



TEXAS A&M UNIVERSITY

School of Law

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LEGAL ISSUES IN THE AGE OF THE CORONAVIRUS

"Navigating the Waters of Business Bankruptcy in the Wake of the Coronavirus Pandemic"

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Presenters:

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- Katherine Hopkins, Partner, Kelly Hart
- Machir Stull, Partner, Cantey Hanger
- Moderator: Neil Sobol, Professor of Law, Texas A&M University School of Law

While the panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.

TRANSCRIPT:

- Howdy. Good afternoon to everyone. My name is Neil Sobol. And I am a professor at Texas A&M University School of Law. It is my pleasure to welcome all of you to this webinar on navigating the waters of business bankruptcy in the wake of the coronavirus pandemic.

Our previous four webinars have focused on the CARES Act, the Coronavirus Aid Relief and Economic Security Act. We have looked at various practical implications flowing from the CARES Act and the government's response to the current pandemic. For example, in the first webinar, we looked at individual incentives under the CARES Act.

The second webinar turned to small business incentives. The third webinar focused on health care implications under the CARES Act. And our fourth webinar looked at the implications of the Act with regard to housing, commercial real estate and bankruptcy.

All of these recorded webinars, as well as the transcripts and presenter slides from them are available online at [TAMULawAnswers.info](https://tamulawanswers.info). That's [TAMULawAnswers.info](https://tamulawanswers.info). Similarly, the

video transcript and slides from today's webinar will also be posted within a day or so at that same site. So you'll be able to get all the information on our website.

For today's webinar, we branch out from the CARES Act. And we will address the impact of the pandemic on business bankruptcies. Before I introduce our three experts, I want to start with a disclaimer.

Our panelists are all attorneys. And they will be discussing the law in general. However, nothing in this webinar should be considered as legal advice. You should consult your own legal advisor to address any of your own unique circumstances and receive legal advice.

And now let me just introduce our panelists. And then we'll talk a little about how the webinar will be organized. Our first presenter is Professor Wayne Barnes from Texas A&M Law School. Wayne teaches in the areas of bankruptcy, consumer law, and contracts.

Katherine Hopkins will be our next presenter. Katherine is a partner at Kelly Hart. And she focuses her practice on bankruptcy and business reorganizations. Our final presenter is Machir Stull, a partner in Cantey Hanger, who focuses on corporate restructuring, distressed businesses, and creditors' rights.

Now in terms of organization, we'll start with allowing each of the panelists time to give a short presentation, about eight minutes each. Then we will move into questions for the panelists for them to respond to and discuss as a group. This may include questions that I had, as well as questions that you have submitted.

You've submitted some questions with registration, but you will also be able to submit questions during the presentations by clicking on the Q&A tab on the bottom of your screen. I will refer to the questions to the panelists to discuss. We will finish right at 1 o'clock. That's my main goal is to make sure that we stay on time.

So again, if you have questions, please feel free to submit them online. And we will get them forwarded to our panelists. And to submit your questions, use the Q&A tab at the bottom of your screen. All right, let's get started. And Professor Barnes is up first. Professor Barnes.

- Thanks so much, Professor Sobol. It's good to see everyone out there. And it's so great to have my fellow co-panelists Katherine and Machir from Kelly Hart and Cantey Hanger. I'm just thrilled that they're here with us to discuss bankruptcy issues in this current pandemic climate.

So I'm going to start by just giving a broad overview of some of the benefits of filing bankruptcy. I know that we have a wide different number of audience members. Some of this-- you already know all this stuff. You're bankruptcy practitioners, but I know there's business owners as well who might just want a first glimpse of what types of tools there are available to them in bankruptcy.

So I'm just going to give the broadest of overviews of some of the basic benefits of bankruptcy for businesses and especially in the current climate. And then my co-panelists will follow-up

with some more specialized topics. So let me share this PowerPoint with you. And hopefully, you can now see that on screen.

I'm going to talk, again, as I say about an overview of bankruptcy relief and tools available for bankruptcy debtors. That sounds a little fancier than it is. I really just want to give you some major things about bankruptcy. And before I even start talking about the benefits, I want to just talk really basically about what are the types of bankruptcy cases.

So you may have some representatives of businesses out there that are corporations. You may be just a mom and pop shop. You may just be a sole proprietor that you don't have a corporation or business organization at all. And so what type of debtor you would be depends a little bit on what kind of bankruptcy you can file.

But real broadly, we can talk about three types of bankruptcy cases. First, there's Chapter 7, straight liquidation. That's what it sounds like. You're kind of liquidating your assets.

And for a business, that generally means you're kind of going away, liquidating. Obviously, this is not necessarily what many of you may hope to accomplish if you want to keep your business intact as a going concern, but it is, of course, an option if things get too dire and it's time to go back to the drawing board. So Chapter 7 is where you basically just liquidate all-- I say non-exempt assets. Of course, the big corporations and companies don't have exemptions. That's only for individuals that file bankruptcy, but if you are an individual, you can exempt certain things, your homestead, certain cars, certain personal property.

Corporations -- there are no exemptions. Everything is subject to liquidation. If you're an individual wanting to file Chapter 7, you do face the potential application of what's known as the means test. Again, you don't worry about that if you're a corporation. But if you're an individual that is a human being, no-- no entity involved, there's a means test that decides whether or not you're allowed to file Chapter 7 versus filing Chapter 13 instead.

