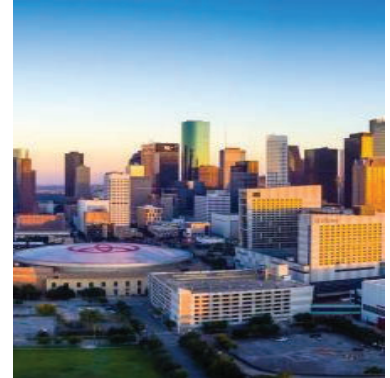


# Bankruptcy Topics for the Real Estate Lawyer

Free, Clear, and Beyond



September 17, 2021

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## Topics

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- Commercial Leases
  - Debtor as Lessor
  - Debtor as Lessee
- Sales of Property in Bankruptcy



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# The Statute

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- The Bankruptcy Code
  - Title 11, U.S.C.
- Today, only two sections
  - Section 365 – Executory Contracts and Unexpired Leases
  - Section 363 – Use, Sale or Lease of Property

# Leases in Bankruptcy

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- The Bankruptcy Code, 11 U.S.C. § 365, provides debtors can assume or reject any executory contract or unexpired lease. It is an area of the law described as a “thicket . . . where . . . lurks a hopelessly convoluted and contradictory jurisprudence.”

# Untangling the Thicket

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- What is an executory contract?
  - The Countryman standard – a contract in which both parties have material unperformed obligations
  - The functional approach – the Fifth Circuit has not endorsed
- Commercial leases are much easier!

# Termination before Bankruptcy

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- Section 365 only applies to contracts or leases that are executory or unexpired as of the commencement of the case
  - Whether terminated is determined by nonbankruptcy law
    - Fraudulent Conveyance
- Ipso Facto Clauses

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