

**Leasing in Troubled Times:
Negotiating and Enforcing Commercial Leases in a Distressed Market**

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Leasing in Troubled Times: Negotiating and Enforcing Commercial Leases in a Distressed Market

I. DUE DILIGENCE: LOOK BEFORE YOU LEAP!

In these challenging economic times, it is imperative for landlords to perform thorough due diligence on prospective tenants. First and foremost, landlords must correctly identify the name of the tenant and any guarantors. This sounds so basic, yet many landlords are remiss in understanding the tenant's ownership structure and identifying the correct entity as the tenant. Prudent landlords will obtain representations and warranties from a tenant regarding its ownership structure. Landlords may even wish to require an officer's certificate, together with copies of the tenant's organizational documents and resolutions authorizing the tenant to enter into the lease transaction and designating one or more authorized signers of the lease agreement. Each guarantor should be identified by his, her or its full legal name and address, so the guarantor can be located for service of process, if necessary.

The internet makes verification of the tenant's name a simple process. In most states, the office of the Secretary of State maintains an online database that is searchable, free of charge, which enables a landlord to verify the corporate existence of a tenant and whether the tenant's entity is in good standing. Landlords should also perform credit checks, a UCC search, a search of the OFAC SDN and Blocked Persons list, and consider retaining a service provider to run a comprehensive search of multiple databases for purposes of gathering information regarding a tenant's or guarantor's background.

Financial statement analysis has always been and continues to be a key component of a landlord's due diligence of a tenant and guarantor. A landlord should require the tenant to deliver annual financial statements for itself, any affiliates, and any guarantors. The landlord should also retain the right to require a security deposit, rent adjustment, or other consequences to protect the landlord if the financial condition of the tenant or any guarantor deteriorates.

An emerging trend in conducting due diligence on tenants is to search previous SEC filings for publicly traded companies to provide an indication of terms that a tenant has agreed to in the past with regard to "material transactions." Previous leases are only likely to be included with SEC filings if the tenant believes the leases to be "material transactions."

TIPS AND EXAMPLES:

- See National Association of Secretaries of State website (http://nass.org/index.php?option=contact_display) for a listing of the official websites of the office of the Secretary of State for the 50 states and U.S. territories.
- See **Appendix 1** for one example of a fee-based background search that can be performed on lease guarantors.
- Go to the SEC's website (<http://www.sec.gov/edgar/searchedgar/webusers.htm>) to search SEC filings.

II. KEY LEASE PROVISIONS IN TROUBLED TIMES

A. Termination Options. Tenants often desire the right to terminate the lease for landlord's default, condemnation, casualty, interruption of services, and/or the business needs of the tenant. In these economic times, tenants may request the right to terminate the lease if its business grows either too much or slows too much. Lenders and landlords generally frown upon termination rights and set-off rights.

A landlord may agree to an early termination option based on a tenant's business needs, provided that the following criteria are satisfied:

1. Recovery of the unamortized Tenant Improvements ("TI") allowance;
2. Recovery of unamortized brokerage commissions;
3. Payment by the tenant of some predetermined portion of rent going forward;
4. Reconciliation of the Common Area Maintenance ("CAM")/operating expenses; and
5. Satisfaction of landlord's lender.

It is prudent for landlords to limit the time period for a tenant's exercise of a termination right. Landlords will typically request a lengthy notice period to give the landlord adequate time to re-lease the space, and to turn profit on the termination.

From the tenant's perspective, flexibility is key. Tenants typically want the right to give back all or a portion of the space and obtain a release from the landlord of the tenant's obligations under the lease. The scope of the tenant's relief from lease obligations may be subject to negotiation, and generally will not exonerate the tenant from pre-existing obligations at the termination date. Savvy tenants will also require certainty regarding the amount of the lease termination fee payable by the tenant. This can be accomplished by specifying total cost of the tenant improvement allowance and brokerage commissions in a Commencement Date Agreement, together with any other components of the termination fee, so that there are no surprises or delays at the time of exercise of the tenant's termination option.

EXAMPLES:

- See **Appendix 2** for a sample cancellation/termination option.
- See **Appendix 3** for a sample Memorandum of Commencement of Rental (a/k/a Commencement Date Agreement) which includes data necessary to calculate a termination fee.

B. Security Deposit v. Letter of Credit. The landlord must carefully examine a tenant's financial viability and determine whether one or more credit enhancements should be required, particularly when the landlord is making a significant investment in reliance upon a lease transaction, such as construction of leasehold improvements, payment of brokerage commissions, or payment of one or more tenant allowances.

A cash security deposit is the most common form of security. In addition to the standard deposit, a landlord may want to consider including lease provisions that provide for incremental security deposits in the event that a tenant's financial condition deteriorates and/or to back up a tenant's end-of-term lease obligations.

Letters of credit ("LOCs"), are an alternative to traditional security deposits. LOCs are most often used with high-risk tenants. The LOC is a commitment by a third party issuer (usually a bank) to pay the beneficiary (the landlord) when certain conditions are met, such as when a tenant defaults. If a tenant fails to satisfy its lease obligations, the landlord can submit a written demand for payment to the

bank who issued the letter. In turn, the bank will be obligated to pay damages to the landlord on the tenant's behalf.

