

## **Bankruptcy Topics for the Real Estate Lawyer**

Free, Clear, and Beyond



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# **Topics**

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



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#### The Statute

- · 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

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### **Leases in Bankruptcy**

 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."

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### **Untangling the Thicket**

- 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!

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### **Termination before Bankruptcy**

- 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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