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Workshop 32

The Lease Can't Go On, Time to Exit Stage Left

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"We continue to evaluate our network of stores, which are a critical component in our transformation, and will make further adjustments as needed and as warranted"

- Sears Press Release, May 31, 2018

I & II Lease Exit Strategies, Introduction and Overview

When parties enter into a long term lease, they tend to focus on the more positive aspects of the deal; they assume that both parties will succeed and ultimately make money. However, as we know, success is not always guaranteed. It is equally important to consider the possibility of failure and to plan accordingly. There are a number of ways parties can protect themselves during lease negotiations in the event that one party needs to terminate a lease early, whether because of low sales, bankruptcy, mergers, or a desire to redevelop a center. The best time to develop an exit strategy is when the lease is being negotiated. While it is impossible to anticipate all the events that may occur during a lease term, planning up front can mitigate the losses later experienced by a party. Provided below are a number of sample lease clauses for use by Tenant and Landlord providing the ability to exit a lease prior to expiration, as well as a sampling of some state law on applicable issues.

III Pre-Planning Exit Strategies: Sample Lease Provisions

A. Considerations In Negotiating Termination Rights

1. Improvement Allowance/Costs of Build-Out

Tenant shall have a one-time right to terminate this Lease before the Expiration Date, effective as of the date (the "Termination Date") which is the first day after the last day of the Sixtieth (60) month on the initial Term of this Lease, which right shall be exercisable by Tenant, if at all, by Tenant delivering to Landlord written notice of termination ("Tenant's Termination Notice") at least _____ (___) days prior to the Termination Date. As consideration for such termination right, Tenant shall deliver to Landlord the Termination Fee (as defined below) on or before the Termination Date. The "Termination Fee" (herein so called) payable by Tenant in connection with such termination of the Lease shall be equal to the sum of: (i) _____ (___) monthly installments of the Base Rental and all additional rent payable by Tenant under the Lease that would have otherwise been payable for the Premises at the rate which would have been in effect immediately following the Termination Date had this Lease not been terminated by Tenant pursuant to this Exhibit "___" (including, without limitation, Tenant's Share of Building Operating Costs and Tenant's Share of Energy Costs), plus (ii) the Unamortized Costs (as defined below). As used herein, the term "Unamortized Costs" (herein so called) shall mean the sum of: (A) the unamortized portion of the brokerage commissions paid or incurred by Landlord in connection with this Lease with respect to the Premises; plus (B) the unamortized portion of the Landlord paid Tenant Finish Costs of _____ and No/Dollars (\$_____) (the "Allowance") paid and/or provided by Landlord pursuant to Exhibit "___" to the Lease; plus (C) the unamortized portion of any and all other costs of construction or other concession incurred by Landlord in connection with this Lease (including, without limitation, the amount of all Base Rental and other charges abated by Landlord pursuant to the Lease). The items set forth in clauses (A) through (C), inclusive, in the immediately preceding sentence shall be amortized on a straight-line basis over the scheduled One Hundred Twenty (120) month initial Lease Term beginning upon the first month rental paid together with interest thereon at the rate of _____ (___%) percent per annum, and the unamortized portions thereof shall be determined based upon the unexpired portion of the initial Lease Term as of the Termination Date had this Lease not been so terminated pursuant to this Exhibit "___". Subject to the timely receipt by Landlord of Tenant's Termination Notice and the Termination Fee, this Lease shall terminate as of the Termination Date, and Landlord and Tenant shall thereupon be relieved of any further of their respective obligations under this Lease arising from and after the Termination Date (such termination shall not, however, terminate those obligations set forth in the Lease which specifically survive expiration or earlier termination thereof).

B. Tenant Strategies

1. Termination by Express Right

Tenant may terminate this Lease, for any reason whatsoever (or for no reason) and completely within Tenant's sole discretion, by delivering written notice ("Early Termination Notice") to Landlord at any time on or prior to the 180th day after the end of the fifth Lease Year ("Early Termination Notice Date"). If Tenant provides the Early Termination Notice to Landlord on or before the Early Termination Notice Date: (a) this Lease will terminate as of the date 30 days after the Early Termination Notice Date ("Early Termination Date"); and (b) all of the terms and conditions of this Lease will apply during such 30 day period.