I'm not going to get into depth right now. But basically, short-- short story is if you have enough means, enough regular income to pay over the course of five years, to pay some amount on your unsecured debts, you may be required to file Chapter 13 instead of Chapter 7. But if you have not enough means, then they think, OK, fine, you can just file under Chapter 7. And I'll leave that to you consulting counsel if you want to explore that option further.

For individuals, the other option usually is Chapter 13. And as opposed to Chapter 7 being just liquidating and being sort of a financial endpoint, Chapter 13 is an individual reorganization or sometimes called individual repayment plan. So this is where you keep your assets. You don't liquidate. You don't give up your assets, but you do commit future income.

So it's usually three to five years. And again, this presupposes you have regular income, like a salary or business income if you're the sole proprietor owner of a business. And you just commit that to your creditors over the course of the usually five year period of the plan. Regular income is required. And by the way, this is only for individuals that is human beings, not entities, like corporations or LLCs.

The one thing to note at the last point on Chapter 13 is there is debt limits. And what that means is if you owe more than these amounts of debt, then you're not eligible to file Chapter 13. You got to file either 7 or, as we'll talk about, Chapter 11.

And you can see the debt limits there, unsecured debts, if you owe more than \$419,000, of course, unsecured meaning there is no assets that collateralize it, no one can come-- your visa card or vendor accounts or unsecured revolving loans. Secured loans, secured by real estate, personal property, cars, equipment, accounts receivable-- if you have more than \$1.2 million, then, again, you are too big a player as they say for Chapter 13. And you would have to go to the final option, which is Chapter 11.

So Chapter 11 is normally thought of as the business reorganization Chapter. And it is for most corporations, that is anyone probably that's watching today. A normal Chapter 11 case is fairly expensive and complex.

There's a lot of different players. There's a creditors' committee. There are professionals that have to be engaged and approved by the bankruptcy court.

Different people can file, competing plans of reorganization. And so it's fairly expensive. Of course, this is what your large corporations tend to do, your American airlines or J.Crews of the world as we just heard. The good thing about it is it's eminently flexible.

There's all kinds of different plans that can be proposed. And talking about too much of the details is beyond the scope of what I want to do right now, but suffice it to say, you can sell off some things to do new investments, tweak your business model, all kinds of different options. The sky's really the limit as far as creativity.

There is a very new small business debtor reorganization Chapter that is much, much more streamlined and simpler. And I believe my co-panelist Katherine is going to talk about that. So I'm going to leave that sort of spoiler or tease for her presentation.

But to go to my really, honestly, last slide, I want to-- and I'm sorry, I didn't even animate this. So I'm violating all the rules of PowerPoint, but if you'll just follow along with me, I want to talk about if you file bankruptcy, here is some of the tools and things that can really benefit you. So you know broadly speaking, probably, that filing bankruptcy gives you some kind of relief from the pressures of your current business pressures or the market climate or the pressures affected by the COVID pandemic, but here is a little more specifics on what that looks like.

So the first thing to note is you get the benefit of the automatic stay. So the automatic stay is it's what it means. It tends in effect automatically. As soon as bankruptcy is filed-- and what it does is it stops creditors and other parties from taking any action, collection actions, or contract actions against you. It's sort of a freeze.

They can come and ask the bankruptcy court if they can do stuff, like repossess things or take an action, terminate a contract, things like that. But if they haven't done it, you sort of call time out

when you file bankruptcy. And it gives you some breathing room, while you figure out your plan. And it takes them a little while to get around this.

So it's just very much a way to call time out, very, very valuable. And then you can kind of get your ducks in a row and figure out what you want to do. So automatic stay, very valuable

Another thing that sometimes surprises some business owners if they haven't consulted counsel is if you file Chapter 11, you can continue your ordinary business operations. American Airlines filed bankruptcy, they kept flying planes that day. And so you can continue your business, your ordinary course of business while you formulate a plan and you get these other benefits of bankruptcy. So it's very valuable.

One thing that can be helpful if you are in need of financing or additional cash for your business, you might think it would be hard to get a bank loan. And it may well be, but surprisingly, because of the bankruptcy codes rules on what's called debtor in possession financing, some lenders may be more willing to lend to you in bankruptcy believe it or not than what they were shortly before outside of bankruptcy, because they get certain perks and privileges when they do so. And again, we can talk about that more in the Q&A, if you like, but it's that it's a benefit. You may get access to capital or rather lending that you didn't have before bankruptcy.

Another thing is the ability to assume or reject contracts or leases. You've got a lease say that's above market and you really want to get out of that store location or you've got another contract, a supplier contract that's for year. And it's really onerous. And you're like I wish I could get out of this. Well, you can. You can reject a contract or lease.

Now they'll get a claim on the bankruptcy. And they only get cents on the dollar on that claim, because of the way bankruptcy distribution works, but that can be a very valuable way to get out from under onerous or difficult contracts or leases. So that's a very, very popular tool in bankruptcy.

If you have secured loans, we can do what's called stripped down of certain business secured loans, that is if you're underwater on them, you owe more money than what the collateral is worth. So you have an office building. And it's worth \$200,000, but your mortgage is \$300,000, you may well be able to sort of strip off that \$100,000 in negative equity, pay them-- you have to pay the \$200,000 in full with interest, but you may be able to get out of paying very little of that remaining underwater portion. And, again, a lot of these things, there are many more details that I can't get into now, but that can be a valuable thing for secured loans.

