Amazon has also decided to venture out and take on industries such as the grocery industry, with its recent purchase of Whole Foods, as I discuss below.<sup>40</sup>

Amazon is an ideal example of the rise of e-commerce and customers' affinity for shopping online. As mentioned above, Amazon began in 1995 as a website that only sold books.<sup>41</sup> Amazon continued to grow beyond this market, and by 1999, Time Magazine named Amazon founder, Jeff Bezos, the "king of cybercommerce."<sup>42</sup> By the end of 2017, Amazon had 310 million active customers, sold more than twelve million products; this figures grows to more than 353

---

<sup>36</sup> *See id.*

<sup>37</sup> Keyes, *supra* note 29.

<sup>38</sup> *Id.*

<sup>39</sup> *Amazon Accounts for 43% of US Retail Sales*, BUS. INSIDER (Feb. 3, 2017, 12:12 PM), <https://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2> [<https://perma.cc/W7PM-676T>] ("An analysis by Slice Intelligence released this week found that 43% of all online retail sales in the US went through Amazon in 2016, as the e-commerce giant's market share continues to grow.").

<sup>40</sup> *See Sarah Halzack, Amazon-Whole Foods: A Year Later what has Changed?*, L.A. TIMES (June 11, 2018, 4:25 PM), <http://www.latimes.com/business/la-fi-amazon-whole-foods-20180611-story.html>.

<sup>41</sup> *See Avery Hartmans, 15 Fascinating Facts You Probably Didn't Know About Amazon*, BUS. INSIDER (Aug. 23, 2018, 9:22 AM), <https://www.businessinsider.com/jeff-bezos-amazon-history-facts-2017-4> [<https://perma.cc/H892-LRL8>].

<sup>42</sup> Catherine Armstrong, *History of Amazon.com*, TECHWALLA, <https://www.techwalla.com/articles/the-history-of-amazoncom> (last visited Aug. 17, 2018) ("Time Magazine featured Jeffery Preston Bezos as Person of the Year in 1999, calling him 'king of cybercommerce.'").



million products when factoring in third-party sellers.<sup>43</sup> After approximately a year since acquiring Whole Foods, Amazon has been able to increase sales while decreasing costs for the grocery chain.<sup>44</sup> By combining e-commerce and grocery shopping, Amazon allows its Amazon Prime subscribers to order their groceries online and have them delivered to their homes or cars in up to fourteen cities.<sup>45</sup> Recently, Amazon has begun to expand into the logistics industry as well.<sup>46</sup> The company is seeking entrepreneurs to start small logistics businesses to help assist in delivering Amazon prime orders.<sup>47</sup> By starting a business under the Amazon umbrella, these startups would benefit from Amazon's logistics software and expertise in delivering packages.<sup>48</sup> This new process is still in the early stages of development, but it is nonetheless another example of Amazon growing and seeking innovative ways to enter other industries. Economists frequently use the term "Amazon effect" to describe "the effect that the entire digital marketplace has had on traditional forms of commerce, like brick-and-mortar retail."<sup>49</sup> The "Amazon effect" is one of the reasons that brick-and-mortar businesses are closing.<sup>50</sup>

---

<sup>43</sup> See Jillian Hufford, *Amazon Statistics: Need to Know Numbers About Amazon*, NCHANNEL: MULTICHANNEL INSIGHTS (Jan. 24, 2018), <https://www.nchannel.com/blog/amazon-statistics/> [perma.cc/6WZX-WN8U].

<sup>44</sup> See Billy Duberstein, *How Amazon is Making Whole Foods More Profitable*, MOTLEY FOOL (July 13, 2018, 9:23 AM), <https://www.fool.com/investing/2018/07/13/how-amazon-is-making-whole-foods-more-profitable.aspx> [perma.cc/S6XS-52XR].

<sup>45</sup> *Id.*

<sup>46</sup> Heather Kelly, *Amazon Wants You to Start a Business to Deliver Its Packages*, CNN (June 28, 2018, 9:41 AM), <https://money.cnn.com/2018/06/28/technology/amazon-delivery-partners/index.html> [perma.cc/779H-NFTA].

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See Lin Grosman, *What The Amazon Effect Means for Retailers*, FORBES (Feb. 22, 2018, 8:30 AM), <https://www.forbes.com/sites/forbescommunicationscouncil/2018/02/22/what-the-amazon-effect-means-for-retailers/#6c4424bb2ded> [<https://perma.cc/JK3G-62VT>] (discussing the concept of the Amazon effect).

<sup>50</sup> *Id.*

### C. How Significant Increases in Retail Bankruptcies Affect Commercial Landlords

Nearly every month an individual can read about how another large retailer is declaring bankruptcy.<sup>51</sup> According to a study by commercial real estate firm CoStar, almost “a quarter of malls in the US, or roughly 310 of the nation’s 1,300 shopping malls, are at high risk of losing an anchor tenant.”<sup>52</sup> Anchor tenants are large retailers, such as Macy’s and J.C. Penney “that occupy the large, multistory buildings at mall entrances.”<sup>53</sup> Losing an anchor tenant can be devastating for a shopping mall because their closings, in addition to the loss of income and shopper traffic, “trigger clauses that allow the remaining mall tenants to exercise their right to terminate their leases or renegotiate their terms.”<sup>54</sup> Thus, the loss of an anchor tenant can severely cripple shopping malls.

Shopping mall owners have experienced difficulty in recent years as they try to cope with retail store closings.<sup>55</sup> Simon Property Group, one of the largest shopping mall operators in the United States, has tried to keep stores open that generate foot traffic, and even sued Starbucks after the coffee chain planned to close seventy-seven Teavana stores located in Simon malls.<sup>56</sup> Starbucks cited underperformance as the reason to close the Teavana stores, but the leases for those stores had not expired, leading Simon to file a lawsuit against Starbucks to keep the stores open.<sup>57</sup> Simon wanted them to remain open until their leases expired and argued that closing the stores “in a time when shopping centers are already under pressure (falling foot

---

<sup>51</sup> See Hayley Peterson, *These 15 Retailers Could be the Next to Declare Bankruptcy*, BUS. INSIDER (Dec. 19, 2017, 4:26 PM), <http://www.businessinsider.com/retail-bankruptcies-expected-in-2018-2017-12> [https://perma.cc/3YKU-VSQ7].

<sup>52</sup> Peterson, *supra* note 5 (“The commercial real estate firm CoStar has estimated that nearly a quarter of malls in the US, or roughly 310 of the nation’s 1,300 shopping malls, are at high risk of losing an anchor tenant.”)

<sup>53</sup> *Id.* (“Anchor tenants are retailers like Macy’s and J.C. Penney that occupy the large, multistory buildings at mall entrances.”).

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *Id.*

<sup>57</sup> See Ronald Holden, *Starbucks Settles with Simon*, FORBES (Jan. 17, 2018, 1:05 PM), <https://www.forbes.com/sites/ronaldholden/2018/01/17/starbucks-settles-with-simon/#78aa73677152> (discussing Simon Property Group’s settlement with Starbucks over its Teavana stores).

traffic, widespread retail bankruptcies)” would cause further harm to Simon as a commercial landlord.<sup>58</sup> Additionally, Simon argued that Starbucks could afford to keep those Teavana stores open.<sup>59</sup> Simon eventually received a judgment in its favor because of the effect that closing the stores would have on foot traffic to surrounding stores.<sup>60</sup> Both sides ultimately settled after Starbucks appealed the judge’s controversial decision before the appeal was heard.<sup>61</sup> Eventually, Starbucks ended up closing all 379 of its Teavana stores because the chain’s “underperformance was likely to continue.”<sup>62</sup>

This example shows how far one of the largest and most successful mall operators in the country was willing to go to gain any advantage in customer foot traffic. Some malls and individual stores, such as Bass Pro Shops, seek to attract customers by making the store a “destination experience.”<sup>63</sup> For example, Bass Pro Shops sells more than just products: the large retailer tries to instill “retail as theater.”<sup>64</sup> Malls are also seeking to get consumers inside by offering restaurants, movie theaters, arcades and bowling alleys.<sup>65</sup> Events are becoming

---

<sup>58</sup> *Id.*

<sup>59</sup> Lisa Fickenscher, *Starbucks Settles Suit with Mall Giant over Teavana Stores*, N.Y. POST (Jan. 12, 2018, 9:42 PM), <https://nypost.com/2018/01/12/starbucks-settles-suit-with-mall-giant-over-teavana-stores/> [perma.cc/J4B4-T5D7].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Phil Wahba, *Starbucks is Closing all 379 of its Teavana Stores*, FORTUNE (July 27, 2018), <http://fortune.com/2017/07/27/starbucks-closing-teavana-stores/> [perma.cc/RP33-5LP3].

