

THE CASE FOR THE PROPERTY TEST FOR NURSING HOMES & ASSISTED LIVING FACILITIES FACING
CHAPTER 11 BANKRUPTCY

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INTRODUCTION

In 2019, sixteen percent of the United States population was at least sixty-five years old.¹ At that time, forty-one percent of individuals from the “baby boom” generation was sixty-five years or older.² In 2040, the population of individuals who are at least sixty-five could exceed twenty-one percent.³ The trend toward retirement for baby boomers highlights the impending health care issues for seniors.⁴ The growth rate of seniors will exceed the growth rate of other age brackets.⁵ Given the influx of individuals into the senior demographic and the comparatively attenuated growth rate of other age brackets, senior individuals could experience fewer options for familial support as they age.⁶ The Department of Health and Human Services (HHS) predicts that over fifty percent of Americans who live to sixty-five will experience a disability necessitating long-term care.⁷

Nursing homes and assisted living facilities are among the institutions that deliver long-term care.⁸ In 2016, the United States had approximately 15,600 nursing homes and

¹ ADMIN. FOR CMTY. LIVING, U.S. DEP’T OF HEALTH & HUM. SERVS., 2021 PROFILE OF OLDER AMERICANS 3 (2021), https://acl.gov/sites/default/files/aging%20and%20Disability%20In%20America/2020Profileolderamericans.final_.pdf.

² *Id.* at 4.

³ *Id.* at 3.

⁴ Lydia Zuraw & Carmen Heredia Rodriguez, *Caring for an Aging Nation*, KAISER HEALTH NEWS (May 28, 2021), <https://khn.org/news/article/caring-for-an-aging-nation/>.

⁵ *Id.*

⁶ *Id.*

⁷ ASSISTANT SEC’Y FOR PLAN. & EVALUATION, U.S. DEP’T OF HEALTH & HUM. SERVS 1 (2021), <https://aspe.hhs.gov/sites/default/files/private/pdf/265126/LTSSOIaRB.pdf>

⁸ LAUREN HARRIS-KOJETIN, MANISHA SENGUPTA, JESSICA PENN LENDON, VINCENT ROME, ROBERTO VALVERDE & CHRISTINE CAFFREY, U.S. DEP’T OF HEALTH & HUM. SERVS, VITAL & HEALTH STATS. SER. 3 NO. 43, LONG-TERM CARE PROVIDERS AND SERVICE USERS IN THE UNITED STATES, 2015–2016 1 (2019), https://www.cdc.gov/nchs/data/series/sr_03/sr03_43-508.pdf.

approximately 28,900 residential care communities.⁹ Approximately 1,347,600 residents lived in nursing homes and approximately 811,500 residents lived in residential care communities in 2016.¹⁰ Maintaining operations for nursing homes and assisted living facilities is essential to meeting the anticipated needs of the expanding senior demographic in the United States.¹¹ However, chapter 11 bankruptcy can place the operations of nursing homes and assisted living facilities in precarity depending on how a bankruptcy court rules on the matter of whether a lease of a facility is of residential or nonresidential real property.¹²

The Bankruptcy Code contains discrete provisions for unexpired leases of residential real property and unexpired leases of nonresidential real property.¹³ In the case of a lease of residential real property, the trustee may assume or reject the debtor's lease at any point during the time preceding the confirmation of a plan.¹⁴ However, when a debtor has a lease of nonresidential real property, the lease will be deemed rejected and the trustee will return the property to the lessor if the trustee fails to assume or reject the lease before the earliest of the following events: (1) the date constituting 210 days following the order for relief; or (2) the date of the order of plan confirmation.¹⁵ Furthermore, in the case of a lease of nonresidential real

⁹ *Id.* at 6.

¹⁰ *Id.* at 1.

¹¹ See Zuraw & Heredia Rodriguez, *supra* note 4.

¹² Christine Tobin-Presser, Jennifer Byrne & Rick Arrowsmith, *No Place Like Home: Treatment of SNF Leases Under § 365*, 40 AM. BANKR. INST. J. 28, 28 (2021).

¹³ See *id.*; 11 U.S.C. § 365(d)(2), (d)(4)(A)–(B).

¹⁴ § 365(d)(2). In a chapter 11 case, “the trustee may assume or reject an . . . unexpired lease of residential real property . . . of the debtor at any time before the confirmation of a plan.” *Id.* However, a party to the lease can implore the bankruptcy court to order the trustee to make the decision to assume or reject the lease in a defined time period. *Id.*

¹⁵ *Id.* § 365(d)(4)(A)(i)–(ii). For a chapter 11 debtor, “an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the 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” (1) 210 days following the order for relief; or (2) the date when an order confirms the plan. *Id.* Upon a motion of a trustee or a lessor for cause, the bankruptcy court can grant a ninety-day extension of this time period before the end of the 210 days. *Id.* § 365(d)(4)(B)(i). Once the bankruptcy court permits an extension, any further extensions require “prior written consent of the lessor in each instance.” *Id.* § 365(d)(4)(B)(ii).

property, the trustee must carry out the debtor's lease obligations in the time period between the order for relief and the assumption or rejection of the lease.¹⁶

This paper will explore how bankruptcy courts have ruled on the matter of whether a lease is residential or nonresidential in the context of nursing homes or assisted living facilities navigating chapter 11 bankruptcy. Bankruptcy courts have utilized two primary tests, the property test and the income test, for leases of nursing homes or assisted living facilities.¹⁷ Part I will examine the property test, in which the bankruptcy court emphasizes the quality of the property and whether individuals live on the leased property.¹⁸ Part II will study the income test, in which the bankruptcy court highlights the quality of the lease and whether the debtor earns income from the lease.¹⁹ Then, Part III will analyze the benefits and shortfalls of the two tests. Part IV will consider which method the United States Supreme Court might choose if given the opportunity to rule on this matter. Finally, Part V will argue that the property test is the method best suited for leases of nursing homes and assisted living facilities.