The reason LOCs are often preferred in situations involving tenant bankruptcies is because an LOC reflects an obligation of the bank rather than the tenant. This means a landlord will not be prohibited from collecting from the bank pursuant to a letter of credit, even if claims against the tenant would be otherwise barred by the automatic stay when a tenant files bankruptcy. Additionally, when the landlord holds a valid LOC, a landlord's damages may not be capped by the Bankruptcy Code, if the tenant elects to reject its lease after filing.

LOCs are not entirely advantageous for landlords. Security deposits are often more readily available because they constitute cash already in the landlord's possession. On the other hand, to collect from an LOC, the landlord must follow proper procedure in making a demand upon the issuing bank. It is important for landlords to keep on top of LOC notice and documentation requirements. For example, most LOCs will expire after one year. If the tenant's lease is for a term longer than one year, the landlord may request an "evergreen" LOC, which provides for automatic renewal for successive periods absent prior notice from the bank that the bank is electing not to renew.

A landlord's ability to draw on an LOC may also depend on the location of the issuing bank. If the issuing bank is in a state different than the landlord, the foreign bank may require the LOC to be "confirmed" by a local bank. Confirmation really just means authentication by a local bank that the LOC is legitimate and enforceable. Landlords should remember that confirmation may delay collection and result in additional expenses.

EXAMPLES:

- See **Appendix 4** for a sample security deposit provision.
- See **Appendix 5** for a sample letter of credit provision.
- See **Appendix 6** for a sample letter of credit.

C. Guaranties. In an unstable economy, it is prudent for a landlord to consider requiring a tenant to provide personal or third-party guaranties, especially when the tenant is a small or closely-held company. In the event of a tenant default, the landlord can seek to collect from the guarantor in addition to the potentially insolvent tenant. When the individual directors of a corporate tenant are serving as guarantors, this means that the landlord can attempt to collect against each of them personally.

A guaranty typically consists of a document separate and apart from the lease itself. Language included in a guaranty should specify the relationship between the tenant and guarantor. Additionally, a landlord must ensure that a tenant asserts that the guarantor will receive some sort of benefit from the lease, because some courts will not enforce a guaranty where it appears the guarantor received no consideration in exchange for its promise to pay.

Landlords should be diligent in determining that a guarantor is financially stable, because a guaranty will be ineffective if the guarantor is unable to pay in the event of a tenant default. A landlord should require both the tenant and guarantor provide financial statements with ongoing reporting of a minimum of once per year. Landlords may want to consider including a lease provision that specifies that a material adverse change in a guarantor's financial condition can itself constitute a default of the tenant's lease, unless the tenant quickly obtains a new guarantor or additional security.

It is also important for landlords to keep in mind how they want guaranties to affect other lease provisions. For instance, the terms of the guaranty should specify that the guaranty will be assignable automatically to the new owner in the event that the landlord sells the property. Also, if a landlord allows its tenant to sublet the leased space, the landlord should obtain additional guaranty protection for the new-subtenant.

EXAMPLES:

- See **Appendix 7** for a sample personal guaranty provision.
- See **Appendix 8** for a sample corporate guaranty provision.¹

D. Subordination/SNDA. A subordination provision in a commercial lease addresses the relative priority of the leasehold estate vis-à-vis existing or future mortgages. The lease that is subordinate to a landlord's mortgage can be extinguished through the foreclosure of that mortgage. Tenants, therefore, normally resist any requirement to be subordinate to present or future mortgages unless they obtain a satisfactory non-disturbance agreement with the mortgagee. Most commercial lenders will require that existing tenants subordinate their leases to the lender's mortgage, and most subordination provisions require the tenants to do so.

To avoid negotiating a separate Subordination, Nondisturbance, and Attornment Agreement ("SNDA"), a lease should include all mortgagee protections and benefits that an SNDA would typically give a mortgagee. The tenant should be required to confirm these protections if a mortgagee so requests, with the form of confirmation attached as an exhibit (perhaps with the form of estoppel certificate). A lease should also build in flexibility to add any other SNDA protections that a future mortgagee might reasonably require. A tenant's cure period for any defaults arising from the tenant's failure to sign any required SNDA should be tightly limited.

From a landlord's perspective, a lease should be automatically subject and subordinate to the landlord's existing or any future mortgage, and subordination should not be conditioned upon delivery of an SNDA from the mortgagee. The lease should also require the tenant to agree to any reasonable modification that a mortgagee requests, if it does not materially reduce the tenant's rights or materially increase its obligations. Further, the lease itself should provide that a mortgagee may unilaterally subordinate its mortgage to the lease, in whole or in part, at any time, including after commencement of a foreclosure action. Any such subordination should bind the tenant automatically, whether or not the tenant has been notified of the subordination.

A tenant with significant leverage may insist that its entry into a satisfactory SNDA with each existing mortgagee be a condition to the effectiveness of the lease, and that the completion of such an SNDA be a condition to the subordination of the lease to any future mortgage. In order to avoid possibly significant costs associated with the negotiation of an SNDA, a landlord should require a tenant to execute the lender's standard form of SNDA which should be attached as an exhibit to the lease, and a tenant's subordination to any future mortgage could be conditioned upon the landlord obtaining for and delivering to the tenant an SNDA that is substantially similar in form to the SNDA that is attached as an exhibit to the lease.

