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BANKRUPTCY LAW

ENFORCEABILITY OF BANKRUPTCY FORFEITURE CLAUSES IN COMMERCIAL LEASES

Queens Boulevard Wine & Liquor Corp. v. Blum

A proceeding pursuant to Chapter XI of the Bankruptcy Act¹ has as its primary purpose the financial rehabilitation of the debtor.² If he is "insolvent or unable to pay his debts as they mature,"³ the debtor may file a petition with a bankruptcy court for an arrangement.⁴ The court, in its discretion, may either allow the debtor to continue in possession of his business or appoint a receiver to carry on the operation during the pendency of the proceeding.⁵ In addition, the court has the power to stay, until final decree, the maintenance of suits against the debtor.⁶ After having met with the approval of at least a majority of the creditors, the proposed arrangement must be confirmed by the court.⁷ Upon confirmation, the plan becomes binding on general non-

¹ 11 U.S.C. § 701 *et seq.* (1970). This is a voluntary proceeding, resembling common law compositions and extensions under the former Bankruptcy Act of 1898, ch. 541, § 12, 30 Stat. 549, and the Act of March 3, 1933, ch. 204, § 74, 47 Stat. 1467, respectively. These sections were supplanted by Chapter XI of the Chandler Act. Act of June 22, 1938, ch. 575, 52 Stat. 840, 905. See generally J. WEINSTEIN, *THE BANKRUPTCY LAW OF 1938* (1938).

² See *Nicholas v. United States*, 384 U.S. 678, 687 (1966).

The provisions of the Bankruptcy Act may be viewed as comprising two distinct categories. The vast majority of proceedings (Chapters I through VII) are straight bankruptcy proceedings involving the collection and distribution of all the debtor's property and his ultimate discharge. On the other hand, the Bankruptcy Act contains other provisions (Chapters VIII through XV) which contemplate the debtor's rehabilitation. Under the latter, the debtor seeks reorganization rather than liquidation, and the creditors look to the future earnings of the bankrupt, rather than the property held by him at the time of suit, to satisfy their claims. See 1 W. COLLIER, *BANKRUPTCY* ¶ 0.01 (14th ed. 1971) [hereinafter cited as COLLIER]. See generally Ashe, *Rehabilitation Under Chapter XI: Fact or Fiction*, 72 *COM. L.J.* 259 (1967).

³ Bankruptcy Act § 323, 11 U.S.C. § 723 (1970).

⁴ An arrangement is defined as "any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms." *Id.* § 306(1), 11 U.S.C. § 706(1).

The petition seeking the arrangement must be filed in a court of bankruptcy, *viz.*, one of the United States district courts or a district court of a territory or possession. *Id.* § 1(10), 11 U.S.C. § 1(10).

⁵ *Id.* § 332, 11 U.S.C. § 732 (appointment of receiver or continuance of trustee in possession); *Id.* § 342, 11 U.S.C. § 742 (continuance of debtor in possession).

⁶ *Id.* § 314, 11 U.S.C. § 714. A debtor has no absolute right to a stay order. Stays are discretionary, but, as they are often essential to the enforcement of the provisions of the Act, the courts generally grant them. See *In re Lieb Bros., Inc.*, 198 F. Supp. 229, 231 (D.N.J. 1961), citing *Foust v. Munson S.S. Lines*, 299 U.S. 77, 83 (1936).

⁷ Sections 361 and 362 of the Bankruptcy Act set forth the requirements for acceptance of the arrangement by the creditors. Bankruptcy Act §§ 361, 362, 11 U.S.C. §§ 761, 762 (1970). Section 366 further requires that the proposed arrangement be "feasible" and "for the best interests of the creditors." *Id.* § 366, 11 U.S.C. § 766.

priority creditors and, as provided for by the arrangement plan, the debtor is discharged from all of his unsecured debts.⁸

An arrangement contemplates the continued operation of the debtor's business in the interest of rehabilitating the debtor as well as fulfilling the expectations of his creditors. Meeting this twofold goal becomes difficult, however, when the debtor's premises are leased and the lessor seeks to terminate the leasehold interest by invoking a bankruptcy forfeiture clause in the lease.⁹ Where such clauses are sufficiently specific, they are enforceable by virtue of section 70(b) of the Bankruptcy Act.¹⁰

