

## message from the managing attorney

In this issue, we again are helping clients and friends weather challenging economic times.

First, Vicki Harding writes about landlords' rights when their tenants enter bankruptcy, and decisions these landlords and tenants need to make about assuming, assigning or rejecting leases. Jonathan Kane and Amy McAndrew outline the proposed Employee Free Choice Act, which could greatly simplify union organizing, and relate what employers must do to prepare.

Pepper is sponsoring and has a major role in the Air and Waste Management Association's 102nd Annual Conference and Exhibition; several of our attorneys are presenting at the event. Other upcoming events involving Pepper include The Capital Roundtable and the INSOL 2009 World Congress.

We've created an "Economic Stimulus Resource Center" on [www.pepperlaw.com](http://www.pepperlaw.com), with valuable advice regarding the new American Recovery and Reinvestment Act.

As always, we welcome your comments and questions about this newsletter, and your suggestions for future issues.

Barbara Rom  
313.393.7351  
[romb@pepperlaw.com](mailto:romb@pepperlaw.com)

## in this issue

- 1 **Leases and Bankruptcy from a Landlord's Perspective: Watch Carefully**
- 2 **Economic Stimulus Resource Center**
- 3 **Are You Prepared for the Employee Free Choice Act?**
- 3 **Pepper Hamilton Sponsors ACE 2009**
- 4 **Upcoming Events**

## Leases and Bankruptcy from a Landlord's Perspective: Watch Carefully

The Bankruptcy Code provides for assumption or rejection of a debtor's unexpired leases, and permits assignment of assumed leases notwithstanding prohibitions or restrictions on assignment. To assume a lease, with limited exceptions defaults must be cured and the landlord must be compensated for actual pecuniary loss resulting from the defaults (or there must be adequate assurance of prompt cure and compensation), and there must be adequate assurance of future performance. To assign a lease, it must be assumed and adequate assurance of the assignee's future performance must be provided.

### Deadline for Assumption or Rejection: Landlord Consent to Additional Extensions

The debtor in a Chapter 11 reorganization case normally has until confirmation of the plan of reorganization to decide whether to assume or reject executory contracts. However, if the debtor is the *tenant* under a *nonresidential* lease, the debtor is generally deemed to reject the lease unless it makes a decision within 120 days after the bankruptcy case commences, subject to one court-approved extension for 90 days. Any further extensions require the consent of the landlord.

The requirement for landlord consent after the initial extension was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCA). For bankruptcies involving a substantial number of leased locations (such as large retail bankruptcies), this gives landlords some leverage, since often the debtor needs more time to evaluate its operational needs and/or the value of the leases.

If a landlord does not prefer rejection of its lease, then it may be able to negotiate concessions from the debtor in exchange for its consent to continuing extensions. For example, the parties could agree on cure costs, specific items required to provide adequate assurance of future performance, or conditions that must be met by an assignee to

provide adequate assurance of its performance. However, if the landlord prefers that the lease be assumed, it should be careful that it does not force the debtor to reject the lease, since that is the only option open to a debtor after the initial 90-day extension if the concessions requested by a landlord are not acceptable.

### **Watch for Actions Affecting Landlord Rights**

Although the requirement that a debtor cure defaults and provide adequate assurance of future performance provides a significant level of protection to a landlord, that protection is effective only if the landlord is diligent in exercising its rights. Whenever a debtor proposes to assume or assign a lease, the landlord needs to make sure that its review is timely and that it responds, if necessary, to the debtor's pleading. A bankruptcy judge is unlikely to reconsider an order approving assumption or assignment of a lease based on a landlord pleading that was filed a couple of weeks late due to delays in internal communications.

A landlord also needs to watch for actions that have an indirect effect on its rights. For example, if a debtor seeks to establish procedures for assumption and rejection of leases, a landlord should review the procedures to confirm that the landlord will have adequate information to evaluate any proposal, as well as adequate time for its review and any response. If not, then it may be important for the landlord to raise objections to the procedures motion.

Proposed bankruptcy sales are another area that should be monitored by a landlord. In addition to sales of leases, this includes sales of a business that may include the leased premises since a proposed business sale typically includes an embedded motion to assume and assign relevant leases and contracts with only minimal detail regarding cure of defaults (often limited to a table of the cure amount for each contract and lease) and adequate assurance of future performance by the assignee (often consisting of unsupported conclusory statements).

