BASIC TIPS ON NAVIGATING THE BANKRUPTCY MINEFIELD

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Introduction

With great relief, after years of anemic real estate activity during the Great Recession, the real estate world has regained its footing and is plowing full speed ahead. Certainly no real estate client or professional is interested in experiencing anything even remotely akin to the pain that was suffered during the 2008-2010 time frame. Even so, at some point the day will come that most any real estate client and its counsel will have to face the problem of dealing with a bankruptcy issue. Given the inevitable journey into the bankruptcy abyss, it is helpful for the real estate practitioner to have a general understanding of certain basic bankruptcy principles and related provisions of the Bankruptcy Code to be in a position to provide some baseline advice to the client. Thus, the purpose of this paper is to assist in providing some general guidance.[2]

Starting With The Basics

A. Important Predicate Concepts

Before outlining some of the more significant aspects of bankruptcy law that affect the real estate world, a few basic bankruptcy concepts are laid out to provide a frame of reference.

- ***Bankruptcy 101***. In very simple terms, bankruptcy is the mechanism by which an individual or company may address his/her/its outstanding debt within a controlled environment. It puts the brakes on collection activity and sets up a process for the administration of the debt in light of the value of the debtor's assets available to satisfy such debt. In a liquidation case, for example, the process facilitates the sale of non-exempt assets with the proceeds to be equitably distributed to creditors. In a reorganization case, the process facilitates preservation of the going concern value of the debtor's business with a short window of time granted to the debtor to propose a plan for the restructuring of the debt.

- ***The Playbook: The Bankruptcy Code.*** Federal bankruptcy proceedings are substantively governed by the United States Bankruptcy Code, often simply referred to as the "Code" by bankruptcy professionals. The Bankruptcy Code is codified within Title 11 of the United States Code.[3] It is broken up into various chapters, some of which are generally applicable to all types of bankruptcy cases[4] and some of which are only applicable to specific types of cases.[5] Often bankruptcy professionals refer to the type of case involved based upon the chapter of the Bankruptcy Code that is specifically applicable. For example:

  Chapter 7: the liquidation chapter, which can involve both individual and business debtors.

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[2] One word of caution. The presentation set forth herein is by no means a comprehensive description of the numerous intricacies associated with the bankruptcy process; it is merely an overview of some of the more significant issues likely to be faced in a bankruptcy case.

[3] *See* 11 U.S.C. § 101, *et seq*.

[4] Specifically, chapters 1, 3 and 5.

[5] Specifically, chapters 7, 9, 11, 12 and 13.

Chapter 11: the reorganization chapter for business debtors and individuals who do not qualify for relief under Chapter 13 because of their high debt levels.[6]

Chapter 13: the debt restructuring chapter for individuals with regular income and, thus, the ability to devote some level of disposable income towards the repayment of creditors over a period of time.[7]

➢ ***The Where and How: Bankruptcy Courts and Procedural Rules.*** Bankruptcy cases ordinarily[8] proceed in the bankruptcy courts, which are specialized courts established by Congress under the authority of Article I of the Constitution.[9] While a bankruptcy case is quite different than a normal litigation case, a bankruptcy case is still a "case" and is managed pursuant to an extensive set of procedural rules known as the Federal Rules of Bankruptcy Procedure or Bankruptcy Rules. In addition to the Bankruptcy Rules, each bankruptcy court has adopted local rules of procedure to supplement or otherwise aid in the implementation of the Bankruptcy Rules. Importantly, matters can often move quite rapidly in a bankruptcy case with very little time to react.[10] Therefore, it is critical for clients and counsel to immediately review any motion of potential significance. Additionally, in responding to any motion, it is critical for counsel to consult both the Bankruptcy Rules and the court's local rules to ensure that the response is timely and addresses all of the rule-imposed requirements.

➢ ***An Important Point of Reference: The Petition Date***. A bankruptcy case is initiated with the filing of a bankruptcy petition. Thus, the date of the such filing is naturally referred to as the "petition date." The petition date is an important line of demarcation. Generally speaking, the bankruptcy process is designed to address claims[11] against a debtor as of the petition date – *i.e*. that arose pre-filing or "pre-petition." Similarly, most of the payment/transfer claw-back provisions of the Bankruptcy Code relate to pre-petition payments/transfers made by the debtor. Consequently, bankruptcy professionals often speak in terms of whether a particular claim/transfer was incurred/made "pre-petition" or "post-petition."

➢ ***The Assets at Stake: The Bankruptcy Estate***. Upon the filing of a bankruptcy case, a bankruptcy estate is created into which all legal and equitable property interests of the debtor, wherever located and by whomever held, are deemed transferred.[12] Depending upon whether the debtor is an individual or business, certain types of property acquired by the debtor post-petition, as well as property derived from property already in the estate, will also become property of the estate.[13] Having a general understanding of the "estate" concept is important because many of the Bankruptcy Code's provisions refer to the estate. Moreover, creditor recoveries are dependent upon the value of assets in the estate.

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[6] *See* 11 U.S.C. § 109(e) (detailing debt limits for Chapter 13 relief).

[7] *See id*.

[8] Technically, jurisdiction originates in the federal district courts. *See* 28 U.S.C. § 1334(a). However, district courts are given the authority to refer bankruptcy cases to the bankruptcy courts, and virtually every district court has entered a standing order providing for such referral. *See id*. § 157(a) (authorizing referral). Occasionally, but very rarely, a district court will withdraw the reference and re-take jurisdiction of the case. *See id*. § 157(d) (provisions for withdrawal of the reference).

[9] *See* U.S. Const. art. I, § 8.

[10] Most types of relief may be requested by motion with a 21-day response deadline (often extended to 24 days by local rule).

[11] In this regard, the Bankruptcy Code defines the term "claim" quite broadly. Not only does the term encompass an unmatured, unliquidated, contingent, or even disputed right to payment, it also includes the right to an equitable remedy for breach of performance if the breach also gives rise to a right to payment, and even if the equitable right is unmatured, contingent, or disputed. *See* 11 U.S.C. § 101(5).

[12] *See* 11 U.S.C. § 541(a)(1).

[13] *See, e.g., id*. § 541(a)(6)-(7).

B. The Typical Players

Next, it is helpful to also understand who the typical players are in a bankruptcy case and their roles. This will vary depending upon the type of bankruptcy case involved.

➢ ***Chapter 7 Liquidation Case***. In a Chapter 7 case, an independent trustee is immediately appointed to take control of the estate and administer its assets for the benefit of creditors in accordance with the provisions of the Bankruptcy Code.[14] The United States Trustee's office, which is part of the U.S. Department of Justice, is responsible for appointing the trustee.[15] The debtor has a limited role and limited rights.

➢ ***Chapter 11 Reorganization Case***. In a Chapter 11 case, the circumstances are much more complex. For example, typically there is an ongoing business to be operated, there are employees and employment issues to be managed, there are key business relationships to maintain, and ultimately there is the need for a viable restructuring and business plan to be developed. As a result, the players in a Chapter 11 case are very different than in a straight liquidation under Chapter 7.

The Debtor (as the "debtor in possession"): Most notably, in a Chapter 11 case an independent trustee is not immediately appointed. Instead, Congress has determined that the debtor (with its existing management team), as opposed to a trustee having no prior involvement with the debtor, is ordinarily in the best position to protect the value of the business and accomplish a prompt reorganization given the debtor's in-depth knowledge of the business, industry and ongoing operations, and given the importance of the debtor's long-standing relationship with employees, lenders, suppliers, customers and other parties in interest.[16] Thus, at least initially, the debtor is granted control over the estate and its business operations and effectively steps into the role of a trustee.[17] In such capacity, the Bankruptcy Code refers to the debtor as the "debtor in possession" (often simply referred to as the "DIP" by bankruptcy professionals).[18] Importantly, while outside of bankruptcy, the debtor and its management team may only have duties running to the debtor's equity holders, during the time in which the debtor serves as the debtor in possession the debtor and its management team have expanded fiduciary duties that run to the estate and creditors as well.[19]

Trustee. Depending upon the circumstances leading up to the bankruptcy filing, a debtor's retention of control over the business and estate presents a level of risk. Thus, to protect against the possibility of abuse, malfeasance, or gross negligence on the part of the debtor and its management, the Bankruptcy Code sets out standards and procedures for the appointment of an independent trustee where such an appointment is necessary to protect the estate and creditors.[20] Upon the appointment of a trustee, the debtor's role as debtor in possession terminates along with all of the rights and obligations accompanying such role.

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[14] *See id.* § 701(a)(1).

[15] Technically, the creditors of a debtor have the right to elect a replacement trustee under specified conditions. *See, e.g.,* 11 U.S.C. § 702. However, the right is rarely exercised.

[16] *See* H.R. Rep. 95-595, 95th Cong., 1st Sess. 233 (1977).

[17] *See* 11 U.S.C. §§ 1107-1108.

[18] *See id*. § 1101(1).

[19] *See, e.g., Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) ("[I]f a debtor remains in possession – that is, if a trustee is not appointed – the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession"); *Official Committee of Unsecured Creditors v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3rd Cir. 2000).

[20] *See* 11 U.S.C. § 1104.

