

# COVID-19's Hidden Costs: Bankruptcy, Repossessions & Hostile Legislation

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Wednesday, June 3<sup>rd</sup>



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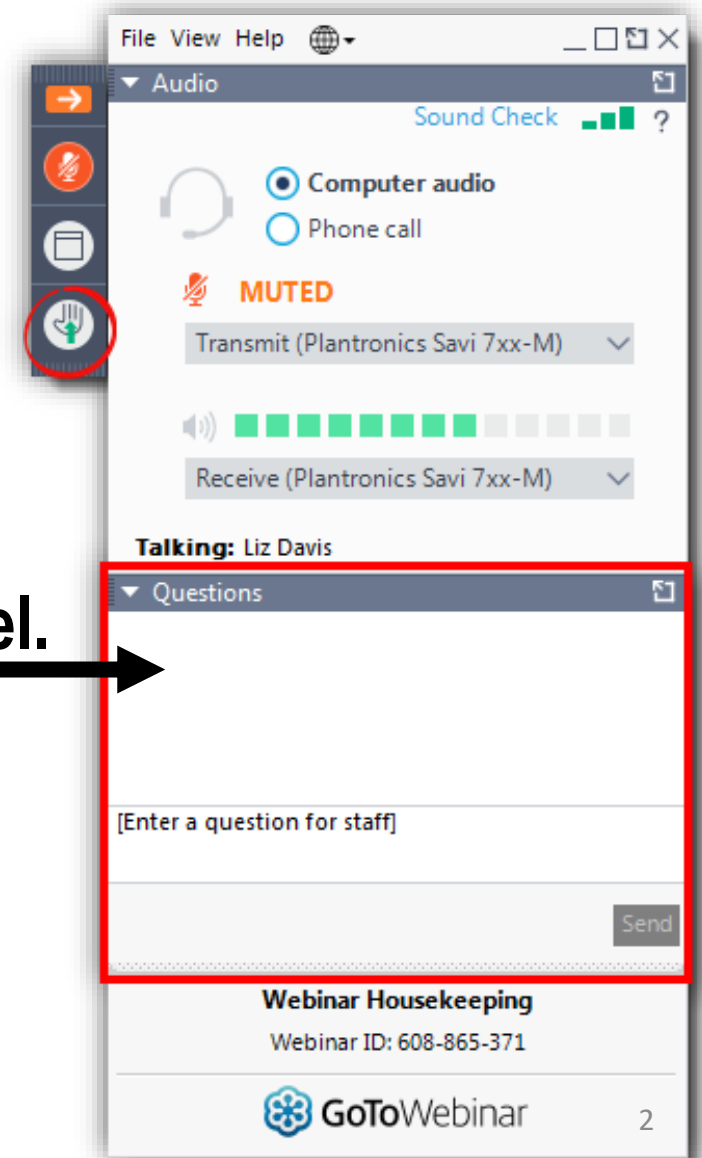


# Housekeeping



Today's web seminar is being recorded.

All questions should be submitted via the Questions Panel.



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# Speakers



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**Scott Riehl**  
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# COVID-19 Inspired State Legislative and Executive Order Overreach

- 22 state legislation sessions have been interrupted and there are only 9 legislatures in session
- Governors across the country are wielding executive authority under emergency powers in ways not seen since the great depression
- It took state legislatures from the end of the great depression until the 1970s to wrestle co-equal power back from the executive branch
- ELFA has actively engaged on 2 hostile legislative proposals (MA, NY) and 1 Governor Executive Order (IL)



# Massachusetts Legislation Could Suspend Some Lease Payments

- Massachusetts [Joint Committee on Financial Services](#) House Chairman [James Murphy](#) (D-Suffolk County) is the primary sponsor among 47 state legislators introducing [Massachusetts HD 5014](#).
- Bill would remove many lessees from their obligation to make payments on commercial equipment lease contracts until 90 days following the end of the coronavirus emergency.
- Financial protections for consumers defined as any natural person and a small business with 50 or fewer full- and part-time employees.
- Those protections encompass prohibiting debt collection and repossession; no creditor could issue or employ any process against a debtor; enforce any judgment obtained; create, perfect, or enforce any lien; collect, assess, or recover a claim or set off any debt.

# New York COVID-19 Tax Proposed

- [New York Assembly Bill 10357](#) sponsored by Assembly Assistant Speaker [Assemblyman Felix Ortiz](#) (D-Brooklyn)
- “all businesses with profits over \$500,000 dollars that do business in the state” and during the disaster emergency have seen an increase in profits by 20% over the same time period in 2019 shall deposit five percent of gross profits into a fund to be used by a COVID-19 Essential Workers Appreciation Task Force

# Illinois Executive Order 2020-16 Suspends Repossessions

- Illinois Governor's Executive Order 2020-16 (Suspending Repossessions) was issued on March 28, 2020 and acts in part to suspend repossessions of all consumer and commercial vehicles and equipment requiring certificate of title.



