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Landlord Lease Remedies

What Are a Landlord's Default Rights and What Can It Recover?

By Marie A. Moore and Andrew R. Capitelli

Many years ago, in an entirely different economy, a landlord did not have to worry about what it could collect from a defaulting tenant. The landlord just terminated the lease and found a new tenant. Many states still base their lease default law on that assumption today, reasoning that a landlord can put a new tenant in the space for the same rent with no delay, and therefore the landlord should not be able to collect loss of rents damages.

This assumption is not reality for a modern landlord. A defaulting tenant presents a landlord with a difficult choice: whether to keep the tenant and try to recover the unpaid rent or to oust the tenant and try to find a replacement. Today, businesses are downsizing to survive, and replacement tenants are scarce. When a tenant defaults, or threatens default to receive rent concessions, the landlord needs to know its remedies options and what it can expect to recover if these options are exercised. Modern landlords also need to include in their leases remedies provisions that expressly permit them to recover their actual rent loss damages.

The Landlord's Alternatives on Tenant's Default

Should the Landlord Keep the Tenant in the Premises?

If the tenant has stopped paying rent but has not vacated the space, the landlord has the option of keeping the tenant in the space and suing for its rent and other damages as they accrue. This approach has the advantage of assuring the landlord that it will have the right to continue to pursue its claim for periodic rent as it comes due, but has the disadvantage of requiring the landlord to sue periodically to collect these amounts.

Rent Concessions. If the tenant is in place and threatening to file for bankruptcy protection, then the landlord may choose to lower the rent to try to keep the tenant in business. If the tenant is a national chain, however, one landlord's rent concessions probably will not alleviate the tenant's overall problems, and the landlord might be better served by taking a hard line on the tenant's lease obligations. The landlord needs to weigh the chance that the tenant will eventually start paying full rent again against the likelihood that the tenant will abandon the space or will never have enough funds to pay full rent.

If the leased space is in a shopping center and the tenant is threatening to close its store, the landlord will have tremendous incentive to keep the tenant open and operating. Most shopping center leases contain a "cotenancy" provision, a clause that gives the tenant the right to reduce its rent or terminate its lease unless most of the other tenant spaces are open and generating foot traffic in the center. If the tenant closes, it will probably be violating a lease obligation to operate continuously, and its landlord may want to threaten the tenant with a court order requiring the tenant to remain open as well as with the damages that will result from a closed store. Most courts, however, will not grant an order requiring a tenant to operate because enforcement of that order will require too much court supervision. See, e.g., *8600 Assocs., Ltd. v. Wearguard Corp.*, 737 F. Supp. 44 (E.D. Mich. 1990); *Lorch, Inc. v. Bessemer Mall Shopping Ctr., Inc.*, 310 So. 2d 872 (Ala. 1975); *M. Leo Storch Ltd. P'ship v. Erol's, Inc.*, 620 A.2d 408 (Md. Ct. Spec. App. 1993). Also, even if the landlord can threaten the tenant with damages to the shopping center as a whole caused by the tenant's closing, most landlords will not want to fund expensive and drawn-out litigation to recover these damages, even if the tenant has the assets to pay a large judgment. As a consequence, retail landlords may prefer giving a tenant a rent break rather than having it close its store.

Some landlords have indicated that they are making the decision whether to give rent concessions on a case-by-case basis and that "for some tenants, cutting rent costs may not be enough to save a business." Amy Wolff Sorter, *Owners to Tenants: Show Me the Financials*, GlobeSt.com (Mar. 12, 2009), available at www.globest.com/news/1365_1365/dallas/177407-1.html. To make this determination, the landlord should take a close look at the tenant's financials when considering whether to reduce the rent. The landlord may wish to limit the rent reduction to a short period or to couple a long-term rent reduction with a right on the part of the landlord to terminate the lease and put a new tenant in the space.