Note however, that Landlord typically will require an early termination payment, as provided in the provision below.

Tenant may terminate this Lease, for any reason whatsoever (or for no reason) and completely within Tenant's sole discretion, by delivering written notice ("Early Termination Notice") to Landlord at any time on or prior to the 60th day after the end of the ____ Lease Year ("Early Termination Notice Date"). If Tenant provides the Early Termination Notice to Landlord on or before the Early Termination Notice Date: (a) this Lease will terminate as of the date 180 days after the Early Termination Notice Date ("Early Termination Date"); and (b) all of the terms and conditions of this Lease will apply during such 180-day period. Tenant's right to terminate this Lease shall be conditioned upon the following:

- (i) the Early Termination Notice shall be accompanied by a "Termination Fee" in the amount of _____ (\$__) [*Note: the amount would be negotiated between Landlord and Tenant*] payable to Landlord in the form of a cashier's check or federal wire transfer funds.

2. Gross Sales

If the Sales Threshold Test (defined below) is not satisfied, Tenant may terminate this Lease, for any reason whatsoever (or for no reason) and completely within Tenant's sole discretion, by delivering written notice ("Early Termination Notice") to Landlord at any time on or prior to the 180th day after the end of the fifth Lease Year ("Early Termination Notice Date"). If Tenant provides the Early Termination Notice to Landlord on or before the Early Termination Notice Date: (a) this Lease will terminate as of the date 30 days after the Early Termination Notice Date ("Early Termination Date"); and (b) all of the terms and conditions of this Lease will apply during such 30 day period. The "Sales Threshold Test" will be deemed satisfied if Tenant's Gross Sales (defined below) for the fifth Lease Year exceed \$10,000,000.00.

3. Violation of Exclusive Use

If any violation of Tenant's Exclusive occurs and continues for 30 days after Tenant remits notice thereof to Landlord, then, in addition to other available remedies: (i) all Rent shall abate, commencing retroactively to the date of initial violation, until the violation ceases; and (ii) Tenant may terminate this Lease upon notice to Landlord at any time prior to the cessation of such violation.

Typically, a Landlord will require a period in which to cure the violation, prior to Tenant's being able to terminate the lease; as provided for below.

In the event of Landlord's violation of Tenant's Exclusive and upon the actual opening of a business that violates the Tenant's Exclusive, Tenant shall provide Landlord thirty (30) days' notice to cure such violation. Provided Landlord fails to cure said breach within such thirty (30) day period, then Base Rent shall be reduced by fifty percent (50%) for a period of two (2) years following the date of Tenant's initial notice. Upon the expiration of such two (2) year period, Tenant shall either return to full Base Rent, or terminate this Lease upon thirty (30) days written notice to Landlord, sent within thirty (30) days of the expiration of such two (2) year period. Notwithstanding the above, if Landlord, at any time subsequent to such 30 day cure period set forth above, cures such exclusive violation, then Tenant's obligation to pay the full amount of Base Rent shall be immediately restored.

4. Co-Tenancy Violation

If at any time a Co-Tenancy Failure exists, Landlord shall notify Tenant of same, and Base Rent and Additional Rent payable by Tenant shall be reduced by 50% for as long as such Co-Tenancy Failure shall continue. If such Co-Tenancy Failure continues for 365 days after Tenant has commenced payment of reduced Base Rent and Additional Rent pursuant to this Paragraph, Tenant may at any time thereafter, unless and until the Co-Tenancy Failure is cured, terminate this Lease by giving notice to Landlord, in which event this Lease shall terminate 30 days after the date of such notice or on such later date as is specified therein.

Again, typically Landlords will require a notice and cure period prior to exercise of a termination right. See the provision provided above for a breach of Tenant's Exclusive Use.

5. Ability to Assign/Sublet

Tenant may assign this Lease or sublet all or any portion of the Premises without the consent of Landlord for any lawful retail use that does not violate any of the restrictions set forth on Exhibit ____.