You can sell various assets, what we call free and clear. So even if there is a security interest or lien on them, the bankruptcy court allows you to sell those to some good faith buyer. And they take it free and clear. And your lender or the lien holder has to just get his realization or it's realization from the proceeds of the sale. So that's a benefit.

If you owe some tax debt for recent years, you can instead of having to pay that right away, you can pay that over time in a Chapter 11 plan. So that can be helpful. The last two things to note-- and I want to turn it over to my next panelist-- is it's a collective remedy.

Outside of bankruptcy, you've got various parties and creators who are suing you in state court or federal court. And you may have 5 or 10 or 15 different things going and balls juggling in the air. Bankruptcy consolidates that all into one form, where everyone has to come to the bankruptcy court. And that, of course, alone procedurally is very valuable and more efficient.

Finally, of course, in many instances, you get, of course, a discharge of various types of pre-bankruptcy plan unsecured debt. So that is certain amounts of in your claims, what have you. If you have a properly filed Chapter 11 plan, you may be able to simply eliminate that debt once the plan payments are finished. This isn't true for a corporation that's simply liquidating under Chapter 7, but it can be true in many other instances.

So I've gone a little long. And we've just scratched the surface, but those are some of the various benefits that are available to you as a business if you file Chapter 11. And those can, of course, help with the pressures that are affected by the current pandemic. So I'll just leave you with the fact that you can always come to our website if you have more questions. I'll take questions in the Q&A, but for now I want to stop this PowerPoint and turn it over to my co-panelists Katherine Hopkins. Katherine.

- Hey, everyone. Thank you all so much for tuning in today. We're happy to explain these issues to you all. I'm going to be speaking about the Small Business Reorganization Act of 2019. And this is going to be a general overview of the Act.

To the extent you have any specific questions, please go ahead and submit it now. Alternatively, you can email me after, and I'm happy to discuss further with you. OK, let me see if I can share my screen. Let's see. Bear with me for a minute.

This is how it goes. Everything's always perfect in practice and not when it's actually time to give the presentation. OK, so, guys, we're going to do it just based on the rough draft of the slides. Sorry, it's not working right now, but it's my first time to do a webinar via Zoom.

So there's all these little kinks. OK, so this Small Business Reorganization Act of 2019, so SBRA was enacted in 2019. And it became effective earlier this year in 2020.

So basically, this Act seeks to strike a balance between Chapter 7 and Chapter 11 bankruptcies for small business debtors. SBRA lowers cost. It also streamlines the plan confirmation process in order to better enable small businesses, individuals, to survive bankruptcy and also retain control of their business operations.

So originally when SBRA was enacted, it proposed a debt threshold of a little over \$2.7 million. So what that means is that an individual or an entity could utilize this provision, SBRA, if the individual entities total debt did not exceed that \$2.7 million threshold. Recently, the Coronavirus Aid Relief and Economic Security Act, otherwise known as the CARES Act that we're all familiar with, it actually increased this debt limit to \$7.5 million.

Please note that this is actually a temporary increase. It will go back to that \$2.7 million number at the end of March in 2021. However, as you can imagine, this even temporary increase will

certainly enable more businesses, more individuals to take advantage of SBRA and its provisions as well as its beneficial aspects.

So let's talk about who can be a small business debtor. So who qualifies under this new provision? So to file under this section, you can be either an entity or an individual. And as I mentioned a minute ago, there is a current debt limit of \$7.5 million.

So that would be cumulative of both your unsecured debt as well as your secured debts. And you also need to be able to show that at least 50% of that pre-petition debt arose from business activities. Something of significance is the fact that publicly held corporations and debtors whose primary activity is owning single asset real estate, those types of entities are not eligible to file under SBRA.

So I mentioned there's a lot of positive and beneficial aspects of SBRA. So let's talk about a few of these. For example, SBRA cases are more affordable. They're also quicker. They're likely more successful.

In other words, they are more likely to reach plan confirmation and be successful than in a typical Chapter 11 case. And lastly, the debtors are really able to maintain control of their operations as well as the case itself. And that's certainly beneficial. Breaking down some of these different benefits.

First of all, SBRA cases are certainly more affordable. For, one, while your typical bankruptcy case may have a Chapter 11 unsecured creditors' committee appointed, this is very rare in a SBRA case. A committee of creditors will not be appointed unless the bankruptcy court determines that cause exists to appoint such a committee.

So because the debtor is going to save its funds-- just so you know in a typical Chapter 11 case, a debtor in the estate, they're obligated to satisfy the committee's professional fees. For example, the committee's attorneys fees are paid by the bankruptcy estate. So in a SBRA case, that would typically not happen. And you're going to-- the debtor is going to be able to preserve all of those funds that would otherwise be paid to creditors' committee professionals.

Also, in a typical Chapter 11 bankruptcy case, the debtor is required to file what's called a disclosure statement. And that kind of lays out, normally in somewhat layman's terms, where the debtor is going, what the intentions are under the plan, and kind of discusses a number of statutory requirements. However, in a SBRA case, the debtor is not required to file a disclosure statement, which will be another cost-saver. And it will also eliminate potentially contested hearings.