I. THE PROPERTY TEST

A. *In re PNW Healthcare Holdings, LLC*

The debtors of *In re PNW Healthcare Holdings, LLC* were for-profit entities, most of which were different limited liability companies running a skilled nursing facility and an assisted living facility in Idaho, Oregon, and Washington.²⁰ During the course of the debtors' chapter 11 case, the debtors and the Official Committee of Unsecured Creditors implored the bankruptcy

¹⁶ *Id.* § 365(4)(d)(3)(A).

¹⁷ *In re PNW Healthcare Holdings, LLC*, 617 B.R. 354, 361–62 (Bankr. W.D. Wash. 2020).

¹⁸ *Id.* at 362.

¹⁹ *In re Passage Midland Meadows Operations, LLC*, 578 B.R. 367, 378 (Bankr. S.D. W. Va. 2017). *See also In re PNW Healthcare Holdings, LLC*, 617 B.R. at 362 (describing the income test under a different name, the “Lease Test,” in saying the method “focuses on the nature of the lease and includes all commercial leases where the debtor/lessee is in the business of generating income, within the terms ‘lease of nonresidential real property’” (quoting 11 U.S.C. § 365)).

²⁰ *In re PNW Healthcare Holdings, LLC*, 617 B.R. at 356.

court to decide the following: (1) section 365(d)(4)’s deadline for assumption or rejection of a lease of nonresidential real property was inapplicable to the debtors’ leases of the facilities; and (2) the obligations imposed by section 365(d)(3) and (d)(4) from leases of nonresidential real property were inapplicable.²¹

The court’s analysis of the question of whether the Master Subleases were residential or nonresidential began with an overview of the history of section 365 of the Bankruptcy Code.²² The initial iteration of section 365, introduced in the 1978 Bankruptcy Code, represented congressional efforts to weigh the rights of both debtors and non-debtors who were stakeholders in executory contracts and leases.²³ Section 365(d) of the 1978 Bankruptcy Code provided a framework for the deadlines to assume or reject executory contracts and leases based on the kind of bankruptcy petition filed.²⁴ This version of section 365 prescribed certain deadlines for different chapters.²⁵ The time period for assuming or rejecting a lease was sixty days for a chapter 7 case and until the confirmation of a plan in chapter 9, 11, and 13 cases.²⁶ Thus, the first rendition of section 365 did not differentiate between a lease of residential property and a lease of nonresidential property.²⁷

In the 1984 amendments to the Bankruptcy Code, Congress added the phrase “unexpired lease of residential real property” to section 365(d)(1) and (d)(2) and introduced section 365(d)(3) and (d)(4) regarding an “unexpired lease of nonresidential real property.”²⁸ Section 365(d)(3) mandated that debtors fulfill their obligations of the lease of nonresidential real

²¹ *Id.* at 356, 358.

²² *Id.* at 358–59.

²³ *Id.* at 359.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 359–60 (quoting 1978 Bankruptcy Code, Pub. L. No. 95-598, § 365, 92 Stat. 2549, 2574 (1978) (emphasis removed)).

property while permitting the court to delay obligations for sixty days following the order for relief.²⁹ Additionally, section 365(d)(4) prescribed that a trustee’s failure to assume a lease of nonresidential real property in sixty days would result in the rejection of the lease and the surrender of the property.³⁰ Section 365(d)(4) permitted the court to increase the time period for assumption pursuant to a motion filed within the sixty days.³¹ The amendments of 1984 aimed to help landlords and neighboring tenants in shopping centers.³²

Between 1984 and 2005, a number of bankruptcies related to anchor tenants in shopping centers erupted.³³ A trend emerged in which courts expanded the window for assumption or rejection of leases.³⁴ In 2005, Congress responded to this trend by amending section 365(d)(4) to mandate a trustee to assume or reject a lease of nonresidential real property within the 120 days following the order for relief or the date of confirmation of a plan, whichever event occurred earlier, or face deemed rejection of the lease and surrender of the property.³⁵ Consistent with the 1984 amendments, the legislative history underpinning the amendments of 2005 also indicated an emphasis on retail properties, especially shopping centers.³⁶

In *PNW Healthcare Holdings*, the court adopted the “[p]roperty [t]est,” which is the method that the majority of courts used when deciding whether a particular lease is of residential real property or of nonresidential real property.³⁷ The property test “focus[es] on the nature of

²⁹ *Id.* at 360.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* Anchor tenants “usually sign long-term leases, pay a low net rent and provide the landlord with overage rentals . . . and attract the shoppers, and the other ‘satellite’ (i.e., smaller) tenants, who provide the diversity. Accordingly, the loss of an anchor tenant due to bankruptcy can detrimentally affect even the most well-established center.” STUART M. SAFT, COMMERCIAL REAL ESTATE TRANSACTIONS § 2:11 (3d ed. 2022).

³⁴ *In re PNW Healthcare Holdings, LLC*, 617 B.R. at 360.

³⁵ *Id.* Under the contemporary version of the Bankruptcy Code, the trustee may assume or reject a lease of nonresidential real property within the longer timeframe of 210 days. 11 U.S.C. § 365(d)(4)(A)(i).

³⁶ *In re PNW Healthcare Holdings, LLC*, 617 B.R. at 361.

³⁷ *Id.* at 361–62.

the leased property and whether people reside on such property.”³⁸ The court’s statutory interpretation analysis explained that the adjectives “nonresidential” and “residential” described the phrase “real property,” rather than the word “lease,” in section 365.³⁹ The holding was “that the correct focus of the definition of residential real property versus nonresidential real property should be on the intended use of such property under the lease.”⁴⁰ Noting that the landlords knew the debtors planned to operate assisted living facilities or skilled nursing facilities, the court found that the Master Subleases were residential.⁴¹ The Master Subleases explicitly reflected the residential purpose of the facilities in utilizing the terms “residential,” “resident,” or “residents” at least forty times.⁴²

B. In re Care Givers, Inc.

In the case of *In re Care Givers, Inc.*, the lessors requested the bankruptcy court to deem rejected the leases of six nursing homes pursuant to section 365(d)(4).⁴³ The debtor, which operated the nursing homes, filed a motion to assume the nursing home leases sixty-two days following the order for relief.⁴⁴ Unlike the debtor, the lessors lacked licensure to operate the six nursing homes.⁴⁵ The court faced the question of whether the leases of the nursing homes were of nonresidential real property under section 365(d)(4).⁴⁶

Turning to statutory interpretation, the court noted that when the Bankruptcy Code’s statutory scheme appears “coherent and consistent,” the statute’s plain language governs.⁴⁷ The

³⁸ *Id.* at 361.