Acceleration. In some states, the landlord is permitted to accelerate the rent on the tenant's default—that is, to declare the rent for the remainder of the term due and payable in a lump sum. See *Friedman on Leases* § 5:3, at 5-37 through 5-50 (Milton R. Friedman & Patrick A. Randolph Jr. eds., 5th ed. 2008). In some jurisdictions, however, if a landlord elects to terminate the lease, it cannot then accelerate the rent that would have accrued for the remainder of the term; conversely, if it accelerates

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the rent, the landlord cannot also terminate the lease—it must give the tenant possession of the leased space. See, e.g., Restatement (Second) of Property: Landlord & Tenant § 12.1 cmt. k (1977); *16 Cobalt LLC v. Harrison Career Inst.*, 590 F. Supp. 2d 44 (D.C. Cir. 2008). Such jurisdictions include the District of Columbia, *Grove Rest. and Bar, Inc. v. Razook*, 571 So. 2d. 596 (Fla. Dist. Ct. App. 1990), Louisiana, *Richard v. Broussard*, 495 So. 2d 1291 (La. 1986), and Pennsylvania, *Markeim-Chalmers-Ludington, Inc. v. Mead Integrity Trust Co.*, 14 A.2d 152 (Pa. Super. Ct. 1940). In these jurisdictions, if the landlord accelerates but the tenant is truly unable to pay the accelerated sum, the landlord may be left with space that continues to be occupied by a tenant that is paying nothing, at least until the landlord obtains a judgment for the accelerated amount and acquires the leasehold interest in a judicial sale.

What Are the Landlord's Rights If It Takes Back the Space?

Under traditional common law principles, a lease was considered an estate in land for a fixed term. Once granted, the leasehold estate could not be forfeited or terminated. See *Friedman on Leases* § 16:1, at 16-2 and 16-3. Thus, the old authorities limited the landlord to suing for rent or breach of a covenant (for example, the covenant to pay rent), but did not give the landlord the right to dispossess the tenant. See, e.g., *tenBraak v. Waffle Shops, Inc.*, 542 F.2d 919 (4th Cir. 1976); *Texas & N.O.R. Co. v. Phillips*, 196 F.2d 692 (5th Cir. 1952).

Of course, modern law permits a landlord to enforce a lease provision letting the landlord end the tenancy if the tenant defaults. *Friedman on Leases* § 16.1, at 16-2 and 16-3. But the historic principles still influence and sometimes limit a landlord's right to collect for its loss of future rent if it does exercise this contractual right. If a landlord wants to reenter the space, it needs to review what is permitted in the state in which the property is located to ascertain how it can exercise this right in a way that best preserves its right to recover its rental loss damages.

Collecting Rent After Reentry. In most states, if the lease is silent, a landlord's termination of the lease cuts off its right to continue receiving rent. *tenBraak*, 542 F.2d at 924 (landlord's acceptance of surrender after tenant's abandonment constitutes termination of the lease); *Circuit City Stores, Inc. v. Rockville Pike Joint Venture Ltd. P'ship*, 829 A.2d 976 (Md. 2003) (same). Most national lease forms attempt to overcome this common law rule by providing that the landlord has the right to reenter the space, dispossess the tenant, and sue for rent as it comes due. As discussed in further detail below, however, the states are divided as to the enforceability of such a provision.

Some jurisdictions permit the landlord to reenter the leased space without automatically terminating the lease. *Herpin v. Nelson*, 140 So. 2d 829 (Ala. 1962) (tenant was not relieved of duty to pay rent when landlord relet premises on behalf of the original tenant); *Hirsh v. Carbon Lehigh Intermediate Unit #21*, No. 2002-C-2043, 2003 WL 23580350 (Pa. Ct. Com. Pleas Dec. 5, 2003) (landlord's re-entry and reletting of premises was not an acceptance of surrender terminating the lease). Generally, the tenant must expressly agree that the landlord has the right to exercise this remedy to overcome the common law rule that the landlord has no right to dispossess the tenant during the term of its leasehold estate. This right to continue collecting rent after landlord's reentry is most frequently given effect when the tenant has abandoned the leased space and not when the landlord has evicted the tenant. See generally Annotation, *Liability for Rent Accruing After Landlord's Institution of Action or Proceedings Against Tenant to Recover Possession*, 93 A.L.R. 1474, 1477 (1934) (stating that "it is generally recognized that an actual eviction of a tenant for any cause will, in the absence of a contractual provision to the contrary, relieve him from any liability for subsequently accruing rent, the lease having been terminated by such eviction"). Courts tend to be less sympathetic to the landlord's claim that the tenant must continue to pay rent when the tenant has not left voluntarily but has been dispossessed by the landlord.