¹ Some landlords are under the misimpression that a "guaranty" from a corporate tenant provides greater ability to collect than a mere promise to pay under a lease. This is not the case. However, a "corporate guaranty" can be very useful if it is from a different party than the tenant. The classic example is when a tenant is a shell limited liability company with no assets. A corporate guaranty is received from its parent company or a related entity which has substantial assets and business operations. In this situation, a "corporate" guaranty can be crucial in collection.

EXAMPLES:

- See **Appendix 9** for a sample subordination provision with no obligation by landlord to obtain an SNDA.
- See **Appendix 10** for a sample subordination provision which includes a landlord's obligation to obtain an SNDA.

E. Acceleration of Rent. Most landlord oriented lease forms permit the landlord to accelerate all or a substantial portion of future rents in the event of a tenant's default. Some commentators have questioned the enforceability of such provisions where they appear to penalize the tenant. See e.g. Restatement 2d of Property – Landlord & Tenant § 12.1, Comment K (2008). Typically, such acceleration provisions are enforceable if they satisfy traditional requirements for the enforceability of liquidated damages provisions. A tenant may seek to eliminate acceleration of rent as a remedy of the landlord. A compromise approach may be to include the acceleration of rent clause as liquidated damages, but allow the tenant credit for the fair and reasonable rental value of the premises at a stated discount rate.

EXAMPLES:

- See **Appendix 11** for a sample full acceleration of rent provision.
- See **Appendix 12(c)** for a sample acceleration of rent provision with credit for fair rental value of premises.

F. Tenant Default. As tenants increasingly are becoming insolvent and making untimely payments, it is more crucial than ever for landlords to have default provisions which allow them to flexibly and aggressively enforce the terms of their lease. In particular, those events constituting default need to be broadly defined to include more than simply the failure to pay rent on a timely basis. Default provisions also need to clearly define how and when the landlord can give notice of default and, most importantly, permit recidivist defaulting tenants to be subject to eviction for late payments.

EXAMPLE:

- See **Appendix 12** for a default provision benefitting the landlord.

G. Attorneys' Fees. The boilerplate attorneys' fees provision in many commercial leases is a mutual fee provision, i.e. the losing party must pay the prevailing party for its attorneys' fees. This allows a court discretion regarding which party has prevailed. We suggest the attorneys' fees provision expressly benefit the landlord.

EXAMPLE:

- See **Appendix 13** for a sample attorneys' fees provision benefitting the landlord.

III. LEASE MODIFICATIONS: MEET ME HALF WAY

In turbulent economic times, a lease modification may be a relatively palatable solution to problems related to a tenant in trouble. A lease modification may be the most efficient and least expensive of various work-out solutions, and it keeps a tenant in the building. Typical provisions which may be modified in a down economy are the following:

1. Reduction in rental rate;
2. Reduction of size of the leased premises;
3. Lengthening of lease term to accommodate free or reduced rent;
4. Tenant improvement allowance to induce a tenant to refurbish or remodel its space rather than vacating; and
5. Assignment of the lease or subletting of the premises may be addressed in the context of a work-out.

A. Factors to Consider.

From a landlord's point of view, there are several critical points to address when pursuing any work-out solution with a tenant. First, be sure to obtain updated financial statements from the tenant and any guarantors of the lease. It will be imperative for the tenant to justify to the landlord its need for a lease work-out. The landlord may also be required to submit the tenant's financial information to its lender. A prudent landlord will require that an officer of the tenant, if the tenant is an entity, certify to the landlord that the financials are true, accurate and complete. If the lease will be assigned to a replacement tenant or a sublease is being proposed as part of the work-out, financials of the assignee or subtenant must also be presented to the landlord.

A landlord must also consider the impact a proposed lease modification may have on its financing for the building. The landlord's loan documents must be reviewed to determine whether the lender's consent to a lease modification is required. If the lender's consent is required, the landlord should be prepared for the lender's analysis of the credit facility, which may include review of updated financial statements of the landlord and any guarantors of the credit facility, a request for additional collateral to secure the loan, prepayment of interest or other payments from the landlord.

Since the landlord will undoubtedly incur costs arising from a tenant's request for a work-out and may actually suffer additional obligations under its financing arrangements for the building, the landlord should consider whether any new obligations can be imposed upon the tenant requesting the work-out. Check the lease to determine whether the tenant is responsible for the landlord's attorneys' fees in connection with an assignment, subletting or workout. Even if the lease does not provide for such payment by the tenant, the landlord might justifiably require the tenant to pay the landlord's attorneys' fees and costs. In many instances, it may be appropriate to request an increased security deposit, letter of credit, additional guarantors or a lien on the tenant's personal property to secure the tenant's obligations under the lease. Depending on the particular circumstances, inspections, environmental audits, indemnities, payments of sublease profits and correction of any problems under the existing lease document may also be considered in connection with a request for a lease modification.