The Official Unsecured Creditors' Committee. Another major player in the Chapter 11 arena, particularly in larger cases, is the officially-appointed committee of unsecured creditors, often simply referred to as the "Committee." The Committee is responsible for representing the interests of the unsecured creditor body as a whole.[21] The United States Trustee is responsible for appointing the Committee as soon as practical after the entry of an order for relief under Chapter 11 (which, in the case of a voluntary Chapter 11 filing, is the petition date).[22] While the U.S. Trustee has some discretion in deciding who to appoint to the Committee, the Bankruptcy Code provides that the Committee should ordinarily consist of those persons, willing to serve, that hold the seven largest unsecured claims against the debtor.[23]

The United States Trustee. The U.S. Trustee Program is charged with the responsibility of protecting the integrity of the federal bankruptcy system and promoting its efficiency. The Program monitors the conduct of parties and privately-appointed trustees in bankruptcy cases, overseas related administrative functions, and acts to ensure compliance with applicable laws and procedures, all in furtherance of the public interest in the just, speedy and economical resolution of bankruptcy cases.[24] Thus, particularly in Chapter 11 cases where an independent trustee has not been appointed, the U.S. Trustee's Office will monitor the case and, as deemed warranted, take action in the case.[25]

➢ ***Chapter 13 Reorganization Case***. Finally, in a Chapter 13 case the rights and duties of a typical trustee are split up between the debtor and an independent trustee given the thorny constitutional issues that accompany an individual case (*e.g.*, the prohibition against involuntary servitude). Generally speaking, the debtor retains control over the estate, obtains most of the typical rights of a trustee, and maintains the right to propose a repayment plan. The trustee, on the other hand, is responsible for monitoring performance under the plan and receiving and distributing to creditors payments made under the plan.[26]

C. Other Important Terminology

One of the first things that a real estate lawyer is likely to encounter in relation to a bankruptcy case is the seemingly foreign language used by bankruptcy professionals in their discussions about the case. Certain of these terms have already been discussed above (*e.g.*, petition date, pre-petition, post-petition, estate, debtor in possession, committee). A few others are also worth mention:[27]

➢ ***Adversary Proceeding***. An adversary proceeding is a contested proceeding related to the bankruptcy case that is separately docketed and proceeds in a manner similar to a lawsuit filed in federal court (*e.g.*, complaint, answer, trial, etc.). For due process reasons, certain types of disputes and claims are required to proceed in the form of an adversary proceeding even though connected to the bankruptcy case. Examples include claims pursued to resolve lien validity and priority disputes, avoidance action

[21] The "primary purpose of a committee in any case … is to maximize the return to the constituency represented by the committee and all actions undertaken by the committee in the case should be with that goal in mind." 7 Collier on Bankruptcy ¶ 1103.05[1][a], at 1103-22 (15th ed. rev. 2009); *see also* 11 U.S.C. § 1102(b)(3) (setting out specific obligations to the creditor body).

[22] *See* 11 U.S.C. § 1102(a)(1).

[23] *Id.* § 1102(b)(1).

[24] See the U.S. Trustee Program Website: www.justice.gov/ust/eo/ust_org/index.htm.

[25] *See* 11 U.S.C. § 307 (providing that the U.S. Trustee may appear and be heard on any issue in a Chapter 11 case).

[26] *See id*. §§ 1302(b), 1303.

[27] See also the attached Glossary of Typical Terms, which provides a basic overview of terms often referenced in the course of a bankruptcy case.

claims, claims to except debt from discharge, and requests for injunctive or other equitable relief (except to the extent proposed under a plan).[28]

➢ ***Automatic Stay***. As further described below, the "automatic stay" is the statutorily-imposed injunction against certain types of post-petition creditor activity. The automatic stay is immediately effective as of the petition date.

➢ ***Avoidance Action Claim***. An avoidance action claim is a cause of action provided under the Bankruptcy Code for the avoidance and recovery of certain types of transfers made by the debtor pre-petition. The types of avoidance action claims most often pursued in connection with a bankruptcy case, particularly in larger cases, are preference claims and fraudulent transfer claims. While most practitioners have some familiarity with fraudulent transfer claims,[29] a "preference claim" is a bankruptcy-specific type of avoidance claim that may, subject to various defenses, enable the avoidance and recovery of a payment/transfer made by the debtor to a creditor within 90 days of the petition date if the payment/transfer was on account of an antecedent debt, the debtor was insolvent at the time of the payment/transfer, and the creditor's receipt of the payment/transfer has enabled the creditor to recover more than what the creditor would have recovered in a Chapter 7 liquidation case if the payment/transfer had not been made.[30]

➢ ***Bar Date***. As explained further below, in most types of bankruptcy cases a creditor must file a formal proof of claim in the bankruptcy case in order to evidence and preserve the claim against the debtor. The "bar date" is a term commonly used by bankruptcy professionals and bankruptcy courts to refer to the deadline for the filing of proofs of claim. Typically, the deadline is set out in a written notice served on all creditors early in the case. This written notice is commonly referred to as the "341 Meeting Notice" because it also provides notice of the date and time for the initial meeting of creditors to be held in accordance with Section 341 of the Bankruptcy Code.

➢ ***Executory Contract***. As most commonly defined by courts, an "executory contract" is a contract under which each of the parties continues to have material unfulfilled obligations, such that the failure of one of the parties to perform will excuse the other party's obligation to perform. An unexpired lease is a type of executory contract. As further explained below, the Bankruptcy Code contains detailed provisions with respect to the assumption, rejection, or assignment of executory contracts and unexpired leases.

➢ ***Order for Relief***. Bankruptcy relief is not always an automatic proposition. Indeed, where creditors have commenced an involuntary bankruptcy case against a debtor, the filing may be an unwelcome development to the debtor. Thus, where bankruptcy relief is resisted, the Bankruptcy Code refers to the order adjudicating the debtor to be a bankrupt subject to the Bankruptcy Code's provisions as the "order for relief."[31] In all voluntarily-initiated bankruptcy cases, the debtor's filing of the bankruptcy petition commencing the case constitutes an order for relief.[32]

➢ ***Schedules and SOFA***. In every bankruptcy case, the debtor is required to file both a comprehensive set of schedules that list all of his/her/its assets and liabilities (commonly simply referred to as the "Schedules") as well as a statement of financial affairs (or "SOFA" for short) that details, among other things, transfers made shortly before the bankruptcy filing. These filings, which must be signed

[28] *See* Fed. R. Bankr. P. 7001.

[29] Generally speaking, the fraudulent transfer provisions of the Bankruptcy Code are very similar to the provisions of the Uniform Fraudulent Transfer Act. *Compare, e.g.*, 11 U.S.C. § 548 *with* Tex. Bus. & Com. Code ch. 24.

[30] *See* 11 U.S.C. § 547.

[31] *See id.* § 102(6).

[32] *See id*. § 301(b).

under oath, can often be helpful in obtaining a preliminary assessment of the debtor's financial condition and the prospects for recovery. For creditors, a review of the Schedules will also provide insight into the debtor's perspective of the creditor's claim (inasmuch as the listing of claims must identify the claims by creditor name, amount, and whether the claim is disputed, contingent and/or unliquidated).

With these basics out of the way, following is a description of several more specific bankruptcy provisions and principles having a connection to real estate.

The Automatic Stay: It is Automatic and Potent; But There are Exceptions and Possible Grounds for Relief

A. Imposition and Scope of the Stay

The automatic stay, set forth in Section 362 of the Code,[33] is a cornerstone of bankruptcy and is present in every bankruptcy case. Generally speaking, the automatic stay serves two purposes: (a) to prevent a race to the courthouse by creditors; and (b) to provide a short "breathing spell" for a debtor attempting to reorganize its business affairs.

While statutory in nature, courts treat the automatic stay as an automatically-imposed injunction against the taking of certain actions against the debtor and property of the estate.[34] Among the actions prohibited are the following:

- The commencement or continuation of any judicial, administrative, or other action or proceeding against the debtor.[35]
- The enforcement against the debtor or property of the estate of any judgment obtained pre-petition.[36]
- Any act to obtain possession of property of the estate or to exercise control over property of the estate.[37]
- Any act to create, perfect or enforce a lien against property of the estate.[38]
- Any act to collect, assess or recover on a pre-petition claim against the debtor.[39]
- The setoff of a pre-petition debt owing to the debtor against a pre-petition claim against the debtor.[40]

Actions taken in violation of the stay, even in situations where the violator is unaware of the bankruptcy filing and the stay, are typically determined to be void or voidable.[41] The following examples are illustrative:

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[33] *Id*. § 362(a).

[34] *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1082 (9th Cir. 2000) ("The automatic stay is an injunction issuing from the authority of the bankruptcy court"); *see also In re Wilson*, 336 B.R. 338, 345 (Bankr. E.D. Tenn. 2005).

[35] 11 U.S.C. § 362(a)(1).

[36] *Id*. § 362(a)(2).

[37] *Id*. § 362(a)(3).

[38] *Id*. § 362(a)(4).

[39] *Id*. § 362(a)(6).

[40] *Id.* § 362(a)(7).

- Post-petition foreclosure of property of the estate invalidated.[42]

- Post-petition sheriff's sale of real property voided (and even though the sale was to an innocent purchaser without knowledge of the bankruptcy case).[43]

- Post-petition recordation of lien determined to be void.[44]

Importantly, a party's violation of the automatic stay may subject the party to sanctions and other adverse consequences. Where a violation is shown to have occurred with the violator's knowledge of the stay, the violator may be subject to contempt of court and an award of damages, attorney's fees and costs.[45] Accordingly, the significance of the automatic stay cannot be understated.

B. Exceptions to the Automatic Stay Affecting Real Property Interests

That said, several exceptions to the automatic stay are set out in the Bankruptcy Code. In the real estate context, certain of the more relevant exceptions are described below.[46] Importantly, should there ever be any doubt about whether an exception applies, the most prudent approach is to request a prophylactic order from the bankruptcy court recognizing the applicability of the exception or otherwise requesting relief from the stay to permit the action to be taken.