³⁹ *Id.* at 362 (quoting 11 U.S.C. § 365).

⁴⁰ *Id.* at 364.

⁴¹ *Id.*

⁴² *Id.* (quoting Second Masterson Decl. Exs. B, C; and then quoting Master Subleases ¶ 22.4).

⁴³ *In re Care Givers, Inc.*, 113 B.R. 263, 265 (Bankr. N.D. Tex. 1989).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 266 (quoting *U.S. v. Ron Pair Enters, Inc.*, 489 U.S. 235, 240 (1989), *abrogated on other grounds by Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018)).

court's reasoning provided the following analysis: "The debtor is the lessee. The lease is of real property. The lease has not expired. People live on the real property. The lease is therefore partially residential and hence not 'nonresidential.'"⁴⁸ In contrast, the lessors implored the court to prioritize "the nature of the lease" rather than "the use of the real property."⁴⁹ According to the lessors, a lease was nonresidential and subject to section 365(d)(4) if the lease qualified as a commercial lease.⁵⁰ Additionally, the lessors advanced the argument that section 365(d)(4) encompassed commercial leases of residential real property as well as all commercial leases of real property.⁵¹

The court disagreed with the lessors, applying the logic that "[t]he Supreme Court instructs that the court must read § 365(d)(4) according to its grammatical structure."⁵² A statute that conformed to the lessors' interpretation of section 365(d)(4) would have contained the language "commercial lease of real property," which differed from the plain language of the statute describing a "lease of nonresidential real property."⁵³ Furthermore, the court explained that because "nonresidential" was an adjective for "real property," the statute emphasized the quality of the property rather than the quality of the lease.⁵⁴

Referencing legislative history, the court noted the applying the statute's plain language rendered an outcome aligning with congressional aims underlying the 1984 amendments to section 365.⁵⁵ One of the goals of the amendments to section 365 was to avoid long-term tenant vacancies in shopping centers that occurred when a tenant in bankruptcy failed to assume or

⁴⁸ *Id.* (quoting 11 U.S.C. § 365(d)(4)).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (citing *Ron Pair Enters, Inc.*, 489 U.S. at 240).

⁵³ *Id.* (quoting § 365(d)(4)).

⁵⁴ *Id.* (quoting § 365(d)(4)).

⁵⁵ *Id.*

reject a lease.⁵⁶ Senator Hatch said that such vacancies injured other shopping center tenants by decreasing overall customer flow and that “[t]enants and landlords in other nonresidential structures have encountered similar problems.”⁵⁷ In contrast to Senators’ documented emphasis on extended vacancies in nonresidential property beyond shopping centers, the legislative history of the 1984 amendments provided no indication that Congress aimed for section 365(d)(4) to encompass residential property.⁵⁸

Furthermore, the court highlighted the fact that the debtor possessed licenses for operating the nursing homes and that the lessors lacked such licensure.⁵⁹ If the leases were subject to section 365(d)(4), then the debtor’s failure to assume the leases on time would have forced the debtor to surrender the real property to the lessors sixty-one days following the order for relief.⁶⁰ In this scenario, “no licensed entity would have been in a position to operate the nursing homes. The plain language of the statute would have produced an unsensible and unintended circumstance by requiring immediate surrender of real property where people live and depend upon a licensed operator.”⁶¹

The lessors suggested that the court categorize the nursing homes as nonresidential given that the facilities possessed both residential and nonresidential qualities.⁶² The court disagreed with the lessors, reasoning that section 365(d)(4) created an exception for nonresidential real property landlords from the “general rule” in which trustees and debtors-in-possession do not otherwise have a sixty-day time period to assume or reject executory contracts.⁶³ Additionally,

⁵⁶ *Id.*

⁵⁷ *Id.* (quoting 130 Cong. Rec. S. 8894–95 (daily ed. June 29, 1984) (statement of Sen. Hatch)).

⁵⁸ *Id.* at 267.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

section 365(d)(4) carved out an exception to the “fundamental policy” of treating equally creditors in bankruptcy by prioritizing nonresidential real property landlords above residential real property landlords and other executory contract stakeholders.⁶⁴ Thus, the court found that the carveouts in section 365(d)(4) necessitated limited application of the exception such that “if people reside on the real property, it is not nonresidential even if it is also used for nonresidential purposes.”⁶⁵ The court held that the nursing homes did not qualify as nonresidential real property.⁶⁶

II. THE INCOME TEST

A. In re Sonora Convalescent Hospital, Inc.

In *In re Sonora Convalescent Hospital, Inc.*, the debtor leased personal and real property of a convalescent hospital.⁶⁷ Following the debtor’s missed rent payments, the state court granted the lessors restoration of the property and a writ of possession.⁶⁸ In the course of the debtor’s chapter 11 bankruptcy, the court allowed the motion for relief from the automatic stay and the debtor sought reconsideration.⁶⁹ The lessors argued in part that the lease was deemed rejected pursuant to section 365(d)(4), which constituted cause for relief from the automatic stay.⁷⁰

In deciding whether the lease of the real property was residential or nonresidential, the court employed the following logic:

[T]he lease contemplated a commercial use of the property. Both the [lessors] and the debtor expected that the debtor would utilize the property to establish a convalescent home, which would take care of patients on a paying basis. This is a

⁶⁴ *Id.* at 267.

⁶⁵ *Id.*

⁶⁶ *Id.* at 268.