B. Documenting the Deal.

Make sure the terms of the lease modification are reduced to a written agreement (typically, a "lease amendment") and that the parties are properly named and any requisite approvals are obtained. If the tenant is an entity, the name of the entity and the entity's standing should be verified with the Secretary of State. In addition to having authorized representatives of the landlord and tenant execute the lease amendment, it is important to have any guarantors of the lease reaffirm their obligations under their guarantees. Such reaffirmations may be crucial to enforcing a guarantor's obligation to pay under his, her or its guaranty. If an assignment of the lease or subletting of the premises occurs in connection with the work-out, make sure the assignee or subtenant signs the agreement. If the landlord's lender's consent is required, be sure to obtain it in writing. Finally, if a modification will reduce or alter the commission payable to a broker, be sure to get the broker's written consent.

IV. UNLAWFUL DETAINER/EVICTION

The following is intended to be a general overview of the procedure to follow when a tenant is in breach of a lease agreement. This material focuses solely on non-payment of rent. It does not cover the more specific procedures that may apply to other material breaches of the lease. In addition, this material assumes there is a written lease agreement. Procedures for tenancy at will or oral agreements are not addressed.

A. Making the Decision to Commence Unlawful Detainer (UD) Proceedings. Review the lease agreement to determine whether the tenant has breached the lease. In cases of non-payment of rent, the breach will usually be obvious.

B. Give the Tenant Notice of the Breach. The lease should set forth the notice you are required to give to the tenant if there is a breach. There are usually timelines that must be followed. The lease will likely require that the notice be sent by certified mail, return receipt requested. However, even if it is not specifically required by the lease, it is advised that you send the notice via certified mail. Note that some leases do not require notice for non-payment of rent.

C. Decide Whether to Go it Alone or Get an Attorney. Once the requisite notice is given, it is time to decide whether an attorney should handle the UD process. Currently, Ramsey County is the only county that consistently requires entities which own buildings to have an attorney in an unlawful detainer action. However, it may be advisable to involve an attorney in other counties, if it appears that there may be complications. Last year, in an unpublished decision, the Minnesota Court of Appeals reversed an eviction action where an unrepresented corporation sought to evict a tenant on the grounds that the corporation was required to be represented by counsel under Minnesota law. Walnut Towers v. Schwan, 2008 WL 4224462 at p.2 (Minn. App. 2008).

D. Draft a Complaint. Once the tenant is given the requisite notice, it is time to draft the complaint. A complaint must include the following information:

1. The full name and date of birth, if known, of the tenant. (This applies largely to residential property. There is no need to include a date of birth for commercial property.)
2. A description of the property. If the property is residential, a street address will be sufficient. If the property is commercial, you should try to include a legal description along with the street address.
3. The person who is entitled to possession of the property as a result of the default (i.e. the landlord).
4. A paragraph describing the breach. For cases involving non-payment of rent, this would include when the payment was due, what amount, the fact that it is late, and the total amount due. A statement indicating that notice was provided to the tenant should also be included if applicable.
5. Be explicit in outlining to the court the relief being requested. Usually this is an immediate writ of restitution so that the landlord can regain possession of the property. In an UD action, the complaint is not seeking money damages, but rather, possession.

There are also several items which should be attached to the complaint as exhibits: a copy of the lease, a copy of the notice of the breach to the tenant, and (if unrepresented by an attorney) a power of attorney.

The person listed on the power of attorney should sign the complaint on behalf of the landlord. That individual should also complete a verification in which he or she swears that everything in the complaint is correct to the best of his or her knowledge (as discussed above, if the landlord is a legal entity, it may be subject to dismissal if not represented by counsel. Supra Walnut.)

E. File and Serve the Summons and Complaint. Deliver the original complaint to the court along with the appropriate filing fee. The court will provide a summons and will assign a hearing date. The hearing will take place 7 to 14 days after the issuance of the summons. Proper service is crucial because the summons and complaint must be served at least 7 days before the hearing. A sheriff can serve the summons and complaint, but cannot always get to it quickly. Many times it is easier to hire a private process server. A private process server can file the complaint with the court, get the summons, and serve it on the tenant.

An affidavit of service must also be filed with the court. In Ramsey and Hennepin counties, the affidavit must be filed by 3:00 p.m. at least 3 business days prior to the hearing. There are statutory procedures that can be followed if the process server cannot find the tenant. But keep in mind, those methods often take longer and require re-filing of the complaint.

F. Attend the Hearing. Unless the tenant has cured its default, the next step is to attend the hearing. If the tenant does not appear, the court will normally issue a default judgment. Ask for an immediate writ of restitution from the court.



NOTE: In Anoka County, some judges require testimony before granting a default judgment. Property managers, as agent of the landlord, can give the testimony. An attorney cannot give testimony and, therefore, you should always accompany your attorney if the UD is in Anoka County.

If the tenant arrives at the hearing with a check for the amount of money owed, the landlord must accept payment. However, the landlord is not required to forgo any late fees or other amounts due and owing as a result of the tenant's default.

The landlord has the option of settling with the tenant. In that case, it is crucial that a written settlement agreement is executed by both parties. In particular, the agreement should state that if the payments are not made pursuant to the terms of the settlement agreement, the writ which is issued at the time of settlement (and stayed) is executed upon.

