



# Tenant Bankruptcy: *What Landlords and Asset Managers Need to Know*

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March 4, 2026

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# Agenda

## Introduction

## Bankruptcy Basics

- Property of the Bankruptcy Estate
- Executory Contracts
- Automatic Stay

## Treatment of Leases in Bankruptcy

- Assumption (& Assignment) or Rejection
- Deadlines to Assume or Reject Under Section 365 of the Code

## Landlord's Claim in its Tenant's Bankruptcy Case

- Calculation of the Landlord Claim
- Subject to 502(b)(6) Limitation
- Creditor Considerations if the Tenant's Lease is Guaranteed by a Third-Party not in Bankruptcy

## Questions

# Bankruptcy Basics

## Property of the Bankruptcy Estate

- Property of the Estate is defined by Section 541 of the Bankruptcy code.
- When a bankruptcy petition is filed (and the bankruptcy is commenced), an “estate” is immediately formed as of that date.
- All of the Debtor’s property, both tangible and intangible, as of the filing of the bankruptcy petition is property of the bankruptcy estate.
- Leases as of the filing of the bankruptcy petition are property of the bankruptcy estate.

## Executory Contracts: What are They and Why do They Matter?

- The Countryman Test defines an [executory contract](#) in bankruptcy as one where both parties have material, unperformed obligations, such that the failure of either to complete performance would constitute a material breach, excusing the other's performance. **Note** that performance must be due by both parties to the contract to pass this test.
- The status of the contract and whether it is an executory contract is evaluated as of the date the bankruptcy petition is filed by the Tenant.
- It is used to determine if a contract can be assumed or rejected under §365.
- Leases that are in existence as of the bankruptcy filing are executory contracts. So, they can be assumed or rejected in the bankruptcy case.

# Automatic Stay

## The Automatic Stay

- What is the stay?
  - It is an injunction that prevents creditors from taking actions to collect against the Debtor.
  - It arises immediately or “automatically” by operation of law when the bankruptcy petition is filed.
- The stay is broad – it covers almost all actions by a creditor against the Debtor/Property of the Estate.
- Since non-expired leases as of the date of the filing of the bankruptcy case are Property of the Estate, actions by Landlords against Tenant Debtors under the Leases are stayed.

## Why have an Automatic Stay?

- The reason for the stay is to give Debtors space and some breathing room to assess their financial situation, assemble their assets and come up with a reorganization or liquidation plan.

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- After the stay arises and is in place, a Landlord cannot take any action against its Tenant under its Lease or against certain security (if that security is considered property of the estate).
- So, what is a Landlord to do, when its Tenant is in default under the Lease and files Bankruptcy?

# Treatment of Leases in Bankruptcy § 365

## Assumption (& Assignment)

- Cure or adequate assurance that it will be promptly cured
- Adequate assurance of future performance
- Deadlines to Assume or Reject Under Section 365 of the Code
- Chapter 7
  - 60 days – may be extended upon motion
- Chapter 11
  - Earlier of:
    - 120 days + 90 days upon motion
    - Further extensions require Landlord approval

# Treatment of Leases in Bankruptcy § 365

## Administrative Expense Claim

- Administrative Expense Claims under §503(b)(1) – actual and necessary expenses of preserving estate
- Post-petition rent
  - Majority – Post-petition, prerejection lease obligations receive administrative priority - §365(d)(3)
  - Minority - §365(d)(3) requires performance, but landlord must prove estate actually benefited from use of property under §503(b)(1)
- Assumption Cure Period
  - Subchapter V
  - Chapter 11

## Rejection

- Rejection ≠ Termination
- Relief from Stay Motion to Repossess Property

# Landlord's Claim in its Tenant's Bankruptcy Case

## Calculation of the Landlord Claim After Rejection

- Subject to Section 502(b)(6) Limitation
    - Unpaid pre-petition Rent Owed +
    - Greater of:
      1. One Year Rent, or
      2. 15% of the remaining lease term (not to exceed three years)
- = Unsecured Claim

## Creditor Considerations if the Tenant's Lease is Guaranteed by a Third-Party not in Bankruptcy

# Upcoming Webinars

## Workouts Without Bankruptcy: Legal Tools for Real Estate Recovery

- Tuesday, March 10 *New Date*

## Landlord Bankruptcy: Safeguarding Tenant Interests and Lease Rights

- Wednesday, March 11

Recordings of all webinars in the series can be found on  
[lathrogpm.com](https://www.lathrogpm.com)



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