The Second Circuit, in *Queens Boulevard Wine & Liquor Corp. v. Blum*,¹¹ was faced with the issue whether a bankruptcy court is *required* to enforce a bankruptcy forfeiture clause in a commercial lease. The district court had held that although such clauses are generally enforceable, the court may deny enforcement on purely equitable grounds where, under the particular circumstances, forfeiture would be inequitable and contrary to the purposes of Chapter XI.¹² The Second Circuit, by a divided panel, affirmed the district court's determination.¹³ In an opinion authored by Judge Timbers, the majority reasoned that enforcement in the instant case would frustrate the legislative intent and rehabilitative purpose of Chapter XI.¹⁴ Although the court subscribed to the general enforceability of bankruptcy clauses and limited

⁸ *Id.* § 367, 11 U.S.C. § 767. Unless the court or the arrangement plan itself provides otherwise, *id.* § 368, 11 U.S.C. § 768, the case is dismissed upon confirmation of the arrangement. The creditors, whether they have consented to the arrangement or not, are bound by its provisions and have no further claim to the balance of the original debts.

Subsection 2 of § 367 provides that priority debts are unaffected by the confirmation. *Id.* § 367(2) 11 U.S.C. § 767(2).

⁹ A bankruptcy clause is a standard lease provision. While there is some variation as to the wording of the condition, such clauses usually provide for automatic termination or termination at the option of the landlord upon the insolvency or bankruptcy of the tenant. *See, e.g.*, *Finn v. Meighan*, 325 U.S. 300 (1945) (termination of lease upon lessee's filing of petition in bankruptcy); *In re Technical Marine Maintenance Co.*, 169 F.2d 548 (3d Cir. 1958) (lessor had option to terminate in event tenant should be adjudicated a bankrupt or take advantage of any insolvency act); *Jandrew v. Bouche*, 29 F.2d 346 (5th Cir. 1928) (automatic termination upon transfer of the lease into the hands of the trustee).

¹⁰ 11 U.S.C. § 110(b) (1970). This section, in part, provides:

A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforceable [*sic*].

¹¹ 503 F.2d 202 (2d Cir. 1974).

¹² *In re Queens Blvd. Wine & Liquor Corp.*, No. 72-B-297 (E.D.N.Y. Feb. 1, 1973).

¹³ The Second Circuit panel consisted of Judges Timbers and Moore in the majority, and Judge Hays, dissenting.

¹⁴ 503 F.2d at 206-07.

its holding to the particular circumstances of the case,¹⁵ its decision not to enforce the clause drastically reduces the future viability of section 70(b) of the Bankruptcy Act. As stated by Judge Hays in his dissent, if section 70(b) "does not apply here, it is hard to imagine a case where it would apply."¹⁶

In *Queens Wine & Liquor*, the debtor was a New York corporation operating a retail liquor store in premises occupied under a seven-year lease from the appellant, Carol Management Corporation. Two years after the commencement of the term, the tenant was delinquent in paying his rent, prompting the landlord to institute summary non-payment proceedings. The same day, the tenant-debtor filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. The referee thereupon issued an order allowing the debtor to continue in possession. Additionally, a temporary stay of all other proceedings against the debtor's property, pending the final decree in the bankruptcy proceeding, was ordered. Thereafter, the debtor offered to pay the accrued rent, subject to his obtaining a surety bond which the creditors required in order to stay his adjudication as a bankrupt.¹⁷ This offer was initially satisfactory to the landlord. However, while the arrangements for the bond were being completed, the landlord, having received an offer to lease the premises at a higher rent, served a notice of termination, pursuant to a bankruptcy forfeiture provision in the lease,¹⁸ and petitioned the referee to vacate the stay.

After the debtor obtained the surety bond, he tendered the full

¹⁵ *Id.* at 207.

¹⁶ *Id.*

¹⁷ See Bankruptcy Act § 326, 11 U.S.C. § 726 (1970), which provides that where a voluntary petition is filed pursuant to section 322, 11 U.S.C. § 722,

the court may, upon hearing and after notice to the debtor and to such other persons as the court may direct, order the debtor to file a bond or undertaking, with such sureties as the court may fix, to indemnify the estate against subsequent loss thereto or diminution thereof

¹⁸ The bankruptcy provision in the lease is set out in Judge Timbers' opinion. Article 16(b) of the lease provided:

If at the date fixed as the commencement of the term of this lease or if at any time during the term hereby demised . . . Tenant make[s] an assignment for the benefit of creditors or petition for or enter into an arrangement this lease, at the option of Landlord, exercised within a reasonable time after notice of the happening of any one or more of such events, may be cancelled and terminated

503 F.2d at 203 n.1.

The above clause was amended by a typewritten addendum:

Notwithstanding the provisions of Article "16" hereof, in the event no relief is requested in any of the bankruptcy proceedings set forth in Article "16" hereof to disaffirm this lease, or to reform the same, . . . and provided, further, that all rent, additional rent and other charges due from Tenant under the lease are paid promptly when due, this lease shall not be terminated as provided in Article "16" hereof, but shall continue in full force and effect.

