

Chapter 7

Executory Contracts and Unexpired Leases of Nonresidential Real Property in Coal Bankruptcy Cases: An Overview for Operators, Landowners, Purchasers and Contract Parties Whose Interests May Be Impacted by Bankruptcy

Ronald E. Gold

Frost Brown Todd LLC

Cincinnati, Ohio

Adam R. Kegley

Frost Brown Todd LLC

Lexington, Kentucky

Synopsis

§ 7.01.	Introduction	244
§ 7.02.	Section 365 of the Bankruptcy Code.....	245
	[1] — Basic Overview of Section 365 of the Bankruptcy Code	245
	[2] — Scope of Section 365 of the Bankruptcy Code	245
§ 7.03.	Fundamental Concepts in Bankruptcy Cases.....	246
	[1] — Policies and Purposes of the Bankruptcy Code	246
	[2] — Probable Types of Coal and Mineral Bankruptcy Cases	247
	[3] — The Debtor’s Estate	248
	[4] — The Debtor, Claims, Creditors and Debts	249
	[5] — The Trustee.....	250
	[6] — The Debtor in Possession	250
	[7] — Parties in Interest	250
	[8] — The Automatic Stay	251
§ 7.04.	Executory Contracts	251
	[1] — Definitions of the Term “Executory Contract”	251
	[2] — General Examples of Executory Contracts.....	252
	[3] — Particular Examples of Executory Contracts.....	254
§ 7.05.	Unexpired Leases	258
§ 7.06.	Ipso Facto Clauses and Anti-Assignment Provisions.....	262
	[1] — Ipso Facto Clauses.....	262
	[2] — Anti-Assignment Provisions	262

§ 7.07. The Business Judgment Standard.....	263
[1] — Benefit to the Debtor’s Estate	263
[2] — Effect of Assumption or Rejection on Nondebtor Party	265
§ 7.08. Assumption and Assignment.....	265
[1] — The Decision to Assume.....	265
[2] — Conditions for Assumption	265
[3] — Effect of Assumption.....	267
[4] — Assignment	268
[5] — Conditions for Assignment.....	268
[6] — Restrictions on Assignment.....	268
§ 7.09. Rejection.....	269
[1] — The Decision to Reject	269
[2] — Conditions for Rejection	269
[3] — Effect of Rejection.....	269
[4] — Rejection Damages.....	272
§ 7.10. Performance, Rights and Obligations Prior to the Decision to Assume, Assume and Assign or Reject	272
[1] — Timing.....	272
[2] — Debtor’s Rights and Obligations.....	273
[3] — Nondebtor’s Rights and Obligations.....	273
§ 7.11. Special Issues	274
[1] — Prepetition Waivers of Rights Under Section 365 of the Bankruptcy Code.....	274
[3] — Postpetition Amendment or Modification	275
[4] — Eleventh Amendment Immunity	276
[5] — Rights of Re-entry	278
[6] — Liens of a Debtor in Possession Lender on Leasehold Interests.....	279

§ 7.01. Introduction.

Several coal companies¹ have filed voluntary and involuntary petitions for relief under title 11 of the United States Code (the “Bankruptcy Code”)² in the past five years. As a result of these filings, various parties in the coal industry have been forced to become familiar with the impact of the

¹ AEI Resources Holding, Inc., Case No. 02-10150 (Bankr. E.D. Ky. filed February 28, 2002); Anker Coal Group, Inc., Case No. 02-13597 (Bankr. N.D. W. Va. filed October 29, 2002); Cook and Sons Mining, Inc., Case No. 03-70789 (Bankr. E.D. Ky. filed August 25, 2003); Horizon Natural Resources Co., Case No. 02-14261 (Bankr. E.D. Ky. filed November 13 and 14, 2002); James River Coal Co., Case No. 03-4095 (Bankr. M.D. Tenn. filed March

Bankruptcy Code on their businesses. This chapter provides a general overview of merely one aspect of the Bankruptcy Code, specifically, section 365 of the Bankruptcy Code,³ that has become particularly relevant to more and more operators, suppliers, landowners, purchasers and other nondebtor contract and lease parties in the coal industry.

§ 7.02. Section 365 of the Bankruptcy Code.

[1] — Basic Overview of Section 365.

Section 365 of the Bankruptcy Code governs various rights and obligations between debtors, debtors in possession and trustees, and nondebtor parties to executory contracts and unexpired leases. Subject to certain restrictions, section 365 of the Bankruptcy Code gives a trustee or a debtor in possession the right,⁴ to assume, assume and assign or reject any executory contract or unexpired lease of the debtor. Rejection, assumption, and assumption and assignment of executory contracts and unexpired leases is subject to the approval of a bankruptcy court, which will utilize the business judgment standard in determining whether to authorize assumption or rejection. In addition to giving a trustee or a debtor in possession the right to assume, assume and assign or reject, section 365 of the Bankruptcy Code contains various provisions regarding the timing of assumption or rejection, assignment, performance, and the effects thereof, on both debtor and nondebtor parties to executory contracts and leases.

[2] — Scope of Section 365 of the Bankruptcy Code.

Section 365 of the Bankruptcy Code applies only to executory contracts and unexpired leases that a debtor entered into prior to the filing of a bankruptcy petition. As discussed below, contracts that are no longer executory, leases that have expired by their terms, and contracts and leases

30, 2001); Lodestar Energy, Inc., Case No. 01-50969 (Bankr. E.D. Ky. filed March 30, 2001); Pen Holdings, Inc., Case No. 02-979 (Bankr. M.D. Tenn. filed January 24, 2002); Quaker Coal Co., Case No. 00-51374 (Bankr. E.D. Ky. filed June 16, 2000).

² 11 U.S.C. §§ 101 *et seq.*

³ *Id.* § 365.

⁴ Pursuant to 11 U.S.C. § 1107, a debtor in possession has most of the rights, powers and duties of a trustee.