<sup>63</sup> See Larry Olmstead, *Memphis Pyramid Brings Bass Pro Shops*, USA TODAY (June 5, 2015, 7:53 AM), <https://www.usatoday.com/story/travel/destinations/2015/06/05/memphis-pyramid-bass-pro-shops/28477061/> [https://perma.cc/ZC8Z-3RMR]; Press Release, Bass Pro Shops, Bass Pro Shops at the Pyramid Celebrates First Anniversary (Apr. 29, 2016), <http://press.basspro.com/bass-pro-shops-at-the-pyramid-celebrates-first-anniversary/> [perma.cc/2EPN-XDER].

<sup>64</sup> Olmstead, *supra* note 63.

<sup>65</sup> See Rieva Lesonsky, *5 Ways to Get Mall Shoppers to Your Store*, SMALL BUS. TRENDS (Aug. 8, 2016), <https://smallbiztrends.com/2016/08/how-to-attract-customers-mall-store.html> [perma.cc/8RMG-LRXN] (describing the measures that mall companies are willing to go to get prospective customers into their malls.)

more common at malls as well, such as trading events, shows, and concerts.<sup>66</sup>

#### ***IV. Treatment of Commercial Leases in Bankruptcy***

##### **A. Chapter 7 and Chapter 11 Bankruptcies**

Bankruptcy is a legal process that an entity or individual may elect to undergo when the entity or individual cannot repay outstanding debts.<sup>67</sup> Title 11 of the U.S. Code (Code) contains the framework for the American bankruptcy system.<sup>68</sup> Within the Code, different types of bankruptcy exist, and, depending on who is filing and for what purpose, different provisions within the Code apply.<sup>69</sup> The most common kinds of bankruptcy for organizations are Chapter 7 Liquidation and Chapter 11 Reorganization.<sup>70</sup>

Chapter 7 can be seen as “a day of reckoning—the current owners of the firm are cashed out, and the assets end up in the hands of new owners.”<sup>71</sup> A company will seek to liquidate its remaining assets and use those assets to repay its creditors before the company ceases to exist.<sup>72</sup> In Chapter 7 liquidation, a court trustee is appointed to oversee the company’s assets and distribute those assets to creditors in a fair manner.<sup>73</sup>

A Chapter 11 bankruptcy is different from a Chapter 7 bankruptcy. When a company files for Chapter 11, the company is still seeks to continue business.<sup>74</sup> In a Chapter 11 bankruptcy, the company

---

<sup>66</sup> Geri Stengel, *6 Ways Retailers Are Thriving In Malls*, FORBES (Feb. 21, 2018, 11:17 AM), <https://www.forbes.com/sites/geristengel/2018/02/21/6-ways-retailers-are-thriving-in-malls/#77d64d322be9> (“Malls providing extra services, such as restaurants, in-mall entertainment, pop-up shops and child care . . .”).

<sup>67</sup> See Emily Kadens, *The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law*, 59 DUKE L.J. 1229, 1234–35 (2010).

<sup>68</sup> See generally 11 U.S.C. §§ 101–1532 (setting forth the framework for US bankruptcy law).

<sup>69</sup> Compare 11 U.S.C. §§ 1121–1129 (2012) (describing Chapter 11 bankruptcy) with 11 U.S.C. §§ 701–707 (2012) (describing Chapter 7 bankruptcy).

<sup>70</sup> See Robert K. Rasmussen, DEBTOR'S CHOICE: A MENU APPROACH TO CORPORATE BANKRUPTCY, 71 TEX. L. REV. 51, 68 (1992).

<sup>71</sup> *Id.* at 71.

<sup>72</sup> *Id.* at 69–71.

<sup>73</sup> *Id.* at 71.

<sup>74</sup> *Id.* at 71–72.

and creditors construct a plan for confirmation by the bankruptcy judge with the aim of emerging and being able to repay its debts over a period of time.<sup>75</sup> Companies use Chapter 11 bankruptcy as a means to resolve problems such as “substantial operating losses that are not merely the product of temporary market conditions,” as well as being “unable to meet its obligations at any reasonably foreseeable level of operating revenue.”<sup>76</sup> Unlike a Chapter 7 bankruptcy, the debtor company continues to do business and with the “fiduciary duty to act in the best interests of the entity's claimants.”<sup>77</sup> This is known as a “debtor in possession,” which is common in Chapter 11 bankruptcy.<sup>78</sup>

### **B. Section 365 Provisions for Commercial Debtors**

Once a retailer files for Chapter 11 bankruptcy, the debtor in possession becomes a fiduciary, with rights and powers of a trustee to operate its business in the best interest of all parties.<sup>79</sup> Initially, the appointed U.S. trustee oversees and monitors the progress of the debtor's Chapter 11 case through the submission of operating reports.<sup>80</sup> Eventually, the U.S. trustee will conduct a “§ 341” meeting, which is a meeting of the creditors where the creditors raise their concerns over the debtor's case.<sup>81</sup> Depending on the goal of the case, the

---

<sup>75</sup> See Lynn M. LoPucki, *Changes in Chapter 11 Success Levels Since 1980*, 87 TEMP. L. REV. 989, 994 (2015) (“[T]o confirm a plan the debtor must have provided a disclosure statement that explained to some extent what happened to the creditors' money and what courses of action, if any, remain open to the creditors.”).

<sup>76</sup> Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large Publicly Held Companies*, 78 CORNELL L. REV. 597, 606 (1993).

<sup>77</sup> Edward S. Adams, *Governance in Chapter 11 Reorganizations: Reducing Costs, Improving Results*, 73 B.U. L. REV. 581, 592, 611 (1993).

<sup>78</sup> *Id.* at 592.

<sup>79</sup> 11 U.S.C. § 1107(a) (2012) (stating that a debtor in possession “shall perform all the functions and duties . . . of a trustee serving in a case under this chapter” who has a fiduciary duty to creditors).

<sup>80</sup> *Id.* § 1106 (stating that “[p]aragraph 6 . . . requires final reports by the trustee, as the court orders).

<sup>81</sup> It is called a “§ 341 meeting” because the contents governing that meaning are found in § 341 of the Bankruptcy Code. *Id.* § 341.

case will proceed until the court confirms a reorganization plan or the company liquidates.<sup>82</sup>

Creditors' committees also play a major role in bankruptcy proceedings. The U.S. trustee appoints the committee which consists of approximately seven of the debtor's largest unsecured creditors.<sup>83</sup> Sometimes a creditor or another interested party can have the case converted from a Chapter 11 to a Chapter 7 when there is cause.<sup>84</sup> Section 1112 of the Bankruptcy Code governs this procedure.<sup>85</sup> A debtor can willingly convert its bankruptcy case from a Chapter 11 to a Chapter 7, unless: (i) the debtor is not a debtor in possession, (ii) the case was involuntary, and (iii) the case was converted to a Chapter 11 involuntary.<sup>86</sup> However, a debtor in a Chapter 11 proceeding has a onetime opportunity to convert the case to a Chapter 7 and liquidate.<sup>87</sup>

As stated above, pursuant to § 365, debtors in possession have the ability to assume or reject any executory contract or unexpired lease.<sup>88</sup> Although the Code does not define executory contract, courts have defined it as a contract where both parties have yet to fully perform their duties and failure to complete those duties would result in a material breach of the contract.<sup>89</sup>

Whoever is administering the case—either the trustee or debtor in possession—is allowed a “reasonable time” to decide which executory contracts to assume or reject.<sup>90</sup> “Reasonable time” is not a specific time limit, and the court considers factors such as the company's interests, harm to creditors, whether the debtor is paying the lease, whether the debtor has progressed toward a plan, and other

---

<sup>82</sup> *Id.* § 1128 (describing how the Court will conduct a confirmation hearing to determine whether to confirm the plan).