It is important to review motions establishing bidding and sale procedures as well as motions to approve the sales themselves. For example, if the sale contemplates proceeding with a "stalking horse" that is the opening bidder at an auction, a landlord will want to make sure that the procedures:

- require any potential purchasers to provide information to the landlord that it requires to evaluate whether there is adequate assurance that the potential purchaser

## **Economic Stimulus Resource Center**

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA or Recovery Act) which contained \$819 billion worth of spending provisions and tax incentives that are intended to help revitalize the U.S. economy. The ARRA legislation affects almost every department and agency of the federal government – and virtually all taxpayers. To help inform our clients, our lawyers are producing a series of articles, webinars and other presentations that examine various aspects of the legislation.

Visit Pepper's Economic Stimulus Resource Center at [www.pepperlaw.com](http://www.pepperlaw.com).

will be able to perform if it is selected and assumes the landlord's lease, and

- allow the landlord sufficient time to review the information and an opportunity to raise any objections it may have to assumption and assignment of the lease.

Going-out-of-business sales are another example of a potential indirect affect on a landlord's rights. In some cases, the debtor may propose to hold going-out-of-business sales as part of winding-up operations at premises where it is discontinuing operations. Since lease and other non-bankruptcy provisions prohibiting or regulating going-out-of-business sales may not be enforced in a bankruptcy, this is another area that a landlord should monitor and review. If a debtor proposes guidelines to govern these sales, a landlord may want to try to negotiate additional rules and restrictions to mitigate the potential adverse effects on the rest of the project.

### **The Bottom Line: Watch Carefully**

In a large bankruptcy, identifying relevant pleadings can be particularly difficult given the volume of filings. Nevertheless, a landlord must be alert and prepared to act quickly if it wants to avoid effectively losing the protections it is entitled to under the Bankruptcy Code.

*Author:*

*Vicki R. Harding  
313.393.7324*

*hardingv@pepperlaw.com*

## Are You Prepared for the Employee Free Choice Act?

By now, most employers have heard of the Employee Free Choice Act (EFCA), the proposed legislation that would make it dramatically easier for unions to organize workers and obtain favorable terms in a first collective bargaining agreement. Under the National Labor Relations Act (NLRA) as it currently stands, unions organize workers through the private election system and then bargain collectively with employers. With the secret ballot system, employees can decide in the privacy of a voting booth whether they want to be represented by a union. As it has been proposed, EFCA would change that by allowing the National Labor Relations Board (NLRB) to certify a union as an employee unit's exclusive bargaining representative after a union convinces a majority of employees to sign union authorization cards or a petition. What's more, EFCA would allow the union to demand that the employer participate in mandatory arbitration for a first contract, which would allow a third party to dictate terms of the agreement and potentially create disastrous economic consequences.

EFCA did not make it through Congress when it was last proposed in 2008. At that time, the legislation overwhelmingly passed the House, and it is expected that it would do so again. In 2008, 52 senators voted in favor of the EFCA, which was not enough to get the legislation onto the floor of the Senate for a vote. However, the union movement targeted Senate races last fall in an attempt to have the requisite 60 votes to overcome a filibuster. While it still is not entirely clear if all of the Senate votes are there, it is clear that this legislation will not go down without a fight. If EFCA makes it through Congress, President Obama has vowed to sign the bill.

Management's first priority is to stop the legislation. Because of where things stand now with the proposal, that may not be possible. If passed, the EFCA will represent the most dramatic change in labor relations since the passage of the Wagner Act in 1935, and will make it extraordinarily easy for unions to organize in both the "traditional" sectors and in many other sectors of the service economy. Is it time to panic? Of course not, but it is time to take action. The ease with which a union could organize through a petition or card-signing campaign<sup>1</sup> makes a thorough re-evaluation of company policies, procedures and practices essential. There are many prudent and cost-efficient steps

## Pepper Hamilton Sponsors ACE 2009

The Air & Waste Management Association's 102nd Annual Conference & Exhibition (ACE) will be held from June 16-19, at Cobo Center in Detroit. The Conference theme is "Driving Environmental Progress." ACE 2009 will feature a technical program boasting more than 500 speakers, hundreds of exhibitors displaying the latest products and services, social tours and networking events, and professional development courses taught by leading instructors.

Pepper partner **Thomas P. Wilczak** has been involved in planning ACE 2009 for approximately five years. He serves as the chair of the Professional Associations Committee for ACE 2009.