Negotiating such an open assignment and subletting provision is difficult, a more typical provision allows for assignment to an affiliate, assignment pursuant to a merger or in the event a sale of all assets, as provided for below.

Notwithstanding any contrary provision of this Article ____, Landlord's consent shall not be necessary for any assignment or subletting of the entire Premises or other transfer of ownership of Tenant to any person or entity (i) which is an affiliate of Tenant or Guarantor; (ii) with which or into which Tenant, Tenant's general partner or managing or majority member has merged or consolidated; (iii) which is being done in connection with the sale or other transfer of interest in all or substantially all assets of Tenant, or (iv) which is a franchisee or regional operator or joint venture partner of Tenant's franchisor or parent entity.

In addition, frequently Landlord may require a recapture right, if so, see the below.

Excluding an affiliated transfer, or a transfer among shareholders of Tenant, if Tenant desires to assign this Lease or sublet all or any portion of the Premises, Tenant shall notify Landlord in writing ("Transfer Notice"). Within 30 days of Landlord's receipt of the Transfer Notice ("Consideration Period"), Landlord may elect in writing to Tenant to terminate this Lease (but in the event of a sublease of less than the entire Premises, Landlord may only terminate this Lease as to the portion of the Premises to be subleased). If Tenant does not receive written notice of Landlord's election on or before the last day of the Consideration Period, Landlord is deemed to have waived its termination right. If Landlord elects to terminate this Lease, this Lease shall terminate 90 days after the expiration of the Consideration Period and Landlord shall pay to Tenant, on or before the expiration of the Consideration Period, the unamortized portion of Tenant's Work (calculated on straight-line basis). However, Tenant may nullify Landlord's termination election by delivering written notice to Landlord withdrawing Tenant's assignment or sublease request on or before 30 days after notice from Landlord of Landlord's election to recapture the Premises. No assignment by Tenant shall relieve Tenant of its liabilities or obligations under this Lease unless the assignee (or its guarantor) has a tangible net worth exceeding \$50,000,000.00; provided that if Landlord and the assignee modify Tenant's obligations under this Lease without Tenant's consent, Tenant shall not be liable for any obligations arising from such modification.

6. Landlord Default

It shall be a default and breach of this Lease by Landlord if Landlord shall fail to perform or observe any material term, condition, covenant or obligation required to be performed or observed by it under this Lease for a period of thirty (30) days after notice thereof from Tenant specifying in detail Landlord's non-compliance (Landlord Event of Default); provided, however, that if the material term, condition, covenant or obligation to be performed by Landlord is of such nature that the same cannot reasonably be performed within such thirty-day period, such default shall be deemed to have been cured if Landlord commences such performance within said thirty (30) day period and thereafter diligently undertakes to complete the same. If: (a) any Landlord Event of Default is not cured within the applicable cure period, Tenant's exclusive remedy shall be an action for specific performance; and (b) if the default is a failure of Landlord to perform a repair obligation which is in Landlord's control and the failure to perform such repair obligation has rendered the Premises untenable, Tenant shall have the right, but not the obligation, to perform such repair so as to make the Premises tenable and Landlord shall reimburse Tenant for the reasonable costs incurred in making such repair within thirty (30) days after Landlord's receipt of Tenant's invoice thereof, which shall include reasonable documentation of all costs incurred. Notwithstanding the foregoing, Tenant hereby waives the benefit of laws granting it: (i) the right to perform Landlord's obligations except as expressly provided in the immediately preceding sentence; or (ii) the right to terminate this Lease or withhold Rent on account of any Landlord Event of Default.

7. Casualty

If any reconstruction of the Shopping Center required to be made by Landlord pursuant to this Lease is not completed within 180 days after such damage, in addition to other available remedies, Tenant may terminate this Lease upon 30 days prior notice to Landlord. If this Lease is so terminated, Tenant shall surrender possession of the Premises within 30 days after notice of termination is duly given, and all obligations of either party under this Lease, including any obligation of Tenant to pay Rent, shall terminate as of the date of such damage. Landlord shall promptly refund to Tenant any unearned Rent paid (or Tenant shall promptly pay to Landlord any Rent then owed and unpaid) as well as any security deposit.