<sup>83</sup> *Id.* § 1103 (describing the powers and duties of committees).

<sup>84</sup> 11 U.S.C. § 1112(b)(1) (2012) (“[T]he court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause . . . .”)

<sup>85</sup> *Id.* (explaining that a “debtor may convert a case under this chapter to a case under chapter 7 of this title.”)

<sup>86</sup> *Id.* § 1112(a) (describing the three exceptions for conversion).

<sup>87</sup> *Id.* (describing the process for conversion or dismissal).

<sup>88</sup> *Id.* § 365(a) (stating that a debtor in possession may assume or reject an executory contract of the debtor).

<sup>89</sup> See *In re Chateaugay Corp.*, 130 B.R. 162, 164 (Bankr. S.D.N.Y. 1991) (discussing the definition that courts accept of an executory contract).

<sup>90</sup> See *Theater Holding Corp. v. Mauro*, 681 F.2d 102, 106 (2d Cir. 1982) (holding that a year would be an unreasonable time of whether to assume or reject an executory contract).

factors.<sup>91</sup> The Bankruptcy Court for the Southern District of New York has found that “it is clear policy of the Bankruptcy Code to provide the debtor with breathing space following the filing of a bankruptcy petition, continuing until confirmation of the plan, in which to assume or reject an executory contract.”<sup>92</sup> Thus, the landlord may sometimes have no choice but to allow the trustee to assign or assume the lease, because the landlord is dependent on the cash each month.

### C. The Power of the Trustee in Bankruptcy Proceedings

Consider the power of the trustee in a Chapter 11 bankruptcy proceeding. The effect of the trustee’s decisions regarding an executory contract has tremendous impact on landlords. Landlords must wait during the bankruptcy proceeding to learn what will become of their lease.<sup>93</sup> Debtor-tenants must still make rent payments during that time to their landlords in the form of post-petition payments.<sup>94</sup> One challenge with § 365(d)(3) is that the provision does not include a consequence if the debtor fails to make rent payments, which is frustrating for landlords.<sup>95</sup> However, when a debtor does not make its rent payments in Chapter 11 bankruptcy, enforcement depends on the specific judge, which can range from “conversion [to Chapter 7] or dismissal of the case to a shrug.”<sup>96</sup> This “waiting period” can be as long as 120 days following the tenant’s bankruptcy filing or the date of a court

---

<sup>91</sup> See *In re Dana Corp.*, 350 B.R. 144, 147 (Bankr. S.D.N.Y. 2006) (discussing the factors that a court uses to determine the reasonable amount of time to assume or reject a lease).

<sup>92</sup> See *id.* (quoting *In re Adelpia Communs. Corp.*, 291 B.R. 283, 292 (Bankr. S.D.N.Y. 2003)).

<sup>93</sup> See generally 11 U.S.C. § 365 (implying that landlords are typically at the mercy of the trustee or debtor in possession).

<sup>94</sup> 11 U.S.C. §365(d)(3) (2012) (“The trustee shall timely perform all the obligations of the debtor . . . until such lease is assumed or rejected . . .”).

<sup>95</sup> Lars Fuller, *Commercial Tenant Debtors in Chapter 11: Fundamentals of Landlords Creditor Protections in Bankruptcy*, BAKER & HOSTETLER LLP FIN. SERVS. BLOG (July 6, 2017), <https://www.finservblog.com/2017/07/commercial-tenant-debtors-in-chapter-11-fundamentals-of-landlord-creditor-protection-in-bankruptcy/> [perma.cc/S8HZ-JYRG] (stating that “[o]ne issue is that § 365(d)(3) does not set forth a consequence if the debtor fails to ‘timely’ perform”).

<sup>96</sup> *Id.*

order confirming the tenant's reorganization plan.<sup>97</sup> However, the court still has the power to extend that time as § 365 has a provision that gives the court this power.<sup>98</sup>

#### D. Special Provisions for Shopping Centers

Section 365(b)(3) of the Bankruptcy Code gives the landlord special protections for a lease in a shopping center, when a bankruptcy trustee for the tenant elects to “(1) assume a lease and retain it or (2) assume a lease and assign it to a third party.”<sup>99</sup> Commercial landlords have “adequate assurance” from the trustee, which means: (A) that any assigned lease will be from a tenant of similar “financial condition and operating performance of the debtor and its guarantors” at the time the parties entered into the original lease, (B) “that any percentage rent due under such lease will not decline substantially,” (C) that an assumption or assignment of the lease will not breach a provision of any lease relating to the shopping center, and (D) the assumption or assignment of the lease will not “disrupt any tenant mix or balance in such shopping center.”<sup>100</sup> In summary, a landlord is “adequately assured” that he will continue to receive rent payments from the tenant or a third party if the lease is assigned and arrangements with other tenants will not be affected. Once again, determining whether a landlord is adequately assured largely depends on the specific judge presiding over the bankruptcy case.

However, what constitutes a “shopping center” under § 365 is not clear and open to judicial interpretation.<sup>101</sup> According to the legislative history, a shopping center under § 365(b)(3) is “a carefully planned enterprise, and though it consists of numerous individual

---

<sup>97</sup> 11 U.S.C. § 365(d)(4)(A)(i) (2012) (“[T]he 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 . . . 120 days after the date of the order for relief or the date of the entry of an order confirming a plan.”).

<sup>98</sup> *Id.* § 365(d)(4)(B)(i) (“The court may extend the period determined . . .”).

<sup>99</sup> See Stephen Wayne Snively, *Bankruptcy and Shopping Center Leases*, HOLLAND & KNIGHT LLP <https://www.hklaw.com/publications/bankruptcy-and-shopping-center-leases-03-01-2000/> (discussing special protections for leases in a shopping center).

<sup>100</sup> 11 U.S.C. § 365(b)(3) (2012) (describing the instances in which landlords can get adequate assurance of future performance).

<sup>101</sup> See generally 11 U.S.C. § 365 (showing that Section 365 does not define “shopping center”).



tenants . . . is planned as a single unit, often subject to a master lease or financing agreement.”<sup>102</sup> For purposes of determining whether a group of entities is a shopping center, some factors usually considered are a combination of leases held by a single landlord, a common parking area, percentage rent provisions in leases, and a joint participation by tenants in trash removal and other maintenance.<sup>103</sup> Although this is a rather helpful provision for landlords, the Bankruptcy Code could clarify as to what exactly is a shopping center and give further protections for shopping centers as well.

## V. *Bankruptcy Law’s Suboptimal Treatment of Commercial Leases*

### A. Section 365’s Negative Effect on Landlords

Section 365 allows a trustee or debtor-in-possession (the tenant) to assume or reject an unexpired lease or executory contract.<sup>104</sup> As discussed above, a debtor-in-possession is an entity that has filed for bankruptcy, but continues to conduct business while in bankruptcy.<sup>105</sup> By rejecting an unexpired lease, the landlord is left with a general unsecured damages claim, just like plenty of other unsecured creditors.<sup>106</sup> An unsecured creditor is a “creditor who, upon giving credit, takes no rights against specific property of the debtor.”<sup>107</sup> Unsecured creditors have more inherent risk because in the event of a default, the unsecured creditor has no security other than what is left over in a bankruptcy.<sup>108</sup> Secured creditors have the “right to protect

---

<sup>102</sup> See Snively, *supra* note 99 (citing H.R. REP. NO. 95-595, at 348–49 (1978)).

<sup>103</sup> Snively, *supra* note 99 (describing the factors that courts look to of what constitutes a shopping center for the purposes of § 365).

<sup>104</sup> See generally 11 U.S.C. § 365 (2012).