Id. at n.2.

amount of rent arrears. Nevertheless, Carol refused to accept the tendered rent, demanding instead a surrender of the premises. The referee ruled that although the lease was terminated as of the date of Carol's notice of termination, the debtor should continue in possession and pay the landlord a sum equal to the rent as compensation for use and occupation.¹⁹ Upon the parties' cross petitions for review, the district court affirmed the referee's determination.²⁰ By this time, the debtor had begun to operate on a profitable basis.²¹ Confirmation of the arrangement, which had been agreed upon by the debtor and his creditors and which contemplated the continuation of the debtor in possession of the premises, was adjourned pending the Second Circuit's review of the district court's order.

Courts have generally held that bankruptcy does not sever the landlord-tenant relationship unless otherwise expressly provided.²² Leases, if unexpired at the date of filing of a petition in bankruptcy, are deemed "executory contracts" and as such may be assumed by the debtor's trustee.²³ However, to guard against insecurity of the leasehold interest and the frequently resulting loss of control over the premises, the landlord will usually insert a bankruptcy clause in the lease which, under section 70(b) of the Bankruptcy Act, shall be enforceable.²⁴

¹⁹ *In re Queens Blvd. Wine & Liquor Corp.*, No. 72-B-297, at A-20 (E.D.N.Y. Feb. 1, 1973).

The referee's decision was prompted by Judge Weinfeld's ruling in *In re Lane Foods, Inc.*, 213 F. Supp. 133 (S.D.N.Y. 1963), which affirmed a stay of a warrant of eviction against a tenant who sought a Chapter XI arrangement. In *Lane*, the referee had ruled that the tenant could remain in possession of the premises, provided he pay the landlord compensation for use and occupancy. Although the lease had been terminated by the issuance of the warrant, the district court held that where eviction would work irreparable harm and loss to the debtor and frustrate the intent of Chapter XI, a stay was warranted under the Bankruptcy Act. The court further stipulated, however, that this holding did not imply that the debtor could remain in possession indefinitely, or even until the proceeding was consummated. *Id.* at 135-36.

²⁰ The landlord sought immediate possession of the premises, whereas the tenant sought a declaration that the termination clause was invalid. The district court granted the latter's petition to the extent of determining that it would be inequitable under the circumstances to allow forfeiture of the lease and that the debtor could continue in possession as a tenant under the lease. *In re Queens Boulevard Wine & Liquor Corp.*, No. 72-B-297 (E.D.N.Y. Feb. 1, 1973).

²¹ The tenant's business was operating at a profit of approximately \$2,000 per week, \$1,000 of which was turned over to the bankruptcy trustee. The accumulated money exceeded \$50,000 and was to be applied toward the payment of debt upon confirmation of the arrangement. 503 F.2d at 204.

²² See, e.g., *In re Roth & Appel*, 181 F. 667, 670 (2d Cir. 1910); *Watson v. Merrill*, 136 F. 359, 363 (8th Cir. 1905); *In re Newkirk Mining Co.*, 238 F. Supp. 1, 3 (E.D. Pa. 1964) (rejection of lease by trustee did not terminate the lease). See also 4A COLLIER, *supra* note 2, at ¶ 70.44[2].

²³ See R. BANKRUPTCY P. 607, *modifying* Bankruptcy Act § 70(b), 11 U.S.C. § 110(b) (1970). Within 30 days after qualification, the trustee must file a statement of executory contracts assumed. Any contract, including an unexpired lease of real property, which is not assumed within 60 days after qualification will be deemed to have been rejected.

²⁴ See note 10 *supra*.

Section 70(b), enacted in 1938,²⁵ was merely declarative of existing case law.²⁶ Numerous courts had upheld the enforceability of bankruptcy clauses in leases.²⁷ In the 1945 decision in *Finn v. Meighan*,²⁸ the Supreme Court held that the forfeiture provision of section 70(b) was applicable to reorganization proceedings under Chapter X.²⁹ Section 302 of the Bankruptcy Act³⁰ makes the provision equally applicable to Chapter XI proceedings. Nonetheless, as a general proposition, forfeiture provisions are disfavored by the law.³¹ If such clauses are to be enforced in the bankruptcy context, they must be explicit;³² for where the language employed is ambiguous, the provision will be construed in a light most favorable to the tenant-debtor.³³

²⁵ Act of June 22, 1938, ch. 575, § 70(b), 52 Stat. 880.

