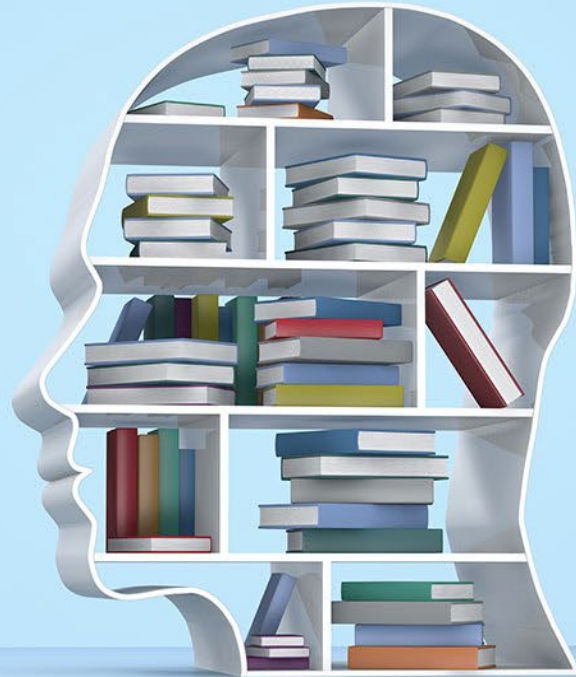


# Bankruptcies and Pending Litigation (In Retail Space) Post-COVID

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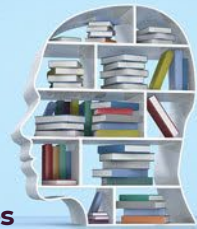
Title Tenets Webinar Series



Presented By: Shawn Elpel

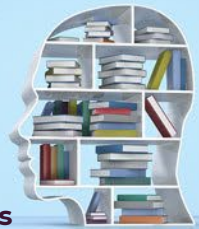
Wednesday, October 19, 2022

# The Many Hurdles to Acquiring Title Insurance For Sellers, Buyers and Borrowers Confronted With Bankruptcies, and Other Litigation - and How to Overcome Them



# What Types of Litigation Cause Concern

- Bankruptcy
  - 363 sale
  - Sale out of Chapter 11 plan
  - Lessee's in Bankruptcy
- Receivership
- Foreclosure (non-judicial, judicial, Notice, Deed in Lieu of Foreclosure)
- Landlord/Tenant disputes
- Pending litigation



# Retailers Stats

- According to a July 26, 2022 article in CBINSIGHTS, 139 major retailers have filed for bankruptcy.
- Regional Mall vacancies have hovered around 11%.



# Articles Regarding Retail

## Moody's Analytics: To survive, malls must share in the risks of their tenants

By Al Urbanski, of CSA

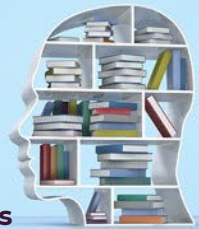
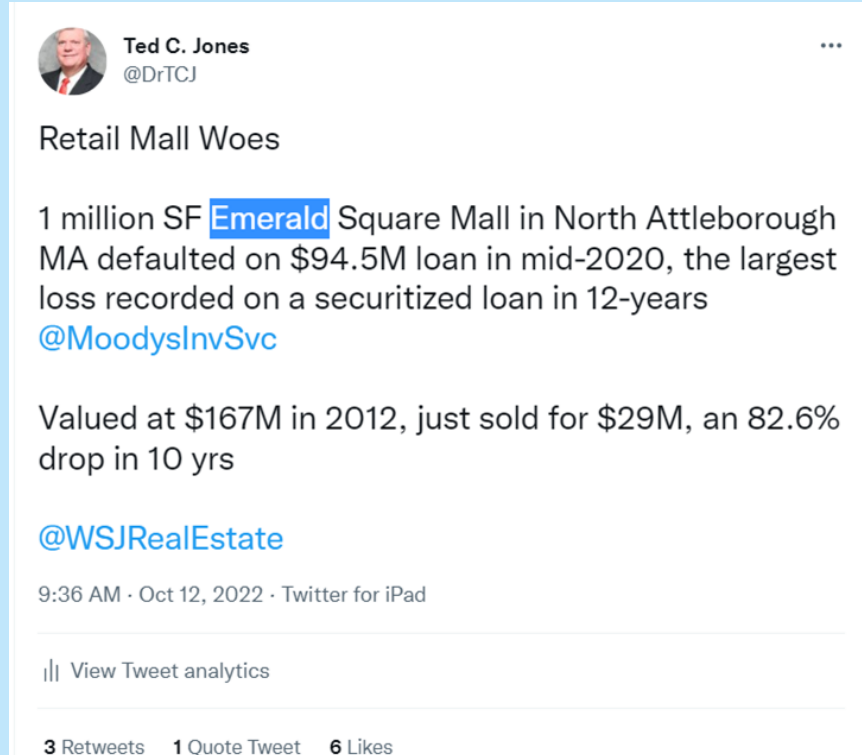
[https://chainstoreage.com/moodys-analytics-survive-malls-must-share-risks-their-tenants?utm\\_source=omeda&utm\\_medium=email&utm\\_campaign=NL\\_CSA\\_Real+Estate&oly\\_enc\\_id=4413F1530689F5Y](https://chainstoreage.com/moodys-analytics-survive-malls-must-share-risks-their-tenants?utm_source=omeda&utm_medium=email&utm_campaign=NL_CSA_Real+Estate&oly_enc_id=4413F1530689F5Y)