In states that permit the landlord to reenter without terminating the lease, the landlord may be able to continue to collect rent as it accrues. *Olim Realty Corp. v. Big John's Moving, Inc.*, 673 N.Y.S.2d 439 at 440 (N.Y. App. Div. 1998) ("tenant's contention that its obligation to pay rent terminated when the landlord changed the locks . . . is without merit as the lease provided that the landlord was permitted to reenter the premises upon the tenant's default and that the tenant's liability for rent would survive such reentry"). Under the traditional law, the landlord had the option of letting the premises sit vacant (and collecting rent as it accrued) or reentering the premises and attempting to relet them on the tenant's behalf. Restatement (Second) of Property: Landlord & Tenant § 12.1(3) (1977). If the landlord successfully relet the premises, the landlord was permitted to recover the difference between the rent reserved in the original lease and the rent paid by the substitute tenant. *Schneiker v. Gordon*, 732 P.2d 603 (Colo. 1987).

In many states today, courts impose on the landlord an *obligation* to mitigate the rental loss it will suffer. *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293 (Tex. 1997) (noting that at least 42 states plus the District of Columbia recognize a duty to mitigate). To satisfy this mitigation requirement, the landlord may be required to advertise and use real efforts to obtain a new tenant. This concept of mitigation is in direct conflict with the concept that the tenant's lease estate has remained in effect. Consequently, a landlord that leases the space to a new tenant always risks a court determination that it has in fact terminated the lease of its defaulting tenant, even if it did not mean to do so. *Nicholas A. Cutaia, Inc. v. Buyer's Bazaar, Inc.*, 637 N.Y.S.2d 857 (N.Y. App. Div. 1996).

Cal. Civ. Code § 1951.4 provides a helpful example of a landlord's rights to collect rent after a tenant's eviction or abandonment. Section 1951.4 permits a landlord whose tenant has abandoned the space to continue the lease and sue for rent as it comes due. The landlord, however, can use this remedy only if the lease permits the tenant to sublease or assign the space. The tenant's right to sublease may be subject to the landlord's reasonable consent or other

reasonable standards. In contrast, the landlord cannot continue to collect rent if the landlord has terminated the tenant's "right to possession." Cal. Civ. Code § 1951.4(b). The California Civil Code does not provide a bright line test for what constitutes a denial of the tenant's right to possession, but section 1951.4(c) clarifies that the tenant's right to possession is not ended by acts of maintenance or preservation or efforts to relet the space, the appointment of a receiver to protect landlord's interests, or the reasonable withholding of consent to a sublease or assignment or reasonable termination of an existing sublease or assignment.

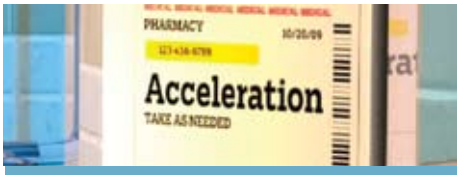
Cal. Civ. Code § 1951.4 clarifies that if the tenant abandons the space, the landlord is not required to retake possession and relet the space. The landlord can simply file suit to collect the periodic rent payments from the tenant, as permitted under the traditional common law.

Based on the foregoing discussion, reentry without termination, even in states in which it is permitted, seldom gives the landlord the recovery that it needs—both real, immediate damages that will cover the rental loss it will suffer by reason of the tenant's breach and the right (but not the obligation) to find a new tenant.