<sup>105</sup> Adams, *supra* note 77, at 592.

<sup>106</sup> See Arthur Steinberg & Scott I. Davidson, *Section 365 of the Code When Does Being in Possession Not Mean in Possession*, AM. BANKR. INST. (July 1, 2006), <https://www.abi.org/abi-journal/section-365-of-the-code-when-does-being-in-possession-not-mean-in-possession> [<https://perma.cc/3R6Z-A5S7>].

<sup>107</sup> *Unsecured creditor*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>108</sup> James F. DesMarais, *The Proper Discount Rate under the Chapter 11 Cramdown Provision: Should Secured Creditors Retain Their State Law Entitlements?*, 72 VA. L. REV. 1499, 1502 (1986) (“Unsecured creditors, who receive a higher interest rate by forgoing security, knowingly accept the possible dilution of their claims in the event of default. State law recognizes

[their] security interest[s] and to insist on receiving no less than the value of [the] collateral.”<sup>109</sup> Thus, secured creditors receive their collateral or the remainder of the assets before an unsecured creditor.<sup>110</sup> A landlord undoubtedly plays a major role in the life of a company. However, the landlord is unfairly treated as a general unsecured creditor because the landlord is subject to the trustee or debtor in possession’s discretion of whether they want to continue with the lease. Even though all of the creditors will “lose” in a given bankruptcy, the commercial landlord’s loss has a lasting impact on the commercial leasing industry.

It seems rather unfair that the entity that has declared bankruptcy and continues to do business as a debtor-in-possession has the ability to decide which leases it wishes to keep and which leases it wants to reject. Not only does this create uncertainty for every landlord to the debtor-in-possession, but it could potentially create an unprofitable situation for the landlord. The landlord’s fate is tied to the debtor-in-possession’s decisions.<sup>111</sup> Although the debtor may no longer be able to make payments on the lease, it is still unfair to the landlord to have to wait out the bankruptcy process with respect to its lease.

Trustees and debtors-in-possession can affect the broader commercial leasing industry from a more macro-economic perspective. As many retailers declare for bankruptcy and/or are otherwise financially unstable, relationships between retailers and landlords are at risk. Tenants defaulting on leases lead to landlords not being able to meet their obligations because they cannot collect rent to make their payments.<sup>112</sup> Along with the continuing rise of e-commerce, there will be even less need for commercial landlords, since there will be fewer commercial tenants. The resulting over-abundance of unfilled commercial property could further assist the demise of shopping malls and the traditional brick-and-mortar stores.

---

the different bargains creditors cast by giving perfected security claims priority over unsecured claims.”).

<sup>109</sup> See Adams, *supra* note 77, at 613.

<sup>110</sup> See *id.*

<sup>111</sup> See discussion *supra* Part IV.

<sup>112</sup> See *supra* Part III.C. (illustrating the difficulties faced by landlords amid the rise of e-commerce).

## B. Bankruptcy Law Must Adjust for the Rise of E-commerce

Although already discussed in depth above, the rise of e-commerce can help foster a future depression of the commercial leasing market.<sup>113</sup> For example, consider RadioShack, which declared its first bankruptcy in 2015.<sup>114</sup> RadioShack then entered a second bankruptcy, restructured its debts, and will now “primarily exist online and through its dealer network.”<sup>115</sup> The CEO of RadioShack, Dene Rogers, placed some blame on the “increasing dominance of Amazon,” which accounted for ninety percent of the \$5.6 billion growth in U.S. consumer electronics in 2015.<sup>116</sup>

Taking into account the trustee’s power in a bankruptcy and the rise of e-commerce, should commercial landlords be concerned about another real estate “bubble” and crash? Considering the amount of recent retail bankruptcies, and figuring that the trend is only going to continue for the near future, it is a distinct possibility. A significant amount of retail space will be left vacant in the event that one of every four shopping malls in America shut its doors.<sup>117</sup> In economics, market saturation occurs when a service or product has been so diffused within a market that there is no longer any further demand for it.<sup>118</sup> If we consider the customer base to be commercial tenants, the commercial leasing market is likely close to market saturation. Thus, commercial landlords face a reduction in the market’s need for commercial leases. Due to a depressed commercial leasing market, at the very least a pricing readjustment must eventually occur. Bankruptcy law is not equipped to deal with a significant amount of distressed retailers. As

---

<sup>113</sup> See *supra* Part III.C.

<sup>114</sup> See Chris Isidore & Katie Lobosco, *RadioShack Declares Bankruptcy*, CNN MONEY (Feb. 5, 2015, 8:39 PM), <http://money.cnn.com/2015/02/05/news/companies/radioshack-bankruptcy/index.html> [perma.cc/P368-JQ3T].

<sup>115</sup> Ben Unglesbee, *Update: RadioShack Escapes Bankruptcy, Again*, RETAIL DIVE, (Jan. 8, 2018) <https://www.retaildive.com/news/update-radioshack-exits-bankruptcy-again/508449/> [perma.cc/DC68-6XV4].

<sup>116</sup> *Id.* (“RadioShack also failed to find any way to dent the increasing dominance of Amazon, which accounted for 90% of the \$5.6 billion growth in U.S. consumer electronics in 2015, according to Deutsche Bank.”).

<sup>117</sup> See Isidore & Lobosco, *supra* note 114.

<sup>118</sup> See, e.g., Martin Croft, *An Upturn for the Books*, MARKETING WEEK, Mar. 10, 1995, at 9 (describing how “a point must come at which . . . response rates will not increase because saturation levels will have been reached”).

large retailers continue to file for bankruptcy in the coming years, more commercial landlords will likely find themselves in limbo with regard to their leases because of § 365's inadequate protections for commercial landlords. They will need new alternatives when such a significant amount of their leases are tied up in bankruptcy.

### C. Case Studies: RadioShack, Sports Authority, and Toys "R" Us

This section will discuss a few recent popular bankruptcies to show how e-commerce has affect the companies.

#### 1. RadioShack

E-commerce played a significant role in RadioShack declaring its first bankruptcy.<sup>119</sup> While it could barely afford to keep its stores open, it was so low on cash that it could not even afford to close enough of the stores to save the company.<sup>120</sup> Due to the rise of e-commerce and online shopping, its "brick-and-mortar stores became dead weight."<sup>121</sup> Once RadioShack filed for bankruptcy, it quickly moved to abandon the stores to avoid paying rent on them.<sup>122</sup> Thus, landlords were already implicated into the bankruptcy proceeding whether they liked it or not.

The landlords' interests were not adequately represented as there were "no landlords [] on the list of Top 50 creditors" in RadioShack's bankruptcy case.<sup>123</sup> Landlords implicated by the bankruptcy argued that had RadioShack liquidated earlier, they could have had the opportunity to receive more cents on the dollar for their

---

<sup>119</sup> Isidore & Lobosco, *supra* note 114.

<sup>120</sup> *Id.* ("But closing stores is expensive, due to the cost of severance, liquidating merchandise and paying penalties to get out of leases.")

<sup>121</sup> *Id.* (discussing how a once formidable company in the 1980s declined drastically).

<sup>122</sup> Tom Hals, *RadioShack Cleared to Sell Leases to 1,100 Abandoned Stores*, REUTERS (Feb. 20, 2015, 12:00 PM), <https://www.reuters.com/article/us-radioshack-bankruptcy-leases/radioshack-cleared-to-sell-leases-to-1100-abandoned-stores-idUSKBN0LO1QJ20150220> [perma.cc/4K6K-D9BS].

<sup>123</sup> Joseph N. DiStefano, *Bankrupt Radio Shack and Its Landlords*, INQUIRER (Feb. 6, 2015), <https://www.philly.com/philly/blogs/inq-phillydeals/Whats-not-in-RadioShacks-bankruptcy-and-store-sale-deal.html> [https://perma.cc/9K3M-4FJ9].

leases.<sup>124</sup> The unsecured creditors alleged (and even later sued) that RadioShack had picked a date to declare bankruptcy when the two hedge funds that loaned significant capital to RadioShack would receive the most money on their loans.<sup>125</sup> Credit default swaps and that allegation are outside the scope of this paper, but it is nonetheless an interesting dispute between the entities.