⁶⁷ *In re Sonora Convalescent Hosp.*, 69 B.R. 134, 135 (Bankr. E.D. Cal. 1986).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 136.

commercial use of the property, despite the fact that patients actually do reside on the property, and warrants a non-residential classification of the property.⁷¹

The court emphasized the parties' shared understanding that the property would serve a commercial purpose in deciding that the facility was nonresidential and thus subject to section 365(d)(4).⁷²

Because the debtor never filed a motion to assume the lease of nonresidential real property in the sixty-day time period under section 364(d)(4), the court determined that the debtor could no longer assume the lease.⁷³ Additionally, the court explained that the "harshness of the rule" provided by section 365(d)(4) reflected Congress's goal of establishing safeguards for landlords through expediting the decision of the trustee or debtor-in-possession to assume or reject a lease.⁷⁴ Furthermore, one lessor was a licensed administrator and both lessors were pursuing hospital licensure such that they could continue providing services for patients and prevent patients from moving.⁷⁵

B. In re Passage Midland Meadows Operations, LLC

The debtors of *In re Passage Midland Meadows Operations, LLC* operated three facilities that delivered assisted living, independent living, skilled nursing, and dementia services to more than 400 residents.⁷⁶ The lessor, Welltower, executed a Master Lease with Passage Healthcare Property, LLC for the three facilities.⁷⁷ Passage Healthcare Property, LLC then subleased the facilities to three subtenants.⁷⁸ One of the issues the bankruptcy court considered was whether

⁷¹ *Id.* (emphasis removed).

⁷² *Id.*

⁷³ *Id.* at 137.

⁷⁴ *Id.* at 138.

⁷⁵ *Id.*

⁷⁶ *In re Passage Midland Meadows Operations, LLC*, 578 B.R. 367, 369 (Bankr. S.D. W. Va. 2017).

⁷⁷ *Id.*

⁷⁸ *Id.*

the Master Lease was nonresidential.⁷⁹ The court said that “[i]t is difficult to imagine any lawyer or layperson describing the Master Lease as residential in nature rather than ‘nonresidential’ or commercial. When one thinks of a residential lease what commonly comes to mind is the agreement that arises from one individual renting a home or apartment from another.”⁸⁰

The court introduced the “income test,” which concentrated on whether the lease served the purpose of creating income for the lessee.⁸¹ Then, the court critiqued the logic of courts that utilized the property test.⁸² One of the arguments for the property test was that because “nonresidential” was an adjective of “real property,” the term “nonresidential” described the quality of the property instead of the quality of the lease.⁸³ However, the court found that by concentrating the statutory interpretation on three words, the property test “risks contravening a time-honored principle . . . that a reviewing court must give meaning and effect to every word of the statute.”⁸⁴

Departing from the property test’s narrow focus on three words, the court searched for additional key vocabulary within section 362(b)(10), section 365(c)(3), section 365(d)(4)(A), and section 541(b)(2), all of which included the phrase “nonresidential real property.”⁸⁵ The court found that the following vocabulary demonstrated that the proper analysis of whether a lease was for nonresidential property included consideration of the debtor’s personal usage of the property: (1) “by a lessor to the debtor” in section 365(b)(10); (2) “lease of the debtor” in section 365(c)(3); (3) “the debtor is the lessee” in section 365(d)(4)(A); and (4) “any interest of the

⁷⁹ *Id.* at 372.

⁸⁰ *Id.* at 376 (quoting 11 U.S.C. § 365).

⁸¹ *Id.* at 378.

⁸² *Id.*

⁸³ *Id.* (quoting *In re Lippman*, 122 B.R. 206, 210 (Bankr. S.D.N.Y. 1990) (quoting 11 U.S.C. § 365(d)(4)).

⁸⁴ *Id.*

⁸⁵ *Id.* at 379 (quoting 11 U.S.C. §§ 362(b)(10), 365(c)(3), (d)(4)(A), 541(b)(2) (emphasis removed)).

debtor as a lessee” in section 541(b)(2).⁸⁶ Consequently, the court argued that the property test was improper because in every case that utilized the property test, the debtor’s purpose was not to use the leased property for personal residence.⁸⁷ The ultimate decision was that the Master Lease was nonresidential.⁸⁸

III. EVALUATING THE PROPERTY TEST & THE INCOME TEST

A. *Strengths & Weaknesses of the Property Test*

The overarching statutory scheme of section 365 and the legislative history surrounding the 1984 and 2005 amendments to the Bankruptcy Code support utilizing the property test to decide whether a lease of a nursing home or assisted living facility is a lease of residential or nonresidential real property.⁸⁹ By highlighting the usage of the property, the property test aligns with the text within section 365(d).⁹⁰ Even though the clause “lease of nonresidential real property” in section 365 encompasses more than shopping center property, to render this clause equivalent to commercial leases as a category would disrupt statutory consistency.⁹¹ Additionally, the property test’s concentration on the quality of the leased property conforms with section 365 as a whole.⁹² According to the bankruptcy court in *PNW Healthcare Holdings*, the phrase “unexpired lease” appears in section 365 whenever Congress meant to emphasize the quality of the lease.⁹³ Furthermore, section 365 utilizes “descriptive adjectives” depicting the kind of property in the provisions addressing assignment, assumption, or rejection.⁹⁴

⁸⁶ *Id.* (quoting §§ 362(b)(10), 365(c)(3), (d)(4)(A), 541(b)(2) (emphasis removed)).

⁸⁷ *Id.*

⁸⁸ *Id.* at 380.

⁸⁹ *In re PNW Healthcare Holdings, LLC*, 617 B.R. 354, 362 (Bankr. W.D. Wash. 2020).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 363.

⁹³ *Id.* (quoting 11 U.S.C. § 365).

⁹⁴ *Id.*

The amendment of section 365(d)(4) in 2005, which provided for a more constrained time period for assumption or rejection of a lease of nonresidential real property, constituted an exception to the previous treatment of the bankruptcy chapters that allowed for reorganization.⁹⁵ Before 2005, the Bankruptcy Code defined one framework applicable to chapter 7 bankruptcies and another framework applicable to reorganizations on the matter of assumption or rejection of a lease.⁹⁶ In a chapter 7 case, assumption or rejection transpired in sixty days when the trustee did not file a motion for extension.⁹⁷ In reorganization cases, assumption or rejection occurred “in the broader context of a plan” subject to the non-debtor’s ability to file a motion to establish an earlier deadline, which would lead the court to exercise discretion on a case-by-case basis.⁹⁸ The income test purports that a commercial lease, through which the debtor earns income, falls under the “lease of nonresidential real property” umbrella.⁹⁹ Because the amendment of 2005 established a carveout within the typical statutory scheme, the bankruptcy court in *PNW Healthcare Holdings* refused “to conflate the terms ‘lease of nonresidential real property’ with commercial income-producing leases without a clear congressional intent to do so.”¹⁰⁰

Consequently, the property test respects the absence of express support from Congress for rendering leases of nonresidential real property and commercial leases identical to each other.¹⁰¹ As previously mentioned, the legislative history demonstrates congressional prioritization of nonresidential real property in the retail sector in amending section 365(d)(4).¹⁰² The bankruptcy court in *PNW Healthcare Holdings* explained that if Congress aimed to

⁹⁵ *Id.* at 360-63.