The tenant has the option to appear at the hearing to contest the eviction. In this case, the court will set a trial date and time. The trial will take place within 7 days. At this point, if it has not already done so, the landlord should immediately retain an attorney.

G. Execute the Writ. If the judge orders an immediate writ, the landlord can begin execution right away. If the judge stays execution, the landlord must wait until the stay is over before executing the writ. The sheriff's office (or sometimes the local police) is responsible for executing the writ. The landlord must get a writ from the court and take it to the sheriff for execution. The sheriff will first demand that the tenant leave the premises within 24 hours. If the tenant does not leave, the sheriff will schedule a date and time to remove them.

The landlord must give the tenant notice of the date and time of removal by first class mail. The landlord must also try to notify the tenant of the date and time by telephone. On the scheduled day, the sheriff will arrive at the premises to remove the tenant. If the landlord wants the tenant's personal property stored off site, the sheriff will have the property removed at that time. The tenant must immediately pay for the expense of moving and storage. If the tenant does not pay, the landlord has a lien

on the property and can keep the property until the expenses are paid. If no payment is made within 60 days, the landlord may hold a public sale. Minn. Stat. § 504B.365 Subd. 3(c).

➤ **NOTE: In Hennepin and Ramsey Counties, the landlord MAY NOT withhold the property until the expenses are paid.**

If the landlord decides to store the property on site, the landlord must prepare an inventory of the property in the presence of the officer. The inventory must be signed and dated within the presence of the officer. The inventory must contain: a list of the items and a description of their condition; the date and signature of the landlord's agent along with the name and telephone number of a person authorized to release the property; and the name and badge number of the officer. The officer must keep a copy of the inventory.

H. Other Considerations.

1. What if the property is abandoned? If the property is abandoned the landlord should follow the procedures listed above. The landlord may take possession of any personal property left in the space and must store and care for the property. If the tenant has not claimed the property within 60 days after the landlord received notice that the tenant has abandoned, or 60 days after the landlord reasonably believed the tenant had abandoned, the landlord has the right to dispose of the property. The disposal can be by sale or other appropriate means.

The landlord must make reasonable efforts to notify the tenant of the sale at least 14 days before it occurs. Notice should be by personal service or certified mail, return receipt requested. The notice must also be posted on the premises for at least two weeks.

After the sale, the landlord can apply a portion of the proceeds to the removal, care, and storage costs and expenses. The remainder of the proceeds must be returned to the tenant if they make a written demand.

If the tenant demands the right to take their property back before the sale, the landlord must allow them to do so.

2. Can a landlord refuse to accept overdue rent? If the tenant pays the landlord all of the rent the tenant owes along with interest, costs, an attorneys' fee up to \$5, and any other amounts owed under the lease, the landlord must allow the tenant to maintain possession of the property.

3. Can a landlord accept partial rent payments as part of a settlement agreement? The landlord can agree to accept partial rent payments as part of a settlement agreement. However, if the landlord does not want to waive a subsequent right to require payment in full, the landlord must include that in a written settlement agreement.

V. COLLECTION

After the tenant has been evicted, in many instances there are outstanding rent charges, late fees and costs of collection the landlord would like to collect. One option is to bring a civil breach of contract action against the tenant and, if applicable, the guarantor.

A. Demand Letter.

1. Compliance with the Lease–Proper Notice. If the landlord has not commenced a UD action and provided the tenant with notice of its default, the landlord should be certain to do so prior to commencing a collection action against the tenant. As noted above, many leases require a minimum of five (5) days prior notice of the tenant’s breach before the tenant is officially in default. As such, landlords should be certain to notify tenants of the breach as promptly as possible. Be certain to set hard deadlines for the tenant to cure its breach. Otherwise, the landlord should stand ready to commence an action for amounts it is owed.

2. Strategy for Collection. The strategy for commencing a collection action depends on a variety of factors. First, landlords should research the collection feasibility of a tenant-in-default. Factors to consider when determining collectability are: (1) whether there is a guarantor; (2) the financial solvency of the tenant entity; (3) possible bankruptcies; and (4) results of previously conducted asset searches.

The amount of money owed by the tenant can be a crucial factor in determining collection strategy. If the total amount owed is less than \$7,500.00, the landlord can bring an action in conciliation court. Conciliation court can offer an inexpensive and efficient forum to resolve disputes and obtain a judgment. (Conciliation Court is not subject to the requirement that corporations be represented by counsel, indeed, Conciliation Court referees are often resistant to permitting corporate counsel to appear arguing against unrepresented parties.)

Landlords should also evaluate their case prior to commencing an action. Some important questions to consider prior to undertaking litigation are:

- (1) Is there a written lease?
- (2) How well is the lease drafted?
- (3) Has the lease been assigned to a new tenant?
- (4) Are there any other parties liable for the lease other than the original tenant?
- (5) Is the claim statute barred?
- (6) Are there any possible counterclaims that may be asserted by the tenant against the landlord?

Fortunately, in most landlord-tenant disputes, the issues are relatively straightforward and landlord usually believes, and often has, a solid case against a tenant and/or guarantor. In most instances, the biggest issue to resolve is whether the landlord has a good claim, but a non-viable tenant.