**Alexander Darcy**  
Shareholder  
Askounis & Darcy PC

# Illinois Executive Order

Section 1. Beginning March 27, 2020 and continuing for the duration of the Gubernatorial Disaster Proclamation, the provisions of the Uniform Commercial Code, 810 ILCS 5/9-609, regarding the possession or usability of a vehicle, and the provisions of the Illinois Vehicle Code, 625 ILCS 5/3-114, regarding the repossession of vehicles, are suspended. No provision contained in this Executive Order shall be construed as relieving any individual of the obligation to make payments or comply with any other obligation that an individual may have pursuant to a loan agreement or otherwise.

# Illinois Executive Order

- Prohibits any vehicle repossessions – ***commercial*** or consumer – related to a loan or financing, includes equipment finance agreements.
- Suspends UCC Article 9-609 right to recover collateral, and suspends statutory section relating to title transfer of repossessed vehicles.

BUT ALLOWS:

- **Voluntary vehicle repossessions** and consensual re-titles related to vehicles which are the subject of loans, financings and equipment finance agreements.
- **True leases to proceed normally.**

# Illinois Executive Order

## What are the real-world ramifications of the Illinois Executive Order on repossessions?

- Is the lender able to wait for the expiration of the Executive Order?
- If “no,” then what circumstances would require the lender to take steps immediately?
- The Executive Order never contemplated failed or bankrupt trucking companies or abandoned trucks/trailers.
- In the case of a failed trucking company where the lender has multiple trucks/trailers, significant risk of losing track of collateral and significant risk of material accumulation of storage liens.

# Illinois Executive Order

## Lender's Solutions:

- Attempt Voluntary Repossession
- File suit and see if the borrower raises the Executive Order as a defense.
  - What if the Judge raises the Executive Order?
- Could attempt an end-around the Executive Order, by arguing:
  1. Executive Order does not extinguish lien rights; does not extinguish rights of replevin or detinue (common law right to force borrower to surrender collateral).
  2. Have a contractual right to repossess collateral, independent of Article 9, so entitled to the equivalent of specific performance where no adequate remedy at law.
- Could attempt a constitutional challenge – perhaps a “taking, as applied” to the particular facts. Not likely to succeed, but may want to include an unconstitutionality claim to protect against an argument that lender intentionally violated the Executive Order.



# Illinois Executive Order

## TAKE AWAY

- ELFA members need to be vigilant and let ELFA know when problematic legislation and executive orders are contemplated.
- Much easier to fix BEFORE a law is enacted.

**If a second virus wave comes, ELFA members can expect other states to consider drastic measures to limit lenders' rights.**



**Arlene Gelman**  
Shareholder  
Vedder Price P.C.

# Bankruptcy Considerations

## Review Internal Procedures

- Check mail daily
- Route notices to appropriate person (both counsel and businesspeople)

# Bankruptcy Considerations

## Beginning of Case Considerations

- Automatic Stay
  - Potential for damages
  - Circuit split regarding collateral return
- Lessee or Borrower right to use equipment, but there are protections
  - Motion to compel assumption or rejection
  - Administrative claims
  - Adequate protection: ask for it early!

# Bankruptcy Considerations

## Beginning of Case Considerations

### Debtor Motions

- Motion to Sell
  - Leased equipment
    - Attempts to sell?
    - Procedures for assumption of executory contracts/cure payments?
  - Collateral
    - Preserve ability to effectively credit bid

# Bankruptcy Considerations

## Beginning of Case Considerations

### Debtor Motions

- DIP Financing Motion
  - Beware of priming attempts
  - Intercreditor issues
- Motion to Abandon/Reject Leases
  - Fight for protections
    - Insurance remain in place
    - Process to remove equipment
    - Reasonable deadline to file rejection claims

# Bankruptcy Considerations

## Small Business Reorganization Act of 2019

- CARES Act increased \$2,725,625 aggregate debt limit to \$7.5 million (for cases filed after 3/27/20)
- at least 50% of debt must be for commercial or business activities (but primary activity cannot be owning single asset RE)
- projected to have large impact on ch. 11 filings

# Bankruptcy Considerations

## Small Business Reorganization Act of 2019

- Intended to move quickly and reduce costs
  - No unsecured creditor committee unless court orders for cause
  - Eliminates UST quarterly fees
  - Debtor must file plan in 90 days and confirmation requirements relaxed
    - If you do not object, stuck with plan treatment
    - No disclosure statement required (unless specifically ordered by Court) but plan must include history, liquidation analysis, and projections to assess feasibility