⁹⁶ *Id.* at 363.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 362 (quoting 11 U.S.C. § 365) (referring to the substance of the income test as the “Lease Test”).

¹⁰⁰ *Id.* at 363 (quoting 11 U.S.C. § 365(d)(4)).

¹⁰¹ *Id.*

¹⁰² *Id.*

encompass residential properties such as nursing homes or multifamily apartment buildings in the category of nonresidential real property, then the legislative history for section 365 or the amendments would have considered the needs of residents of these properties.¹⁰³

When the bankruptcy court utilizes the property test for a lease of a nursing home or an assisted living facility, which yields the decision that such a lease is of residential real property, the debtor may gain more opportunities when compared to those available for a lease of nonresidential real property.¹⁰⁴ The debtor to a lease of residential real property receives the significant advantage of extra time to decide whether to assume the lease.¹⁰⁵ Additionally, a lease of residential real property is not subject to section 365(d)(3)'s "affirmative requirements to timely perform postpetition obligations," resulting in "meaningful cash-flow relief" throughout the bankruptcy case.¹⁰⁶

Although the property test offers consistency with legislative history as well as potential logistical benefits for debtors leasing nursing homes and assisted living facilities, this test may pose theoretical problems.¹⁰⁷ The fact that legislative history constitutes an influential source of support for courts that selected the property test creates a potential weakness in the validity of using the property test.¹⁰⁸ A number of decisions that adopted the property test occurred before the trend of diminishing application of legislative history in statutory interpretation.¹⁰⁹

¹⁰³ *Id.*

¹⁰⁴ Tobin-Presser et al., *supra* note 12, at 51.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Under section 365(d)(4)(A), the trustee must "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." 11 U.S.C. § 365(d)(4)(A).

¹⁰⁷ *In re Passage Midland Meadows Operations, LLC*, 578 B.R. 367, 379–381 (Bankr. S.D. W. Va. 2017).

¹⁰⁸ *Id.* at 381.

¹⁰⁹ *Id.*

The bankruptcy court in *Passage Midland Meadows* noted that the logic of the property test deteriorated in light of the complex reality of lease agreements.¹¹⁰ The property test, as utilized in prior cases, disregarded the fact that the debtor’s purpose for the leased property was not for personal residence.¹¹¹ The property test only concentrated “on the use to which unnamed, unknown nondebtor sublessees, perhaps far down the leasing chain, will put the property. And that remote use (*e.g.*, living in a dwelling) will not be the same use (*e.g.*, investment and income production) that the original leasing parties contemplated.”¹¹² The court explained that in a case such as *Passage Midland Meadows*, the residents of the senior living center would determine the result of whether a lease was of residential or nonresidential real property under the property test.¹¹³ However, residents in such a facility would not be not parties to lease of the “ultimate lessor,” which was Welltower in that case.¹¹⁴ The court found that the property test concentrated on the quality of the property but wholly neglected the debtor’s purpose for the property usage, which was investment and profit.¹¹⁵

Furthermore, proponents of the property test sometimes refer to protection of tenants or patients to bolster the argument for the results.¹¹⁶ However, the potential that sublessors’ defaults will cause “mass evictions” of sublessees is minimal.¹¹⁷ Given the state of regulation and the fact that lessors are risk-conscious, the possibility that a lessor would promote “orderly transition from the lessee” is higher than any threat of a wave of evictions.¹¹⁸

B. The Superiority & the Inferiority of the Income Test

¹¹⁰ *Id.* at 379.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 380.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 381.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

While the property test offers advantages for a debtor trying to maintain operations of a nursing home or an assisted living facility, the income test is more amenable to the interests of a lessor who might prefer a shorter period of time for assumption or rejection of a lease of nonresidential real property.¹¹⁹ Additionally, the income test's "bright lines" are conducive to chapter 11 cases in which the informal conversations framing the stages of insolvency can avert court intervention while saving expenses and time.¹²⁰ For example, in "mixed cases" of property with residential and nonresidential qualities, the income test represents a practical method for deciding how to classify the lease of the property pursuant to section 365.¹²¹

By examining the quality of the lease and the purpose of the parties to the lease, the income test is more helpful to the parties and to the court in "close cases" of "mixed character properties" such as a situation where a single property contains residential apartments and commercial spaces.¹²² The income test would categorize the following leases as leases of nonresidential real property in the "mixed character propert[y]" case of a building with apartments and businesses: (1) the lease between the owner and the management company; and (2) the leases between the management company and businesses.¹²³ Yet, the leases between the management company and tenants residing in the apartments would represent leases of residential real property.¹²⁴

In contrast, the property's test concentration on the quality of the property might not be as instructive in close cases where a property features apartments and businesses.¹²⁵ Though a

¹¹⁹ See *In re Care Givers, Inc.*, 113 B.R. 263, 266-67 (Bankr. N.D. Tex. 1989).

¹²⁰ *In re Passage Midland Meadows Operations, LLC*, 578 B.R. at 380.

