



Past Due

Strategies for Commercial Landlords in a Down Economy

Commercial landlords sit in a conundrum: what to do with the non- or short-paying tenant. On one hand, the tenant is breaching its lease; on the other, dark windows is an unattractive option. After calling an attorney, here are a few strategies for the landlord to consider in these circumstances.

First, comply with default notice requirements under the lease and serve a three-day notice to pay rent or vacate in conformity with Utah Code Ann. § 78B-6-801, *et seq.* A three-day notice may be served anytime after rent is due and is best served shortly after the tenant fails to

substantial non-reoccurring expense. If the prospect for the business is still positive, use a forbearance agreement to help the tenant cure the arrears. A common forbearance agreement requires the tenant to simultaneously pay the full monthly rent and chip away at the arrears over time. In exchange, the landlord forebears, or holds off, filing a lawsuit to evict the tenant under the three-day notice.

Use a rental abatement agreement to abate, or delay, the payment of the arrears until a future date after the tenant has turned the business around.

suggest payment of the arrears if the landlord agrees to reduce the rent. Rather, the landlord should insist the arrears be cured before it will accept the application. Then, the landlord can make an informed and unhindered decision whether the situation merits rent relief, without being blinded by a promise to pay the arrears if relief is granted.

Fourth, avoid getting nothing for something. If the principals of the tenant have not previously signed a personal guaranty of the lease, these negotiations often present an opportunity for the principals to “put some skin in the game” by guaranteeing the obligation. A personal guaranty greatly aids collection efforts, even if it is just limited to the payments under the forbearance or abatement agreement.

Fifth, consider the lessor’s lien under Utah Code Ann § 38-3-1, *et seq.* If preserved, landlords have an automatic lien for rent due upon all of the tenant’s nonexempt property brought on or kept upon the leased premises so long as the tenant occupies the property and for 30 days afterward. Although often trumped by an all-encompassing UCC filing by a lender, it may be apt to remind the tenant of the lien during negotiation if the tenant threatens to wind up its business or sell some of its equipment or inventory.

There is no perfect path as landlords and tenants balance their relationship with each other, especially in a down economy. These simple strategies, however, may help landlords walk through the process in a stronger position and without leaving too much on the table. **UB**

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pay rent. This dual-purpose tool should bring the tenant to the table within a few days and allows the landlord to negotiate from a position of strength with the inducement of triple damages.

A landlord should not be nervous the tenant will vacate. Although a few will, many will either pay the arrears or contact the landlord to work out a plan. If the tenant does leave the premises after the three-day notice, it is a clear indication the tenant’s business was no longer viable. Delaying the three-day notice only prolongs the inevitable with rapidly growing arrears.

Second, work with the tenant to achieve the best outcome if the tenant is willing to talk. For many tenants, business is cyclical with a high and low season, or the tenant may have had a recent,

For example, most businesses profits are made after the holiday season. It may be appropriate for the abatement agreement to run through the following January, which gives the tenant some relief during the slow period, keeps the tenant operating and, assuming predictions hold true, allows the landlord to collect all of the rent. Landlords should consult with tax professionals on whether it may be better to collect the rents just before or after the end of the calendar year.

Third, require the tenant be current on rent before the considering rent relief. In a down economy, tenants claim a hardship that the full rent cannot be paid because business has decreased. In such cases, it is appropriate to grant temporary rent relief. The landlord should not be held hostage, however, should the tenant