Damages After Reentry. Courts seem to be seeking a theory under which they can let a landlord terminate the tenant's possession and recover the same type of foreseeable damages that it could recover if a lease was another type of contract. Courts struggle, however, to harmonize this approach with the traditional view that if the right of occupancy is taken away from the tenant, the tenant has no further rent payment obligations because the landlord will be able to use the property or lease it to someone else.

As discussed previously, some courts permit the landlord to both accelerate the rent and terminate the lease if the lease permits this remedy. See, e.g., *Hardin v. Kirkland Enters., Inc.*, 939 So. 2d 40 (Ala. Civ. App. 2006); *Cummings Props., LLC v. National Communic'ns Corp.*, 869 N.E.2d 617 (Mass. 2007). Permitting recovery of accelerated rent after lease termination gives the landlord a much-needed right to recover all amounts due by the tenant in one suit and one judgment, rather than periodic suits and judgments for monthly rent as it accrues. But courts generally like equitable results, and many courts have observed that permitting the landlord to recover the accelerated rent, with no reduction for costs saved or rent received from a new tenant, is not equitable.

Many courts have tempered the effects of an acceleration clause in one of two ways: (1) by imposing a judicial deduction in the accelerated amount for the losses that could have been avoided by mitigation; or (2) by imposing an obligation on the landlord to credit or account to the tenant for rent received later. E.g., *Quintero-Chadid Corp. v. Gersten*, 582 So. 2d 685 (Fla. Dist. Ct. App. 1991); *Aurora Bus. Park Assocs., L.P. v. Michael Albert, Inc.*, 548 N.W.2d 153 (Iowa 1996). A few courts also have required that the accelerated amount be reduced to present value. E.g., *HealthSouth Rehab. Corp. v. Falcon Mgmt. Co.*, 799 So. 2d 177 (Ala. 2001); *Vibrant Video, Inc. v. Dixie Pointe Assocs.*, 567 So. 2d 1003 (Fla. Dist. Ct. App. 1990).



Some courts permit the landlord to both accelerate the rent and terminate the lease if the lease permits this remedy.

In other cases, courts have refused to enforce acceleration provisions, calling them impermissible penalties, but indicating that the parties could have made them enforceable stipulations of the landlord's actual losses by providing for the deduction of third-party rents and other mitigating factors. E.g., *Nobles v. Jiffy Mkt. Food Store Corp.*, 579 S.E.2d 63 (Ga. Ct. App. 2003); *Ross Realty v. V&A Fabricators Inc.*, 787 N.Y.S.2d 602 (N.Y. App. Term 2004).

These cases show the risks a landlord takes when it terminates a lease and pursues the tenant for the full accelerated future rent that would have come due after termination, without deductions for rents received and without reduction to present value. In some states, the court will give this provision some effect by judicially reducing it so that it approximates the landlord's actual damages. In others, and if the landlord insists on the full, unreduced accelerated amount, the court may reject the acceleration clause completely as an impermissible penalty that is not a real attempt to estimate in advance the landlord's actual damages.

Reasonable Damages Stipulated in the Lease. Although courts frequently refer to rent acceleration provisions as contractual stipulations of liquidated damages, they also frequently do something that is not consistent with liquidated damages—they modify the damage amount to deduct rents received or reduce the amount to present value. E.g., *HealthSouth Rehab. Corp.*, 799 So. 2d 177; *Cummings Props.*, 869 N.E.2d 617.

It is not in the landlord's best interest to let a court decide what amounts to deduct from the accelerated rents, hold the judgment open to see what rents should be received or for a later accounting, or determine the discount factor that will be used to reduce the rents to present value. A landlord is much better served by including in its lease an express statement of the way in which its rental loss damages should be calculated. In other words, landlords should include a real liquidated damages provision that starts with the accelerated future rent amount, reduced to present value at a low discount rate, then deducts the future rent likely to be received from the space.