¹²¹ Jeffrey S. Battershall, *Commercial Leases and Section 365 of the Bankruptcy Code*, 64 AM. BANKR. L.J. 329, 341 (1990).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

“dominant use” theory could address the issue of mixed property cases, a method for evaluating dominant use is unavailable.¹²⁶ Consequently, neither the dominant use theory nor the property test provides lessors and lessees with a “clear guide” establishing whether a lease is of residential or of nonresidential real property.¹²⁷ Under the property test, the absence of an express methodology for answering this question renders lessors and lessees uninformed about their statutory obligations and rights outlined in section 365.¹²⁸

Nevertheless, the income test poses significant challenges to debtors operating nursing homes and assisted living facilities, and consequently, to the residents of such facilities.¹²⁹ For example, the six nursing homes of *Care Givers* delivered skilled nursing services to residents twenty-four hours a day.¹³⁰ Residents evidenced a range of mobility from being ambulatory to bedridden.¹³¹ The time period of residence in a nursing home varied from short-term admission to years to the rest of one’s life.¹³² Residents often listed the nursing homes as their residences for receiving mail and used the nursing homes as their residences in the context of voter registration.¹³³ The bankruptcy court acknowledged that the consequence of ruling the leases of the nursing homes were of nonresidential real property would threaten the operations that provided services to all these residents, given that the lessors lacked operating licenses.¹³⁴ The income test poses the possibility that the lessor who does not have an operating license will

¹²⁶ *Id.* (quoting RICHARD I. AARON, BANKRUPTCY LAW HANDBOOK § 5.04 [4], at 157 (1985)).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See In re Care Givers, Inc.*, 113 B.R. 263, 265 (Bankr. N.D. Tex. 1989).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 267.

succeed in obtaining the property without having the capacity to maintain services for the facility residents.¹³⁵

Additionally, the income test raises potential issues with statutory interpretation.¹³⁶ Under the income test, the clause “lease of nonresidential [real] property” becomes an umbrella category encompassing any commercial lease.¹³⁷ When statutory language is plain, then “the sole function of the court is to enforce it according to its terms.”¹³⁸ Based on the plain language principle, “nonresidential” and “residential” describe “real property” instead of “lease” under section 365.¹³⁹ Furthermore, the income test threatens to increase the coverage of exceptions to the established policy of treating equally all creditors and to the historically similar treatment of the bankruptcy chapters envisioning reorganization by allowing the landlord of every commercial lease to benefit from the restricted assumption or rejection period.¹⁴⁰

IV. ANTICIPATING THE SUPREME COURT’S DECISION

If provided with the opportunity to decide whether a lease of a nursing home or an assisted living facility was a lease of residential real property or nonresidential real property, the United States Supreme Court would probably choose the income test over the property test in its analysis.

A. Considering the Property Test

¹³⁵ *Id. Contra In re Passage Midland Meadows Operations, LLC*, 578 B.R. 367, 380 (Bankr. S.D. W. Va. 2017) (arguing that under the current landscape of regulation and risk management, the likelihood that an “ultimate lessor will voluntarily, or by court order, stay his or her hand to allow for an orderly transition from the lessee” is higher than the probability of large-scale evictions).

¹³⁶ *In re PNW Healthcare Holdings, LLC*, 617 B.R. 354, 362 (Bankr. W.D. Wash. 2020).

¹³⁷ *Id.* (quoting 11 U.S.C. § 365).

¹³⁸ *Id.* (quoting *U.S. v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989), *abrogated on other grounds by Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018)).

¹³⁹ *See id.* (quoting § 365).

¹⁴⁰ *In re Care Givers, Inc.*, 113 B.R. at 267 (Bankr. N.D. Tex. 1989); *In re PNW Healthcare Holdings, LLC*, 617 B.R. at 363.

The Supreme Court’s decision to adopt the income test would likely reflect the trend toward diminishing usage of legislative history for interpretation.¹⁴¹ In the period preceding the 1970s, the Supreme Court viewed legislative history as a valid source for courts conducting statutory interpretation and agreed upon the existence of “a hierarchy of legislative history in terms of reliability, reflecting the degree to which that legislative history is likely to shed light on Congress’s purpose in enacting the statute.”¹⁴² The agreement regarding the hierarchy of legislative history disintegrated with the rise of court citations to statements from committee hearings and floor debates, some of “the least reliable” legislative history sources, in the 1970s.¹⁴³ During the mid-1980s, a number of federal appellate judges, including Justice Scalia when he served as a D.C. Circuit Judge, looked unfavorably upon courts utilizing legislative history at all.¹⁴⁴ Justice Scalia and other proponents of textualism critiqued purposivism in arguing that courts must disregard legislative history and exert sole concentration on the text of the statute.¹⁴⁵ Consequently, Justice Scalia’s presence on the Supreme Court contributed to the shift in prioritizing the text of a statute.¹⁴⁶

Previous bankruptcy court decisions utilizing the property test to decide whether a lease of a nursing home or an assisted living facility was a lease of residential or nonresidential real property referenced the legislative history surrounding the amendments to section 365 in 1984 and in 2005.¹⁴⁷ The courts citing legislative history established that congressional records

¹⁴¹ See *In re Passage Midland Meadows Operations, LLC*, 578 B.R. at 381.

¹⁴² Stuard Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia’s Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1025–26 (2020) (footnote omitted).

¹⁴³ *Id.* at 1026.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 856, 873, 915 (2017).

¹⁴⁷ *In re Passage Midland Meadows Operations, LLC*, 578 B.R. 367, 381 (Bankr. S.D. W. Va. 2017). See also *In re Care Givers, Inc.*, 113 B.R. 263, 266–67 (Bankr. N.D. Tex. 1989); *In re PNW Healthcare Holdings, LLC*, 617 B.R. 354, 360–61 (Bankr. W.D. Wash. 2020).

demonstrated an explicit aim of alleviating the difficulties that debtor-lessees imposed upon the economic health of landlords and adjacent tenants in shopping centers.¹⁴⁸ By relying on the absence of corresponding legislative history targeting residential property, courts adopting the property test reasoned that Congress did not envision that the words “nonresidential real property” in section 365(d)(4) would encompass residential buildings.¹⁴⁹ The property test’s dependence on legislative history would likely inform the Supreme Court’s choice to deem the income test the correct test for categorizing a lease of a nursing home or an assisted living facility.¹⁵⁰

B. Selecting the Income Test

The Supreme Court would probably favor the income test’s amenability to the application of a textualist analysis.¹⁵¹ The recent case of *Bostock v. Clayton County* is one example of the Supreme Court’s endorsement of textualism.¹⁵² In *Bostock*, the Supreme Court ruled that the Civil Rights Act of 1964 prevents an employer from firing an employee on the premise of being homosexual or transgender.¹⁵³ The majority noted that “[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law”¹⁵⁴

¹⁴⁸ *In re Care Givers, Inc.*, 113 B.R. at 267; *In re PNW Healthcare Holdings, LLC*, 617 B.R. at 360.