- ***Expired Lease Exception***. A lessor of <u>*nonresidential*</u> real property may re-take possession of the property after the lease has terminated by the expiration of the stated term of the lease.[47]

- ***Relation-Back Perfection Exception***. A creditor may perfect an interest in property if (a) applicable non-bankruptcy law permits the perfection to be effective against an entity that acquires rights in such property before the date of perfection, and (b) the requisite action to perfect the interest is taken within the time-frame dictated by such non-bankruptcy law; *provided, however*, that if the action required to perfect is seizure of the property or the commencement of an action, then instead of such seizure or filing of litigation, perfection shall be accomplished by giving notice (typically in the form of a notice filed in the bankruptcy case and served on the debtor) by the deadline imposed by the applicable non-bankruptcy law.[48]

- ***Maintenance/Continuation of Perfection Exception***. A creditor may take action to maintain or continue the perfection of an interest in property if (a) applicable non-bankruptcy law provides for the maintenance or continuation of perfection to be effective against an entity that acquires rights in such

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[41] *See, e.g., Ozonne v. Bendon (In re Ozonne)*, 337 B.R. 214, 220 (B.A.P. 9th Cir. 2006) (actual knowledge of the automatic stay is irrelevant; knowledge of the bankruptcy filing is the legal equivalent of knowledge of the automatic stay).

[42] *See, e.g*., *Phoenix Bond & Indem. Co. v. Shamblin (In re Shamblin)*, 890 F.2d 123, 125 (9th Cir. 1989); *In re Ward*, 837 F.2d 124, 126 (3rd Cir. 1988).

[43] *See, e.g., Singleton v. Abussad (In re Abussad)*, 309 B.R. 895 (Bankr. N.D. Tex. 2004).

[44] *See, e.g*., *Field v. Fifth Third Bank (In re Nasr)*, 191 B.R. 689, 693 (Bankr. S.D. Ohio 1996).

[45] *See* 11 U.S.C. § 362(k); *Pettitt v. Baker*, 876 F.2d 456, 457-58 (5th Cir. 1989); *Homer Nat'l Bank v. Namie*, 96 B.R. 652, 654 (W.D. La. 1989).

[46] While not separately detailed below, there are also three overall (*i.e*. non-real estate specific) stay exception or termination provisions applicable to repeat filers – two applicable to individual debtors and one applicable to a "small business debtor." *See* 11 U.S.C. §§ 362(c)(3),(c)(4),(n); *see also id*. § 101(51D) (definition of "small business debtor").

[47] *See* 11 U.S.C. § 362(b)(10). Note, however, that this provision presumes that the term of the lease has not been shortened by virtue of an *ipso facto* clause in the lease. *Ipso facto* clauses are generally unenforceable. *See id*. § 365(e)(1).

[48] *See id.* §§ 362(b)(3), 546(b)(1)(A),(b)(2).

property before the date on which the action is taken to effect such maintenance or continuation, and (b) the requisite action to maintain or continue the perfection is taken within the time-frame dictated by such non-bankruptcy law; *provided, however*, that if the action required to maintain or continue the perfection is seizure of the property or the commencement of an action, then instead of such seizure or filing of litigation, the maintenance/continuation of perfection shall be accomplished by giving notice (typically in the form of a notice filed in the bankruptcy case and served on the debtor).[49]

➢ ***Prior Fraudulent Conduct Exception***. A creditor may take any act to enforce its lien against or security interest in real property if (a) the creditor, in a prior bankruptcy case, obtained an order for relief from the automatic stay under Section 362(d)(4) of the Code in relation to the property (*i.e*. as a result of fraudulent conduct involving the property); (b) the debtor has not obtained relief from the order based upon changed circumstances or other good cause; and (c) the creditor action is taken *within 2 years* of the date of entry of the order in the prior case.[50]

➢ ***Ineligible Debtor Exception***. A creditor may take any act to enforce its lien against or security interest in real property if the debtor is an individual or family farmer[51] and (a) pursuant to Section 109(g) of the Bankruptcy Code, the debtor is ineligible to be a debtor because within 180 days prior to the current bankruptcy filing the debtor had another bankruptcy case that (i) was dismissed for the willful failure of the debtor to abide by orders of the court or to appear before the court in proper prosecution of the case, or (ii) was voluntarily dismissed at the request of the debtor following a creditor's filing of a request for relief from the automatic stay; or (b) the current case was filed in violation of a bankruptcy court order entered in a prior case that prohibited the debtor from filing the current case.[52]

➢ ***Individual Eviction Judgment Exception***. If an *individual* debtor is a lessee of *residential* real property under a lease or rental agreement, then the debtor must indicate on his/her bankruptcy petition whether a judgment for possession of the property was obtained by the lessor prior to the bankruptcy filing.[53] If such a judgment was obtained, but the debtor claims that applicable non-bankruptcy law permits the debtor to cure the monetary default giving rise to the judgment and the debtor intends to continue residing at the property, then the debtor must also, among other things, certify whether the debtor is claiming the right to cure (hereafter referred to as a "Cure Right"). If claiming a Cure Right, then the debtor must also certify that the debtor (or an adult dependent of the debtor) has made a deposit with the clerk of the court for the rent that would be due under the lease (but for the judgment) during the 30-day period following the petition date (hereafter referred to as the "Short-Term Deposit").[54] If the debtor fails to certify that a Cure Right exists or that the Short-Term Deposit has been made, then the lessor may immediately continue any eviction, unlawful detainer action, or similar proceeding against the debtor to regain possession of the leasehold property.[55] If, on the other hand, the Cure Right is claimed and the Short-Term Deposit is made, then the lessor may not proceed with the eviction *for a period of 30 days*. Prior to the expiration of the 30-day period, the debtor may eliminate the stay exception by filing (and serving on the lessor) a separate certification reflecting that the debtor (or an adult dependent of the debtor) has cured the entire monetary default leading to the judgment.[56] If the debtor fails to do so within the 30-day period, however, then upon expiration of the 30-day period the lessor may immediately

[49] *See id.* §§ 362(b)(3), 546(b)(1)(B),(b)(2).

[50] *See id.* § 362(b)(20),(d)(4).

[51] *See id.* § 101(18) (definition of "family farmer"). While not discussed herein, Chapter 12 of the Bankruptcy Code sets out provisions applicable to family farmer bankruptcy cases.

[52] *See id.* § 362(b)(21); *see also id*. § 109(g) (setting out eligibility requirements).

[53] *See id.* § 362(l)(5).

[54] *See id.* Following deposit of the Short-Term Deposit, the clerk of court is directed to remit the deposit to the lessor. *See id.* § 362(l)(5)(D).

[55] *See id*. § 362(b)(22), (l)(1), (l)(4).

[56] *See id*. § 362(l)(2).

continue any eviction, unlawful detainer action, or similar proceeding against the debtor to regain possession of the leasehold.[57] There is also a procedure for the lessor to contest the certifications made by the debtor.[58]

➢ ***Individual Endangered Property Eviction Exception***. If an *individual* debtor is a lessee of *residential* real property under a lease or rental agreement and the property is endangered or an illegal controlled substance is being used on the property, then the lessor may proceed with an eviction action based upon such facts if (a) the lessor files with the court and serves on the debtor a certification under penalty of perjury stating that (i) the eviction action was initiated prior to the bankruptcy filing, or (ii) during the 30-day period preceding the date of the filing of the certification, the debtor has endangered the property or illegally used or allowed to be used a controlled substance on the property;[59] and (b) the debtor does not contest the lessor's certification *within 15 days* of its filing/service.[60] If the debtor files an objection to the certification within the 15-day period, then the court is required to hold a hearing within 10 days after the filing/service of the objection to determine if the situation giving rise to the lessor's filing of the certification existed and, if so, whether it has been remedied.[61] If the court determines that either the situation never existed, or that the situation has been remedied, then the stay exception will not apply.[62] If, however, the court determines that the debtor has failed to satisfactorily demonstrate that the situation did not exist or that the debtor has failed to satisfactorily demonstrate that the situation has been remedied, then the stay exception will apply immediately upon the court's entry of an order so ruling, after which the eviction action may proceed.[63]

C. Grounds for Relief from the Automatic Stay

If none of the exceptions to the automatic stay apply, then an order for relief from the stay must be obtained from the bankruptcy court before any action precluded by the stay may be taken. The Bankruptcy Code provides four possible grounds:

➢ ***"For Cause," Including Lack of Adequate Protection***. First, the stay may be lifted "for cause."[64] "Cause" is purposely not defined in the Bankruptcy Code so as to provide the court with wide latitude in assessing the particular circumstances at issue. Nevertheless, the Code does specify at least one such basis for cause – that being "lack of adequate protection." In the context of real property interests, a party's interest in property is generally not adequately protected if the value of such interest is being adversely impacted without any substitution of value to protect against, or compensate the party for, the loss in such value.[65]

➢ ***No Equity and Not Necessary***. Second, the stay may be lifted in relation to property of the estate where it is established that (a) the estate has no equity in the property, and (b) the property is not necessary to an effective reorganization.[66] The first prong of the test is necessarily valuation driven and,

[57] *See id.* § 362(b)(22), (l)(4).

[58] *See id*. § 362(l)(3).

[59] *See id*. § 362(b)(23).

[60] *See id*. § 362(m)(1),(3).