California's legislature has broken from the common law tradition of letting courts decide what remedies are appropriate if the lease is silent. It has codified the remedies that a landlord can include in its lease. Under California law, if the tenant breaches the lease and either the tenant abandons the space or the landlord terminates the lease, the landlord may recover the

following from the tenant provided that these damages are set out in the lease:

> (1) The worth at the time of award of the unpaid rent which had been earned at the time of termination;
> (2) The worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided;
> (3) Subject to subdivision (c), the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided; and
> (4) Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom.
> (b) The "worth at the time of award" of the amounts referred to in paragraphs (1) and (2) of subdivision (a) is computed by allowing interest at such lawful rate as may be specified in the lease or, if no such rate is specified in the lease, at the legal rate. The worth at the time of award of the amount referred to in paragraph (3) of subdivision (a) is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus 1 per cent.

Cal. Civ. Code § 1951.2(a). Subsection (c) of section 1951.2 limits the landlord's right to receive the damages in (a) above to (1) landlords that have provided for these damages in the lease or (2) landlords that have actually relet the property before the time of the award so long as "in reletting the property [the landlord] acted reasonably and in a good faith effort to mitigate the damages[.]" Section 1951.2(c) thus permits a landlord to recover the damages for loss of future rents that are stipulated in Cal. Civ. Code § 1951.2(a) if the tenant agreed to this formula in the lease, and even if the landlord does not show that it has actually used efforts to mitigate—because the mitigation deduction is built into the formula already.

Other states permit a landlord to collect damages stipulated in the lease on a default termination of the lease. See, e.g., *Camelot Music, Inc. v. Marx Realty & Improvement Co., Inc.*, 514 So. 2d 987 (Ala. 1987); *Emrich v. Joyce's Submarine Sandwiches, Inc.*, 751 P.2d 651 (Colo. Ct. App. 1987). None has done so as clearly as California, however. Landlords in other states can use the California calculation as an example of "fair" breach

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of lease damages when seeking damages for loss of the bargain from their tenants after a default termination.

The Bankruptcy Limitations

If a tenant files for protection under the Bankruptcy Code, the landlord's remedies may be limited severely. As a preliminary matter, the tenant's petition for protection under the Bankruptcy Code operates as an automatic stay of any judicial, administrative, or other action against the tenant. Until the bankruptcy court lifts the stay to permit the landlord's action, the landlord cannot terminate the lease, reenter the space, or bring a state court action to evict the tenant or recover damages from the tenant. 11 U.S.C. § 362.

Consequently, if the landlord suspects that the tenant is about to file for protection under the Bankruptcy Code and if the tenant is in default (beyond stipulated notice and cure periods), the landlord should use any right it has under the lease or state law to terminate the lease and to apply its security deposit to the landlord's damages. If this termination is effected before the tenant files its bankruptcy petition, the landlord will not have the headache of filing an action to lift the stay in the tenant's bankruptcy proceeding in order to terminate the lease, and the trustee or debtor in possession cannot assume the lease. 11 U.S.C. § 365(c).

If the termination is not effected before the bankruptcy petition is filed, the trustee or debtor in possession has two alternatives. One is to assume the lease and the other is to reject it in accordance with 11 U.S.C. § 365.

Assumption of the lease may not be a bad result for the landlord in an economy in which there are few replacement tenants. If the tenant is in default before the bankruptcy filing, the trustee or debtor in possession may not assume the lease unless it cures the default, or provides adequate assurance that the trustee or debtor in possession will cure the default (with some exceptions, including the exception that the trustee or debtor in possession need not cure the tenant's insolvency or bankruptcy even if these are stipulated to be defaults). 11 U.S.C. § 365 (b). The trustee or debtor in possession also must provide the landlord with "adequate assurance of future performance." 11 U.S.C. § 365(b)(1). In a shopping center lease "adequate assurance of future performance" includes the following:

> [A]dequate assurance—
> (A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;
> (B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and
(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

11 U.S.C. § 365(b)(3). Although bankruptcy courts may chafe under these restrictions, they provide the shopping center landlord with some protection against a totally inappropriate assignee or an assignee whose use violates other tenant leases in the center. For any type of lease, if the lease is assumed or is assumed and assigned, the landlord must be given some assurance that its post-bankruptcy rent will be paid.