¹⁴⁹ *In re Care Givers, Inc.*, 113 B.R. at 267 (quoting 11 U.S.C. § 365(d)(4)); *In re PNW Healthcare Holdings, LLC*, 617 B.R. at 363–64 (quoting § 365(d)(4)).

¹⁵⁰ See *In re Passage Midland Meadows Operations, LLC*, 578 B.R. at 381.

¹⁵¹ See *id.* at 379.

¹⁵² See Jonathan Skrmetti, *Symposium: The triumph of textualism: “Only the written word is the law”*, SCOTUSBLOG (July 15, 2020, 9:04 PM), <https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/>.

¹⁵³ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

¹⁵⁴ *Id.*

Under Title VII of the Civil Rights Act, an employer cannot “discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”¹⁵⁵ In *Bostock*, the Supreme Court reasoned that when an employer fires a male employee for being “attracted to men” then the employer discriminates against the male employee for a characteristic the employer accepts in the case of a female employee.¹⁵⁶ Based on this logic, the Supreme Court found that discrimination against people for being transgender or homosexual constituted sex discrimination in violation of Title VII.¹⁵⁷

Although the Supreme Court’s decision represented an important step toward ending discrimination based on sexual orientation, the holding contradicted the social milieu surrounding the Civil Rights Act of 1964.¹⁵⁸ Beginning in the 1970s, Congress Members proposed several bills to combat discrimination of sexual orientation in the employment setting.¹⁵⁹ With the exception of the most recent bills, prior bills evidenced a difference between sex discrimination and sexual orientation discrimination reflective of broader societal separation of the categories.¹⁶⁰ Furthermore, the legislative history underpinning Title VII illuminated that congressional debate addressed “biological sex” discrimination without reference to gender identity or sexual orientation discrimination.¹⁶¹ Thus, the Supreme Court’s recent prioritization of text over legislative history, as shown in the representative case of *Bostock*, would influence the decision of whether to adopt the property test or the income test.¹⁶²

¹⁵⁵ *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1)).

¹⁵⁶ *Id.* at 1741.

¹⁵⁷ *Id.* at 1741–42.

¹⁵⁸ *Id.* at 1756 (Alito, J., dissenting); *id.* at 1828–30 (Kavanaugh, J., dissenting).

¹⁵⁹ *Id.* at 1830 (Kavanaugh, J., dissenting).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1776 (Alito, J., dissenting) (footnote omitted).

¹⁶² See Skrmetti, *supra* note 153.

The Supreme Court would probably disapprove of the property test (for drawing upon legislative history for validation) and choose to adopt the income test as the method most conducive to textualism.¹⁶³ In *Passage Midland Meadows*, the bankruptcy court relied on the text of section 365(d)(4) and related provisions to argue that the statutory framework envisioned consideration of the debtor's personal usage of a lease in deciding whether a lease was of residential or nonresidential real property.¹⁶⁴ The property test's concentration on the quality of the property, instead of the debtor's personal utilization of the property, conflicted with the court's textual analysis.¹⁶⁵ Thus, the court implied that the income test represented the better textualist interpretation when reading section 365(d)(4) within the overarching framework of other pertinent provisions.¹⁶⁶

V. THE ARGUMENT FOR THE PROPERTY TEST

Bankruptcy courts should apply the property test in chapter 11 cases of debtors operating nursing homes and assisted living facilities. The income test presents both conceptual gaps and logistical hurdles that outweigh the property test's downfalls in areas such as the dependence on legislative history.¹⁶⁷

A. Legislative History

Wholesale disregard of the legislative history of the 1984 and 2005 amendments to section 365 in favor of the income test could result in interrupting health care services in nursing homes and assisted living facilities.¹⁶⁸ Legislative history shows that Congress considered the loss of customer flow resulting from extended vacancies in shopping centers in addition to

¹⁶³ See *id.* See also *In re Passage Midland Meadows Operations, LLC*, 578 B.R. 367, 381 (Bankr. S.D. W. Va. 2017) (noting the dwindling application of legislative history for statutory interpretation).

¹⁶⁴ *In re Passage Midland Meadows Operations, LLC*, 578 B.R. at 379.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Contra id.* at 379–81.

¹⁶⁸ See *In re Care Givers, Inc.*, 113 B.R. 263, 266–67 (Bankr. N.D. Tex. 1989).

analogous issues in other kinds of nonresidential property through the section 365 amendments.¹⁶⁹ Thus, the legislative history suggests that Congress desired the text “nonresidential real property” to assuage the burdens resembling those of landlords and tenants in shopping centers where debtors’ failure to assume or reject a lease decreased customer flow.¹⁷⁰

Nursing homes and assisted living facilities are not shopping centers nor are they analogous to shopping centers.¹⁷¹ In the case of a chapter 11 debtor operating a nursing home or an assisted living facility, the failure to assume or reject a lease within the comparatively shorter timeframe under section 365(d)(4) does not create the same degree of economic injury as in the case of a debtor-tenant conducting business in a shopping center.¹⁷² Nursing homes and assisted living facilities are not sections of larger buildings with other tenants that rely upon customer flow.¹⁷³ Because the economic suffering of neighboring tenants is not a factor in the chapter 11 bankruptcy of a debtor operating a nursing home or an assisted living facility, deciding a lease is of nonresidential property benefits fewer stakeholders.¹⁷⁴

B. Nursing Homes & Assisted Living Facilities

Bankruptcy courts should utilize the property test for its conduciveness to the reality of licensure in the industry of nursing homes and assisted living facilities.¹⁷⁵ For example, if the court in *Care Givers* adopted the income test such that the leases of the six nursing homes were leases of nonresidential real property, then the debtor would have returned the property to the

¹⁶⁹ *See id.*

¹⁷⁰ *Id.* (quoting 11 U.S.C. § 365(d)(4)).