[61] *See id.* § 362(m)(2)(A)-(B).

[62] *See id*. § 362(m)(2)(C).

[63] *See id.* § 362(m)(2)(D).

[64] *See id.* § 362(d)(1).

[65] *See, e.g., Security Leasing Partners L.P. v. Proalert LLC (In re Proalert LLC)*, 314 B.R. 436, 441 (B.A.P. 9th Cir. 2004) ("The secured creditor has an entitlement to the value of its lien. Adequate protection protects that entitlement"); *see also* 11 U.S.C. § 361 (providing statutory examples of how "adequate protection" may be provided, including periodic cash payments and/or additional/replacements liens in property).

[66] *See* 11 U.S.C. § 362(d)(2).

therefore, highly fact intensive. With respect to the second prong, if the case is proceeding under Chapter 7, then there is obviously no reorganization taking place and the prong is satisfied. If, however, the case is proceeding under Chapter 11 or 13, then the court will need to determine the necessity of the property to an "effective" reorganization (*e.g.*, the debtor's proposed plan has a reasonable likelihood of being approved).

➢ ***Single Asset Real Estate Cases***. Third, in a single asset real estate case,[67] a creditor whose claim is secured by an interest in the real estate is entitled to relief from the stay to take action in relation to the real estate unless, by no later than the later of (a) 90 days of the order for relief (the same date as the petition date in a voluntary bankruptcy case), or such longer period as the court may order for cause within the 90-day period, or (b) 30 days after the court determines that the case constitutes a single real estate case (if disputed), the debtor has (x) filed a reorganization plan that has a reasonable possibility of being confirmed within a reasonable time, or (y) commenced making monthly payments to the creditor in an amount equal to interest at the then applicable non-default contract rate of interest on the value of the creditor's interest in the real estate.[68]

➢ ***Fraudulent/Bad Faith Filings***. Finally, a creditor whose claim is secured by an interest in real estate is entitled to relief from the stay to take action in relation to the real estate if the creditor establishes that the filing of the bankruptcy case was part of a scheme to delay, hinder, and defraud creditors that involved either (a) the transfer of all or part ownership of, or other interest in, such real property without the consent of the creditor or court approval, or (b) multiple bankruptcy filings affecting the real property.[69]

Executory Contracts and Unexpired Leases: Assumption, Rejection, and Assignment; Applicable Time Limits; and Lease Rejection Claim Issues

A. Terminology and Application of Section 365 of the Bankruptcy Code

Section 365 of the Bankruptcy Code sets out provisions relating to "executory" contracts and unexpired leases. In the context of Section 365, most courts have considered a contract to be "executory" if each of the parties to the contract continues to have material unfulfilled obligations, such that the failure of one of the parties to perform will excuse the other party's obligation to perform.[70] While Section 365 also separately refers to unexpired leases, unexpired leases are simply a type of executory contract.[71]

Pursuant to Section 365, the trustee/debtor in possession (DIP) has the option of "assuming" or "rejecting" executory contracts and unexpired leases, subject to court approval.[72] The trustee/DIP also

[67] *See id.* § 101(51B) (defining "single asset real estate" as real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor (who is not a family farmer) and on which no substantial business is being conducted by the debtor other than the business of operating the real property and activities incidental thereto).

[68] *See id* § 362(d)(3).

[69] *See id*. § 362(d)(4). Section 362(d)(4) also provides that an order for relief from the stay on such basis may be recorded as part of the real property records for the property to ensure that any subsequent transferees of the property are on notice of debtor's prior fraudulent conduct and the implications of the order.

[70] *See In re Smith*, 269 B.R. 629, 631 (Bankr. E.D. Tex. 2001).

[71] *See Kent's Run Partnership, Ltd. v. Glosser*, 323 B.R. 408, 424 (W.D. Pa. 2005), *aff'd sub nom. Glosser v. Marysville Regional Water Dist.*, 174 Fed. Appx. 34 (3rd Cir. 2006).

[72] *See* 11 U.S.C. § 365(a).

has the option (with some limitations) of assuming and assigning an executory contract or unexpired lease to a third party.[73]

➢ ***The Meaning of "Rejection"***. "Rejection" embraces the economic concept of "efficient breach," in that it provides an opportunity for the trustee/DIP to extricate the estate from a burdensome contract/lease by rejecting (breaching) it,[74] with the resulting damages claim to be transformed into a ***pre-petition*** claim against the debtor subject to satisfaction through the bankruptcy process (*i.e*. often for cents on the dollar).[75] In the case of a long-term lease, there are also limitations on the amount of the rejection damages claim that may be allowed in a bankruptcy case. This is addressed further below. By way of example, assume that the debtor is the lessee under a 30-year office lease having a remaining term of 20 years, and that, not only are the rental terms now substantially above market, but the debtor no longer has a need for the amount of square footage provided under the lease. Assume further that the lessor has refused to negotiate a reduction of the rent/space and that the debtor has located suitable alternative office space on terms that are substantially more favorable. In this scenario, depending upon the cost differential between the two leases, the debtor (as the DIP) may determine that its best option is to reject the existing lease and enter into the new lease, understanding that the existing lessor's rejection damages claim will be treated as a pre-petition claim and likely be limited in amount as a result of the damages cap (*i.e*. resulting in the conclusion that "rejection" is the most rational financial course of action to pursue). That said, in those instances where the debtor is the ***lessor*** of real property under an unexpired lease or the ***seller*** of real property or a timeshare interest under an executory contract, Section 365 provides some level of protection to the lessee/buyer of such property interests in the event of the trustee's/DIP's rejection of the lease/contract. While the specific provisions of the Bankruptcy Code footnoted below should be carefully reviewed and considered in such scenarios, the gist of these provisions is to protect the lessee's/buyer's possessory rights in the property if the lessee/buyer has already taken possession of the property.[76]

➢ ***The Meaning of "Assumption" and Requirements***. "Assumption," on the other hand, is the equivalent of reaffirmation.[77] While typically a court will defer to the trustee's/DIP's business judgment in evaluating a request for assumption, if the debtor is in default under the contract/lease then there are specific requirements that must be met before the bankruptcy court may authorize the assumption. Specifically, the trustee/DIP must: (a) cure all defaults under the contract/lease (or provide adequate assurance of prompt cure); (b) compensate the lessor for pecuniary losses resulting from defaults under the contract/lease (or provide adequate assurance of prompt compensation); and (c) provide adequate assurance of future performance under the contract/lease.[78] That said, in relation to the cure requirement the Bankruptcy Code makes a few exceptions:

> First, if the default relates to a non-monetary obligation that, by its terms, is impossible to cure, then the obligation to cure such obligation is excused. The exception can be best illustrated with an example. Assume that the lease contains the following 2 requirements: first, that the lessee maintain continuous operations on the leasehold during the term of the lease (Term A); and, second, that the lessee periodically (at fixed times) update the landscaping at the leasehold location (Term B). Assume further that prior to the bankruptcy filing the lessee shut down its

[73] *See id*. § 365(f).

[74] Under the Bankruptcy Code, rejection of the contract/lease constitutes a breach of the contract/lease. *See* 11 U.S.C. § 365(g).

[75] *See id*. § 365(g)(1) (damage claim treated as arising pre-petition); *see also Miller v. Chateau Communities, Inc. (In re Miller)*, 282 F.3d 874, 877 (6th Cir. 2002).

[76] *See* 11 U.S.C. § 365(h)(1) (lease), (h)(2) (timeshare interest), (i) (sale of real property or timeshare interest).

[77] *See Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 798 (4th Cir.), *cert. denied*, 525 U.S. 962 (1998); *Stewart Title Guaranty Co. v. Old Republic Nat'l Title Ins. Co*., 83 F.3d 735, 741 (5th Cir. 1996).

[78] *See* 11 U.S.C. § 365(b)(1).

operations at the location (Term A default) and the debtor failed to update the landscaping by the periodic deadline imposed (Term B default). Is the trustee/DIP required to cure these defaults? As to the landscaping (Term B), yes, because, while untimely, the trustee/DIP has the ability to update the landscaping. But in the case of the continuous operations provision (Term A), absent time travel there is no way for the trustee/DIP to cure the default. Thus, Section 365 excuses the obligation to cure the Term A breach; *provided, however*, that Term A is complied with on a go forward basis.[79]

Second, the cure obligation does not apply to a default that is a breach of a provision relating to (a) the insolvency or financial condition of the debtor at any time prior to the closing of the bankruptcy case; (b) the commencement of the bankruptcy case; (c) the appointment of or taking possession by a trustee in the bankruptcy case or a custodian (*e.g.*, receiver) prior to the bankruptcy filing; or (d) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations.[80]

Separately, in relation to the requirement of adequate assurance of future performance, in the case of a lease by the debtor of real property in a shopping center, the adequate assurance required includes specific assurances related to the source of rent and other consideration due under the lease; the continuity of the percentage rent due under the lease; compliance with radius, location, use, or exclusivity provisions and the non-triggering of a breach of any provision contained in any other lease, financing agreement, or master agreement related to the shopping center; and the non-disruption of any tenant mix or balance in the shopping center.[81]

➢ ***Assignment and Requirements***. Finally, the trustee/DIP has the option of assigning the executory contract or unexpired lease to a third party. In this regard, as a general principle, "notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee[/DIP] may assign such contract or lease…"[82] But the trustee/DIP may only do so if (a) the trustee/DIP assumes the contract/lease (including satisfaction of the cure and compensation obligations outlined above if the contract/lease is in default), and (b) adequate assurance of future performance <u>*by the assignee*</u> is provided, whether or not there has been a default.[83] Even here, however, there are a couple of important exceptions to note:

First, if applicable nonbankruptcy law excuses the non-debtor counterparty from accepting performance from or rendering performance to an entity other than the debtor or the DIP (extremely rare), then whether or not the contract/lease prohibits or restricts the assignment of rights or the delegation of duties to a third party, the trustee/DIP may not assign the contract/lease.