20% of the 1,000-plus malls in the nation will continue to operate as classic malls, according to a new report from Moody Analytics called “The Mall of the Future.”



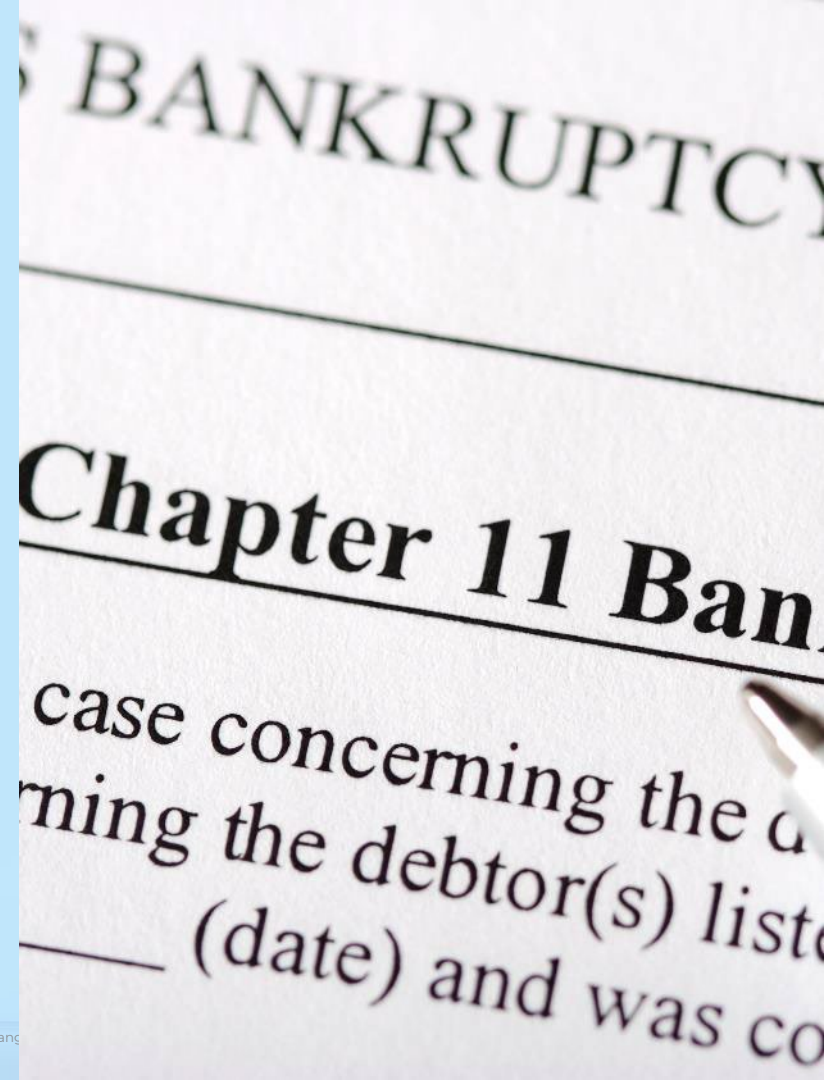
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# Recent Tweet by Ted Jones, Economist for STG



# Bankruptcy

- i. Chapter 7 – Liquidation
- ii. Chapter 11 - Reorganization





# Bankruptcy Title Exception:

- Chapter \* Pending Bankruptcy Proceedings
- Any sale, mortgage, purchase or release of security interest must be pursuant to court order, satisfactory to the company
- The Company requires for review copies of the docket sheet, petition with schedules

US District Court	
Case Number	
Bankrupt	
Filed	
Trustee	
Attorney for Bankrupt	
Telephone No.	