In addition, there's no US trustee quarterly fees that have to be paid by the SBRA debtor, which is also a benefit. And lastly, whatever administrative expense claims exists. So for example, the debtors' attorneys' post-petition fees, those are considered administrative expense claims. And those, in a SBRA case, can be paid throughout the life of the help-- excuse me, the plan, rather than in full in cash on the plan's effective date.

Now moving on to why SBRA cases are quicker. They're certainly quicker, as well as more efficient. And a couple of those reasons are the fact, one being that there is a mandatory status conference in front of the bankruptcy court that has to occur within 60 days of the bankruptcy-- excuse me, the bankruptcy filing.

And the debtor is required to file a report within 14 days prior to that status conference. Basically that report will detail what attempt the debtor has made to achieve a consensual plan of reorganization. Also, there is a shorter deadline for filing a Chapter 11 plan in the SBRA context.

So in a typical Chapter 11, the debtor has 120 days from the petition date to file the Chapter 11 plan. The SBRA debtor is required to file a plan within 90 days of the bankruptcy filing. Also, in Chapter 11 SBRA cases, a small business trustee going to be appointed in each case.

This trustee is very beneficial as it will develop and work towards a consensual plan between the parties. They'll also resolve issues with other creditors. Basically, the trustee helps moving the case forward, which is certainly helpful to all of the creditors as well as any other party in interest and the debtor itself.

Lastly, as I mentioned a minute ago, there's typically no creditors' committee appointed. So there's not going to be any prolonged matters relating to committee issues. So SBRA cases are more likely to be successful or in other words, they're more likely to reach confirmation of the proposed plan. And that's for a number of reasons.

For example, in a SBRA case, the absolute priority rule is eliminated. So what that means is that the typical absolute priority rule that applies in Chapter 11 cases no longer applies in a SBRA case. And equity owners are allowed to retain that ownership in the business, even if the plan does not pay unsecured claims in full.

There are other requirements that the small business debtor must show. For example, the small debtor small business debtor must show that the plan does not discriminate unfairly and is fair and equitable with respect to all impaired claims. Also of interest is the fact that the debtor does not need to obtain an acceptance of impaired classes creditors. The court can actually confirm the SBRA plan, even if all [INAUDIBLE] and creditors vote to reject the plan.

And again, as mentioned a moment ago, the purpose of the trustee or one of the purposes of this trustee is to facilitate a consensual plan between the parties. Notably in a SBRA case only the debtor may file a plan. So this is going to eliminate the risk that any lender or any other predators are going to file a competing plan and you're going to have contested hearings and litigation over that. Again, it's something that I continue to mention on a lot of these slides. It's rare that a-- well, we believe it to be rare that a creditors' committee will be appointed. So that's going to result in less objections and less issues at plan confirmation.

So lastly and of significance is the fact that a SBRA debtor is able to retain more control than it would, for example, if a Chapter 11 trustee was appointed. The SBRA debtor will maintain control of the case as well as its operations. For one, the debtor is the only party-- as I mentioned a minute ago, the debtor is the only party that's able to file a plan.

So the debtor gets to determine where it's going with the case, what type of plan it intends to propose, and then effectuate back. Also, as mentioned, equity holders are able to retain equity interest, which is very important I'm sure to all of you small business owners who would like to continue that ownership interest and continue running the company post-bankruptcy. Lastly, the trustee in a small business case is different than Chapter 11 trustee, because this type of trustee, the SBRA trustee, really just serves in this nonpossessory, non-operating role. The debtor is going to be able to continue to manage its affairs, manage its operations, in the context of a SBRA case. So ultimately, in conclusion, by lowering cost, also by simplifying the plan confirmation process, SBRA aims to offer an additional option for small businesses, for individuals wishing to reorganize and wanting to come out of the Chapter 11 process successfully.

- Well, thank you, Katherine. And we'll go to our last speaker now Machir Stull. We have about 32 minutes left. After his presentation, again, we'll turn it to Q&A. So remember to please submit your-- any questions that you have on the Q&A tab. And we'll answer them.

- Great. Thank you, Neil. Good afternoon. My name is Machir Stull. I'm a bankruptcy lawyer at Cantey Hangar in Dallas and Fort Worth.

When we brainstormed about what to talk about today, I thought real estate would be appropriate for a couple of reasons. First, so nearly every bankruptcy has some sort of real estate component, often a lease or a mortgage. And second and even more noteworthy this week is most big bankruptcies are filed with the purpose of shedding unwanted leases.

For example, J. Crew filed this week in Virginia. And in their first day declaration, they noted that the company has over 500 leases nationwide with over 140 different landlords. And so on a monthly basis, J. Crew pays over \$23 million in lease obligations. So one of the first things they're going to do is try to renegotiate all these leases or at least the ones that are valuable to them. And if they can't, they'll simply reject them.

So I think that shows how pretty much in every bankruptcy real estate is going to be a big issue, if not, the biggest issue, regardless of the size or the scope of the restructuring. With that being said, in the recession of 2008 and 2009, not many real estate borrowers filed bankruptcy. By a real estate borrower, I mean, someone that finances say the purchase of an office building or something like that.

And I think the reason for this is probably twofold. First, I think Katherine used the term-- maybe it was Wayne who used the term single asset real estate bankruptcy. It's kind of a term of art. And bankruptcy is defined in section 101 of the bankruptcy code.