Recently after its second bankruptcy proceeding, RadioShack attempted to restructure its business from brick-and-mortar retail sales to nearly completely online.<sup>126</sup> Thus, the company will not need any commercial leases or landlords from which to rent space. As more companies choose to do business via e-commerce platforms, more commercial space will become available with fewer tenants seeking space to rent.

## 2. Sports Authority

Another major retailer, Sports Authority, declared and filed for Chapter 11 bankruptcy in March 2016.<sup>127</sup> Sports Authority tried to reorganize by selling and closing about one-third of its stores.<sup>128</sup> However, that plan failed, as Sports Authority could not find sufficient buyers for its locations, and it decided to liquidate all 463 of its stores.<sup>129</sup> While debt was generally Sports Authority's biggest issue,

---

<sup>124</sup> See Stephen B. Selbst, *RadioShack Dissected: The Decline, Fall and Possible Rebirth*, ABF J. (Mar. 2016), [http://www.abfjournal.com/%3Fpost\\_type%3Darticles%26p%3D45905](http://www.abfjournal.com/%3Fpost_type%3Darticles%26p%3D45905).

<sup>125</sup> See Kim Peterson, *Creditors Say RadioShack's Bankruptcy Doesn't Add Up*, CBS NEWS (Feb. 19, 2015, 8:02 AM), <https://www.cbsnews.com/news/creditors-say-radioshacks-bankruptcy-doesnt-add-up/> [perma.cc/QR3M-VZKZ] (explaining the unsecured creditors' concerns regarding the timing of the filing of RadioShack's bankruptcy).

<sup>126</sup> Unglesbee, *supra* note 115 ("RadioShack's second bankruptcy will leave its storefront presence all but nonexistent.").

<sup>127</sup> Nathan Bomey, *Sports Authority Files for Chapter 11 Bankruptcy*, CNBC (Mar. 2, 2016, 6:26 AM), <https://www.cnbc.com/2016/03/02/us-retailer-sports-authority-files-for-bankruptcy.html> [perma.cc/K2NB-SDRF] ("Big box chain Sports authority lost its bid to remain in the retail game . . . as the company filed for Chapter 11 bankruptcy Tuesday.").

<sup>128</sup> *Id.*

<sup>129</sup> See Alyssa Newcomb, *Sports Authority is Going Out of Business: What Shoppers Need to Know*, ABC NEWS (May 24, 2016, 4:03 PM), <https://abcnews.go.com/Business/sports-authority-business-shoppers/story?id=39332593> [perma.cc/YMP4-9ME3].

Sports Authority was also trying to “invest heavily in e-commerce,” recognizing the need to grow its online sales while also trying to compete with rival, Dick’s Sporting Goods.<sup>130</sup> Lee Peterson of WD Partners, a customer experience expert for global food and retail brands, believes that the second largest retailer in a market where e-commerce is prevalent has faced difficulty in surviving.<sup>131</sup> Peterson uses Linens ‘n Things as another example. Linens ‘n Things was the number two behind Bed Bath & Beyond, ultimately lost market share to its rival, and as a result, ceased business operations.<sup>132</sup>

When Sports Authority initially announced that a majority of its stores would close, key issues for landlords were “determining whether any leased locations will be closed, if any rent will be paid, and when.”<sup>133</sup> According to Seyfarth Shaw, it would be wise for landlords to also determine “whether there are any pre-bankruptcy defaults under the lease, either monetary or non-monetary, and determine the damages.”<sup>134</sup> That is, before Sports Authority decided to close all its locations, landlords needed to be diligent in determining whether a a location was going out of business or attempting to continue operations.<sup>135</sup>

### 3. Toys “R” Us

In September 2017, Toys “R” Us filed for Chapter 11 bankruptcy, “becoming the latest casualty of the pressures facing brick-and-mortar retailers.”<sup>136</sup> The reason for the timing of the bankruptcy was

---

<sup>130</sup> See Lara Ewen, *How Sports Authority Went Bankrupt— and Who Could be next to Fall*, RETAIL DIVE (Mar. 15, 2016), [https://www.retaildive.com/news/how-sports-authority-went-bankruptand-who-could-be-next-to-fall/415343/\[perma.cc/B4A5-NK78\]](https://www.retaildive.com/news/how-sports-authority-went-bankruptand-who-could-be-next-to-fall/415343/[perma.cc/B4A5-NK78]).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (“For example, Linens ‘N Things market share went to Bed Bath & Beyond.”).

<sup>133</sup> James B. Sowka & Edward M. Fox, *How Sports Authority’s Bankruptcy Filing Impacts Landlords and Trade Creditors, and Creates Opportunities for Retailers*, SEYFARTH SHAW LLP CLIENT ALERTS (Mar. 3, 2016), <https://www.seyfarth.com/publications/OMM030316-RE> [<https://perma.cc/GJD6-8F9F>].

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (describing landlord issues prior to Sports Authority’s decision to close stores).

<sup>136</sup> Michael Corkery, *Toys ‘R’ Us Files for Bankruptcy, Crippled by Competition and Debt*, N.Y. TIMES (Sept. 19, 2017), <https://www.nytimes.com/2017/>

Toys “R” Us faced \$400 million in debt that was coming due in March 2018.<sup>137</sup> After struggling through its bankruptcy proceeding, Toys “R” Us is now in the process of closing its doors for good and liquidating inventory in its 735 stores across the United States.<sup>138</sup> Toys “R” Us was not necessarily doomed because of the rise of e-commerce—after all, Amazon made Toys “R” Us its exclusive toy vender—but the toy company was struggling to survive in a changing retail landscape.<sup>139</sup> With the rise of big-box retailers such as Walmart and Target, which sell a variety of items, Toys “R” Us was doomed since the early 2000s, as Walmart and Target could sell the same toys and other items at much lower prices.<sup>140</sup>

## **VI. *Proposals for Reforming Bankruptcy Law’s Treatment of Commercial Leases and Policy Reform***

### **A. *Changes Within the Bankruptcy Code***

#### *1. Simplify the Definition of a “Shopping Center” to Broaden Protections for Shopping Centers*

Congress has already recognized that shopping centers are in a unique position in a bankruptcy proceeding, and included special provisions in the Bankruptcy Code to protect shopping centers.<sup>141</sup> Congress correctly realized that landlords require increased protections with respect to the assigning of shopping center leases. Thus, Congress included the adequate assurance language for shopping centers in

---

09/19/business/dealbook/toys-r-us-bankruptcy.html (“The company made the Chapter 11 bankruptcy filing . . . acknowledging that it needed to revamp its long-term debt totaling more than \$5 billion.”).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See Elizabeth Gurdus, *Cramer Reveals What Sealed the Fate of the Toiling Toys R Us*, CNBC (Mar. 15, 2018, 6:20 PM), <https://www.cnbc.com/2018/03/15/cramer-amazon-walmart-and-target-sealed-toys-r-us-fate.html> [perma.cc/NKF4-F5NL].

<sup>140</sup> *See id.*

<sup>141</sup> See 11 U.S.C. § 365(b)(3) (2012) (providing for a special provision on shopping centers); *Shopping Centers Receive Preferred Treatment Under the Bankruptcy Code*, FOX ROTHSCHILD LLP (Nov. 11, 2008), <https://delawarebankruptcy.foxrothschild.com/2008/11/articles/commercial-landlords/shopping-centers-receive-preferred-treatment-under-the-bankruptcy-code> (discussing the preferential treatment of shopping centers).