B. Commencing the Collection Lawsuit. After the landlord decides to pursue collection, there are a number of important steps to take prior to initiating the lawsuit.

1. Caption (Proper Parties–Secretary of State). It is imperative that the caption of the pleadings accurately reflects the names of the parties. In most instances, a landlord should confirm a tenant’s organizational information on the Secretary of State’s website. This will ensure the proper entity is being served with the action, and by doing so, the landlord may discover the supposed entity leasing the property is not actually in existence. This may form the basis for personal liability against the individual that executed the lease and occupied the space.

EXAMPLE:



See Appendix 14 for a sample Summons and Complaint.

2. Attorneys' Fees. Most leases authorize landlords to recover their attorneys' fees and costs incurred to enforce the lease. As such, a landlord bringing an action against a tenant should always review the lease prior to serving a complaint. If the lease provides for recovery of attorneys' fees, the landlord should include a specific count requesting its attorneys' fees and costs incurred in bringing the action. The landlord should not, however, request a specific amount of attorneys' fees in its complaint, as doing so may handcuff the landlord in obtaining its fees in an administrative default proceeding.

3. Service Strategy. The service of the summons and complaint will commence the action. As such, proper service is crucial and must comply with the Minnesota Rules of Civil Procedure. Many tenants and guarantors will dodge service. Landlords may need to utilize persistent and creative process servers to effectively commence an action.

If the tenant is an entity and is dodging service or cannot to be found, the landlord may effectuate service via the Secretary of State. To do so, the process server must execute an affidavit of not found and serve the summons and complaint on the Secretary of State. This will allow the tenant an additional ten (10) days to answer to the complaint.

C. Litigation. After the process server has located and personally served the tenant and any guarantor, the landlord must be prepared to litigate the action to collect amounts it is owed. The tenant and guarantor have twenty (20) days from the date of service to answer the complaint. An answer must comply with the Minnesota Rules of Civil Procedure or it may be ineffective. For example, in many instances, the tenant (either through an officer or its guarantor) will respond to the landlord's complaint with a "certified" letter denying the claims made by the landlord. In all likelihood this letter will not comply with the Minnesota Rules of Civil Procedure in a number of respects. If the tenant is an entity, it must be represented in litigation by an attorney licensed to practice law in the State of Minnesota. See Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753 (Minn. 1992). Accordingly, it is often prudent for the landlord to inform the tenant and guarantor that their "certified" letter does not comply with the Rules of Civil Procedure and reminding them of the requirement to serve an answer in compliance with the Rules within twenty (20) days of service of the complaint. Otherwise, the landlord will be required to treat the "certified" letter as an answer (and counterclaim if applicable) and proceed with discovery.

1. Default Judgment (Minnesota Rule of Civil Procedure 55). As noted above, the tenant and guarantor have twenty (20) days to serve an answer to the complaint after service of the summons, exclusive of the date of service. If the tenant and guarantor fail "to plead or otherwise defend" they will be found in default. Minn. R. Civ. P. 55.01.

2. Administrative Default. In most instances, the landlord's claim against the tenant and guarantor will be for the payment of money, including any applicable late fees and interest. When a landlord only seeks specific breach of contract damages and the tenant is in default, the action is ripe for an administrative default proceeding under Rule 55.

An administrative default is both a cost effective and efficient way to obtain a judgment against defendants-in-default. First, no court hearing is required and the landlord merely needs to apply to the court for an administrative default. Second, the landlord is not required to notify a defendant-in-default of its intent to obtain an administrative default, which helps effectuate efficiency in obtaining judgment and prevent the defendant from hindering post-judgment collection activities.

In order to apply for an administrative default, landlord must file the following documents with the district court administrator for the county in which the action was commenced:

- (a) The original summons and complaint, along with original affidavits of service;
- (b) Affidavit in support of application for attorneys fees (if applicable);

In the event landlord wishes to enforce an attorney's fees provision within the lease, (and is moving for an administrative default), a couple of steps must be taken prior to submitting the application to the court. First, landlord must serve a Rule 119 Notice and Request for Hearing to determine attorneys fees and an Affidavit in Support of Attorneys Fees Award on the tenant and guarantor. In order to obtain an award for attorney's fees administratively (and without a hearing), the total amount sought cannot be greater than 15% of the entire judgment amount or \$3,000, whichever is less. After serving the Notice and Request for Hearing to determine attorney's fees and applicable affidavit, the tenant and guarantor have twenty (20) days to sign and remit the Notice and Request for Hearing to landlord's counsel, if they wish to challenge the reasonableness of the application for attorneys' fees. Upon receiving the Notice and Request for Hearing, the landlord must file the lawsuit and obtain a judicial assignment and hearing date immediately. Once the tenant and guarantor have decided to challenge the reasonableness of the attorneys' fees, the court has discretion to award fees in excess of the 15% and \$3,000 limitations traditionally imposed by Rule 119. In the event the defendants do not remit the Notice and Request for Hearing within the afore-mentioned twenty (20) day period, the landlord may file an affidavit in support of attorneys' fees attaching the original Notice and Request for Hearing to determine attorney's fees and original Affidavit in Support of Attorney's Fees Award (previously served on the Defendants), along with an affidavit of service, to the court with its application for administrative default; and