Typically a landlord will limit a tenant's ability to terminate due to a casualty to the last few years of the term or only in the event a certain percentage of damage is caused, as provided in the negotiated provision below.

If (a) the Premises are destroyed or damaged to any extent by fire or other casualty and, as of the date of loss, at least thirty six (36) full calendar months remain in the term of this Lease, or (b) the Premises are damaged to an extent of less than thirty percent (30%) of replacement cost above the foundation at any time when less than thirty six (36) but at least twenty four (24) full calendar months remain in the term of this Lease, or (c) the Premises are damaged to an extent of less than twenty percent (20%) of replacement cost above the foundation at any time when less than twenty four (24) but at least twelve (12) full calendar months remain in the term of this Lease, then

Landlord shall be obligated to repair and restore the Premises, at Landlord's sole cost and expense, to the condition that existed upon the date Landlord originally tendered possession of the Premises to Tenant. If the Premises should be destroyed or damaged by fire or other risk other than as provided in the immediately preceding sentence, then Landlord shall have the election to terminate this Lease or to repair and reconstruct the Premises, and Landlord will notify Tenant of its election within sixty (60) days after receipt of written notice from Tenant of such damage or destruction. If as of the date of loss, Tenant has a renewal option that has not been exercised (but is still in effect), then provided Tenant exercises said option within ten (10) business days following Landlord's notice, then Landlord shall be obligated to repair and restore the Premises as provided above.

Notwithstanding that the Premises may not be destroyed or damaged by fire or other casualty, in the event that other buildings containing forty percent (40%) or more of the ground floor building area of the Shopping Center shall be damaged or destroyed by fire or other risk, whether or not covered by Landlord's fire and extended coverage insurance, Tenant shall have the option to terminate this Lease upon fifteen (15) days' written notice to Landlord, which shall be given, if at all, within thirty (30) days after the date of such casualty. Time is of the essence. If Tenant fails or refuses to deliver its termination notice to Landlord within such 30-day period, then Tenant will be deemed to have elected not to terminate this Lease for this particular casualty event. If Tenant elects to terminate as provided herein, Landlord may override such termination by giving Tenant written notice (which must be given, if at all, prior to the expiration of the fifteen (15) day period in Tenant's notice of termination) that Landlord intends to repair or reconstruct such damaged portion(s) of the Shopping Center. If within two hundred seventy (270) days after the date of the casualty, Landlord fails to repair and reconstruct to leasable condition at least sixty (60%) percent of the floor area of the Shopping Center which existed immediately prior to the casualty, then at any time after the expiration of the two hundred seventy (270) day period, but in all events prior to the date that Landlord repairs and reconstructs at least sixty percent (60%) of the floor area of the Shopping Center, Tenant shall have the right to terminate this Lease upon thirty (30) days' prior written notice to Landlord.

C. Landlord Strategies

1. Termination by Express Right

Landlord shall have the option to terminate and cancel the Amended Lease ("Landlord's Termination Option") by delivering to Tenant written notice of Landlord's exercise of Landlord's Termination Option (the "Termination Notice"). The Amended Lease shall terminate effective as of the date that is sixty (60) days after Landlord's delivery to Tenant of the Termination Notice (the "Termination Date"), and Tenant shall surrender the Retained Premises to Landlord on or before the Termination Date in accordance with Article 21 of the Lease. If Landlord exercises Landlord's Termination Option, and Tenant timely and properly surrenders the Retained Premises to Landlord on or before the Termination Date, Tenant shall not be obligated to pay the monthly installments of Monthly Base Rent and Deferred Monthly Payments that are due after the Termination Date.

2. Failure to Open or Operate

Tenant shall be obligated to construct a prototypical ____ restaurant in conformance with the approved Development Plan and open for business within twenty four (24) months of the Delivery Date. In the event Tenant fails to construct the Building and/or open for business, subject to extension for periods of force majeure as provided in Section ____, within twenty four (24) months of the Delivery Date, Landlord shall have the option, upon sixty (60) days prior written notice to Tenant, to terminate the Lease whereupon this Lease shall be of no further force or effect and Tenant and Landlord shall be released from all obligations hereunder (except those that expressly survive a termination).

