

PRACTICAL CONSIDERATIONS IN LIGHT OF EVICTION AND FORECLOSURE STAY

On Friday afternoon, Governor Tony Evers and Secretary-designee Andrea Palm issued [Emergency Order #15](#), a Temporary Ban on Evictions and Foreclosures. The Order generally prevents the commencement and continuation of eviction and foreclosure proceedings statewide for a period of 60 days commencing March 27, 2020. The Order raises some practical considerations for landlords and tenants alike.^[1]

The Order contains several provisions that alter the traditional landlord-tenant relationship. Principally, landlords are prohibited from initiating measures to remove tenants from the leased premises. Landlords may not issue notices terminating tenancy, commence civil actions for eviction, or deliver writs of restitution to the sheriff. A narrow exception to this general bar applies. The bar does not prevent landlords from taking legal action based on non-monetary defaults if the basis for the termination of tenancy is that a failure to do so “will result in an eminent threat of serious physical harm to another person.” In that event, any notice served, action commenced, or writ delivered by a landlord must be accompanied by an affidavit from an individual with personal knowledge detailing the reasonable belief of eminent threat of serious physical harm that would result if action is not taken.

Importantly, the Order does not work to authorize a period of holdover for a tenant, nor does the Order relieve a tenant from any of its obligations under a lease, including a tenant’s responsibility to pay rent.

While the Order works to prevent a near-term spike in eviction proceedings resulting from the economic effects of COVID-19, landlords’ eviction-based remedies will be restored eventually. This underscores the importance, for both landlords and tenants, of finding practical solutions to potential rental problems.

One of the first things that landlords and tenants should consider is whether there is [business interruption insurance](#) available to cover rental payments. Business interruption coverage can be triggered by unforeseen events that cause business losses. Each policy is unique and should be carefully examined by a qualified professional to determine whether a claim can be made.

If business interruption coverage is not available, landlords and tenants will need to make alternative payment arrangements until each tenant’s business stabilizes. The parties may wish to amend their leases so that payment for less than the current rental rate does not constitute an event of default. Repayment of the rental arrearage should also be specified so that parties have a clear understanding of the new terms of the lease. Because most leases contain a clause that requires any modifications of the lease to be in writing, parties to a

lease should be careful to properly document all of their modifications in a lease amendment that satisfies the Statute of Frauds, Section 706.02, Wis. Stats.

Whether you are a landlord or a tenant experiencing lease issues as a result of the economic effects of COVID-19, our experienced legal team at O'Neil Cannon can answer your lease questions and protect your interests.

[1] This article focuses on leasehold interests, but the Order also has practical implications for mortgagees and mortgagors. Mortgagees are prevented from commencing foreclosure actions and scheduling sheriff's sales, and sheriffs are prevented from conducting sheriff's sales and acting on writs of assistance. The only exception to this general bar is for abandoned property pursuant to Section 846.102, Wis. Stats. Mortgagees and mortgagors should consider how their remedies and statutory timelines may be affected by the Order.

BEWARE OF MAINTENANCE AND REPAIR RESPONSIBILITIES IN COMMERCIAL LEASES

One of the most important aspects of a commercial lease is apportioning the maintenance and repair responsibilities for the leased premises. Maintenance and repair responsibilities vary greatly based on the type of lease, design of the leased premises, and negotiating power of the landlord and tenant.

At the outset, it is important to appreciate the structure of each lease. Generally speaking, there are two categories of leases based on how rent is calculated. On one end of the spectrum is the gross lease (sometimes called a "full-service lease"), which provides that a tenant's rental payment includes all expenses associated with the leased premises. On the other end of the spectrum is the net lease, which provides that a tenant's rental payment is net of certain expenses in association with the leased premises. In a net lease, the tenant reimburses the landlord for these expenses in the form of additional rent or pays the expenses directly.

Variations of the gross lease and net lease exist. A modified gross lease is more tenant-friendly and allows the landlord and tenant to negotiate which expenses relating to the leased premises should be included and excluded from the tenant's rental payment. A triple

net (NNN) lease is the most common type of net lease, and generally provides that a tenant pays the landlord for its proportionate share of real estate taxes, insurance, and operating expenses (usually specifically defined) in addition to the tenant's base rental payment. An absolute net lease is the most landlord-friendly type of lease and apportions all risk and expenses associated with the leased premises, including all maintenance and repair responsibilities, to the tenant.

Chapter 704 of the Wisconsin Statutes governs landlord-tenant rights. Section 704.07 provides default rules for maintenance and repair obligations in the absence of contrary language in a commercial lease.

A landlord's obligations include:

- Keeping common areas in good repair;
- Keeping equipment that furnishes services (e.g., heat, water, elevator, air conditioning) to the tenant in good repair;
- Making all necessary structural repairs; and
- Repairing and replacing plumbing, electrical wiring, machinery, and equipment furnished with the leased premises.

Wis. Stats. § 704.07(2).

A tenant's obligations include:

- Repair and remediation for damage and infestation caused by action or inaction of the tenant; and
- Ordinary and routine maintenance and repairs for plumbing, electrical wiring, machinery, and equipment furnished with the leased premises.

Wis. Stats. § 704.07(3).

Typically, a landlord is responsible for the repair of structural and major component parts of the leased premises, as well as any replacements that would be considered capital expenditures, such as the roof, parking lot, and foundation. The tenant remains responsible for maintenance and ordinary repairs to items inside of the leased premises over which the tenant has control. In many commercial leases, however, a landlord may attempt to shift repair and replacement responsibilities to a tenant for items that exclusively service the leased premises. One common example is heating, ventilation, and air conditioning (HVAC) systems, which can carry considerable costs.

A good rule of thumb is that the longer the lease term and the fewer number of tenants in a particular building, the more likely it is that a tenant will take on additional maintenance and repair responsibilities. Landlords and tenants should be careful to clearly apportion these responsibilities to avoid ambiguity. For example, "operating expenses" should be clearly

defined to avoid any misunderstandings between the parties.

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