

Real Estate Litigation and Counseling

# How Landlords and Real Estate Lenders are Responding to Defaulting Tenants and Borrowers in Light of COVID-19



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We have been asked to share observations of what we are seeing and hearing in the commercial and residential real estate space in relation to COVID-19. Of course, the specifics of any owner's or tenant's situation will depend on the specific terms of lease and/or loan documents and state and local laws. Those types of specific circumstances notwithstanding, some general observations can be drawn.

## **Forbearance Observations**

We are observing significant interest in forbearance from remedies by landlords and lenders facing payment defaults by tenants and borrowers. As a practical matter, landlords and lenders may wish to avoid exacerbating the financial distress of their tenants and borrowers during the immediate crisis, in the hopes that circumstances and financial health will improve in the future. They may also seek to avoid the potential reputational risk associated with sending notices of default under present circumstances. In the commercial and multifamily space, we have observed that some landlords and lenders are offering forbearance for 30 to 120 days, with the possibility of re-evaluating or extending as circumstances change. Government Sponsored Enterprises (such as Fannie Mae and Freddie Mac) and the Federal Housing Authority have agreed to a 60-day moratorium on foreclosures and are instructing their servicers to pursue loss mitigation options, including forbearance.

An additional reason for interest in forbearance is that it will likely be difficult to enforce judicial remedies against defaulting tenants or borrowers under the current circumstances. An increasing number of jurisdictions are imposing moratoria on evictions and foreclosures, although the specific terms of those moratoria vary between jurisdictions. Even in jurisdictions without such moratoria, eviction and foreclosure actions likely will be significantly delayed given that courts and sheriff departments are operating on reduced schedules and with limited staff. Additionally, landlords and lenders are likely to find that courts may be unsympathetic to eviction and foreclosure actions in this environment and may be more likely to dismiss or delay such actions than they otherwise would. That said, there may be circumstances in which asserting legal claims (i.e., monetary damages) against a defaulting borrower, tenant, or guarantor may make sense even where foreclosures or similar equitable remedies are not available.

Generally speaking, if a landlord has concerns about the lease language, tenant-friendly case law or simply wants to mitigate risks, then sending and updating default notices pursuant to the leases and applicable law would be prudent. Alternatively, landlords may choose to rely on standard lease language typically found in the "Waiver," "Default" or "Remedies" provisions that reserves the landlord's rights for failing to complain of any act or omission on the part of the tenant (such as non-payment of rent). Reliance on such provisions may be sufficient in many jurisdictions, although it will depend on the particular circumstances. Even in those instances where a formal notice of default is not sent, it may be advisable for landlords to send defaulting tenants reasonable offers for temporary forbearance or deferral, while expressly reserving all rights available under the lease. It may also be

possible to draft a relatively friendly communication to tenants or borrowers advising them of a general policy of forbearance and reservation of rights.

A potential alternative to forbearance is to consider pursuing a liquid guarantor, to the extent the contract provides for one. If pursuing a guarantor is an option, and if doing so would require litigation under the circumstances, the landlord or lender should evaluate whether any relevant moratorium prevents landlords or lenders from pursuing liquid guarantors.

### **Insurance Coverage Observations**

From an insurance perspective, we are advising landlords that receive requests for rent relief to be sure to avail themselves of all potential coverage under tenant policies. Landlords should consider requiring tenants seeking relief to confirm that they have submitted insurance claims under all potentially relevant policies. We are also suggesting that landlords send us their insurance policies (in particular, commercial property insurance) so that we can review and advise as to whether the landlord should make its own claim under its own insurance. We have separately written about some of the considerations applicable to coverage for COVID-19-related losses under property coverage policies. The article is available [here](#).

At least one state, New Jersey, is already working on a bill that would require property insurers to pay COVID-19 claims (even if there are policy exclusions) and then permit the insurers to seek reimbursement from a state fund that will be paid by future assessments on insurers. This bill passed the state assembly but was pulled by the state senate for further work. We will likely start seeing similar legislative efforts from other states. But all will depend on policyholders already having made timely claims, which is why the claims should be made now.

### **Legislative and Regulatory Developments Related to Lease and Mortgage Defaults**

We are tracking developments in federal, state and local Coronavirus legislation. We are aware of several cities that have placed moratoria on commercial and residential evictions, and several court systems are no longer hearing cases, making judicial evictions impossible. We are also aware of proposals at the federal level to prevent all evictions. We intend to update this document as we learn more detail about the viability of those proposals, whether they will cover both commercial and residential leases and loans and whether they will preempt local and state laws.

### **Forbearance Agreement Considerations**

If a landlord or lender elects to use a formal forbearance agreement, the following is a non-exhaustive list of subjects that should be considered in preparing the agreement:

- The length of the forbearance period
- Forbearance period termination events
- Payment of a forbearance fee
- Modification of the debt service payment schedule
- Cash management issues
- The borrower's cooperation to provide information or reports
- Additional recourse guarantees and/or collateral
- The borrower's acknowledgment of the debt and ratification of the loan documents
- Waivers of defenses by the borrower
- Acknowledgements by the parties of relevant facts
- Depositing a deed or assigning collateral into escrow

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*Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support*

clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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