And a single asset case is one generally where it's kind of a piece of property. And most of the income of the debtor comes from the real estate like rent. And so if you're a single asset real estate debtor, you have 90 days to either file a plan or start making payments. That's a pretty quick turnaround.

The automatic stay that Wayne talked about earlier isn't quite as valuable when you have 90 days to start making moves. And the second big reason when you might not have seen some bankruptcies back in the last recession out of real estate borrowers is that many loans for real estate have what's called a springing recourse guarantee. And what that means is that these are often things like bad boy carve-outs.

So it's going to be a non-recourse loan, but there will be a carve-out that says if you commit fraud or maybe even file bankruptcy, this non-recourse loan becomes recourse. And so all of a sudden, the principles of the borrower may not want to file bankruptcy if they might be on the hook for this loan. So that being said, time will tell how many real estate borrowers filed this time around, but that doesn't negate the fact that real estate will be a big issue in some form or fashion in most of these cases.

So that being said, I'll briefly touch on four quick topics here in the next few minutes. The first is going to be if a tenant files bankruptcy. The second will be if a landlord files bankruptcy. The third will be what if you're a secured creditor or secured lender. And the last will be what happens to mortgages.

So let's start off with a tenant. If the tenant follows bankruptcy, the first thing I always tell a landlord is watch out for the automatic stay. And so as Wayne said earlier, attempts to collect, collect money or payments or rent need to stop. An overlooked byproduct to the automatic stay is also that leases can't be terminated.

You can't just terminate a lease. The state prevents that, but one-- I think we saw we had a question about this earlier. And one caveat to that is guarantors of that lease can still be pursued.

So a bankruptcy of a borrower doesn't prevent the pursuit of a guarantor. And the guarantor might not have money or assets, but it can create leverage in a bankruptcy. So that's one important thing to remember.

Another frequent issue in some of these cases is what's called ipso facto clauses. If you look closely a lot of these leases, you'll see a clause that says something like, if the tenant files bankruptcy or is insolvent, the lease terminates. That's an ipso facto clause. And under section 365 of the code, those are not enforceable.

So the lease will continue to remain in place, regardless of this term that states otherwise. Another big issue for tenants is, do they have to pay post-petition rent? And the answer is yes under 365(d)(3) of the code, it says that the tenant shall timely perform all obligations of the debtor, arising from an unexpired lease of real property.

So the answer is, yes, they have to pay post-petition rent. Does it always work this way? Not really. Oftentimes, a landlord will have to file a motion for admin expense and seek an immediate payment. So you got to-- there's some haggling and hassle that goes along with that, but under the strict provisions of the code, post-provision rent should be paid.

Now that that brings up kind of a big issue of stub rent. Do you have to pay stub rent in bankruptcy? And in the Imperial Beverage case here in Dallas about a decade ago, Judge Houser defined stub rent as the rent that is owed by a debtor to the landlord from the petition date until the first day of the following month. So for example, Neiman Marcus filed bankruptcy today. So the stub rent would be today through May 31.

As I understand it, I dealt with this issue about a year ago in another case. And as I recall, I think there's kind of a split of authority on what the landlord was entitled to and the timing of such payments. So it's not always. That issue, I think, is a little grayer than in black and white. And it might vary based upon the circuit in which the case is filed, but going back to the big issue, the main issue is assumption or rejection of leases. generally.

Generally, and in Chapter 11, a tenant has about 210 days with all the extensions to assume or reject a lease. If the lease is rejected, you'll have an unsecured claim for damages, subject to some statutory caps built in the bankruptcy code. And if they're assumed, then that's great.

Typically, the defaults, the bad payments have to be cured, but that's also not always black and white, because what'll happen-- I'm sure, J. Crew is doing this right now, they may owe some landlords a million dollars in back rent. And they'll say I will pay you \$200,000 if you agree to let us assume this. And so the landlords are saying, well, assumption is great, because I get payments down the road, but I lose this back rent. Is worth it? Maybe, maybe it is.

And one of the overlooked issues in assumption or rejection is what's called the kiwi defense. If the lease is assumed, you typically can't be sued for preference down the road. So that's always another reason why some landlords may want to work with a tenant and have a lease assumed.

So I promise I'll breeze through the rest of this stuff real fast. If a landlord files bankruptcy, I haven't dealt with this as much. It's a little less frequent. Typically, they can still assume or reject leases, but a tenant is entitled to remain in possession and then offset damages from the rejection against rent. So the tenant's not necessarily left high and dry in that scenario.

Let's pivotal real fast to a secure lender in bankruptcy. The first thing I always, always tell clients and everyone always typically does is you request what's called adequate protection. A secure lender, a secured creditor has a right to adequate protection if the debtor proposes to use your collateral in the bankruptcy.

And so adequate protection can be periodic payments. It can be maintenance payments of insurance on a property. It can be all sorts of things. You can get as creative as you want, but always-- it's always best to request adequate protection. And the big kind of fulcrum issue in a secure lender case-- or if you're secured lender in a bankruptcy case is what's the collateral worth?

If you're really over-secured, meaning that the collateral is worth more than the debt, you may just sit tight and do nothing about the case. You're entitled to interest in attorney's fees under 506(b). So you might just sit tight with the debtor, figure it out.

On the flip side, if you're under-secured or right now if the value of the collateral is decreasing rapidly, you might be more active in the case. So take, for example, a hotel in bankruptcy. Right now, these hotels are losing value by the day as rooms aren't rented out.

