

been widely publicized and it is likely that in the meantime, there will be a flurry of MCPA claims filed against residential builders. Practitioners pursuing or defending such claims should keep in mind that there is a regulated activity exemption under the MCPA and a line of cases interpreting such exemption both of which were ignored by the Court of Appeals in its *Forton* decision.

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### **Debtor/Tenant of Nonresidential Real Estate Must Pay Full Month's Rent Even if Lease is Rejected Mid-Month**

On February 15, 2000, the Sixth Circuit Court issued its opinion in *Koenig Sporting Goods, Inc. v Morse Road Company*, 203 F.3d 986 (6th Cir. 2000) – and became the first Circuit Court to confirm that a debtor/tenant *must* pay *all* of the rent which becomes due during the post-petition, pre-rejection period under a lease of nonresidential real property.

At issue was Section 365(d)(3) of the Bankruptcy Code which states, in pertinent part:

The trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title . . .

In *Koenig* the landlord and tenant were parties to a 10-year lease of nonresidential real property under which the tenant was to pay monthly rent of \$8,500 on the *first* day of each month. On August 18, 1997 the tenant filed Chapter 11. Subsequently, the debtor/tenant filed a motion to reject its leases upon 7-days' notice to its landlords: that motion was granted on November 6, 1997. On November 25, 1997 the debtor/tenant notified one of its landlords that it was rejecting the lease effective December 2, 1997 and, in fact, vacated the leased premises on December 2.

On January 29, 1998 the landlord filed a motion with the bankruptcy court seeking payment of rent for the full month of December. The debtor/tenant objected and argued that the landlord was only entitled to rent for

December 1 and 2, which totaled \$516.13. The Bankruptcy Court granted the landlord's motion. The debtor/tenant appealed to the Bankruptcy Appellate Panel for the Sixth Circuit, which affirmed. The debtor/tenant then appealed to the Sixth Circuit Court of Appeals.

In a well-reasoned opinion, the Court became the first Circuit Court to resolve a split of authority on this issue. One line of cases supported the debtor/tenant's position that the landlord was only entitled to a pro-rata share of the December rent for only those days during which the debtor/tenant actually occupied the leased premises. See, e.g. *In re McCrory Corp.*, 210 B.R. 934 (S.D.N.Y. 1997). Another line of cases supported the landlord's position that it was entitled to the full month's rent if the debtor/tenant occupied the nonresidential real property for any portion of a month. See e.g. *In re Krystal Co.*, 194 B.R. 161 (Bankr. E.D. Tenn 1996).

The Sixth Circuit rejected the debtor/tenant's argument that 11 U.S.C. 365(d)(3) was ambiguous in the context of this case. Because the lease provided that rent was due on the *first* day of the month, and because December 1, 1997 occurred during the post-petition, pre-rejection period, 11 U.S.C. 365(d)(3) unambiguously required the debtor/tenant to pay the full December rent even though the lease was rejected and the debtor/tenant vacated the premises on December 2, 1997.

The Court rejected the debtor/tenant's arguments that "equity" and "common sense" mandated that the December rent be prorated so that the debtor/tenant would only pay for the two days that it occupied the leased premises. The Court noted that the debtor/tenant had rejected the lease just 2 days earlier – on November 30, 1997 – it would never have become obligated to pay the December, 1997 rent. Because the debtor/tenant had control over the dates on which it rejected the lease and vacated, the Court held that it would be inequitable to deny the landlord the full December rent.

While *Koenig* may seem harsh to debtor's lawyers, it is a well-written decision which clearly defines the debtor/tenant's rent obligation if a lease of nonresidential real property is rejected mid-month. The decision brings a much-needed certainty to the application of 11 U.S.C. 365(d)(3) for both landlord and tenants.

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