Second, in the case of a lease by the debtor of real property in a shopping center, the requirement of adequate assurance of future performance by the assignee includes all of the requirements noted above in relation to assumption (as if there were a default) plus specific assurances related to the comparable financial condition and operating performance of the assignee and its guarantors (if any) as of the time the lease was first entered into by the debtor.[84]

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[79] *See id*. § 365(b)(1)(A).

[80] *See id*. § 365(b)(2).

[81] *See id.* § 365(b)(3).

[82] *Id*. § 365(f).

[83] *See id*. § 365(f)(1)-(2).

[84] *See id*. § 365(b)(3), (f)(2)(B).

➢ ***Ipso Facto Lease Termination Provisions are Generally Ineffective***. Given the expansive rights of the trustee/DIP to assume or assign leases, a real estate practitioner might naturally think to explore the possibility of creatively providing for an automatic termination of a lessor client's lease with a debtor in the event of the debtor's financial demise. In this regard, Section 365 of the Code provides that a trustee may not assume or assign a lease of nonresidential real property that has terminated under applicable nonbankruptcy law prior to the bankruptcy filing.[85] And as previously explained, one of the exceptions to the automatic stay is the retaking of possession of nonresidential real property from a lessee debtor if the lease has terminated by the expiration of its stated term.[86] Here, the Code simply recognizes that because the debtor/estate no longer holds any legal interest in the property following a pre-petition termination or the end of the lease term, the trustee/DIP no longer has any rights in relation to the property nor any entitlement to the stay's protections.[87] Even so, it is important to understand that the Bankruptcy Code invalidates many types of *ipso facto* lease termination/modification provisions. For example, Section 365 of the Code provides that "[n]otwithstanding a provision in an … unexpired lease, or in applicable law, an … unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such … lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such … lease that is conditioned on – (A) the insolvency or financial condition of the debtor at any time before the closing of the case; (B) the commencement of a [bankruptcy] case []; or (C) the appointment of or taking of possession by a trustee in a [bankruptcy] case..."[88] Similarly, the Bankruptcy Code renders unenforceable any lease provision or applicable nonbankruptcy law that would terminate or modify, or entitle the lessor to terminate or modify, the lease on account of an assignment of the lease.[89]

B. Time Limits Applicable to Assumption; Interim Performance Obligations and Conditionally Excused Performance

In all bankruptcy cases, the Bankruptcy Code fixes a deadline for the assumption of executory contracts and unexpired leases. In Chapter 7 cases, the deadline for assumption of both contracts and leases is 60 days after the order for relief (unless extended by the court for cause within the 60-day period), after which the contract/lease is deemed rejected.[90] In a Chapter 11 or 13 case, the general rule is that the debtor may assume or reject an executory contract/unexpired lease at any time prior to confirmation of the plan in the case.[91] However, there are two significant exceptions to this general rule. First, upon the request of a counterparty to a particular contract/lease, the court may, for cause, fix a shorter deadline for the assumption or rejection.[92] Second, in the case of a commercial real property lease under which the

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[85] *See id.* § 365(c)(3). In order for this prohibition to apply, however, all of the preconditions to termination must have occurred prior to the filing. *See, e.g., Hart Environmental Mngt. Corp. v. Sanshoe Wordwide Corp. (In re Sandhoe Worldwise Corp.)*, 993 F.2d 300, 304-05 (2nd Cir. 1993) (explaining that termination is not effectuated under New York law by providing notice of eviction alone); *Vanderpark Props., Inc. v. Buchbinder (In re Windmill Farms, Inc.)*, 841 F.2d 1467, 1472 (9th Cir. 1988) (analysis of applicability of § 365(c)(3) requires consideration of whether forfeiture could be avoided under applicable state law).

[86] *See* 11 U.S.C. § 362(b)(10).

[87] *See* 11 U.S.C. § 541(b)(2) (recognizing that property of the estate (a) does not include "any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the [bankruptcy] case" and "ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case"); *see also id*. § 362(c)(1) ("the stay of an act against property of the estate … continues until such property is no longer property of the estate").

[88] 11 U.S.C. § 365(e)(1).

[89] *See id*. § 365(f)(3).

[90] *See id.* § 365(d)(1).

[91] *See id*. § 365(d)(2).

[92] *See id.*

debtor is the lessee, unless the debtor assumes the lease by the earlier of (a) 120 days after the order for relief (unless extended by the court for cause within the 120-day period, limited to an extension of 90 additional days unless extended further thereafter with the written consent of the lessor), or (b) the date of the entry of an order confirming a plan, then the lease is deemed rejected.[93]

Often the cure and compensation for loss provisions of Section 365 applicable to assumption can prove to be quite costly, and sometimes even impractical, for the trustee/DIP depending upon the nature of outstanding defaults, the extent and magnitude of pecuniary loss suffered by the counterparty, the size of the estate, and the debtor's financial wherewithal. Consequently, in Chapter 11 cases trustees/DIPs are often reluctant to make a prompt decision regarding assumption/rejection. On the flip side, any sort of delay can prove to be quite detrimental to the non-debtor party, particularly in the case of a lease of real property. Thus, the Bankruptcy Code provides two interim protections to lessors. First, in the case of a *nonresidential* real property lease, pending the trustee's/DIP's assumption/rejection decision, the trustee/DIP is required to perform all of debtor's obligations under the lease (with the exception of the types of obligations that the trustee/DIP would not have to cure to assume) as they come due (noting, however, that the court, for cause, may extend the time to perform obligations arising during the first 60 days to up to the 60th day after the order for relief).[94] Second, in the case of both residential and nonresidential leases, if the debtor lessee is in default (except for the type of default that the trustee/DIP would not be required to cure to assume), then unless and until the lease is assumed or rejected the trustee/DIP may not require the lessor to provide services or supplies incidental to the lease unless the lessor is compensated under the terms of the lease for any services and supplies provided under the lease.[95]

C. Lease Rejection Damage Limits and Alternative Security Considerations

Finally, as alluded to above, in the case of the trustee's/DIP's rejection of a long-term lease of real property, the Bankruptcy Code may limit the allowable amount of the lessor's rejection damages claim. Initially (and as will become relevant in the discussion of security below), the rejection of a lease, in and of itself, does not result in the award of a damages claim to the lessor. The rejection simply constitutes a breach[96] *entitling* the lessor to assert a rejection damages claim in the bankruptcy case.[97] In the event such a claim is filed, Section 502(b)(6) of the Bankruptcy Code provides that such claim is disallowable to the extent the claim exceeds (a) the amount of any unpaid rent (without acceleration) as of the bankruptcy filing or the date of the lessor's repossession, or the debtor's surrender of possession, of the property, if earlier, plus (b) the rent reserved under the lease (without acceleration) for the greater of (i) 1 year or (ii) 15% (but not to exceed 3 years) of the remaining term of the lease as of the same date (*i.e.* petition date or date of repossession/surrender).[98] While some might question the reasoning, Congress

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[93] *See id*. § 365(d)(4)(A).

[94] *See id*. § 365(d)(3). Importantly, the obligation to perform only relates to post-petition obligations. Most courts hold that a trustee/DIP is not required to timely pay rent that came due prior to the bankruptcy filing, even if the rent was for post-petition possession of the leasehold premises. *See, e.g.*, *In re Appletree Markets Inc*., 139 B.R. 417 (Bankr. S.D. Tex. 1992) (rent came due pre-petition; therefore, 365(d)(3) not applicable). However, some courts have equitably carved around this anomaly by allowing a lessor an administrative claim in the case (*i.e*. a high priority unsecured claim) for the value of the lessor's post-petition possession and use of the premises. *See, e.g., In re Garden Ridge Corp*., 323 B.R. 136, 140-43 (Bankr. D. Del. 2005).

[95] *See* 11 U.S.C. § 365(b)(4).

[96] *See id.* § 365(g).

[97] *See, e.g*., Fed. R. Bankr. P. 3002(c)(4) (providing in Chapter 7 and 13 cases that a claim arising from the rejection of an unexpired lease *may* be filed within such time as the court may direct), 3003(c)(3) (incorporating the provisions of rule 3002(c)(4) in Chapter 11 cases).

