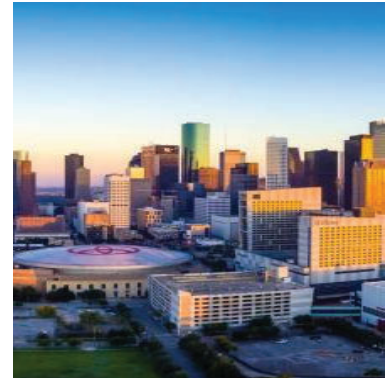


Bankruptcy Topics for the Real Estate Lawyer

Free, Clear, and Beyond



September 17, 2021

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Topics

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



2

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

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.”

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!

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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First appeared as part of the conference materials for the
55th Annual William W. Gibson, Jr. Mortgage Lending and Servicing Institute session
"Bankruptcy Topics for the Real Estate Lawyer; Free, Clear, and Beyond"