All landlords want their tenants to open and commence business, but this is especially important for landlords when a tenant is responsible for a build-out, and a landlord is concerned with the completion of construction. The above provision will provide the landlord the ability to take back the space and safeguard against a tenant not completing construction and opening. This provision does not give the landlord any additional remedy, however, and landlords should consider whether or not to negotiate an additional remedy (i.e. the amount of rent that would accrue).

3. No Ability to Assign/Sublet

In the event Tenant should seek to assign or sublease the entire demised premises, Tenant shall provide Landlord with notice thereof (a "Proposed Tenant Notice"). Landlord shall have a period of thirty (30) days after receipt of a Proposed Tenant Notice to notify Tenant that it elects to recapture the demised premises in accordance with the provisions hereof. In the event Tenant has provided a Proposed Tenant Notice and Landlord

does not exercise the right of recapture as set forth herein, then Tenant may assign this lease or sublet the demised premises within one hundred eighty (180) days after Landlord fails to recapture in accordance with the Proposed Tenant Notice. If Landlord elects to recapture the demised premises within the required time period, Landlord's Notice of Recapture shall set forth a date within thirty (30) days of such notice, as the date for the termination of this Lease and Tenant shall vacate the demised premises in accordance with this Lease, and upon such date, this Lease shall be null and void and of no further force and effect, except for accrued liabilities and those obligations intended to survive this lease, including that the provisions of Section 9.1(c) and its subsections shall apply to any such termination of this lease under this Section 9.1(d) to the extent not inconsistent within the provisions hereof. The recapture rights set forth herein shall be applicable each time Tenant or an assignee or sublessee desires to assign or sublet the whole of the demised premises.

4. Minimum Co-Tenancy

If after completion of construction of the Building and the opening for business therein to the general public, business operations cease in more than 50% of the entire Building for a period in excess of twelve (12) consecutive months (hereinafter a "Voluntary Closing"), Landlord shall have the right to cancel the remaining term of this lease by giving Tenant written notice of its election to do so ("Landlord's Cancellation Notice") within one hundred twenty (120) days after any such Voluntary Closing, as the case may be, subject to the terms and conditions set forth herein. Subject to the provisions of Sections 9.1(c)(ii) and 9.2(c)(iii) hereof, if Landlord elects to cancel this lease as herein provided, then this lease shall terminate as of the date (the "Termination Date") selected by Landlord not later than 180 days from the date of receipt of Landlord's Cancellation Notice, as set forth in a notice from Tenant to Landlord and, if no such notice is given by Landlord then the Termination Date shall be deemed to be the date which is 180 days from the date of receipt of Landlord's Cancellation Notice.

5. Casualty

Landlord may terminate this Lease, by giving written notice thereof to Tenant within sixty (60) days after the fire or other casualty, if the Building is so damaged thereby that (1) the Building is rendered substantially unfit for occupancy and cannot be reasonably be restored within 180 days, as reasonably determined by Landlord, (2) the Building is damaged to the extent that Landlord elects to demolish the Building, or (3) any Mortgagee requires that any or all of the insurance proceeds issued on account of such damage be used to retire all of the debt secured by its Mortgage. If Landlord terminates this Lease under this Section, then (1) Tenant shall pay to Landlord the Minimum Rent and any Additional Rent payable by Tenant hereunder through the date of the fire or other casualty, (2) Landlord shall repay to Tenant any and all prepaid Rent for periods after such fire or other casualty, and (3) Landlord may enter upon and repossess the Premises without further notice.

The ability of a landlord to terminate in the event of a causal is particularly important given that a lender may require that all insurance proceeds be applied toward repayment of a loan.