If the trustee or debtor in possession rejects the lease, this rejection will constitute a breach of the lease by the tenant. 11 U.S.C. § 365(g). The breach, however, will not necessarily terminate the lease or dispossess the tenant. Thus, after the rejection, the landlord may be forced to have section 362's automatic stay lifted, then file state court eviction or other proceedings to terminate the lease and remove the tenant or its property from the space.

Under 11 U.S.C. § 365(d)(3), the landlord should have an administrative claim for the rent that comes due from the date of the filing until the lease is rejected. There is some question about the "stub rent" that is due for the portion of a month in which the petition is filed that is attributable to the period after the petition is filed, but the better view is that this rent is indeed entitled to priority as an administrative claim. *In re Goody's Family Clothing, Inc.*, 392 B.R. 604 (Bankr. D. Del. 2008); *In re Stone Barn Manhattan LLC*, 398 B.R. 359 (Bankr. S.D.N.Y. 2008).

More important, when a lease is terminated by reason of the tenant's default either before the bankruptcy action was filed or by reason of a bankruptcy rejection, the landlord's damages are limited. They cannot exceed "the rent reserved by such lease, without acceleration, for the greater of one year, or 15 %, not to exceed three years, of the remaining term of such lease" calculated from the earlier of the date on which the bankruptcy petition is filed or the date on which the landlord takes back or the tenant surrenders the premises, plus any unpaid rent due (without acceleration) on this earlier date. 11 U.S.C. § 502(b)(6). The landlord's claim for these damages will be an unsecured claim, paid in proportion to the assets remaining after the tenant's mortgagees, as well as its equipment, inventory, and accounts receivable secured lenders, and other secured lenders, have been paid from the assets in which they hold liens.

What about the statutory landlord's lien? A lien for rent or distress of rent is a "statutory lien," as defined in 11 U.S.C. § 101(53), and the trustee or debtor in possession may avoid this lien under 11 U.S.C. §§ 545(3) and (4).

Consequently, a landlord that has spent or plans to spend a great deal on improvements or otherwise getting the tenant to lease the space needs to evaluate a threat of the tenant's bankruptcy very carefully. If the tenant files for bankruptcy protection and the trustee or debtor in possession rejects the lease, the landlord may be left with an unsecured claim for the greater of one year's rent or the rent for 15% of the remainder of the term, capped at three years' rent. This is likely to be much less than the landlord's actual business loss.

Lease Provisions That Will Maximize the Landlord's Rights

A landlord can do a great deal to protect itself when it first enters into a lease, and the landlord should make its leasing decisions with the seriousness of a bank making a loan. It should evaluate its risk and the tenant's credit strength and decide what credit amount (the allowance amount spent by the landlord to construct tenant improvements) is appropriate.

If the tenant will operate as part of a national chain, the landlord must review the financial statements of the entity that will actually sign the lease. Many national brands operate through regional or even local subsidiaries or are franchisors that permit their locations to be operated by franchisees. If the landlord discovers that a different entity actually holds most of the national brand's assets, the landlord should require that the entity with the assets guaranty the lease.

Similarly, if the tenant is a corporation, limited liability company, or other entity owned by individuals who will operate the business, the landlord should request a guaranty from these individuals. Even if the entity has no money, the individuals may own other businesses or at least a house and a car. If there is a default, the landlord can then sue and obtain a judgment for its lease damages from the tenant and the individual guarantor or guarantors and, depending on state law, can record this judgment in the real estate records of the counties where it believes the individual guarantors own real estate. Sooner or later, a guarantor will want to sell or finance this house or other real estate, and in many states, the guarantor will have to pay the amount due to the landlord to clear the lien created by the landlord's judgment and permit this sale or finance.