# Bankruptcy

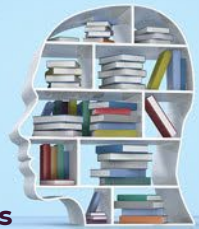
- 363 sale
- Motion for Stay Pending Appeal – timing
- Statutory Mootness



# Bankruptcy

If the sale is not made free and clear of liens, typically require a copy of:

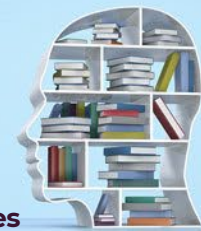
- the notice of sale, a certificate evidencing notice to all interested parties
- copy of the docket sheet and/or letter of attorney of the debtor showing that no objection or request for hearing has been filed on or before the date of the certificate (which should be dated at least 21 days after notice of the proposed sale, subject to any reasonable order shortening notice)
- If the sale involves all or substantially all of the assets of the estate in a Chapter 7, 11, or 12 proceeding, require notice of sale, a certificate of service, and a final court order approving the transfer.



# Bankruptcy

If the sale is made free and clear of liens, typically require a copy of:

- the notice by the trustee or debtor-in-possession and order specifically describing the liens as to which the sale is free and clear
- recitation in the order that the lien(s) (which must be specifically described) attach(es) to the proceeds
- evidence that the lienholder was given notice (for example, by appearance of the creditor at the hearing, or satisfactory certificate of service)
- a recited justification under section 363(f) in the court order to allow the sale free and clear, except in a Chapter 12 proceeding where the trustee joins. For example, search for recitation that the lien is in dispute (if so, the dispute must be specified) or that the lienholder consents, or that the sales price exceeds (the value of) all liens or that the sale involves only a portion of land covered by the lien
- a court order authorizing the sale that is final as evidenced by an attorney's letter or review of docket sheet
- verify the liens as to which the sale is free and clear are not ad valorem tax liens, or hazardous waste clean-up liens or other governmental assessments or charges (you should secure underwriter approval in such case)
- determine that the sale is not to a party related to the debtor
- verify that the property was not scheduled as exempt

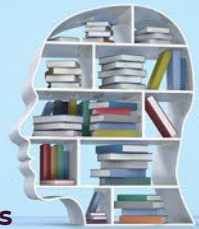


# Bankruptcy – Seller



## Chapter 11 - Sale out of bankruptcy plan

- Best interest of creditors
- Appeal period and stay pending appeal
- Equitable Mootness



# Bankruptcy – Appeal

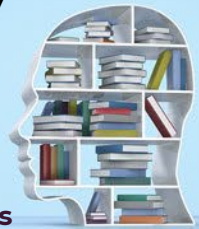
- Appeal period – 14 days
- Waiving the appeal period



# Bankruptcy – Liens Executed by Bankruptcy Estate

The debtor or trustee can obtain credit and execute a mortgage or lien on property which is either an inferior mortgage or a new mortgage prior to any outstanding liens after notice and a hearing. In order to secure first lien financing on encumbered land, the debtor must establish that:

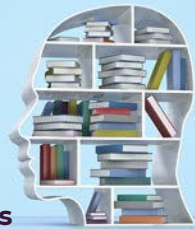
- the prior lender whose lien is subordinated to the new financing is adequately protected and
- the debtor has made every effort to seek financial assistance by other means.