(c) Affidavit of No Answer, Identification, Non-Military Status, Amount Due and Costs and Disbursements and Landlord must submit an affidavit substantiating that it has not received an answer, in compliance with the Minnesota Rules of Civil Procedure, to its complaint within twenty (20) days of its service. Additionally, the affidavit must identify the names and addresses of defendants the landlord wishes to obtain an administrative default against. Landlord must also determine whether the guarantor (and tenant if not an entity) is not active in the United States Military. There are a number of governmental websites which can be utilized in order to determine an individual's military status. In the event the affiant verily believes the individuals are not actively engaged in the military, a statement evidencing such must be included in the affidavit. Finally, the landlord must calculate the total amount due, as well as costs, attorneys' fees and disbursements it wishes to obtain via administrative default.

(d) Finally, landlord should be certain it remits a check in the proper amount for the court's filing fee. Currently, in most Twin Cities metropolitan counties, the filing fee is \$320.00.

3. Settlement Agreement. In many instances, even though the tenant and guarantor may be in default, they may be interested in settlement with the landlord. The landlord should be diligent in keeping settlement negotiations moving along because in many instances, it is merely a delay tactic by the tenant and guarantor to avoid judgment. Additionally, a landlord should

always require a formal settlement agreement and release, as well as a detailed payment plan when agreeing to a settlement proposal.

Additionally, the landlord should always require the tenant and its guarantor execute a Confession of Judgment for the entire amount owed to landlord. A Confession of Judgment is a document under which the signator confesses judgment (i.e., admits it owes) the amount set forth in the document. The Confession of Judgment should be clear that upon default of the tenant and/or guarantor under the settlement agreement, the landlord or its counsel may file the Confession of Judgment with an applicable district court and obtain judgment against each party. Additionally, the Confession of Judgment should always entitle the landlord to recover its attorneys' fees in enforcing the settlement agreement and/or Confession of Judgment. By utilizing a Confession of Judgment, the landlord will minimize its risk and exposure to additional expenses should the tenant and/or guarantor default on the terms of the settlement agreement.

4. Discovery. In the event the defendants serve an answer in compliance with the Rules within the required twenty (20) day period, the next step is to engage in discovery. In a typical collection action, discovery will usually be quite limited in scope. The use of Requests for Production of Documents, Interrogatories, and Request for Admissions are generally effective tools to identify and evaluate any possible defenses on behalf of the defendants, as well as pressure the parties to either resolve the dispute or incur attorneys' fees and costs associated with litigating the matter. Discovery requests should be narrowly tailored so they are not easily objected to, and the landlord should spend a reasonable amount of time determining what documents and information will strategically improve its case.

5. Summary Judgment–Rule 56. After the completion of discovery, or more commonly when landlord has obtained sufficient information to substantiate its case against the tenant and guarantor, the next step is a motion for summary judgment. Summary judgment is defined as a drastic rule which, if successful, will result in judgment being entered against the tenant and/or guarantor. Minnesota Rule of Civil Procedure 56 provides that: “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact in that either party is entitled to judgment as a matter of law,” summary judgment is warranted.

Motions for summary judgment requires a memorandum of law and supporting factual affidavits. Additionally, the landlord must schedule a hearing at which the motion for summary judgment will be argued and ultimately decided by the district court judge. Motions for summary judgment can be expensive; however, in most collection actions, they provide a much less expensive mechanism to adjudicate landlord's claims than a trial on the merits. Additionally, as noted above, the factual and legal issues in most collection actions are relatively straight forward and, therefore, success at summary judgment is more likely than in other realms of civil litigation.

D. Collecting the Judgment.

1. Garnishment–Minn. Stat. Chapter 571. Creditors may garnish the assets of a debtor at any time after the entry of a money judgment in a civil action. Minn. Stat. § 571.71(3). The primary objective of a garnishment proceeding is to enforce the payment of a judgment creditor's claim by reaching the judgment debtor's property in the hands of a third party, commonly known as the garnishee. See *Buyssev Bauma Furrie & Sign Co.*, 448 N.W.2d 865 (Minn. 1989). The garnishment process involves two main hurdles for the judgment creditor in order to obtain possession of the garnished property. First, the garnished property will be retained (or attached) by the garnishee upon service of the Garnishment Summons. Second, the judgment creditor must levy on the garnished property with a Writ of Execution, obtain a Court Order, or obtain a consent from the judgment debtor to release the garnished property.

Not all property of the debtor is subject to garnishment. However, all non-exempt earnings, indebtedness, money, or property due or belonging to the debtor and under the control of the garnishee at the time the Garnishment Summons is served is subject to the creditor's claim. Minn. Stat. § 571.73(1)-(3). Indeed, even spousal maintenance payments are subject to garnishment. See *Lost v. Lost*, 438 N.W.2d 122 (Minn. App. 1989).