So you might come here and say, try to look beyond the automatic stay and try to really exert your influence in the case, because you can't be adequately protected if the value is plummeting at the hotel. So that's kind of the big issue as a secured lender in bankruptcy. Typically, a debtor will either sell the collateral. They'll rework the note, or they'll give you what's called the indubitably equivalent. And that basically means they'll throw you the keys. I hope I pronounced that right.

Last thing-- and I'm almost done here, Neil, is with mortgages. And I don't deal in mortgages a ton in bankruptcy. The homestead exemption in Texas is very strong.

It's an unlimited homestead, which is limited-- I guess it's not unlimited homestead value-- limited by acreage for based on in rural or urban homestead. But in a Chapter 13 case, I guess you'll pay arrears in the plan, but that doesn't mean you get to keep the home and not the mortgage. It doesn't quite work that way. You still got to pay the mortgage, but you get to keep your home. So I think that's all I have, and I'll turn it back to Wayne, you, or Neil.

- Great. Thank you very much. And thank you to all the panelists. We'll go to the Q&A section now. And again, I want to remind you that if you have questions, please feel free to use the Q&A tab at the bottom of your screen to submit those to us.

In the meantime, I'll go over some of the questions that we have already received. In this first one we received kind of a series of questions about this bankruptcy practice issues in general. And I'll open this up to all three panelists and I'll kind of put them all together.

We've got a question about, is this now a big time to help people with Chapter 7, 11 bankruptcies? What will bankruptcy practice look like in the next year? And what does bankruptcy practice now look like on a day-to-day basis? So I'll open it up, or I guess we'll start with Wayne. We can go in the same order that we went with our speakers.

- Sure. The least qualified on the panel to answer that. Well, I'm not sure what it looks like right now. I suspect, in general, just like Dillard's is slow. I'm not sure how busy the courts are. Katherine and Machir can speak to that in a bit.

I'm certain that we're going to have-- I think everyone feels like it's quite obvious that we're going to have a huge wave of bankruptcies coming. It's kind of a-- people are going through the fire right now. And then when the smoke clears, the bankruptcies are going to start coming in a month or two or three months.

Some may be starting right away, but it will sort of be a lagging indicator, but I think everyone believes that we're going to have a fairly significant amount of bankruptcies filed in the coming months as a result of this pandemic and as the squeeze continues to tighten on a lot of these small businesses and large businesses alike. But there's some discussion about, can the bankruptcy

court system handle the coming strain of that? And Machir and Katherine might be able to speak to that.

But I think it's always a good time if you need bankruptcy relief to file. There's not necessarily any-- well, there may be reasons to wait, but in theory, it's always a good time if you're in need of the relief. And I think there's no question that filings are going to increase in the not too distant future.

- Yeah, I certainly agree with that, Wayne. Right now, just to speak to what my practice is like right now, it's fairly steady. I've kind of referred to it as the calm before the storm.

I feel like on a day-to-day basis we are assisting clients evaluate, of course, bankruptcy options, but as well as protecting themselves from a potential landlord or tenant filing or an oil and gas operator filing-- how do you protect those mineral interests, all of that. So it's this prep time period, trying to cover all our bases and make sure the clients that need protection have that, getting them situated for the upcoming storm. I certainly think that the next year, definitely probably in the next couple of years, we'll be very busy.

As Machir stated a minute ago, Neiman's filed today, J. Crew filed the other day. Pier 1 still is kind of in limbo in their case.

I definitely think retailers are going to-- those types of bankruptcies are going to increase. It's probably going to be a few months or so before we start seeing a lot of the energy sector bankruptcies, just from my viewpoint and from my experience and watching the markets, but we'll see, because that's kind of started as well. And then with respect individuals, that's also getting crazy. I mean, at the end of the day, this pandemic has not spared anyone.

So yeah, I think that if you're interested in filing or if this would be something that would be helpful to you, certainly reach out to an attorney to assist you. If you are an attorney and are interested in bankruptcy, I mean, I think that there's going to be a lot of work and a lot of-- you'll have the ability to receive a lot of experience. And bankruptcy is pretty cool.

As a practitioner, it's really neat to represent a debtor or a creditor. A lot of different types of law are involved. So you're able to get exposed to a vast amount of the practice of law, in general.

- Yeah, I think one thing I would add is I think Katherine's right on. And I think a lot of the filings we've seen so far probably were months, if not years in the making. And so one of the reasons for potential lag in filings is so often a debtor like a J. Crew or a Neiman's, they don't file-- they don't freefall into bankruptcy. They don't just write down their petition and file it and figure it out later.

They're going to negotiate with their bondholders and their creditors and their lenders. And they're going to try to at least have everyone on the same page, close to the same page before they file. And that takes that takes months, if not years. And so the COVID pandemic may have spread that out, but my experience-- and I could be wrong-- but I think the COVID thing kind of came so fast that it's hard for people to turn on a file so quickly, especially now people are being

pretty forgiving in terms of loan payments and no payments and things like that. And you're sort of a culture of understanding right now, but that's going to not last forever.

So I think you'll see a lot of filing here in the next few months, once the parties don't freefall into bankruptcy. And another point, Katherine mentioned oil gas piece, and I've just read in the news that a lot of these banks, where lenders took such big haircuts kind of in the last crash in '16 and '17, that they're now trying to form holding companies to operate these assets. And that doesn't happen overnight.