§ 365(b)(3).<sup>142</sup> Landlords for shopping center leases receive adequate assurance that if their leases are assigned, the assignee will operate similarly as the debtor, that rent will not decline substantially, and the assignee will not breach any provisions of the previous lease with the debtor.<sup>143</sup> For example, if the landlord has a property where the previous tenant was an auto-parts store, the new tenant cannot be a discount clothing retailer.<sup>144</sup> In this example, if the location was not considered a shopping center, a debtor may generally assign its lease even if there is a provision that restricts assignment.<sup>145</sup>

In 1978, Congress increased protections for shopping centers, addressed concerns relating to assignments of leases, and ensured landlords ability to collect rent payments from assignees.<sup>146</sup> With the rise of e-commerce, Congress should consider further protections for shopping centers again. Although courts have addressed and have described factors as to what is a shopping center,<sup>147</sup> Congress should define “shopping center” and not leave the term to judicial interpretation. The Bankruptcy Code does not define “shopping center” and courts have a history of strictly construing what constitutes one.<sup>148</sup> Some factors courts consider include the presence of a common parking area, whether all leases are held by a single landlord, the existence of percentage rent provision in the leases, and joint participation in trash removal.<sup>149</sup> The most important factor that courts consider, described in *In re Joshua Slocum*, is whether there is a combination of leases held by a single landlord, leased to retail distributors of goods, with the presence of a single common parking area.<sup>150</sup>

---

<sup>142</sup> See 11 U.S.C. § 365(b)(3) (2012).

<sup>143</sup> 3 COLLIER ON BANKRUPTCY ¶ 365.05 (Alan Resnick & Henry J. Sommer eds., 16th ed. 2010) (discussing adequate assurance for shopping centers).

<sup>144</sup> See *In re Trak Auto Corp.*, 367 F.3d 237, 244–45 (4th Cir. 2004) (rejecting an assignment of a lease to a discount retail clothier because the lease provision required the premises be used only for an auto-parts store).

<sup>145</sup> See *id.* at 239 (holding that if the location were not a shopping center, 11 U.S.C. § 365(f) would apply and the restriction would not be valid).

<sup>146</sup> *Shopping Centers Receive Preferred Treatment under the Bankruptcy Code*, *supra* note 141.

<sup>147</sup> See *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1087 (3d Cir. 1990) (discussing the factors of what constitutes a shopping center).

<sup>148</sup> 3 COLLIER ON BANKRUPTCY, *supra* note 143, ¶ 365.06.

<sup>149</sup> 922 F.2d at 1087.

<sup>150</sup> 3 COLLIER ON BANKRUPTCY, *supra* note 143, ¶ 365.05.



The consideration of fourteen factors in deciding whether a premises is a shopping center is problematic.<sup>151</sup> While no one factor is determinative, fourteen is too many. These factors can be condensed to one simple definition to determine whether a premises is a shopping center. The simple definition of the most important factor that *In re Joshua Slocum* discussed would function more practically. In cases such as *In re Sun TV & Appliances*, the court would not have to consider “the contiguity of the stores.”<sup>152</sup> It seems apparent that a store located next to—but outside of—a mall should be part of the overall shopping center for bankruptcy purposes. There is high potential for a store to not meet a few of the fourteen factors, which can result in more conservative courts finding that a premises does not meet the definition of a shopping center.

Most shopping centers may satisfy all fourteen factors, but in effect, smaller shopping center premises are being cut out of the Code’s special protections. Congress should adopt a simple and broader definition. Rather than let courts decide what exactly a shopping center is, Congress should step in and make it easier for shopping centers to get extra protections for lease assignments, or at least be able to rely on a simpler definition.

## 2. *Require That Landlords Must Have Representation on a Creditors’ Committee*

Creditors’ committees are an integral part of a Chapter 11 bankruptcy proceeding because the bankruptcy could potentially involve thousands of interested parties, especially if the company is a national or multi-national corporation.<sup>153</sup> The U.S. Trustee, who oversees a bankruptcy case, appoints a committee of unsecured creditors to represent all unsecured creditors in a company’s bankruptcy.<sup>154</sup> The

---

<sup>151</sup> See *In re Ames Dep’t Stores, Inc.*, 348 B.R. 91, 95 (Bankr. S.D.N.Y. 2006).

<sup>152</sup> See *In re Sun & TV Appliances, Inc.*, 234 B.R. 356, 369 (Bankr. D. Del. 1999) (concluding that a store located outside of a mall was part of a shopping center).

<sup>153</sup> Allen Wilen, *Creditors’ Committees: Invaluable in the Chapter 11 Process*, CORP. COUNSEL BUS. J. (May 21, 2013), <http://cbjournal.com/articles/23343/creditors%E2%80%99-committee-invaluable-chapter-11-process> (“Any given company that is a Chapter 11 debtor-in-possession (DIP) has hundreds, if not thousands of vendors, landlords, litigation counterparties and other unsecured creditors.”).

<sup>154</sup> *Id.*

Debtor is required to file a list of twenty creditors that have the largest unsecured claims against the debtor.<sup>155</sup> From this list, the Trustee generally selects the entities that hold the seven largest unsecured claims against the debtor.<sup>156</sup>

Section 1102(a)(1) requires the U.S. Trustee in a bankruptcy proceeding appoint “a committee of creditors holding unsecured claims.”<sup>157</sup> Section 1103 governs the creditors’ committees’ power and duties.<sup>158</sup> The main powers of the creditors’ committees are the ability to consult with the trustee on the administration of the case, investigate any matter relevant to the case, and participate in formulating the debtor’s plan of reorganization.<sup>159</sup> Creditors’ committees have a fiduciary duty to represent, and take into account the best interests of the committee as a whole.<sup>160</sup> The committee functions as a “watchdog on behalf of the larger body of creditors which it represents.”<sup>161</sup> The creditors’ committee has a fiduciary duty to its members and must act in their best interests.<sup>162</sup> However, a committee cannot bind any individual member of the committee to a reorganization plan.<sup>163</sup> Each

---

<sup>155</sup> FED. R. BANKR. P. 1007(d) (“[A] debtor . . . shall file with the petition a list containing the name, address and claim of the creditors that hold the 20 largest unsecured claims . . .”).

<sup>156</sup> See *The Chapter 11 Creditors’ Committee: A Seat at the Table for Unsecured Creditors*, MUCH SHELIST, P.C. (Apr. 19, 2010), <https://www.muchlaw.com/insights/article/chapter-11-creditors-committee-seat-table-unsecured-creditors> [<https://perma.cc/Q5S6-648V>].

<sup>157</sup> See 11 U.S.C. § 1102(a)(1) (2012).

<sup>158</sup> See 11 U.S.C. § 1103 (2012).

<sup>159</sup> *Id.*

<sup>160</sup> See 7 COLLIER ON BANKRUPTCY ¶ 1103.05 (Alan Resnick & Henry J. Sommer eds., 16th ed. 2010).

<sup>161</sup> See *Advisory Comm. of Major Funding Corp. v. Sommers*, 109 F.3d 219, 224 (5th Cir. 1997) (quoting *In re AKF Foods, Inc.*, 36 B.R. 288, 289 (Bankr. E.D.N.Y. 1984)).

<sup>162</sup> *In re L.F. Rothschild Holdings, Inc.*, 163 B.R. 45, 49 (S.D.N.Y. 1994) (stating that Section 1103 implies “a fiduciary duty to committee constituents”). See Wilen, *supra* note 153 (“[A]n Official Committee of Unsecured Creditors to represent all unsecured creditors in a particular bankruptcy—effectively on a fiduciary basis.”).

<sup>163</sup> See 7 COLLIER ON BANKRUPTCY, *supra* note 160 (“Although committees are charged with negotiating the plan on behalf of their constituencies, the committees are not authorized or empowered to bind any member of their constituencies.”).

unsecured creditor of the committee may still vote on the plan, but usually will follow the recommendations of the committee.<sup>164</sup>

But what if the landlord does not hold one of the seven largest claims against a debtor? What if the landlord is not even within the twenty largest claims to choose from? The landlord, an important creditor of the debtor, may not get adequate representation in the bankruptcy proceeding. While creditors' committees represent the creditors as a whole, landlords have an issue other than the purely monetary unsecured claim, as real property is involved.