²⁶ See 4A COLLIER, *supra* note 2 at ¶ 70.03[3]. This section was inserted in the Bankruptcy Act merely "to round out and make comprehensive the provision dealing with unexpired leases." J. WEINSTEIN, BANKRUPTCY LAW OF 1938, at 159 (1938).

²⁷ See, e.g., *In re Walker*, 93 F.2d 281 (2d Cir. 1937) (landlord allowed to terminate lease where court order continuing debtor in possession, in effect, made the debtor a "receiver" within the meaning of the bankruptcy clause in the lease); *Model Dairy Co. v. Foltis-Fischer, Inc.*, 67 F.2d 704 (2d Cir. 1933) (court held lessor entitled to evict tenant where appointment of a receiver was breach of bankruptcy clause); *Jandrew v. Bouche*, 29 F.2d 346 (5th Cir. 1928) (lease was terminated by the tenant's adjudication as a bankrupt and the subsequent appointment of a trustee according to the conditional limitation in the lease); *Empress Theatre Co. v. Horton*, 266 F. 657 (8th Cir. 1920) (lease provision providing for termination of leasehold interest upon insolvency or bankruptcy of lessee enforced against debtor's trustee in bankruptcy); *In re Scholtz-Mutual Drug Co.*, 298 F. 539 (D. Colo. 1924) (forfeiture enforced against tenant who was held in breach of lease provision when bankruptcy petition was filed against him).

²⁸ 325 U.S. 300 (1945).

²⁹ Affirming the Second Circuit's judgment, the Supreme Court held that the lease in question was effectively terminated, pursuant to its forfeiture provision, by the tenant's petition for reorganization under Chapter X. The debtor's trustee was directed to surrender possession to the landlord. Justice Douglas, speaking for a unanimous Court, stated that Congress had made § 70(b) applicable to Chapter X proceedings by virtue of § 102 of the Bankruptcy Act, 11 U.S.C. § 502 (1970). 325 U.S. at 302. Section 102 states that other chapters should be applicable "insofar as they are not inconsistent or in conflict with the provisions" of Chapter X. Bankruptcy Act § 102, 11 U.S.C. § 502 (1970). Justice Douglas further declared: "That being the policy adopted by Congress, our duty is to enforce it." 325 U.S. at 303. *Accord, In re Technical Marine Maintenance Co.*, 169 F.2d 548 (3d Cir. 1948).

³⁰ Bankruptcy Act § 302, 11 U.S.C. § 702 (1970). Section 302 provides, *inter alia*, that "[t]he provisions of chapters 1 to 7 of this title shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter." See *Geraghty v. Kiamie Fifth Ave. Corp.*, 210 F.2d 95 (2d Cir. 1954); *In re Burke*, 76 F. Supp. 5 (S.D. Cal. 1948).

³¹ "Forfeitures are not favored either at law or in equity." *In re Clerc Chem. Corp.*, 52 F. Supp. 109, 110 (D.N.J. 1943), *aff'd*, 142 F.2d 672 (3d Cir. 1944), *citing In re Larkey*, 214 F. 867 (D.N.J. 1914).

³² Section 70(b) of the Bankruptcy Act specifies that an "express" covenant is enforceable. 11 U.S.C. § 110(b) (1970).

³³ Courts very often have strained to interpret forfeiture clauses narrowly, or to find them insufficiently "express" within the meaning of the federal statute. See, e.g., *In re Imperial "400" Nat'l, Inc.*, 429 F.2d 680, 683 (3d Cir.) (per curiam), *cert. denied*, 400 U.S. 946 (1970); *In re Clerc Chem. Corp.*, 142 F.2d 672, 674 (3d Cir. 1944); *Urban Properties Corp. v. Benson, Inc.*, 116 F.2d 321 (9th Cir. 1940) (dissenting opinion); *In re Burke*, 76 F. Supp. 5 (S.D. Cal. 1948). See also 4A COLLIER, *supra* note 2, at ¶ 70.44[3].