A cash security deposit held by the landlord will provide assurance that the landlord's losses will be covered at least to the extent of the security deposit. The tenant's obligations can also be secured by a letter of credit issued to

the landlord by a solvent financial institution. For bankruptcy reasons, however, the landlord should avoid having to certify that the tenant is in default to draw down on this letter of credit.

The landlord also needs to be sure that the written lease provides it with the default rights that can be enforced under the laws of the state in which the property is located, including the following:

- Interest on past due rent is a simple but important provision. If the interest rate is high enough, the threat of this interest can persuade a tenant to pay its rent on time and before it pays other creditors. Similarly, the landlord should obligate the tenant to pay the attorney's fees and costs that the landlord will incur if the tenant defaults.
- In states that permit this remedy, the landlord should include the right to reenter the space and keep collecting the rent. If a waiver of the obligation to mitigate will be given effect in the state, the landlord should include this waiver. Most national tenants will require that the landlord include an express mitigation obligation, but the landlord of a multi-tenant building can often soften the effects of this provision by stating that the landlord is not obligated to rent the leased space before it leases other similar spaces and that its mitigation efforts must be only those that are commercially reasonable under the circumstances.
- In states that permit the landlord to accelerate the rent, the landlord needs to include this right in the lease to be able to exercise it. In some states the landlord also may want to call the accelerated rent "liquidated damages," though if the tenant has been dispossessed, the court is not likely to find that the full accelerated rent is a real attempt to quantify the landlord's actual loss. Savvy tenants do not agree to acceleration clauses except as part of a calculation of liquidated damages that includes a deduction for the rent loss that the landlord could have avoided. Because a provision permitting the landlord to accelerate all rent due for the remainder of the term may not be enforceable in all circumstances and, when given effect, may impede the landlord's ability to place a new tenant in the space quickly, landlords frequently agree to delete the acceleration remedy in return for inclusion of a reasoned liquidated damages provision.

The landlord needs to be sure that the written lease provides it with the default rights that can be enforced under the laws of the state in which the property is located.

- The most important default remedy for a landlord is the right to terminate the lease and proceed against the tenant for the landlord's damages. Because a lease traditionally is viewed as an estate in land, the landlord should be sure that it includes an explicit right to terminate on the tenant's default. In some states, the landlord also should include waivers of notices required by law and a waiver of the tenant's rights of redemption.
- In states that permit the landlord to continue to collect rent after a default termination, the landlord should include this right in its lease.
- Suing from time to time for the rent or a rent differential is not cost-effective. Liquidated damages are far better, and landlords should include a provision that fixes the liquidated damages that must be paid by the tenant if the landlord terminates the lease. Because one year's rent is the limit of what most landlords can collect in a bankruptcy proceeding, the landlord may wish to provide for liquidated damages of no less than one year's rent, although this may not be given effect in some states. See, e.g., *Vernitron Corp. v. CF 48 Assocs.*, 478 N.Y.S.2d 933 (N.Y. App. Div. 1984). The liquidated damages most likely to be given effect by a court are those that approximate the landlord's actual, foreseeable damages, as they would be calculated for a normal contract breach. The calculation that has been blessed by the California legislature in Cal. Civ. Code § 1951.2(a) is a good guide to what a legislature, and arguably, a court, would find reasonable.

Conclusion

Landlords have limited options for dealing with a defaulting tenant. Of course, the landlord can seldom re-write an existing lease to provide itself with more protections. The landlord can work with the tenant, however, if the tenant's financial statement indicates that a rent reduction will help the tenant regain financial strength. If this is not the case, the landlord will need to review the laws of the state in which the property is located to understand what it can and cannot do to enforce the tenant's lease obligations.

In all cases, however, a tenant's obligation to pay its rent for the whole term is not as immutable as a borrower's obligation to pay a secured debt, and a landlord may not be entitled even to the foreseeable damages for lost profits that would be recoverable in an action under another type of contract. Landlords should craft their lease remedies carefully. If the landlord is dealing with a default under a lease form that does not contain well-drafted remedies, the landlord should consider what it is permitted to do under state law and exercise those rights that are best suited to maximize its recovery. ■