An addition to the Chapter 11 or to the bankruptcy regulations can ensure that landlords have adequate representation on the creditors' committee in a bankruptcy proceeding for a large retailer. A requirement that a representative of the debtor's landlord has a seat on the creditors' committee would establish concrete representation of the landlord, which would all but ensure fair and adequate representation. Assumptions, rejections, and assignments of leases can be heard and accounted for swiftly, rather than leaving the landlord in the dark until the trustee decides the future of the debtor's commercial leases. The most important part of this new requirement would be access to information, so landlords can better prepare for the fate of their leases.

A problem with this requirement is that landlords of a large retailer may be located across the country, and hundreds of stores are closing can be problematic for landlord's representation on the creditors' committee. But ensuring that at least one landlord is on the committee is better than no landlord representation. Thus, a new requirement that a landlord must sit on the creditors' committee, no matter whether the landlord is one of the seven largest creditors, would be a valuable reform.

### **B. Federal Reserve Should Increase Interest Rates**

Another proposal, rooted in macro-economic policy, involves the Federal Reserve. Based on current estimates of the rise of e-commerce discussed in this paper and the increasing bankruptcies of large retailers, analysts estimate "that 1 out of every 4 malls in the U.S.

---

<sup>164</sup> *Id.* ("The plan will be submitted to creditors and to equity security holders for voting and those holders may or may not follow the committees' recommendations. In most instances, however, the constituent members of a group will follow the recommendations of their committee . . .").

could be out of business” by 2022.<sup>165</sup> There is a significant overabundance of malls, strip malls, and large department stores in the country.<sup>166</sup> If developers keep building, that would continue to saturate the commercial leasing market, and many landlords, or real estate development companies, will be on the hook and lose money if they fail to fill their stores.

In the third quarter of 2013, the national average for vacancy for strip malls was 10.5 percent.<sup>167</sup> The best strip malls have impressive vacancy rates of about five percent, such as some of the ones owned by Simon Property Group.<sup>168</sup> Some strip malls “limp along with 40 percent of the space vacant.”<sup>169</sup> The overabundance of these strip malls, leads to a failure to fill them, and the landlords who actively seek out tenants struggle to find enough to fill their strip malls.<sup>170</sup> While there may be a demand for more commercial space at present, with the rate of vacancy in malls and strip malls increasing, along with the rise of e-commerce, a market failure is likely developing that could have a significant impact in the near future.<sup>171</sup> Whether it is a commercial leasing price readjustment or a commercial leasing market collapse, a negative outlook is warranted if developers keep

---

<sup>165</sup> See Josh Sanburn, *Why the Death of Malls is About More than Shopping*, TIME (July 20, 2017), <http://time.com/4865957/death-and-life-shopping-mall/> [perma.cc/86X9-UPV3].

<sup>166</sup> Ilaina Jonas, *U.S. Still Has too many Strip Malls: Report*, REUTERS (Oct. 2, 2013, 11:40 PM), <https://www.reuters.com/article/us-usproperty-retail-report/u-s-still-has-too-many-strip-malls-report-idUSBRE99202Y20131003> [perma.cc/D7N5-6A6T].

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Chris Isidore, *Malls are Doomed: 25% Will be Gone in 5 Years*, CNN (June 2, 2017, 12:58 PM), <https://money.cnn.com/2017/06/02/news/economy/doomed-malls/index.html> [https://perma.cc/S3KC-2QQD].

<sup>171</sup> Paul R. La Monica, *There is a Retail Bubble -- and It's Bursting*, CNN (Mar. 9, 2017, 11:46 AM) <https://money.cnn.com/2017/03/09/investing/retail-bubble-amazon-urban-outfitters-ceo/index.html?iid=EL> [https://perma.cc/484X-S7QR] (discussing how a quick growth in store openings and rents followed by a slew of closings resembles a retail bubble within the U.S.).

creating commercial space while demand for that space is decreasing due to e-commerce.<sup>172</sup>

A way to curb this market failure is for the Federal Reserve to assist by raising interest rates. For purposes of this proposal, only effects on the commercial leasing market are considered. The Federal Reserve desires to prevent the current economy from “overheating for the first time since the 2008 financial crisis.”<sup>173</sup> The Federal Reserve recently raised its benchmark rate to between 2% and 2.25% in its September 2018 meeting.<sup>174</sup> The Federal Reserve should continue the rate increase despite President Trump’s wishes that the it cease doing so.<sup>175</sup>

Raising interest rates will help slow down the commercial real estate market and curb investors from continuing to build unnecessary commercial space at a time when the commercial real estate market likely needs to slow its growth.<sup>176</sup> By raising interest rates, the Federal Reserve will make borrowing money costlier for developers and investors, which hopefully slows down investment in the commercial market.<sup>177</sup> Of course, the Federal Reserve has concerns other than the commercial leasing market. But raising interest rates could actually be a blessing in disguise for the commercial leasing market to help prevent a possible market failure.

---

<sup>172</sup> *Id.* (“So don’t be surprised to see even more store closures and bankruptcies.”).

<sup>173</sup> See Binyamin Appelbaum, *Fed Plans to Continue Raising Rates, Despite Trump’s Ire*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/business/fed-interest-rates-trump.html>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See Peter Grant, *Rising Borrowing Costs Spell Trouble for Commercial Real Estate*, WALL ST. J. (Dec. 18, 2018, 7:00 AM) <https://www.wsj.com/articles/rising-borrowing-costs-spell-trouble-for-commercial-real-estate-11545134400>.

<sup>177</sup> See *id.* (“Higher borrowing costs mean tighter margins and less room for error. In the past, this tightening spread has often presaged a drop in property prices, sometimes with dire results.”).

## VII. *Alternatives to Bankruptcy Law Reform*

### A. **Merger and Acquisitions Activism**

Distressed investing is a popular mechanism for hedge funds and private equity funds to make money.<sup>178</sup> Distressed companies represent attractive targets for acquisitions.<sup>179</sup> Generally, hedge funds and private equity funds invest in the equity and/or bonds of companies that are in bankruptcy or are filing for bankruptcy soon.<sup>180</sup> By providing a little equity and loading up on the distressed companies' bonds, the acquirer can take control of a company, improve its operating results, and then sell it off as a profit.<sup>181</sup>

More acquisitions of distressed companies may actually be beneficial for the commercial leasing market. By keeping the company afloat and functioning, lessees can keep making payments on their leases through the debt that they raise.<sup>182</sup> While the company still has a risk of failure, at least it has a better chance of surviving than completely liquidating the company. Some will succeed, which can assist in continuing leases, which in turn will not affect landlords. Depending on the investment fund's strategy, distressed companies can emerge better than before and possibly expand.<sup>183</sup> For a high-level example, consider a private equity firm that takes a distressed company private, uses the private equity firm's expertise to better its capital and organizational structure, and then sells the company to another organization or takes it public again. While it is by no means a given, distressed investing can help some landlords, and thus assists in the proper functioning of the commercial leasing market.

---

<sup>178</sup> See Anousha Sakoui, *Private Equity Funds Focus on Distressed Debt*, FIN. TIMES (Aug. 12, 2008) <https://www.ft.com/content/b6f8819c-689a-11dd-a4e5-0000779fd18c> (highlighting record private equity investments and growing hedge fund involvement in distressed companies as the firms are viewed "as the next big opportunity").

<sup>179</sup> See *id.*

<sup>180</sup> See George Putnam, *What Is Distressed Investing*, SEEKING ALPHA (Dec. 20, 2016, 10:50 AM), <https://seekingalpha.com/article/4031684-distressed-investing> [perma.cc/8SWN-MSEJ].

<sup>181</sup> See *id.*

<sup>182</sup> Thomas K. Cheng, *A Consumer Behavioral Approach to Resale Price Maintenance*, 12 VA. L. & BUS. REV. 1, 7 (2017) (describing the inter-retailer substitution effect as "drawing customers from other retailers"). See Putnam, *supra* note 180.

<sup>183</sup> See Putnam, *supra* note 180.

