

**LANDLORDS' AND TENANTS' PERSPECTIVES**  
**ON RESTRUCTURING COMMERCIAL LEASES**

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1. The Situations

- a. The tenant in financial trouble.
- b. The tenant that wants a voluntary rent reduction but may not be in serious financial trouble “*per se*”.
- c. The tenant who is suddenly asserting a “nonmonetary” “technical” default to gain concessions or uncover overcharges.
- d. The Assignment/Sublease.
  - i. A new entity.
  - ii. New owners.

2. Tools for Landlord

- a. Forgiveness, forbearance or deferral of part or all of rent.
  - i. Structure as current forbearance, future forgiveness.
  - ii. Condition forgiveness in future based on actually receiving reduced rent payments and compliance with other performance standards.
  - iii. Create penalty for nonperformance; all deferred amounts are due plus interest.
  - iv. Leaves larger amount to cure default in bankruptcy. [**take promissory note for deferred payments?**]
- b. Right of landlord to terminate in future if landlord finds replacement tenant unless tenant restores part or all of deferral. [*“Pay to Continue to Play”*]
- c. Limit deferral or forgiveness to Base or Minimum Rent modification, make sure landlord is charging full “Additional Rent,” CAM, taxes, etc. [**PROPERTY TAXES ARE GOING UP.**]

- d. Modify concessions that were granted to tenants which had bargaining power when lease was executed:
    - i. Eliminate or reduce “exclusives”, “co-tenancies” and restrictions.
    - ii. Review CAM, operating expense clauses to eliminate or adjust ceilings, “caps” or “artificial percentages”. **[AGAIN, TAXES, INSURANCE GOING UP.]**
    - iii. Modify or eliminate concessions-future tenant improvement allowance, free rent, option rights, etc.
  - e. Require occupancy, full operation during concession period;
  - f. Prohibit going out of business type sales etc.
3. Always Consider Guarantors.
- a. Obtain written consents and ratification from all guarantors; do not give guarantors the argument they are released.
  - b. Investigate whether financial condition of each guarantor has changed and whether additional credit is required.
4. Always Consider Lender.
- a. Check Loan Documents for restrictions on amending leases and any required notice to or consent of lender.
    - i. Amendment of lease could be a default.
    - ii. Amendment of lease could be a basis for personal liability in securitized loans.
  - b. Obtain required consents of lender.
5. “Claimed” Landlord Defaults.
- a. Incorrect Parties.
    - i. Prior sales, assignments.
    - ii. Original mistake.
  - b. CAM/Operating expense.

- i. Audits (employees, brokers keeping busy; contingent fee auditors).
    - ii. Overcharges in past [Time periods to assert; “reasonable time” in absence of specific period?]
  - c. Complaints about maintenance, etc.
  - d. Violation of exclusives, “co-tenancies” and restrictions.
    - i. Complaints about violations by other tenants of exclusives, restrictions.
    - ii. Broad definition of “Shopping Center” or “Property”.
    - iii. Video stores, small specialty retailers, larger retailers with “no more than x foot of” clauses, or “primarily” clauses, or “hamburger” or “sandwich” clauses; “Red Boxes” and “Chicken Burgers”.
6. Assignment and Subletting.
- a. Tighten up sublease language: Define extensive “sublease” as an “assignment” or prohibit subleases of substantially all of the premises for substantially all of the term.
  - b. Default exists at time of prohibited assignment or sublease vs. prohibited sublease void.
  - c. Require continuing status as an affiliate after change of control.
  - d. Prohibit assignment or sublease to another Landlord (avoid helping it steal your tenant) or to another existing tenant (lets another tenant benefit).
  - e. Require assignor guaranty/continued liability.
  - f. As part of “reasonable approval” of assignment or sublease, impose new: prohibited uses, recapture rights, rent sharing, rent increases.
  - g. As part of “reasonable approval” of assignment or sublease, make assignee, sublessee pay legal fees.