6. Remedies

a. Accelerated Rent

Upon the occurrence of a Default, Landlord shall have the rights and remedies hereunder set forth, which shall be distinct, separate, and cumulative with and in addition to any other rights or remedies allowed under any law or provisions of this Lease:

- (i) Landlord may, at its sole discretion, immediately terminate Tenant's right to possession of the Premises or the Lease, or both, and reenter and repossess the Premises by detainer suit, summary proceedings or other lawful means, with or without terminating the Lease (and, if applicable law permits, unless Landlord shall have expressly terminated the Lease in writing, any such action shall be deemed a termination of Tenant's right to possession only). In such event, Landlord shall have the right to recover from Tenant the sum of (a) the worth at the time of award of the unpaid Rental which had been earned at the time of such termination or Landlord's repossession of the Premises; (b) the worth at the time of award of the amount by which the Rental for the balance of the Term, if only possession of the Premises but not the Lease has been terminated, exceeds the amount of such Rental loss that Tenant affirmatively proves could have been reasonably avoided; (c) any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform Tenant's obligations under this Lease or which in the ordinary course of things would be likely to result therefrom; and (d) all such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time under applicable Law; or

- (ii) Landlord may, at its sole discretion, have this Lease continue in effect for so long as Landlord does not terminate this Lease and Tenant's right to possession of the Premises, in which event Landlord shall have the right to enforce all of Landlord's rights and remedies under this Lease including the right to recover the Minimum Annual Rental, Percentage Rental, Additional Rental and other Rental payable by Tenant under this Lease as they become due under this Lease; or

The ability of a landlord to terminate either the lease or the tenant's right to possession of the premises provides different remedies. Parties should be wary of inadvertently waiving their rights

b. Mitigation of Damages

In the event Landlord terminates this Lease or Tenant's right to possession of the Premises, Landlord shall be required to use only reasonable efforts to relet the Premises and otherwise mitigate its damages, but Landlord shall not be required to relet the Premises ahead of any other premises in the Shopping Center. Landlord's efforts to mitigate shall not be required to exceed such efforts as Landlord generally uses to lease other spaces at the Shopping Center. Further, Landlord shall not be deemed to have failed to use reasonable efforts to mitigate if Landlord leases any other portion of the Shopping Center before renting all or any portion of the Premises. Any failure by Landlord to use reasonable efforts to mitigate as described herein with respect to any period of time shall only excuse and abate the Rental to which Landlord would be entitled for such period, taking into account, among other things, the condition of the Premises, market conditions and the period of time the Premises may reasonably remain vacant before Landlord is able to relet the same to a suitable replacement tenant. In recognition that the value of the Shopping Center depends on the rental rates and terms of leases therein, Landlord's rejection of a prospective replacement tenant based on an offer of rentals below rates of comparable tenants in comparable shopping centers in the geographical area of the Shopping Center at the time in question, or at Landlord's option, below the rates provided in the Lease, or containing less favorable terms than those contained herein, shall not give rise to a claim or defense by Tenant that Landlord failed to mitigate Landlord's damages.

Whether a landlord discharged its duty to mitigate damages is a fact specific question that typically requires testimony of experts and ultimately delays a resolution. The parties should define the duty to mitigate, including what it means to be reasonable.

c. Right to Injunctive Relief and/or Specific Performance

Landlord shall at all times have the right without prior demand or notice, except as required by applicable law, to seek any declaratory, injunctive or other equitable relief, and specifically enforce the Lease or restrain or enjoin a violation of any provision hereof, and Tenant hereby waives any right to require that Landlord post a bond in connection therewith. Notwithstanding anything to the contrary contained in this Lease, to the extent not expressly prohibited by applicable law, in the event of any Default by Tenant, Landlord may terminate the Lease and/or Tenant's right to possession and accelerate and declare that all Rental reserved for the remainder of the Term immediately due and payable (in which event, Tenant's obligations for Percentage Rental or any amount of Additional Rent that would have accrued thereafter shall be projected in the manner described in Section _____; provided the Rental so accelerated shall be discounted in accordance with accepted financial practice at the rate of four percent (4%) per annum to the then present value, and Landlord shall, after receiving payment of the same from Tenant, be obligated to turn over to Tenant any actual net reletting proceeds (net of all costs of such reletting) thereafter received during the remainder of the Term, up to the amount so received from Tenant pursuant to this provision. Tenant shall have no right to any excess.