[98] *See* 11 U.S.C. § 502(b)(6).

imposed the cap to ensure that other general unsecured creditors are not deprived of a dividend in the case by virtue of large landlord claims.[99]

Thus, what options does a lessor have to protect itself against the damages cap? One option is consider obtaining security in the form of third-party financial accommodations. For the most part, the Code does not interfere with the rights of creditors against non-debtor third parties. Landlords that have obtained guarantees, for example, retain their rights against the guarantors and, absent a supplemental stay order or injunction (difficult for a trustee/DIP to obtain), may pursue recovery from the guarantors notwithstanding the bankruptcy of the accommodated debtor.[100] Provided the guaranty is structured carefully – *e.g*. guaranteeing performance of the terms of the lease as opposed to guaranteeing payment of amounts that the debtor may owe – the rejection damage cap arguably should not impact the amount recoverable from the guarantor.[101]

Another option is a letter of credit; but this can be tricky. Initially, like guarantees, the Bankruptcy Code generally does not interfere with a lessor's right to pursue recovery against the non-debtor issuer of a letter of credit.[102] But whereas a carefully structured guaranty may effectively make the guarantor a co-obligor of *performance* obligations under the lease, a letter of credit is more akin a guaranty of *payment* obligations owed by the debtor. In this regard, generally a letter of credit is an independent agreement to pay a sum certain to the beneficiary (lessor) in the event certain conditions precedent have occurred (*e.g*., a breach), and in most cases the payment obligation is, in turn, limited to the amount owed by the letter of credit applicant (the debtor) to the beneficiary (the lessor) under the terms of the underlying agreement (the lease). If so structured, the rejection damage cap may, in fact, come into play in limiting a lessor's ability to recover the amount of the claim in excess of the damages cap because the debtor is not obligated to pay such excess.[103]

In 2005, however, the Fifth Circuit exposed a loophole for lessors in the case of *EOP-Colonnade of Dallas Ltd. Partnership v. Faulkner (In re Stonebridge Technolgoies, Inc.)*.[104] In *Stonebridge*, the lessor obtained, among other things, an irrevocable letter of credit to secure the payment of amounts owing by the debtor under the lease. Following the debtor's Chapter 11 bankruptcy filing, the lessor and debtor submitted an agreed order for the debtor's rejection of the lease. Because the rejection constituted a breach of the lease under Section 365 of the Code, the lessor obtained a claim for damages caused by the breach. Instead of filing a claim in the bankruptcy case to assert the rejection damage claim, however, the lessor submitted a draw request to the letter of credit issuer to recover the damages, ultimately receiving proceeds in excess of the amount of the rejection damage claim that would have been allowable under Section 502 of the Code due to the damages cap. Later, based upon the damages cap, the trustee under the debtor's confirmed plan filed suit against the lessor to recover the difference between the amount of

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[99] S. Rep. No. 95-989, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5849; H.R. Rep. No. 95-595, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6309 (purpose of allowing rejection damage claim, but subject to a cap, is "to compensate the landlord for his loss while not permitting a claim so large (based on a long-term lease) as to prevent other general unsecured creditors from recovering a dividend of the estate").

[100] *See In re Moore*, 318 B.R. 679, 682 (Bankr. W.D. Wis. 2004) ("Bankruptcy does not affect third-party guarantees of a debtor's obligations. 'The automatic stay does not apply to guarantors, sureties, insurers, partners, and other persons liable on the debt'") (*quoting United States v. Wright*, 57 F.3d 561, 562 (7th Cir. 1995)).

[101] *See, e.g., Koplow v. P.M. Holding Corp. (In re Modern Textile, Inc.)*, 900 F.2d 1184, 1191 (8th Cir. 1990); *Things Remembered, Inc. v. BGTV, Inc*., 151 B.R. 827, 831 (Bankr. N.D. Ohio 1993).

[102] *See Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.)*, 831 F.2d 586, 589 (5th Cir. 1987).

[103] *See, e.g., Solow v. PPI Enters., Inc. (In re PPI Enters., Inc.)*, 324 F.3d 197, 208-10 (3rd Cir. 2003) (because lessor's claim against debtor disallowed to the extent in excess of the rejection damage cap, lessor's recovery from letter of credit proceeds credited against the amount of the capped rejection damages claim); *Redback Networks, Inc. v. Mayan Networks Corp. (In re Mayan Networks Corp.)*, 306 B.R. 295 (B.A.P. 9th Cir. 2004) (same).

[104] 430 F.3d 260 (5th Cir. 2005).

the proceeds recovered under the letter of credit and the allowable amount of the claim as capped by Section 502. The Bankruptcy Court agreed with the trustee, awarding the difference, and the District Court affirmed. On further appeal, however, the Fifth Circuit reversed.

The Fifth Circuit focused on the significance of the claims allowance process in bankruptcy. It explained that while the rejection of a lease constitutes a breach of the lease, the Code does not automatically recognize a claim in favor of the lessor for the damages caused by the breach. Instead, the lessor must file a claim for such damages in order for the claim to be included in the bankruptcy case for distribution purposes.[105] If such a claim is filed, the claim is then deemed allowed unless and until an objection to its allowance is lodged under Section 502(b) of the Code.[106] Pursuant to Section 502(b)(6), a lease rejection damage claim must be disallowed to the extent that it exceeds the rejection damage cap.[107] However the allowance/disallowance process, itself, is the event leading to a limitation of the debtor's liability to the lessor. Such liability is not automatically limited. Based upon such analysis, the Fifth Circuit concluded that "the damages cap of § 502(b)(6) does not apply to limit the beneficiary's entitlement to the proceeds of the letter of credit *unless and until the lessor makes a claim against the estate*."[108]

Thus, applying the holding of *Stonebridge*, a lessor who holds security in the form of a letter of credit should carefully analyze the terms of the letter of credit to evaluate whether or not to file a claim in the bankruptcy case following the rejection of its lease if the damages caused by the rejection are in excess of the rejection damage cap and the amount of availability under the letter of credit is greater than the rejection damage cap.

Evidencing Claims in the Bankruptcy Case

A. Proofs of Claim

Shifting gears to claims generally, essential to the bankruptcy process is the determination of all pre-petition unsecured claims against the debtor. For this reason, Bankruptcy Rule 3002 provides, with a few exceptions, that "[a]n unsecured creditor … must file a proof of claim … for the claim … to be allowed."[109] One of the key exceptions relates to Chapter 11 cases. In a Chapter 11 case, if the debtor lists the claim on its schedules and does not identify it as unliquidated in amount, contingent or disputed, then the creditor is not required to file a proof of claim.[110] Of course, the more prudent course of action is to file a proof of claim anyway to avoid any questions down the road. Proof of claim forms are typically mailed to those creditors/potential creditors identified by the debtor in its mailing matrix filed with the court at the time of the bankruptcy filing. Most courts also have proof of claim forms available for download from their websites.[111]

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[105] *See Stonebridge*, 430 F.3d at 269; *see also Century Indem. Co. v. National Gypsum Co. Settlement Trust (In re National Gypsum Co.)*, 208 F.3d 498, 505 (5th Cir.) ("opportunity" to file a lease rejection claim arises after lease is rejected), *cert. denied*, 531 U.S. 871 (2000); *Eastover Bank for Savings v. Sowashee Venture (In re Austin Dev. Co.)*, 19 F.3d 1077, 1084 (5th Cir.) (rejection of lease simply entitles lessor to then file a proof of claim), *cert. denied sub nom. Sowashee Venture v. EB, Inc.*, 513 U.S. 874 (1994).

[106] *See* 11 U.S.C. § 502(a).

[107] *Id*. § 502(b)(6).

[108] *Stonebridge*, 430 F.3d at 270 (emphasis added); *see also id*. at 269 ("By its terms, § 502(b) applies only to claims against the bankruptcy estate"); *In re SKA! Design, Inc*., 308 B.R. 777, 781 (Bankr. N.D. Tex. 2004) ("Section 502 deals only with allowance by a landlord of a claim, *if presented*, against the bankruptcy estate") (emphasis added) (quoting *In re Mr. Gatti's, Inc*., 162 B.R. 1004 (Bankr. W.D. Tex. 1994)).

[109] Fed. R. Bankr. P. 3002(a) (emphasis added).

[110] *See* 11 U.S.C. § 1111(a); Fed. R. Bankr. P. 3003(b)(1).

[111] For the Bankruptcy Court for the Northern District of Texas, for example, such forms may be accessed by going to www.txnb.uscourts.gov/forms/.

Notably absent from Bankruptcy Rule 3002 is the requirement to file a proof of claim for a secured claim. Without going into the intricacies of property and constitutional law, the boiled down explanation is that because a lien against or security interest in property constitutes an interest in the property, such an interest cannot be eliminated solely because of the secured party's failure to timely file a proof of claim.[112] Nevertheless, the exception is limited to the *in rem* nature of the interest as opposed to the *in personam* nature of the underlying claim. As to the claim, itself, the *in personam* liability of the debtor remains susceptible to discharge through the bankruptcy process. Hence, a secured creditor's failure to timely file a proof of claim will, in most cases, limit the creditor's recourse to collection of the claim from any sales proceeds subsequently realized from a sale of the property (whenever that might occur) – not a particularly enviable outcome. To add a few more layers of complication, in a Chapter 11 context, Congress has expressly recognized any property dealt with in the plan will be free and clear of all claims and interests upon confirmation of the plan (except as otherwise provided in the plan or the court's confirmation order).[113] And if there is any chance of a deficiency as a result of the value of the collateral, the deficiency (an unsecured claim) will be eliminated in the absence of a proof of claim to assert such deficiency.[114] Therefore, it is always advisable for secured creditors to timely file proofs of claim in the case.

The deadline for filing proofs of claim is commonly referred to as the "bar date." In Chapter 7 and 13 cases, the deadline is 90 days from the first date set for the 341 meeting.[115] In a Chapter 11 case, the deadline is established by the court.[116] By local rule, certain courts have ordered that the same 90-day deadline will apply in Chapter 11 cases unless changed by separate order.[117] The 341 notice sent to those creditors/potential creditors listed on the debtor's mailing matrix will specify the deadline. The failure to timely file a proof of claim can have disastrous effects for at least three reasons. First, distributions from the bankruptcy case will only be made on account of allowed claims timely evidenced in the bankruptcy case. Second, claims that are filed after the bar date has passed are subject to disallowance.[118] Finally, the debtor will normally obtain a discharge from all pre-petition claims.[119] Therefore, failure to timely participate in the case may lead to the claim being forever barred.