Yet, even where a forfeiture clause has been found valid and enforceable on its face, courts have created two exceptions to alleviate the potentially harsh consequences of what otherwise would be the mandatory application of section 70(b). The traditional exception is waiver and estoppel, which has been applied by several federal courts of appeals to avoid an unjust forfeiture of a tenant's lease.³⁴ Thus, where the lessor has engaged in some form of conduct evincing an intent to affirm the tenancy, he will be deemed to have waived his right to terminate the lease and be estopped from asserting its forfeiture. Typical conduct by a landlord which constitutes a waiver is the acceptance of rent,³⁵ or an unreasonable delay in giving notice of termination.³⁶ At least one court has invoked the waiver doctrine in the face of a lease containing a conditional limitation that, upon the occurrence of the condition, the lease shall automatically terminate without any notice or action by the landlord.³⁷

The majority in *Queens Wine & Liquor* felt constrained to affirm the joint findings of the district court and the referee that there was no waiver.³⁸ However, the court acknowledged that the landlord's initial concern solely with the overdue rent, and the tenant's subsequent reliance on the landlord's apparent intention not to pursue eviction if he

³⁴ See cases cited in notes 35-37 *infra*.

³⁵ See *B.J.M. Realty Corp. v. Ruggieri*, 338 F.2d 653 (2d Cir. 1964) (landlord's acceptance of two checks for rent after the petition was filed constituted waiver); *Ten-Six Olive, Inc. v. Curby*, 208 F.2d 117 (8th Cir. 1953) (acceptance of six monthly payments, in accordance with lease, from the reorganization trustee and later the trustee in bankruptcy, constituted a waiver of the right to terminate).

³⁶ See, e.g., *Geraghty v. Kiamie Fifth Ave. Corp.*, 210 F.2d 95 (2d Cir. 1954) (landlord's right to terminate waived and intention to affirm tenancy inferred from his seven-month delay before electing to cancel the lease).

³⁷ See *Atwell Bldg. Corp. v. Sound, Inc.*, 171 F.2d 253 (7th Cir.), *cert. denied*, 336 U.S. 962 (1948), wherein the clause in the lease provided that the tenant's filing of a petition in bankruptcy would constitute a breach and automatic termination of the lease. The landlord contended that this was a conditional limitation and, therefore, could not be waived. The court rejected this argument, holding that where the landlord elected to acknowledge the continued existence of the lease, he was bound whether the lease provision was a condition or a conditional limitation.

Although the Second Circuit refers to the lease provision in *Queens Wine & Liquor* as a conditional limitation, it is more accurately termed a condition. The technical distinction between the two is that the latter requires an affirmative act on the part of the lessor, whereas the former provides for automatic termination upon the occurrence of the condition. 1 H. TIFFANY, *LANDLORD AND TENANT* § 12(d),(e), at 68-72 (1912). Although vestiges of the distinction are still found in some decisions, for the most part, the technicality is now ignored by the courts. Judge Judd, in the district court, easily disposed of the issue, reasoning that "[t]he equitable power of a bankruptcy court should not depend on the vagaries of ancient nomenclature." *In re Queens Boulevard Wine & Liquor Corp.*, No. 72-B-297 (E.D.N.Y. Feb. 1, 1973).

³⁸ 503 F.2d at 205. Concurrent findings of fact by a referee and the district court may not be set aside unless they are "clearly erroneous." *In re Simon v. Agar*, 299 F.2d 853 (2d Cir. 1962) (*per curiam*).

received the rent, lent weight to the tenant's estoppel argument.³⁹ Nevertheless, the court refused to rest its decision on this ground, in deference to the more flexible rationale that the lease provision was unenforceable due to "compelling equitable and policy considerations."⁴⁰

This additional, far more novel and liberal exception to the enforcement of valid forfeiture clauses was created by the Third and Fourth Circuits, respectively, in *In re Fleetwood Motel Corp.*⁴¹ and *Weaver v. Hutson*.⁴² In these cases, the courts, looking beyond the objective validity of the forfeiture clauses and the conduct of the parties, viewed the effects enforcement would have on the debtor and the public. Each case arose in the context of Chapter X reorganization proceedings⁴³ and the courts therein held that enforcement of the forfeiture provisions under the circumstances would frustrate the reorganization aims of Chapter X. Both circuits held that, as courts of equity, they had the power and discretion to disallow forfeiture where it would be inequitable and contrary to the public interest.⁴⁴

Fleetwood involved the reorganization of a publicly owned hotel corporation. The tenant-corporation leased, for a term of 99 years, certain premises upon which it constructed a motel complex. According to the lease provisions, upon termination of the lease, the tenant was required to deliver not only the premises but all the improvements thereon. The lease also contained a bankruptcy clause similar to the one in *Queens Wine & Liquor*. Upon the tenant's filing of a petition for Chapter X reorganization, the landlord⁴⁵ attempted to invoke the forfeiture provision and regain possession of the property. The unanimous court of appeals panel declared that, since reorganization would be futile if the property were forfeited, enforcement of the provision