They have all sorts of regulatory issues to work out and just behind the scenes stuff. And so maybe on the oil and gas side, you have a lot of folks saying, hold off on filing while we get ready. And so you might-- maybe it's not meet the next quarter, when that hits, but I'm not an oil and gas price expert. So I could be wrong. Maybe prices bounce back next week and [INAUDIBLE].

And in terms of just kind of the day-to-day, kind of like Katherine what I'm seeing is I don't have a lot of massive just 15 hour projects I'm working on. Instead, it's question here, a question there, a call here. Everyone's kind of bracing. And the dam is starting to break, so to speak, in terms of filings, but hadn't quite happened yet. When that will happen, anyone's guess, but I'm kind of spread around to a lot of different issues, a lot of different clients just helping folks prep here and there.

- Just to add one thing-- that was all terrific. I'm so glad you guys are on the panel to bring the real life practice experience, but one thing that Katherine mentioned, I think Machir touched on it too, we have different audience members. I know we have bankruptcy lawyers. We have non-bankruptcy lawyers who might have to lend a hand.

We have business owners, but we also have I know several law students watching. And I just want to reiterate and emphasize something that Katherine said, that if you're kind of kicking around the idea of what to do and what kind of practice, this is a fantastic time to focus on thinking about a bankruptcy practice, because-- I mean, I always say it's a good area and for the reasons they've mentioned.

It's interesting. You do a lot of different things. You're in court a lot, but not in this huge adversarial way.

You're negotiating all the time. You're doing lots of different law, lots of different business issues. And so I would just encourage those law students watching to really think seriously about a bankruptcy practice, because it's probably about as good a time as ever to think about that right now.

- I would echo what Wayne says too. Bankruptcy does offer lots of alternatives and lots of options for bankruptcy practice, options for students as well as people in other practices that may see the ability now to switch over and develop more expertise in bankruptcy practice. A lot of your clients that were-- had business issues may now have bankruptcy reorganization issues. So it's a good thing to be looking at.

Let me continue with some of these questions that I have here. One that kind of relates to the idea that J.Crew and Neiman Marcus has filed, and we've seen these big filings, are those signaling a big push that's going to affect the small businesses to file more? And if so, what's your estimate, if you can, on when that wave is going to come through? And I'll start with Wayne.

- I'll let the practitioners on the ground take a crack at that one.

I'll jump in real quick. And I'll turn it over to Katherine, because my answer might be wrong. So correct me if is. You know, I used the oil & gas industry as an analogy. I think Haynes and Boone had a big oil & gas bankruptcy tracker.

And the E&P companies that filed a bunch of big names, and there is 100 or 200, whatever was, but what's so interesting is each kind of well, or oil, or E&P producer or whatever, kind of has their own ecosystem of small businesses that revolve around it. So you have folks doing saltwater disposal. You have people riding sand, whatever.

And so as far as the kind of the driver of ecosystem files and other smaller businesses can't survive, I think historically they typically will file 7, because there's not a whole lot to reorganize. But I think Katherine might say otherwise this time around with the new small business aspect of Chapter 11. It could be a great avenue for that. So that's a good segue if you want to correct any of my misstatements, Katherine.

- No, I completely agree. I think that's a great example. Generally speaking, I think sometimes bankruptcy does have this-- if you ask your average mom and pop owner store, bankruptcy does have a negative stigma to them when you see these giants of the world filing for this type of protection, bankruptcy protection. I think that it makes it a little more real to those mom and pops, where they see, OK, if the name ends, the J. Crews, these massive companies can't withstand this storm, maybe we need to look into something like this too, some type of relief, such as bankruptcy. But then when it comes to that specific industry, yeah, when you've got one that filed, it can be like a chain reaction.

So I'm not sure exactly. It's a little difficult to me to predict when small business cases are going to-- when they're going to happen. I think that that's somewhat specific as to each entity, each individual's financials, and what's going on, for example. If somebody's got a PPP loan, they can potentially stay afloat longer than an agency that didn't.

So it's a little difficult to predict, but I do think they're coming. And the fact I also think that once some of these small business cases start being filed, I think it's just going to be a wave of them once small business owners really understand that these provisions exist and they could qualify for them and potentially get out of bankruptcy successfully in a much more cost- and time-efficient manner than would be. So I think that would maybe change the Chapter 7 analysis. And personally I predict that some of these current cases, like let's say you have a Chapter 7 right now-- I mean they could potentially convert to a SBRA case, even if it was previously filed to utilize some of these aspects. So I think that may be something that we see as well.

- Along those lines, I had a question from the audience about whether a franchisee can file using SBRA.

- So I saw that, and I've been thinking about it. There's very little case law, since SBRA was just recently effective this year, there's very little case law saying what business really can't. The way I read this statute is that a franchisee would be able to utilize SBRA, assuming that the total debt is under the \$7.5 million threshold.

Correct me if you all read it otherwise, Wayne or Machir, if you're aware of some case that I'm not, but based on the information that I'm aware of, I think that the franchisee would potentially be able to utilize those provisions. I don't see anything that would limit the type of business other than it can't be a single asset, I guess real estate; well, hmm. So I guess it also depends on all of that.