B. Complexities Involving Secured Claims

Returning to secured claims, there are many complexities associated with their treatment under the Bankruptcy Code. In certain respects, this is because of the general constitutional principle that a secured creditor may not be deprived of its interest in property without due process of law.[120] However, the focus

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[112] *See Dewsnup v. Timm*, 502 U.S. 410, 417 (1992); *Stonebridge*, 430 F.3d at 269 n.6 ("[t]he filing of a proof of claim serves no purpose if the creditor is secured"); *see also* 11 U.S.C. § 506(d)(2).

[113] *See* 11 U.S.C. § 1141(c). *But see FDIC v. Union Entities (In re Be-Mac Transport Co.)*, 83 F.3d 1020, 1024-27 (8th Cir. 1996) (explaining that if secured creditor does not participate in the bankruptcy, then its lien is not "dealt with" through the plan).

[114] *See, e.g.*, 11 U.S.C. § 506(a) (providing for bifurcation of claims secured by property of the estate into secured and unsecured claims based upon the value of the property).

[115] *See* Fed. R. Bankr. P. 3002(c) (noting, however, certain exceptions including rejection damage claims where an executory contract or unexpired lease has been rejected, certain types of claims arising from post-petition judgments, and cases initially identified by the trustee as "no asset" cases).

[116] *See* Fed. R. Bankr. P. 3003(c)(3).

[117] *See e.g.*, Bankruptcy Local Rule 3003-1 for the Bankruptcy Courts of the Northern and Southern Districts of Texas.

[118] *See* 11 U.S.C. § 502(b)(9). *But see also id*. § 726(a)(3) (providing for subordinated treatment of tardily filed claims that are filed and allowed in a Chapter 7 case).

[119] *See id*. §§ 727, 1141(d)(1)(A), 1328; *see also id*. § 524(a).

[120] *See* U.S. Const. amend. V.

of such constitutional limitation is on *interests in property* as opposed to *claims* secured by such property interests. Hence, in the bankruptcy context, the limitation only protects the value of the secured creditor's interest in estate property, as opposed to the secured creditor's underlying claim in the bankruptcy case. A simple illustration highlights this point. Suppose, for example, that Creditor A's claim, totaling $10,000, is secured by property of the estate having a value of $20,000. Here, the value of Creditor A's interest in the property is equal to Creditor A's claim because the property has a greater value than the amount of the claim. Suppose, on the other hand, that the property only has a value of $5,000. In that situation because the value of Creditor A's interest in the property cannot exceed the value of the property, the value of Creditor A's interest in the property is $5,000, whereas the claim is still $10,000.

These valuation concepts are taken into consideration under Section 506 of the Bankruptcy Code, which bifurcates claims secured by property of the estate into secured claims and unsecured claims. Specifically, pursuant to section 506(a), a claim of a creditor which is secured by a lien on property in which the estate has an interest is classified as a secured claim only to the extent of the value of such creditor's interest in the estate's interest in such property, and classified as an unsecured claim to the extent of the balance.[121] In the Chapter 11 context, it is possible to override this bifurcation process, but only under limited and rather complex conditions having a relationship to the Chapter 11 plan process.[122]

A Basic Overview of the Chapter 11 Plan Process

Focusing next on the Chapter 11 plan and confirmation process, the following is a very basic overview of concepts. Inasmuch as plan and confirmation issues can be, and often are, quite complex, the following is simply provided as a frame of reference.

A. The Theory Underlying Reorganization

Chapter 11 embodies the practical reality that assets that are acquired, used and maintained by an operating debtor for the particular purposes of the debtor's business or trade often have a greater "going concern" value than the value realizable in liquidation or on a "scrap sale" basis. From a public policy perspective, Chapter 11 also embodies Congress' interest in preserving jobs, preserving the local tax base, and minimizing the possibility of collateral damage in the form of additional business failures of suppliers and customers who are dependent upon the debtor's continuing existence, all of which may be accomplished by facilitating the reorganization of a debtor that is financially troubled, yet functionally viable.[123] Provided the plan satisfies specific statutory requirements and is either accepted by each class of claims and equity interests or is at least fair and equitable to, and does not discriminate unfairly against, any dissenting classes, the bankruptcy court may approve the plan as the new governing agreement among the debtor and its creditors and equity interest holders.

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[121] *See* 11 U.S.C. § 506(a)(1).

[122] *See id*. § 1111 (allowing a class of secured claims to elect to have the full amount of the claims treated as secured claims under the plan, subject to certain exceptions). Making such an election (commonly referred to as the "1111(b) election"), however, does not guaranty that a creditor holding a secured claim within the electing class will be paid the full amount of the claim *on a present value basis*; it simply entitles the creditor to payment of the full amount of the claim *over time*, which may equate to less than the full amount of the claim on a present value basis so long as the present value of such payments is equal to at least the value of the claimholder's interest in the property. *See id*. § 1129(b)(2)(A)(i)(II) (plan treatment required in relation to class of secured claims that votes to reject the plan).

[123] *See* H.R. Rep. 95-595, 95th Cong., 1st Sess. 220 (1977).

B. Classification of Claims

One of the requirements of any plan is the classification of claims.[124] Classification serves two important purposes: first, it provides an efficient means for the plan to address numerous claims of similar type by class (instead of providing for the individualized treatment of each particular claim); and second, it serves the purpose of ensuring that all claims within the same class are afforded equal treatment.

C. Voting Rights on the Plan

In many ways, the plan confirmation process is designed to be consensual in nature, whereby the debtor's creditors and equity interest holders are given an opportunity to accept or reject the proposed plan. While it is not necessary for each individual creditor and equity interest holder to accept the plan, confirmation is dependent upon the plan's approval by each of the ***classes*** of claims and equity interests established under the plan; *provided, however*, that under specified conditions, the Bankruptcy Code does allow for non-consensual confirmation where a particular class' rejection of the plan is effectively shown to have been unreasonably withheld.

Thus, the classification of claims is also important to the voting process, as votes are tallied on a class basis. As a predicate matter, only classes of claims that are "impaired" under the plan are entitled to vote. If a class is not impaired, then the class is deemed to have accepted the plan.[125] In very general terms, a class is deemed impaired unless the plan leaves unaltered all of the legal, equitable, and contractual rights to which the holders of the claims within the class are entitled.[126] For those classes of claims that are impaired and thus entitled to vote, the class is deemed to have accepted the plan if the plan is accepted by creditors holding at least two-thirds in amount and more than one-half in number of the allowed claims within such class that are timely voted.[127]

In soliciting votes on the plan, the trustee/DIP must circulate a court-approved disclosure statement containing "adequate information" regarding the case and plan.[128] As explained by Section 1125 of the Bankruptcy Code, "adequate information" is "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan…"[129]

D. Key Confirmation Requirement: The "Best Interest of Creditors" Test

While there are a number of requirements which must be satisfied in order for the bankruptcy court to confirm (approve) the plan, including that the plan is feasible,[130] one of the requirements is worth specific mention as it ensures that the policy/theory underlying Chapter 11 is honored. Known as the "best interest of creditors" test, Section 1129(a)(7) of the Bankruptcy Code requires that each holder of a claim within an impaired class under the plan (a) has voted to accept the plan, or (b) will receive or retain under the plan property of a value, as of the effective date of the plan, that is not less than the amount that such

[124] *See* 11 U.S.C. § 1123(a)(1); *see also id*. § 1122 (regulating the classification of claims).

[125] *See id.* § 1126(f).

[126] *See id.* § 1124.

[127] *See id.* § 1126(c).

[128] *See id.* § 1125.

[129] *See id*. § 1125(a)(1).

[130] *See id.* § 1129(a)(11).

holder would receive or retain on account such claim if the debtor were liquidated under Chapter 7 of the Bankruptcy Code.[131]

Avoidance Exposure in Relation to Unperfected or Untimely Perfected Interests

Finally, following is a brief overview of certain avoidance powers that may come into play in the event that an interest in real property has not been perfected as of the time of a bankruptcy filing, or is untimely perfected either shortly before or after the bankruptcy filing. In this regard, critical to every real estate closing or financing is the timely filing of each of the documents necessary to perfect the interest transferred – whether it be a deed, deed of trust, financing statement, or otherwise. The failure to timely file such instruments can lead to disastrous results in a bankruptcy under at least three possible different scenarios.

➢ ***Avoidance of Unperfected Interests***. First, assume the requisite instrument for perfection was not filed by the time of the bankruptcy. In this situation, the transfer may be subject to avoidance under Section 544 of the Code, commonly referred to as the "strong-arm" power. Pursuant to Section 544, the trustee/DIP has the rights and powers of (or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by) the following types of parties whether or not such a party exists in reality:

(a) a judicial lien creditor having a lien on all property on which a creditor to a simple contract could obtain a judicial lien;[132]

(b) a creditor who has obtained execution against the debtor that is returned unsatisfied;[133] and

(c) a bona fide purchaser of real property (other than fixtures) from the debtor, against whom applicable law permits such transfer to be perfected, who has perfected the transfer of the real property.[134]

Significantly, such rights and powers exist irrespective of whether the trustee/DIP or any creditors of the debtor had actual knowledge of the unrecorded instrument.[135] Using the strong-arm powers, trustees/DIPs have avoided the following types of transfers:

- Fee interests under unrecorded quitclaim and warranty deeds.[136]
- Equitable liens that are not recorded in any manner.[137]
- Mortgages and deed of trust liens that are not recorded.[138]
- Assignment of rents where assignment instrument not properly recorded.[139]

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[131] *See id.* § 1129(a)(7).