## B. The “Substitution Effect”

Within retail stores, there is a “substitution effect” between retail giants competing for limited market space.<sup>184</sup> Within any retail industry, there is only enough market share for one major retail company to exist and eventually other competing companies will either merge with one another or file for bankruptcy. Examples of this theory are discussed below and include an evaluation of Best Buy vs. Circuit City and Dick’s Sporting Goods vs. Sports Authority. The substitution effect can potentially alleviate stresses on shopping mall landlords to find new companies that would want to assume a lease of a bankrupt company.

### 1. *Best Buy vs. Circuit City*

Best Buy and Circuit City used to be the number one and number two electronics retailers in the United States.<sup>185</sup> However, Circuit City filed for bankruptcy in November of 2008.<sup>186</sup> Interestingly enough, Circuit City has actually revived itself and plans on reopening with a “dynamic, social-focused e-commerce site,” with innovative e-commerce stores that resemble a cross between an Apple store and a Best Buy.<sup>187</sup> But back in 2008, regardless of the legitimate reasons for the bankruptcy of Circuit City—such as complacency, inventory management, and failing customer service—Circuit City’s revival exemplifies the substitution effect.<sup>188</sup> There is only room for one

---

<sup>184</sup> See Douglas Rushkoff, *Corporations Weren’t Designed to Run on Code*, HARV. BUS. REV. (Mar. 2, 2016), <https://hbr.org/2016/03/corporations-werent-designed-to-run-on-code> (discussing how the modern economy creates constant market churn as companies expand beyond their healthy limits to “win a complete monopoly” of their respective sectors”).

<sup>185</sup> See Anita Hamilton, *Why Circuit City Busted, Why Best Buy Boomed*, TIME (Nov. 11, 2008), <http://content.time.com/time/business/article/0,8599,1858079,00.html> [perma.cc/H72E-87GC].

<sup>186</sup> See *id.* (“There is no mystery as to why the No. 2 electronics retailer in the U.S., Circuit City, filed for bankruptcy on Nov. 10.”).

<sup>187</sup> Rick Duprey, *Why Best Buy Is Still a Buy Despite the Return of Circuit City and RadioShack*, MOTLEY FOOL (Jan. 24, 2018, 6:45 PM), <https://www.fool.com/investing/2018/01/24/why-best-buy-is-still-a-buy-despite-the-return-of.aspx> [perma.cc/2XZY-FWLM] (discussing how Circuit City is “rising from the grave”).

<sup>188</sup> See Intersectional Economics, *Economics Explained: Income and Substitution Effects* (last visited Mar. 29, 2019, 12:34 PM), <http://www.econogist>.

“giant” in a given industry, such as electronics or toys.<sup>189</sup> Eventually, out of the two or three largest companies, only one will emerge as successful down the road.<sup>190</sup> In this example, Best Buy is the industry “giant” who has experienced much more success relative to Circuit City.<sup>191</sup>

## 2. *Dick’s Sporting Goods vs. Sports Authority*

Another recent example is Dick’s Sporting Goods and Sports Authority. The stores were two of the largest retail companies in the sporting goods industry.<sup>192</sup> When Sports Authority declared bankruptcy and announced that it would be closing many of its locations, Dick’s Sporting Goods announced that it would open new stores.<sup>193</sup> This indicated that Dick’s Sporting Goods had won the battle and beat out number two, Sports Authority. The battle between the two sporting goods stores for market share demonstrated that “there is room for only one major player in any given sector.”<sup>194</sup> With the sporting goods retail market consolidating, Dick’s Sporting Goods was able to acquire new market share, some of which Sport’s Authority had previously owned.<sup>195</sup> Dick’s Sporting Goods paid \$15 million for the use of Sport’s Authority brand name and the company’s intellectual property,

---

com/home/income-and-substitution-effects (“In their most basic form, the income and substitution effects describe the reactions actors have to price change.”).

<sup>189</sup> Denise Lee Yohn, *What Sports Authority and Dick’s Sporting Goods Indicate About the State of Retail Industry*, Forbes (Mar. 30, 2016, 5:30 AM), <https://www.forbes.com/sites/deniselyohn/2016/03/30/what-sports-authority-and-dicks-sporting-goods-indicate-about-the-state-of-the-retail-industry/#742f115d489b> [perma.cc/J7DU-PJCZ].

<sup>190</sup> Hamilton, *supra* note 185.

<sup>191</sup> *Id.*

<sup>192</sup> See Lauren Thomas, *Dick’s Sporting Goods Could be a ‘Survivor’ like Best Buy: Wells Fargo*, CNBC (Jan. 3, 2018, 11:33 AM), <https://www.cnbc.com/2018/01/03/dicks-sporting-goods-could-be-a-survivor-like-best-buy.html> [perma.cc/4KQM-62QB].

<sup>193</sup> Yohn, *supra* note 189 (“A week after Sports Authority filed for bankruptcy, Dick’s Sporting Goods announced plans to open 36 new stores.”).

<sup>194</sup> *Id.*

<sup>195</sup> Thomas, *supra* note 192.



which further sealed Sport's Authority defeat.<sup>196</sup> This concept proves to be even more logical in light of the growth of e-commerce and specialty stores.<sup>197</sup>

The substitution effect also implicates mergers and acquisitions.<sup>198</sup> Although many large companies still have many leases when they file for bankruptcy, their competitors can assist in assuming the leases and possibly opening up one of their stores.<sup>199</sup> For example, when Sports Authority declared bankruptcy and announced that the company would be closing stores, Dick's Sporting Goods announced that it would be opening additional stores.<sup>200</sup> Instead of building its own stores, Dick's Sporting Goods could have taken over some of Sports Authority leases in shopping malls and plazas.<sup>201</sup> Even if it was just thirty-six stores out of the hundred-plus that Sports Authority would close, it eases at least some concern for landlords.

While there are many other factors to consider such as location and the attractiveness of the lease for the company to assume, the "surviving" company still has the ability to grow even while assisting in the recovery of the commercial leasing market. Furthermore, "number two" stores are already equipped to sell the same merchandise as the company moving in because they are in the same line of retail business.

### VIII. Conclusion

Since the rise of the internet, e-commerce has been taking over retail markets and forcing traditional brick-and-mortar businesses to adjust their operations. While many brick-and-mortar businesses have failed in recent years, such as RadioShack, Toys "R" Us, and Sports Authority, others have found a way to survive. But what about the landlords? The shopping mall owners, the strip mall owners, and other retail landlords that are creditors to these large retail bankruptcies

---

<sup>196</sup> See Michal Addady, *Dick's Just Paid \$15 Million for Sports Authority's Name*, FORTUNE (June 30, 2016), <http://fortune.com/2016/06/30/dicks-sports-authority/> [perma.cc/29EH-KSDB].

<sup>197</sup> Yohn, *supra* note 189 ("There might only be enough demand to sustain one brick-and-mortar retailer, while e-commerce and specialty stores grow in appeal. It's a depressing assessment of retail, but a logical one.").

<sup>198</sup> See Rushkoff, *supra* note 184.

<sup>199</sup> *Id.*

<sup>200</sup> Yohn, *supra* note 189.

<sup>201</sup> Addady, *supra* note 196.

also have debts to repay and businesses to run. Do they require more protections from their retail tenants, which are declaring bankruptcy at a rapid pace? Is there enough protection for these landlords in § 365? This paper argued that further protections in addition to those already specified in § 365 are needed to prevent a commercial lease pricing readjustment or another real estate downfall.

Section 365 was not intended to have a significant effect on commercial leasing prices. Rather, it was intended to administer the proceedings of the bankrupt entity that is interested in reorganization or liquidation. However, with the significant number of retailers declaring bankruptcy, § 365 is increasingly implicated in commercial leases. Simplifying the definition of “shopping center,” requiring landlord representation on creditors’ committees, and incorporating non-bankruptcy options may ease this burden as more retail stores are expected to close in the near future.

Bankruptcy law should embrace reform to better assist commercial landlords whose tenants are in bankruptcy. Other avenues discussed in this paper should also be considered to alleviate the strain on the commercial leasing market. Continuing to disregard these commercial leases in bankruptcy, especially with e-commerce forcing brick-and-mortar businesses to adjust, could lead to a commercial lease crisis, including a readjustment of the pricing of commercial leases.