The ability to obtain specific performance gives a landlord additional leverage to prevent a tenant from closing prematurely. Courts are reluctant to allow landlords to "double dip" so any acceleration provision should also address mitigation of damages.

IV. No Pre-Planning – What is a Party to do?

A. Strategic Default: Understand your liability/recovery

1. Does Rent Continue?

The law in many states provides that termination of a tenant's right to possession, by summary proceeding or otherwise, also terminates the tenant's obligation to by rent unless the lease provides otherwise.

Illinois

The suit for possession must be regarded as terminating the tenancy, and we think the judgment for possession the decisive act which annulled the lease. *Johannes Kielgast*, 27 Ill.App. 576 (1st Dist. 1888)

Colorado

Termination of the lease agreement or eviction of the tenant by the landlord relieves the tenant from all liabilities to accrue in the future, including rent, except where the parties, by express agreement, have contracted to the contrary. *McArthur v. Rostek*, 483 P.2d 1351, 1352 (Colo.App.1971)

North Carolina

A successful summary ejectment action terminates a lease and a tenant's obligation to pay future rent. Consequently, if a landlord does not want this result, he should file a suit for rent instead. If a lease does not contain a provision expressly holding the tenant liable for future rents after ejectment, the lease is terminated when tenant is removed and landlord is placed in possession pursuant to the summary ejectment proceeding. *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412 (N.C. App. 1994)

Indiana

It is a general rule that a tenant will be relieved of any obligation to pay further rent if the landlord deprives the tenant of possession and beneficial use and enjoyment of any part of the demised premises by an actual eviction. *Nylen v. Park Doral Apartments*, 535 N.E.2d 178, 181 (Ind.App.1989)

2. Accelerated Rent vs. Accrued Rent

Rent Acceleration is always a source of disagreement among the parties, and while many landlords want to include an accelerated rent provision in their commercial lease in many cases such provisions are not enforceable. Each state has its own approach as to the enforceability of accelerated rent provisions, so while an accelerated rent provision may be included in the lease, note that, inclusion is certainly no guarantee of enforcement. Below are brief examples of how a few states have chosen to handle accelerated rent provisions.

Texas

While in Texas, acceleration clauses have been recognized as valid by Texas courts, it is a difficult to actually enforce such provisions, since a Landlord is required to mitigate its damages in the event of a breach. The Texas Property Code §91.006 imposes upon Landlord the duty to mitigate damages.

This duty requires that the landlord use "objectively reasonable efforts to re-lease the premises when the tenant vacates in breach of the lease." See *Rem Servs., Inc. v. Zaheer* (citing *Austin Hill County Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293 (Tex. 1997); *White v. Harrison*, 390 S.W.3d 666 (Tex. App. 2012)).

But it is important to note that the tenant bears the burden of proving both that the landlord did not mitigate his damages and the amount by which the landlord could have mitigated his damages. This is likely a difficult burden. In *Rem Servs. v. Zaheer*, a Texas Court of Appeals upheld a judgment by the trial court "award[ing] the landlord \$24,000 in damages, representing the four months of accelerated rents on his breach of contract claim", and the court decided that the landlord did not breach his duty to mitigate even though he did not list the property for rent during the four months remaining on the lease.

New York

A New York commercial landlord's ability to enforce lease provisions that provide for the acceleration of a tenant's future rent obligation in the event of breach came under scrutiny recently in the decision by New York's highest court, the Court of Appeals, in *Van Duzer Realty v. Globe Alumni Student Assistance*, 24 N.Y.3s 528 (2014).

New York law imposes no duty on commercial landlords to mitigate damages. That is, landlords have no obligation to re-let premises previously leased by defaulting tenants. Landlords, however, cannot collect from tenants more than what was bargained for at the time a lease was signed. Thus, a commercial landlord must make sure that any damages measured by the accelerated rent are not disproportionate to its actual damages.

The Court of Appeals in Van Duzer found that a lease provision that gave the landlord both possession of the premises during the term of the lease and the right to immediately recover all rents due under the lease (without calculating for net present value) was akin to “double-dipping” because it gave the landlord the ability to collect rent from a defaulting tenant and a future tenant for the same period.

