

Bankruptcy, a Landlord's Perspective
Part 1: First Day Considerations
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In recent years, landlords have found themselves in an unfamiliar territory, bankruptcy court. Prior to a tenant filing bankruptcy, a landlord must maximize its contractual rights to better protect itself in the often debtor-friendly bankruptcy arena. Furthermore, a landlord must also be aware of how its contractual rights will be affected by the Bankruptcy Code and the practical business considerations it will be faced with when dealing with its tenant/debtor.

This introduction will provide a summary of the Bankruptcy Code sections that affect all leases the instant the debtor files its voluntary petition, regardless of whether the debtor ultimately assumes, rejects or assigns the lease. Subsequent parts will provide a discussion of a landlord's claim in the event of the rejection of the lease and the landlord's rights when a debtor chooses to assume or assign the lease.

The automatic stay is in effect the instant the debtor files bankruptcy. 11 U.S.C. §362. Thereafter, a landlord cannot terminate the lease, require the debtor to unpaid pre-petition rent, seize property of the debtor such as its security deposit, file suit against the debtor or continue any litigation which was pending pre-petition. If the lease expired pre-petition, then a landlord may act to retake possession of the premises. 11 U.S.C. §362(b)(10). A lease provision that automatically terminates the lease upon the tenant's filing of bankruptcy is unenforceable. 11 U.S.C. §365(e).

Within sixty days of filing bankruptcy, a debtor must assume, reject or assign the lease, 11 U.S.C. §365(4), unless the debtor obtains an order granting an extension of time to do so. During the time the lease is in "limbo", the debtor must continue to pay rent and expenses that would be considered "additional rent". 11 U.S.C. §365(d)(3). Also, while the lease is in "limbo" and upon notification of the debtor's decision as to the status of the lease, the ball then falls into the landlord's court to take action. The landlord's rights, obligations and alternatives at this junction will be discussed in upcoming parts of this article.

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