


Landlord/Tenant Issues in Bankruptcy Cases

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Real Property Law Section
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KRGL KANE RUSSELL COLEMAN & LOGAN PC Presented By: Jason B. Binford



- ☛ General Bankruptcy Concepts
- ☛ Debtor as Tenant
- ☛ Debtor as Landlord
- ☛ 363 Sales

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Bankruptcy Concepts – In General

- ☛ Bankruptcy Chapters
 - ▲ Chapter 7 – Liquidation
 - ▲ Chapter 13 – Personal Reorganization
 - ▲ Chapter 11 – Corporate Reorganization
 - ▲ Chapter 15 – Cross-Border Insolvency

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Bankruptcy Concepts – In General

- ☞ US Trustee vs. Bankruptcy Trustee
- ☞ Automatic Stay
- ☞ Property of the Estate



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Claims in Bankruptcy Cases

- ☞ Proofs of Claim
- ☞ Bar Dates
- ☞ Types of Claims...



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Claim Priority – Climbing the Ladder

- ☞ Secured Claims
- ☞ Administrative Expense Claims
- ☞ Unsecured Claims




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Debtor
as
Tenant



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As To Its Leases, The Debtor Has Two Choices:



- ☞ Assumption
- ☞ Rejection

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Deadline for a Debtor to Assume or Reject a Lease

- ☞ Decision must be made before 120 days after the Petition Date or the Confirmation Order
- ☞ Extension is available for 90 days. Therefore, the important time period to remember is:
 - ▲ **210 DAYS**

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Deadline for a Debtor to Assume or Reject a Lease

- ☞ After 210 days, must have landlord's consent
- ☞ Issue *may* give landlords *some* leverage



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Lease Assumption

- ☞ Cure monetary defaults
- ☞ Provide adequate assurance of future Performance



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Lease Assumption

- ☞ Assumption and Assignment of Leases is Common
- ☞ Anti-Assignment Provisions Generally are Not Enforceable
- ☞ Exception: "Shopping Centers"
- ☞ "Nonmonetary Defaults" – the debtor must pay the monetary value associated with the default, but the default will not preclude assignment



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Lease Rejection

- ☞ Rejection Damages = General Unsecured Claim
- ☞ Statutory cap on Rejection Damages
- ☞ Damages Limited to the greater of:
 - ▲ 1 year of rent under the lease; or
 - ▲ 15% of rent for remaining term (not to exceed 3 years)
- ☞ Subject to mitigation (state law)



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Limiting Rejection Damage Claims

- ☞ Deposit
- ☞ Letter of Credit
- ☞ Guaranty from Non-Debtor Entity



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Stub Rent

- ☞ Stub Rent = Rent for Post-Petition period of filing month
- ☞ Issue: Is Sub Rent entitled to:
 - ▲ 1. Administrative Expense Priority, and/or
 - ▲ 2. Immediate payment
- ☞ Trend in Case Law:
 - ▲ 1. Yes
 - ▲ 2. No



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Debtor
as
Landlord



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Same Two Choices:

- ↪ Assumption
- ↪ Rejection

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Lease Assumption

- ↪ Generally the same issues
- ↪ Cure
- ↪ Adequate assurance of future performance
- ↪ Assumption and assignment

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Lease Rejection

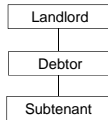
- ☞ Bankruptcy Code section 365(h) – Debtor/tenant has a choice:
- ☞ Treat rejection as termination – pursue claim; or
- ☞ Retain possession of the premises for the term of the lease – including permissible renewals or extensions, while offsetting rent against nonperformance of the landlord/debtor's obligations



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Subleases

- ☞ What if the debtor is both a sublessor and a sublessee?



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Subleases

- ☞ Courts are split on the effect of rejection of both leases
- ☞ Some courts hold that the subtenant has no further right to possession because it is not in privity with the principal landlord



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Subleases

- ☞ Other courts hold that section 365(h) allows a subtenant to remain in possession
- ☞ Lease breach versus termination – section 365(g)
- ☞ Assumption and assignment of the sublease may solve the problem



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Case Law

- ☞ *In re Amicus Wind Down Corp.*, 2012 WL 604143 (Bankr. D. Del. Feb. 24, 2012)

Section 365(h) protects a subtenant, even if there is no privity between the subtenant and the “over landlord”



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Case Law

- ☞ *In re 48th Street Steakhouse, Inc.*, 61 B.R. 182 (Bankr. S.D.N.Y. 1986)

Over landlord may be liable for violating the automatic stay for attempting to terminate a lease with the non-debtor tenant because terminating would affect the debtor subtenant



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Case Law

- ☞ *Super Nova 330 v. Gazes*, 2012 WL 3125241 (2d Cir. Aug 2, 2012)

A lease can be “terminated” but still “unexpired” as of the petition date if the tenant has a right to revive it.



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Case Law

- ☞ *Green Tree Servicing, LLC v. DBSI Landmark Towers, LLC*, 652 F.3d 910 (8th Cir. 2011)

A subtenant normally would not be able to enforce rights against “over landlord” because of lack of privity. But, an attornment right will protect the subtenant and will be enforced post-rejection



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363 Sales

- ☞ 363(f) – debtor may sell property free and clear of “interests” in property
- ☞ 363(e) – right to adequate protection
- ☞ *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537 (7th Cir. 2003) – subtenant who sleeps on its rights loses



KANE RUSSELL COLEMAN & LOGAN PC

Jason B. Binford
Kane Russell Coleman & Logan PC
1601 Elm Street, Suite 3700
Dallas, Texas 75201
Phone: 214-777-4227
Fax: 214-777-4299



KANE RUSSELL COLEMAN & LOGAN PC