# Other Bankruptcy Issues

- Tenant in Bankruptcy
- Rejection of Lease

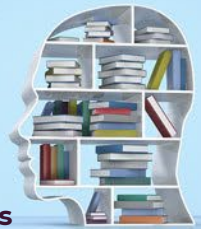




# State Receivership Actions

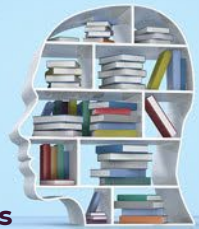


- Secured creditor electing receivership
- Final and unappealable order
- States have different deadlines to file an appeal



# State Receiverships

Modeled after fed bankruptcy code



# State Receiverships

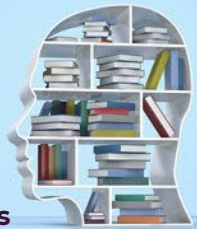
Two types of typical scenarios:

- i. Secured creditor
- ii. Municipality



# State Receiverships

- i. Defaults
- ii. Appeal periods – States vary
- iii. Federal tax liens



# Foreclosures and Other Remedies





# Foreclosures and Other Remedies

## 1. Foreclosure

### a. Non-Judicial Foreclosure Sale

- i. Product: Trustee Sale Guarantee
- ii. Copy of Default Notice
- iii. Copy of Mailings/proof of mailings/proof of publication
- iv. Notice of Trustee Sale
- v. Copy of Notice/proof of mailings/proof of publication

### b. Judicial Foreclosure

- i. Product: Litigation guarantee
- ii. Judgment and Order of Sale
- iii. Certificate of Sale
- iv. Right of Redemption

### c. Deed in Lieu of Foreclosure



# Pending Litigation – Types of Suits

- Effect of Lis Pendens
- Effect of no Lis Pendens





# Sample Lis Pendens Statute

## **RCW 4.28.320 Lis pendens in actions affecting title to real estate.**

At any time after an action affecting title to real property has been commenced, or after a writ of attachment with respect to real property has been issued in an action, or after a receiver has been appointed with respect to any real property, the plaintiff, the defendant, or such a receiver may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. **From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action.** . . . . For the purpose of this section an action shall be deemed to be pending from the time of filing such notice: PROVIDED, HOWEVER, That such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced may, at its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be evidenced by the recording of the court order.



# Pending Litigation

How will the suit be resolved?

What claims are being made?



# Typical Pending Litigation Exception:

*Pending Action in \_\_\_\_\_ County:*

*Superior Court Cause No.: \_\_\_\_\_*

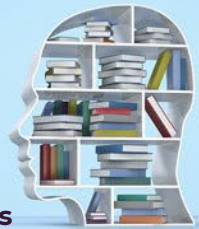
*Being an Action For:*

*Plaintiff: \_\_\_\_\_*

*Defendant: \_\_\_\_\_*

*Attorney For Plaintiff: \_\_\_\_\_*

*A Lis Pendens of said action was recorded on November 16, 2017, under Recording No..*



# Revised Pending Litigation Exception if Exception Will Appear on Final Policy

*That certain pending lawsuit styled \_\_\_\_\_, \_\_\_\_\_ Court of the State of \_\_\_\_\_, \_\_\_\_\_ County, Index No \_\_\_\_\_ (the "Pending Litigation"), any future lawsuit filed by the same Plaintiff, or any party claiming by or through the Plaintiff, and based upon the same or substantially similar allegations underlying the Pending Litigation (a "Future Direct Lawsuit"), and any consequences adverse to the Title of the Pending Litigation and a Future Direct Lawsuit, as the case may be.*

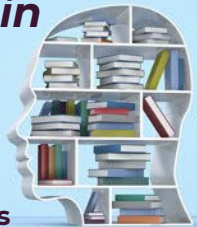
*Notwithstanding the last sentence of the Covered Risks section of the policy or any provision of the Conditions, the Company shall also have no obligation to defend, and will not pay the costs, attorneys' fees or expenses incurred in defense of, the Pending Litigation and any Future Direct Lawsuit.*





***Notwithstanding the last sentence of the Covered Risks section of the policy or any provision of the Conditions, the Company shall also have no obligation to defend, and will not pay the costs, attorneys' fees or expenses incurred in defense of, the Pending Litigation and any Future Direct Lawsuit.***

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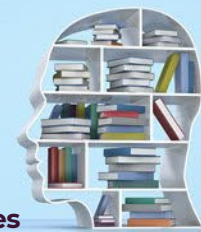




# Settlements and Stipulated Agreements to Settle



- Timing
- Terms of settlement
- Title's review of settlement and timing of dismissal
- Approval by court





**Stewart Title**  
**National Commercial Services**  
Shawn Elpel  
Senior Underwriting Counsel  
[stewart.com/commercial](http://stewart.com/commercial)

# Thank you

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