³⁹ Carol's conduct prior to the notice of termination indicated a willingness to forgive the tenant's default and permit the tenancy to continue, provided the debtor tender all rent arrears. Even after the termination notice had been served and a stay ordered by the referee, Carol sent a letter to the tenant indicating full awareness of its right to terminate but refraining from so doing. At a subsequent hearing on the debtor's application to continue in possession, the lessor merely requested that either the stay be lifted or that the money be paid. In reliance on the landlord's behavior, the debtor, his creditors, and their attorneys worked to formulate a satisfactory arrangement plan. 503 F.2d at 205.

⁴⁰ *Id.* at 206.

⁴¹ 335 F.2d 857 (3d Cir. 1964).

⁴² 459 F.2d 741 (4th Cir. 1972).

⁴³ Bankruptcy Act, ch. X, 11 U.S.C. § 501 *et seq.* (1970).

⁴⁴ *In re Fleetwood Motel Corp.*, 335 F.2d 857, 862 (3d Cir. 1964); *Weaver v. Hutson*, 459 F.2d 741, 744 (4th Cir. 1972).

⁴⁵ The petition was filed by Joseph F. Bradway and Bernard W. Capaldi as trustees, representing various persons having an interest in the leasehold property. To avoid confusion with the trustees of the debtor-tenant, the court referred to these parties in interest as the "landlord." See 335 F.2d at 859 n.1.

in this case would frustrate the aims of Chapter X and seriously impair the rights of the investing public.⁴⁶ Furthermore, forfeiture of the lease would result in a windfall to the landlord, who would thereby acquire the motel and its fixtures, the corporation's only assets.

Under strikingly similar facts, the Fourth Circuit, in *Weaver*, unanimously adopted the reasoning of the *Fleetwood* court. Here too, the case involved the Chapter X reorganization of a hotel corporation. When three debenture holders of the corporation filed a Chapter X petition as creditors,⁴⁷ the landlords sought to have the lease declared forfeited. The court held that "the Landlords' insistence upon a forfeiture was highly unconscionable and inequitable in the circumstances—a demand for blood."⁴⁸ Insofar as all the debtor's property would revert to the landlords if the lease were forfeited, reorganization would become moot.⁴⁹

In reaching their decisions, both the *Weaver* and *Fleetwood* courts relied heavily on the decision of the Supreme Court in *Smith v. Hoboken R.R.*⁵⁰ *Smith* involved a railroad reorganization under section 77 of the Bankruptcy Act,⁵¹ thus raising important considerations under the Interstate Commerce Act.⁵² It is the function of the Interstate Commerce Commission under section 77 to prepare a plan for reorganization of the debtor that is fair and equitable and "compatible with the public interest."⁵³ Continued operation by a carrier is of primary importance to its security holders as well as to the public. The *Smith* Court found that "[i]f forfeiture of the lease [were] . . . declared, no plan of reorganization [would] be possible."⁵⁴ Consequently, the Court stayed effectuation of the bankruptcy clause in the railroad's lease, pending the Commission's plan for reorganization.⁵⁵

Conceding that there were factual differences between *Weaver*,

⁴⁶ 335 F.2d at 862. The public shareholders, represented by the Securities and Exchange Commission in this proceeding, had invested over \$500,000 in the debtor corporation. *Id.*

⁴⁷ Not only a debtor corporation, but also "three or more creditors who have claims against the corporation or its property" or "an indenture trustee" may file a petition under Chapter X. Bankruptcy Act § 126, 11 U.S.C. § 526 (1970).

⁴⁸ 459 F.2d at 745.

⁴⁹ *Id.* at 744.

⁵⁰ 328 U.S. 123 (1946).

⁵¹ Bankruptcy Act § 77, 11 U.S.C. § 205 (1970). This comprehensive section governs the reorganization of railroads engaged in interstate commerce.

⁵² Interstate Commerce Act, 49 U.S.C. § 1 (1970). Congress intended in the Act to carry out a national transportation policy of fair and impartial regulation of interstate commerce. *See* Act of Sept. 18, 1940, ch. 722, tit. I, § 1, 54 Stat. 899.

⁵³ Bankruptcy Act § 77(d), 11 U.S.C. § 205(d) (1970).

⁵⁴ 328 U.S. at 131-32.

⁵⁵ *Id.* at 133.