I don't think a franchisee would be a single asset real estate owner, per se, and qualifies that. I guess it's also factual specific. So I'm not really totally answering the question I think just on point blank. I think that you would be able to utilize it under-- as a franchisee.

- OK. Thank you. And, Machir, under that information that Katherine brought up single asset real estate bankruptcies, can you identify what those are?

- It's defined in section 101(51B) of the bankruptcy code. And generally, I think it's just it's a single property or project of properties, who derive the majority of their income from the operation of real estate. And so I think that the easiest example is just kind of like an office building that a borrower that owns an office building. And its income comes from collecting rents.

They may have a coffee shop on the first floor. And they may get a few thousand bucks from coffee here and there, but I think the majority comes from rent and that sort of thing. Then there's going to be single asset case. And that can be a real pivotal issue in bankruptcies, because you have this 90 day window to either file a plan or make payments. And so a lot of times a debtor won't check that box saying they are a single asset real estate case. And if you're on the other side, you might need to file a quick motion on mercy basis to try to have the court determine if they are and get the 90 day deadline running.

- Thank you. And one other question for Katherine, can a small business debtor receive a PPP loan?

- Well, that's an interesting question. And it's there's kind of a split in court authority right now. So to kind of give you all a little bit of background-- so under the CARES Act, there's this Paycheck Protection Program-- probably you all know about it, just in case, the PPP program. So the actual form requires that a borrower certify that it is not presently involved in a bankruptcy.

SBA subsequently issued this new rule stating that if the loan applicant is a debtor in bankruptcy then the applicant is ineligible to receive the PPP loan. In the last week or so we've had a number of cases come out in a variety of courts nationwide as to whether or not this type of provision is

enforceable and all of that. For example, the Southern District of Texas came out with a case and Judge Jones basically said, hey, the harm to the debtor in not getting this loan, it outweighs the harm to the SBA. So the court in that case granted a temporary restraining order and allowed the debtor to strike that provision, or strike that provision we're talking about not presently involved in a bankruptcy, out of the SBA form. And it also said in the order, in the court's order, that the SBA should not condition approval of the PPP loan on the debtor being presently in a bankruptcy.

I will say that just recently also in New Mexico, there was another bankruptcy court. That bankruptcy court said that it actually ordered the SBA to fund a loan to the Chapter 11 debtor. And it clarified that if the debtor does not get the loan then that court would consider an adversary for damages potentially even punitive damages.

On the flip side, there's also cases saying, like out of the Western District of Texas and Delaware, probably other places as well-- I mean, I keep seeing these cases pop up, but those courts have said the opposite, basically that, hey, we get it. We understand the debtors' plight and this difficult time period and the financial dire of the situation. However, bankruptcy courts don't have the authority to grant this type of relief. And so the debtor, in those cases, was not able to obtain a PPP loan.

So it's kind of up in the air as to different courts interpreting these provisions in different manners. So we'll see. I don't know. I am really curious to see what happens on appeal, because I imagine some of these orders are going to be appealed. So we'll see what the appellate courts have to say about it.

- OK, one final question before we have to end. And this is about bankruptcy alternatives. So we had a question about, are there other potential funding sources for businesses, like small restaurants, once the PPP and the Economic Injury Disaster loans run out? Because the concern is that the regular levels of business may they take a while for them to return. And is bankruptcy the only option that we have?

- Well, I can start and then as per usual say some generally overbroad things and then see if Katherine and Machir have some specifics. I think Katherine, maybe, we talked about this just before the webinar. Obviously, the alternative bankruptcy is as I think Machir and Katherine both have referenced is to try and do individual workouts, the negotiations.

You contact your lenders, your creditors. You try to work out new terms with them, forbearance agreements, renegotiations, lowering your payments, what have you. And so that's the number one alternative. As far as funding sources, it's a market, any one you can find who's willing to loan you money, they can do.

As far as formally, I might let Katherine speak to that. I think she is aware of a particular place you might be able to look for that, but the short answer is anyone you can find-- any bank you can find that would loan you money is a backup plan. Katherine.

- Yeah, Wayne, I agree. When it comes to a specific program alternative, other than the PPP program, I would suggest looking at the Main Street. I believe it's the Main Street Lending Program.

This is another program-- a loan program that was commenced by the feds. And the purpose-- my understanding of the purpose of this loan, it's business-- loans for businesses and that you can receive this loan either if you applied for a PPP loan, didn't get one, or if the PPP loan wasn't enough for you. It's my understanding there's three different types of loans in the Main Street Lending Program.

So I think you'd have to check under what type of loan program you would qualify and the one that best fits your needs. But I mean, I would literally Google that. And it should bring you to the fed's website.

And there is a frequently asked questions, like 20 pages of frequently asked questions that are extremely helpful in layman's terms. And it's really pretty easy to understand. So I would look into that definitely.

- Well, thank you very much. And we are at our time limit. So I want to thank the panel for their expertise and their time.

And I want to remind everyone that this webinar will be available in about a day on our website TAMULawAnswers.info. And I also want to invite you to our next webinar, which will be held on Tuesday, May 12 at noon. And the topic will be workplace implications after the COVID-19 crisis, where workplace experts from TAMU Law Faculty and local firms will share practical and fact-based information regarding employer-employee considerations. So thank you again for your participation, and thank you again to our panelists. Thank you.

- Thanks.

While the panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.

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