The court was persuaded by the argument that the damages measured by the accelerated rent could be disproportionate to the landlord’s actual damages because the landlord had possession and immediately collected all rent due for the balance of the lease in one lump sum. According to the court, the rent acceleration provision contained in the lease, which gave the landlord both possession and a lump sum payment, allowed for the landlord to receive more than the compensation it would have received had there been full performance of the lease. The court, therefore, ruled that the case had to be sent back to the trial court so that the tenant could submit evidence demonstrating that the damages sought by the landlord were disproportionate to what was bargained for under the lease.

Maryland

In *Circuit City Stores, Inc. v. Rockville Pike Joint Venture Limited Partnership*, 376 Md. 331 (2018), the Court of Appeals of Maryland clarified Maryland law relating to a commercial landlord's duty to mitigate damages following a default by a tenant.

Under common law real property principles applicable to leases, a commercial landlord did not have any duty to undertake any efforts to mitigate damages, absent an agreement in the lease to the contrary. Under a contract, however, the common law imposed a duty to mitigate damages on the parties in the event of a breach by one of them.

Interestingly, the Legislature enacted by statute, the duty of residential landlords to mitigate damages. Since the legislature only changed the common law applicable to residential leases, many practitioners thought the common law rule of "no duty to mitigate damages" still protected commercial landlords. The Court has now clarified that there is, and has been, under contract principles, a common law duty to mitigate imposed even on commercial landlords in certain circumstances.

The Court ruled that, following a lease termination by the landlord, the landlord's claim is one for money damages, and not for rent since the tenant no longer has a right to possession. The landlord's right to collect damages must be governed by contract law principles and not real property law principles. As a result, if a landlord terminates a lease, or accepts a surrender of possession of the premises, it has a duty to use reasonable efforts to mitigate damages.

The lessons, therefore, are (a) landlords should not rush to send termination letters to tenants, and (b) landlords should include a clause in their leases clearly negating any duty to mitigate damages, as a matter of contract law, even after the landlord terminates or retakes possession of the premises. Tenants, on the other hand, are advised to include provisions requiring landlord to (a) mitigate its damages even if it does not terminate the lease, or (b) terminate the lease as a condition of filing a claim for acceleration of rent or future damages.

California

California law also imposes a duty to mitigate damages. There are two important limitations on an award to the landlord of damages for lost future rent. First, the award of lost future rent must be reduced by the amount of the "rental loss that the lessee proves could be reasonably avoided." Ca. Civ. Code § 1951.2(a)(3). In most cases, some, if not all, future rent loss can be mitigated by the likely rent from a replacement tenant. Second, the award must be computed by "discounting" the future lost rent by a certain rate of interest. Ca. Civ. Code § 1951.2(b). Essentially, this means reducing the future rent revenue stream to its present value in order to compensate for the fact that the future rent would not have been earned at the time the damages are awarded to the landlord.

In addition to lost rent damages, a landlord may be entitled to recover "consequential"• damages. These are losses which the landlord sustains as a direct result of the tenant's breach of the lease. However, a landlord cannot recover more in total rent and consequential damages than the landlord would have realized had the tenant not breached the lease. So what can a savvy tenant do to minimize potential liability? The first thing a tenant should consider is that, for many landlords, recouping possession of the leased premises is priority number one. If a tenant is significantly past due on rent payments or has ceased paying altogether, the landlord will want to get the premises back on the market and re-let without delay. Moreover, the legal uncertainty that often exists when the relationship with the tenant has broken down is of particular concern for landlords.

In *Sanders Const. Co., Inc. v. San Joaquin First Federal Sav. and Loan Ass'n* (App. 5 Dist. 1982) 186 Cal.Rptr. 218, 136 Cal.App.3d 387, the Court found that Ca. Civ. Code §1951.2 is designed to give lessor benefit of his bargain, but not more; thus, landlord is required to mitigate damages by avoiding rental loss by taking reasonable steps to relet property, and lump sum awards of future rentals are discounted to reflect prepayment.