[132] *See id.* § 544(a)(1).

[133] *See id*. § 544(a)(2).

[134] *See id*. § 544(a)(3).

[135] *See id*. § 544(a) (specifying that that the rights/powers exist "without regard to any knowledge of the trustee or of any creditor").

[136] *See, e.g., Cox v. Griffin (In re Griffin)*, 319 B.R. 609 (B.A.P. 8th Cir. 2005), *aff'd*, 178 Fed. Appx. 595 (8th Cir. 2006); *Wahlman v. Tardif (In re Kravec)*, 310 B.R. 655 (Bankr. M.D. Fla. 2004).

[137] *See, e.g., Gaffney v. United States Dep't of Transp. (In re Premier Airways, Inc.)*, 303 B.R. 295 (Bankr. W.D.N.Y. 2003).

[138] *See, e.g., Hearn v. Bank of New York (In re Hearn)*, 337 B.R. 603 (Bankr. E.D. Mich. 2006); *Weisbart v. Sanger Bank (In re Tilton)*, 297 B.R. 478 (Bankr. E.D. Tex. 2003).

[139] *See, e.g., In re Wheaton Oaks Office Partners Ltd. Partnership*, 27 F.3d 1234 (7th Cir. 1994).

➢ ***Avoidance of Interests Untimely Perfected Shortly Before the Bankruptcy Filing***. Next, assume the requisite instrument for perfection was not filed at the time of the closing 2 years ago, but instead was filed 30 days before the bankruptcy filing. In this instance, Section 547 of the Code (the "preference" provision) may come into play. Section 547 provides that the trustee/DIP may avoid any transfer of an interest of the debtor in property which (a) was made within 90 days (or within 1 year if to an insider) of the bankruptcy filing, (b) was made while the debtor was insolvent, (c) was made to or for the benefit of a creditor, for or on account of an antecedent debt, and (d) enabled the creditor to receive more than what the creditor would receive on account of the debt in a Chapter 7 liquidation case if the transfer were unwound.[140] For purposes of Section 547, "transfer" is defined broadly and includes the creation of a lien, the retention of title as a security interest, a foreclosure, and "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, disposing of property or an interest in property."[141] Using the preference avoidance powers, trustees/DIPs have avoided the following types of transfers:

- Fee interests under untimely recorded quitclaim deeds.[142]
- Interest in tenancy in common under untimely recorded deed.[143]
- Charge against real estate pursuant to lis pendens.[144]
- Mortgages and deed of trust liens granted under untimely filed mortgages and deeds of trust.[145]

➢ ***Avoidance of Interests Untimely Perfected After the Bankruptcy Filing***. Finally, assume that the requisite instrument for perfection was not filed until after the bankruptcy filing (without court approval). Here, Section 549 of the Code may be applicable. Pursuant to Section 549, a trustee may avoid a post-petition transfer of property of the estate that is not authorized by the Code or by court order (with very few exceptions).[146]

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[140] 11 U.S.C. § 547(b).

[141] *Id.* § 101(54).

[142] *See, e.g., Grandy v. Sanders (In re Smith)*, 336 B.R. 402 (Bankr. S.D. Ill. 2006); *Rice v. First Arkansas Valley Bank (In re May)*, 310 B.R. 405 (Bankr. E.D. Ark. 2004).

[143] *See, e.g., Wallach v. Korniczky (In re Korniczky)*, 308 B.R. 153 (Bankr. W.D.N.Y. 2004).

[144] *See, e.g., Rice v. First Arkansas Valley Bank (In re May)*, 310 B.R. 405 (Bankr. E.D. Ark. 2004).

[145] *See, e.g., Superior Bank, FSB v. Boyd (In re Lewis)*, 398 F.3d 735 (6th Cir. 2005); *Anstine v. Centex Home Equity Co., LLC (In re Pepper)*, 339 B.R. 756 (B.A.P. 10th Cir. 2006).

[146] 11 U.S.C. § 549(a). *See, e.g., Grandy v. Sanders (In re Smith)*, 336 B.R. 402 (Bankr. S.D. Ill. 2006) (transfer of property effectuated by recordation of quitclaim deed after bankruptcy case filed avoidable by trustee).

GLOSSARY OF TYPICAL TERMS

Bankruptcy Lingo	Meaning
341 Meeting	The initial meeting of creditors required pursuant to Section 341 of the Code. The 341 meeting is normally conducted at the U.S. Trustee's Office, where the debtor (or representative of the debtor) is placed under oath and asked certain basic questions regarding the bankruptcy filing, the debtor's schedules of assets and liabilities, and the debtor's statement of financial affairs, by a representative of the U.S. Trustee's Office. Creditors are invited to attend and also have the right to ask questions (generally limited to overall case issues, as opposed to creditor-specific issues). If relevant, an election of a substitute trustee will also be taken up at the meeting.
341 Notice	The notice sent to creditors shortly after the bankruptcy filing. Importantly, in addition to specifying the date/time/place of the 341 meeting, it also specifies the deadline for the filing of proofs of claim in the case.
2004 Exam	An examination (deposition) conducted pursuant to Bankruptcy Rule 2004. Generally, it is a means to formally obtain information relating to administration of the estate/case, but is generally not a mechanism to fish for information relating to pending litigation.
Adequate Protection	The protection provided/required in relation to a non-debtor party's interest in property of the estate (*e.g.*, lien, reversionary interest in realty, etc.) to ensure that the value of such interest is protected during the course of the bankruptcy case.
Adversary Proceeding	An adversary proceeding is a contested proceeding related to the bankruptcy case that is separately docketed and proceeds in a manner similar to a federal court lawsuit.
Automatic Stay	The stay automatically imposed pursuant to Section 362 of the Code immediately upon the bankruptcy filing, which precludes the taking of most actions against the debtor and property of the estate unless and until the stay is lifted or terminates. Further discussion regarding the automatic stay and exceptions thereto are set out below.
Avoidance Action Claim	A cause of action provided under the Bankruptcy Code for the avoidance and recovery of certain types of transfers made by the debtor pre-petition.
Bar Date	The deadline for the filing of proofs of claim in the case.
Class	In a Chapter 11 case, the grouping into which claims of a particular nature are placed for purposes of voting and treatment under a plan of reorganization.
Committee	The Official Committee of Unsecured Creditors appointed in a Chapter 11 case by the U.S. Trustee's Office. The Committee is charged with the responsibility of representing the common interests of all unsecured creditors in the case.
Confirmation	In a Chapter 11 case, the Court's approval of the proposed plan of reorganization under the provisions of Section 1129 of the Code.
Cramdown	In a Chapter 11 case, the pursuit of confirmation of a plan when the plan has been rejected by a class of creditors or equity interests.
CRO	Chief Restructuring Officer (often a member of a turnaround firm specially engaged by the debtor in a large Chapter 11 case).
Debtor in Possession or DIP	Short for debtor in possession. In a Chapter 11 case, the debtor (as the debtor in possession, or DIP for short) remains in control and possession of estate assets, continues to have the authority to operate the business, and obtains most of the rights and powers of a trustee under the Code.
Estate	The bankruptcy estate, consisting of all of the debtor's legal and equitable interests in property pursuant to Section 541 of the Code.
Exclusivity	In a Chapter 11 case, the initial period of time during which only the debtor has the right to file a proposed plan. Once exclusivity expires, any party in interest may file a proposed plan.

Bankruptcy Lingo	Meaning
Executory Contract	As most commonly defined by courts, a contract under which each of the parties continues to have material unfulfilled obligations, such that the failure of one of the parties to perform will excuse the other party's obligation to perform (*i.e.* would constitute a material breach).
Main Case	A term sometimes used to refer to the bankruptcy case so as to distinguish it from a pending adversary proceeding.
Order for Relief	The bankruptcy court order adjudicating the debtor to be a bankrupt subject to the Bankruptcy Code's provisions. In all voluntarily-initiated bankruptcy cases, the debtor's filing of the bankruptcy petition commencing the case constitutes an order for relief.
Petition Date	The date of the bankruptcy filing.
POC	Short for proof of claim, the claim form used by creditors to assert a claim in the bankruptcy case.
Post-Petition	Time period following the date of the bankruptcy filing.
Preference Claim	A bankruptcy-specific type of avoidance claim that may, subject to certain defenses, enable the avoidance and recovery of a payment or other transfer made by the debtor to a creditor within 90 days (or within a year for insiders of the debtor) of the petition date if the payment/transfer was on account of an antecedent debt, the debtor was insolvent, and the creditor recovered more through the payment/transfer than what the creditor would have received under a Chapter 7 liquidation case if the payment/transfer had not been made.
Pre-Petition	Time period preceding the date of the bankruptcy filing.
Schedules	The schedule of assets and liabilities which a debtor is required to file shortly after the bankruptcy filing.
Single Asset Real Estate Case	A case in which the debtor's primary asset is "single asset real estate," meaning real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of the debtor (who is not a family farmer) and on which no substantial business is being conducted by the debtor other than the business of operating the real property and activities incidental thereto.
SOFA	Short for the statement of financial affairs which a debtor is required to file shortly after the bankruptcy filing.
Trustee	The individual appointed to administer the bankruptcy estate. In Chapter 7, 12 and 13 cases, a trustee is automatically appointed. In Chapter 11 cases, a trustee is not automatically appointed (see DIP description above), but may be appointed for cause under Section 1104 of the Code.