Fleetwood, and the instant case, the *Queens Wine & Liquor* majority nevertheless found the rationale of those cases compelling. However, *Queens Wine & Liquor* is not only factually dissimilar to the cases relied upon, but clearly distinguishable. The most obvious distinction is that *Fleetwood* and *Weaver* arose in the context of Chapter X reorganization proceedings whereas *Queens Wine & Liquor* involved a Chapter XI arrangement. The majority barely made note of this difference, except to assert that since both chapters contemplate the rehabilitation of the debtor, the relevancy of the cases was unimpaired.⁵⁶ Chapters X and XI are mutually exclusive rehabilitative provisions,⁵⁷ embodying distinct schemes of reorganization. Chapter X contemplates the reorganization of corporations with complicated debt structures and a large number of stockholders, whereas Chapter XI is designed for small businesses and corporations with few stockholders.⁵⁸ While a plan under Chapter X may alter the status of a number of classes of investors and creditors, a Chapter XI arrangement involves only the rights of unsecured creditors of the debtor.⁵⁹ The debtor is in almost complete control of a Chapter XI arrangement. Chapter X plans, however, are subject to pervasive judicial control and, in addition, are supervised by the Securities and Exchange Commission to protect the interests of public investors.⁶⁰

Moreover, the equitable and policy considerations present in *Queens Wine & Liquor* were considerably attenuated from those which concerned the *Fleetwood* and *Weaver* courts. *Fleetwood* and *Weaver* involved the interests of public shareholders, and the regulatory activities of the Securities and Exchange Commission.⁶¹ While the interests

⁵⁶ 503 F.2d at 205 n.6.

⁵⁷ Chapters X and XI "are not alternate routes, the choice of which is in the hands of the debtor." *SEC v. American Trailer Rentals Co.*, 379 U.S. 594, 607 (1965). A debtor may only resort to Chapter X if he is unable to obtain adequate relief under Chapter XI; similarly, the court will dismiss a Chapter XI petition if it should have been brought under Chapter X. *Id.*

⁵⁸ *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 447 (1940).

⁵⁹ *Id.* at 452. See note 4 *supra*.

⁶⁰ See *SEC v. American Trailer Rentals Co.*, 379 U.S. 594, 605-06 (1965), wherein the Court remarked:

The contrast between the provisions of Chapter X, carefully designed to protect the creditor and stockholder interests involved, and the summary provisions of Chapter XI is quite marked. The formulation of the plan of arrangement, and indeed the entire Chapter XI proceeding, for all practical purposes is in the hands of the debtor, subject only to the requisite content of a majority in number and amount of unsecured creditors. . . .

⁶¹ Authority for consideration of the effect of a forfeiture clause on the interests of the public was derived from the Supreme Court's decision in *Smith v. Hoboken R.R.*, 328 U.S. 123 (1946). Concerned with maintaining a satisfactory system of transportation, the Court sought to foster the interests of the Interstate Commerce Commission, the railroad's security holders, and the general public. See notes 50-55 and accompanying text *supra*.

of general creditors are important considerations in any bankruptcy proceeding, the majority's contention that the trade creditors and private investors of the tenant-debtor in *Queens Wine & Liquor* "stand on no less significant a footing than did the shareholders of the debtors in *Weaver* and *Fleetwood*"⁶² is dubious. Unlike most shareholders, trade creditors generally exercise substantial control over their investments and certainly possess a keen awareness of the debtor's financial condition.⁶³ Thus, while considerations of equity and public policy are appropriate where innocent stockholders are involved, such considerations are entitled to less weight where the affected parties are trade creditors who, despite their current knowledge of the debtor's financial situation, choose to continue their business dealings with the debtor.

Furthermore, reorganization of the hotel corporations in *Fleetwood* and *Weaver* would have been totally emasculated by forfeiture since the result would have been deprivation of the debtors' entire assets. In addition, the landlord in each case would have realized a windfall acquisition of the debtor's improvements to the property. In *Queens Wine & Liquor*, by contrast, the debtor's potential loss was small. While location is admittedly an important asset to any retail establishment, this factor was overly magnified by the majority for purposes of a strained comparison between the two forfeiture situations. The landlord in *Queens Wine & Liquor* merely sought to obtain, by enforcement of the forfeiture provision, possession of his own property.⁶⁴ Judge Timbers drew an unconvincing analogy in characterizing as a windfall the increased rent that the landlord could earn by re-letting the premises.⁶⁵ It was natural for the landlord to attempt to re-let the property at the maximum rent the current market would bear.