¹⁷¹ *See id.*

¹⁷² *See In re Care Givers, Inc.*, 113 B.R. at 266; *see also In re PNW Healthcare Holdings, LLC*, 617 B.R. 354, 360 (Bankr. W.D. Wash. 2020) (describing bankruptcies of anchor tenants between 1984 and 2005).

¹⁷³ *In re Care Givers, Inc.*, 113 B.R. at 266.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 267.

movants who lacked the licensure to continue operations for the residents.¹⁷⁶ Even though the court in *Sonora Convalescent Hospital* decided the lease was of nonresidential real property, the potential consequences of surrendering the property were less severe considering that one lessor already held a license as an administrator and that the lessors were undergoing the steps toward obtaining hospital licensure.¹⁷⁷

C. The Bankruptcy Code

The Bankruptcy Code contains two main policy goals: (1) alleviation of the debtor's responsibility for specific debts that the debtor is unable to pay; and (2) repayment of creditors through fair and organized distribution of a portion of the debtor's property.¹⁷⁸ In general, the goal of chapter 11 bankruptcy is reorganizing debt such that the debtor can sustain business operations.¹⁷⁹ The logical basis for reorganization under chapter 11 is that maintaining business operations will produce greater worth than liquidation of the business.¹⁸⁰

Utilizing the income test in a case of a lease of a nursing home or an assisted living facility could conflict with chapter 11 bankruptcy's goal of reorganizing the debtor to preserve business operations.¹⁸¹ By rendering a lease of a nursing home or an assisted living facility a lease of nonresidential real property subject to the more limited window for assumption or rejection of the lease, the income test could terminate facility operations if the lessor receiving the surrendered property lacked the proper licensure to sustain operations.¹⁸² Termination of

¹⁷⁶ *Id.*

¹⁷⁷ *In re Sonora Convalescent Hosp.*, 69 B.R. 134, 138 (Bankr. E.D. Cal. 1986).

¹⁷⁸ CONGR. RSCH. SERV., BANKRUPTCY BASICS: A PRIMER 1 (2022), <https://crsreports.congress.gov/product/pdf/R/R45137>.

¹⁷⁹ *Id.* at 14.

¹⁸⁰ *Id.*

¹⁸¹ See CONGR. RSCH. SERV., *supra* note 179, at 14; *In re Care Givers, Inc.*, 113 B.R. 263, 266–67 (Bankr. N.D. Tex. 1989).

¹⁸² *In re Care Givers, Inc.*, 113 B.R. at 267; Tobin-Presser et al., *supra* note 12, at 51.

nursing home or assisted living facility operations would obstruct the principle of chapter 11 bankruptcy that a business generates greater worth through operation than through liquidation of business property.¹⁸³ The comparatively longer time period for assumption or rejection under the property test could better promote the maintenance of business operations, and consequently reflect the underlying concept of chapter 11 that the business's worth is higher when operating.¹⁸⁴

CONCLUSION

The health care services of nursing homes and assisted living facilities will be essential in the upcoming decades with the anticipated rise in the population of seniors.¹⁸⁵ A bankruptcy court's decision on whether a lease of a nursing home or an assisted living facility is a lease of residential or nonresidential real property can either promote or impede upon health care services for the residents of these facilities.¹⁸⁶ Under the property test, the lease of a nursing home or an assisted living facility is a lease of residential real property because residents reside on the property.¹⁸⁷ Under the income test, such a lease is a lease of nonresidential real property because the debtor earns income from operating a nursing home or an assisted living facility.¹⁸⁸ Section 365(d)(2) of the Bankruptcy Code grants a debtor to a lease of residential real property a longer time period for assumption or rejection of the lease when compared to the more limited time period for a lease of nonresidential real property under section 365(d)(4).¹⁸⁹

¹⁸³ See CONGR. RSCH. SERV., *supra* note 179, at 14.

¹⁸⁴ See *id.*; *In re Care Givers, Inc.*, 113 B.R. at 267; Tobin-Presser et al., *supra* note 12, at 51.

¹⁸⁵ See Zuraw & Heredia Rodriguez, *supra* note 4.

¹⁸⁶ See *In re Care Givers, Inc.*, 113 B.R. at 267. *Contra In re Passage Midland Meadows Operations, LLC*, 578 B.R. 367, 381 (Bankr. S.D. W. Va. 2017).

¹⁸⁷ *In re PNW Healthcare Holdings, LLC*, 617 B.R. 354, 363–64 (Bankr. W.D. Wash. 2020).

¹⁸⁸ *In re Passage Midland Meadows Operations, LLC*, 578 B.R. at 378.

¹⁸⁹ 11 U.S.C. § 365(d)(2), (d)(4); Tobin-Presser et al., *supra* note 12, at 28.

The property test represents the best test for bankruptcy courts ruling on the issue of whether the lease of a nursing home or an assisted living facility is a lease of residential or nonresidential real property. First, the legislative history of the section 365 amendments targeting shopping centers and nonresidential real property facing analogous issues to shopping centers suggests that Congress did not aim to include nursing homes and assisted living centers in the category of nonresidential real property.¹⁹⁰ Second, in light of the licensing requirements of health care facilities, the property test is more amenable to ensuring that residents continue to receive care throughout the course of the operating debtor's bankruptcy.¹⁹¹ Third, the property test is most conducive to fulfilling chapter 11 bankruptcy's goal of reorganizing the debtor's debts to promote business operations.¹⁹² Therefore, the property test should be the universal test for chapter 11 cases with leases of nursing homes and assisted living facilities.

¹⁹⁰ *In re Care Givers, Inc.*, 113 B.R. at 266–67; *In re PNW Healthcare Holdings, LLC*, 617 B.R. at 363.

¹⁹¹ *See In re Care Givers, Inc.*, 113 B.R. at 267. *Contra In re Passage Midland Meadows Operations, LLC*, 578 B.R. at 381.

¹⁹² *See* CONGR. RSCH. SERV., *supra* note 179, at 14; *In re Care Givers, Inc.*, 113 B.R. at 266–67.