# Bankruptcy Considerations

## Small Business Reorganization Act of 2019

- Eliminates absolute priority rule (debtor can retain equity even if unsecured creditors not paid in full)
- Administrative claims can be paid through plan instead of effective date
- No impaired accepting class required (cramdown easier), but
  - retains prohibition against unfair discrimination (can't treat similar interests differently)
  - retains requirement that plan must be fair and equitable (e.g., secured creditors retain lien and are paid value of collateral as of effective date over life plan)
  - plan must be feasible
  - in cramdown, debtor must commit all of its disposable income (or distribute property equal to same amount) for plan term of at least 3 years (not to exceed 5 years)

# Bankruptcy Considerations

## New Case Approaches Resulting From Pandemic

- Bankruptcy Court Operations: telephonic hearings and 341 meetings
- Consensual orders to hold AP or lease payments in abeyance
- Partial Freezes

# Bankruptcy Considerations

## New Case Approaches Resulting From Pandemic

### ■ Pier 1 Opinion/Orders

- Granted deferral of rent payments
- Would not schedule hearings for motions to lift stay or to compel assumption or rejection for 45 days after limited operations period
- Held that § 365(d)(3) does not give lessors a right to compel payment – lessor entitled to admin claim (not superpriority claim)
- Held that lessors were adequately protected because insurance, security obligations, utilities, and similar obligations were being paid and debtor assured that catch-up payment would be made in July if allowed to re-open in June

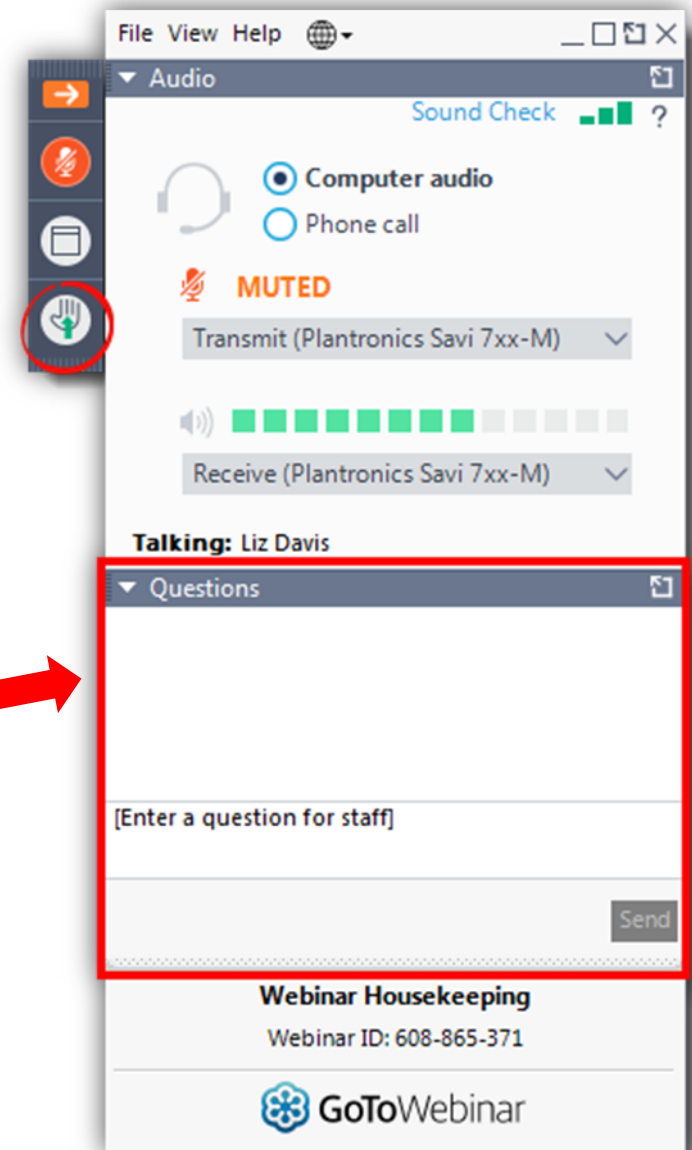
# Bankruptcy Considerations

## New Case Approaches Resulting From Pandemic

- CraftWorks Temporary Procedures Order
  - encouraged both equipment and real estate lessors to try to reach an agreement with the debtor
  - stated that no hearing for admin claims or motions compelling assumption or rejection or stay relief would be set prior to a month after order entered (even though approved DIP budgets did not provide for payments to landlords)
- Modell's Sporting Goods Orders Temporarily Suspending The Debtors' Chapter 11 Cases
  - Granted temporary suspensions that deferred all payments except those “absolutely essential”



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via the Questions Panel



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Wednesday, June 17<sup>th</sup>

# Building a Foundation for Digital Agility

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