The Second Circuit's decision in *Queens Wine & Liquor* creates uncertainty for the landlord as to the future efficacy of including a bankruptcy forfeiture clause in a commercial lease. Although the court limited its holding to the facts of the case, the circumstances were not

⁶² 503 F.2d at 207.

⁶³ See *SEC v. American Trailer Rentals Co.*, 379 U.S. 549, 613-14 (1965), where the Court observed:

Public investors are . . . generally widely scattered and are far less likely than trade creditors to be aware of the financial condition and cause of the collapse of the debtor. They are less commonly organized in groups or committees capable of protecting their interests.

⁶⁴ The majority in *Queens Wine & Liquor* acknowledged the fact that forfeiture of the lease would have enabled the landlords in *Fleetwood* and *Weaver* to acquire substantial "tenant assets." 503 F.2d at 206 (emphasis in original). They nevertheless failed to recognize that this difference in benefit to the landlord merited a distinction and found the rationale of these cases to be applicable. *Id.*

⁶⁵ *Id.*

so unique as to prevent the average retail establishment from availing itself of this precedent to circumvent the intended effect of such a provision. If the court felt so constrained by the equities involved to disallow forfeiture in this case, it could have reached the same result by resting its decision on the much less controversial ground of estoppel.⁶⁶

It is possible that the majority in *Queens Wine & Liquor* might well have been anticipating the ultimate legislative demise of section 70(b). The Proposed Bankruptcy Act of 1973,⁶⁷ which is, in effect, a total revision of the present Act, provides that if defaults in prior performance are cured, a bankruptcy clause in a lease shall not be enforceable in a rehabilitation proceeding.⁶⁸ The Commission on the Bankruptcy Laws of the United States, which authored the bill, has recognized that reservation of the right to terminate a lease in the event of a filing of a petition in bankruptcy "is often tantamount to giving [the lessor] a veto on any plan of reorganization without regard to the viability of a reorganization plan and the interests of the creditors."⁶⁹

Although restraining the lessor, the approach of the Proposed Bankruptcy Act is appealing since it provides appropriate safeguards to insure that the lessor's interests are adequately protected. Under the revised Act, all business rehabilitation provisions presently contained in Chapters X, XI, and XII are combined into one chapter.⁷⁰ The filing of a petition by the debtor works an automatic stay of the commencement of any civil actions against him.⁷¹ However, the Act further provides that the lessor may file a complaint to terminate or modify the stay, thereby placing upon the debtor the burden of proving that the value of the lessor's interest in the leased property is properly secured.⁷² In a situation such as that presented in *Queens Wine & Liquor*, the debtor would be free from the immediate threat of loss of property

⁶⁶ See note 39 *supra*.

⁶⁷ See REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 137, 93d Cong., 1st Sess. (1973) [hereinafter cited as COMMISSION REPORT]. The Report is divided into parts. Part I contains the findings of the Commission; part II contains the proposed bill and the Commission's notes. See generally Coogan, *The Proposed Bankruptcy Act of 1973: Questions For the Non-Bankruptcy Business Lawyer*, 29 Bus. Law. 729 (1974).

The bill has been introduced in both Houses of Congress. Proposed Bankruptcy Act of 1973, S. 2565, 93d Cong., 1st Sess. (1973); H.R. 10792, 93d Cong., 1st Sess. (1973) [hereinafter cited as Proposed Bankruptcy Act].

⁶⁸ Proposed Bankruptcy Act, *supra* note 67, at § 4-602(b)(2).

⁶⁹ COMMISSION REPORT, *supra* note 67, pt. 1, at 16.

⁷⁰ Since the three chapters under the present Act contain many overlapping rules and there is frequent wasteful litigation regarding the applicability of a given chapter to a particular case, the Commission found that it would be more effective to deal with the rehabilitation of business debtors in one chapter. *Id.* at 23.

⁷¹ Proposed Bankruptcy Act, *supra* note 67, at § 4-501.

⁷² *Id.* § 7-203(b).

essential to his arrangement with his creditors. In the event, however, that the ultimate rehabilitation of the debtor became suspect, the landlord would be able to secure adequate assurance of future performance, modification of the stay with the imposition of conditions to adequately protect his interest, or in the alternative, termination of the stay and eventual dispossession.⁷³ The procedure outlined by the Proposed Bankruptcy Act would provide a basis upon which a court could make a flexible response to both policy considerations and the legitimate needs of the lessor. With the passage of the Act, courts would no longer have to strain to avoid the strict requirements of the current section 70(b).

Joanne Welty

⁷³ *Id.*