Wilczak and fellow Pepper attorneys **William Walsh, Todd Fracassi, Kurt Kissling, AnnMarie Sanford** and **Mark Erman** have contributed papers to be presented at technical panels and paper sessions through-out the conference. Topics include: Encouraging Development in a Time of Economic Uncertainty - A Michigan Perspective; Impact of Sustainability Regulations on Products; The Regulation of Nanotechnology - The Times They Are A-Changin'; Climate Change Is Coming, Is Your Company Ready?; The Great Lakes Legacy Act - A Tool for Protecting the Great Lakes; and The Revised Lead NAAQS: More Than Meets the Eye.

that employers can take right now to positively affect their workplaces.

When a company knows that it is being targeted for unionization, it should immediately take steps to ensure a healthy environment for relations with employees. These steps should start with an accurate review and assessment of policies and practices, compensation, management training, communications systems and problem-solving procedures. An internal self-serving review is not only a waste of time, but can be counterproductive in its failure to identify real problems and their causes. External reviews are much more accurate and do not cover up blemishes. Once problems are identified, they must be corrected. In addition, auditing and survey mechanisms need to be put in place to ensure that the employer's policies, practices

and procedures continue to be assessed and corrected on an ongoing basis.

Cooperative or collaborative committees or groups comprised of management and employees also can promote positive employee relations. But if not organized correctly, such groups or committees could violate the company-dominated union provision of Section 8(a)(2) of the National Labor Relations Act. Competent labor relations counsel can put in place the most effective cooperating committees possible, while avoiding the National Labor Relations Act prohibitions. The committees are effective; unions so strongly oppose them because, if used well, continually and legally, the committees can eliminate the unions' element of surprise, as the committees – not the unions – serve as an excellent “early warning” system that will alert the company of employee unrest.

Further, companies in multiple locations should have their labor counsel review all the sites to determine which of them would be an “appropriate unit” under the National Labor Relations Act. It may be possible to take action to ensure that the “only appropriate unit” consists of multiple sites. Even if a petition or cards are signed at one site without the employer’s knowledge, it would be extremely difficult for a union to extend that successful organizing to another site or, in the alternative, to organize multiple sites successfully from the outset. Employers should not wait to undertake this type of review.

An enormous amount of money and political effort is involved in supporting the proposed legislation. It is important to take prudent and cost-effective steps now to be prepared.

*Authors:*

*Jonathan Kane*  
610.640.7803

*kanej@pepperlaw.com*

*Amy G. McAndrew*  
610.640.7824

*mcandrewa@pepperlaw.com*

**Endnotes**

- 1 Think, for example, about employees who do not want a union to represent their interests but may sign an authorization card in the face of subtle or even explicit union intimidation since they will not be permitted to make their decision in secret.

## Upcoming Events

### *The Capital Roundtable*

- **Succeeding at Fundraising for PE, VC and Mezz Firms: How to Win at Fundraising Despite the Funding Famine - Where to Go, Who to See, What Not to Say**

**MasterClass**

Thursday, May 7, 2009

8:00 a.m. - 4:30 p.m. EDT

Julia D. Corelli and Michael B. Staebler

- **Special Half-Day Pre-MasterClass Workshops (Optional)**

Wednesday, May 6, 2009

2:00 p.m. - 5:00 p.m.

### *INSOL 2009 Eighth World Congress*

**Monday, June 22, 2009**

**Vancouver, Canada**

Pepper partner **Robert S. Hertzberg** will moderate a panel titled “Strictly Confidential: The Use (and Abuse) of Confidential Information in Restructuring Discussions.”

For more information, visit [www.insol.org](http://www.insol.org).

## Pepper Hamilton LLP

Attorneys at Law

The material in this publication is based on laws, court decisions, administrative rulings and congressional materials, and should not be construed as legal advice or legal opinions on specific facts. The information in this publication is not intended to create, and the transmission and receipt of it does not constitute, a lawyer-client relationship.

Please send address corrections to [phinfo@pepperlaw.com](mailto:phinfo@pepperlaw.com).

[www.pepperlaw.com](http://www.pepperlaw.com)

Berwyn | Boston | Detroit | Harrisburg | New York | Orange County  
Philadelphia | Pittsburgh | Princeton | Washington, D.C. | Wilmington

© 2009 Pepper Hamilton LLP. All Rights Reserved.

*This publication may contain attorney advertising.*