2. Pre-Judgment Garnishment (Debtor-in-Default). In some instances, creditors do not have to wait for judgment (either by default or litigation) and may begin garnishing on a debtor's property prior to the court entering judgment. Minn. Stat. § 571.71(2) makes garnishment available to a creditor when the creditor could have obtained a default judgment at any time forty (40) days or more after service of a summons and complaint on the debtor. The first time a Garnishment Summons is served on the debtor under Section 571.71(2), the creditor must also serve a copy of the Affidavit of Service of the original summons and complaint. Service of garnishment documents on the debtor is effective upon mailing.

3. Post-Judgment Garnishment. As noted above a creditor may garnish at any time after the entry of a money judgment in a civil action. Minn. Stat. § 571.71(3).

4. Information Needed. Any banking information known to the landlord can be helpful when undertaking a garnishment proceeding. Copies of old checks, account information and other financial information should always be retained by landlords throughout all stages of a business relationship. Otherwise, strategic choices as to who should be garnished must be made (i.e., major area banks. etc.).

5. Garnishment Procedures. There are at least three (3) categories of documents that must be served in order to garnish in every garnishment: (1) Garnishment Summons; (2) Garnishment Disclosure Form; and (3) Exemption Form (only when the debtor is a natural person) and related documentation.

(a) *Garnishment Summons*. A Garnishment Summons must state the following (See Appendix 15):

- (i) the full name and address of the debtor and the unpaid amount of the claim;
- (ii) the date of the judgment or that the debtor is in default (if a pre-judgment garnishment, must include a copy of the court order); Minn. Stat. § 571.72, subd. 2, (1)-(7);
- (iii) statement requiring the garnishee to serve upon the creditor and upon the debtor within 20 days (in cases involving a garnishment on any indebtedness, money, or property other than earnings), a written disclosure of the garnishee's indebtedness, money, or property owing to the debtor and answers to all interrogatories that are served with the garnishment summons. The garnishment summons must also state that if the garnishment is on earnings and the debtor has garnishable earnings, the garnishee shall serve the disclosure on the creditor within 10 days of the last payday to occur within 70 days after the date of service of the garnishment summons;
- (iv) a statement that the creditor shall not require disclosure of the disposable earnings, indebtedness, money, or property of debtor

in the garnishee's possession or under the garnishee's control in excess of 110% of the amount of the claim that remains unpaid. The statute provides for 100% of the amount of the claim to allow for court costs and attorneys' fees, if appropriate;

- (v) a statement that the garnishee shall retain disposable earnings, indebtedness, money, or property of the debtor in the garnishee's possession or under the garnishee's control not in excess of 110% of the amount of the claim that remains unpaid, until the creditor causes a writ of execution to be served on the garnishee, until the debtor authorizes release to the creditor, until the creditor authorizes release to the debtor, upon court order or by operation of law;
- (vi) a statement that after the expiration of a period of time as specified by Minnesota Statutes § 571.79 from the date of service of the garnishment summons, the garnishee's retention obligation automatically expires; and
- (vii) a statement that an assignment of wages made by debtor within ten days before the service of the first garnishment summons on a debt is void and that any indebtedness to the garnishee, incurred within 10 days before service of the first garnishment summons on a debt, may not be set off against amounts otherwise subject to the garnishment.

(b) *Garnishment Disclosure Form.* In addition with to the Garnishment Summons, a creditor must serve on the debtor the appropriate disclosure form. Whether the creditor is garnishing on earnings or non-earnings will dictate which disclosure form is appropriate. In Minnesota, there are three (3) separate disclosure forms available to a creditor:

- (i) Earnings Disclosure;
- (ii) Earnings Disclosure Including Child Support; and
- (iii) Non-Earnings Disclosure (See Appendix 16).

(c) *Exemption Form (only when the debtor is a natural person).* In instances where landlords are attempting to collect on an entity, an Exemption Form is not required. However, in the event a landlord had previously secured a personal guaranty and wishes to collect on the guarantor, landlord will be required to serve two (2) copies of an exemption form, instructions for completing the exemption form, and notice that the landlord has frozen money in the debtor's account, all in addition to the Garnishment Summons and appropriate financial disclosure form. Timing and method of service of the garnishment Exemption Form documentation will vary depending on whom the landlord elects to garnish and what type of property the landlord is attempting to garnish. (See Appendices 17, 18 and 19 for examples of these Exemption documents).

- (d) *Service on a Garnishee.* Service of garnishment paperwork on the garnishee may be made by personal service or by certified mail, return receipt requested, at the garnishee's regular place of business. The effective date of service by certified mail is the time of receipt by the garnishee. Minn. Stat. § 571.72(2). The date of service can be crucial when determining priority to the garnished property, as the date of service is the date the creditor's claim attaches to the property relative to other lien claimants.
- (e) *Service on Debtor.* A copy of the Garnishment Summons and all other papers served on the garnishee must be served by mail to the debtor within five (5) days after the service is made upon the garnishee. See Minn. Stat. § 571.71. Additionally, it is important to keep in mind that the first time a Garnishment Summons is served on the debtor pursuant to Minn. Stat. § 571.71(2) (pre-judgment, post-default garnishment) landlord is also required to serve a copy of the Affidavit of Service of the original summons and complaint.
- (f) *Garnishment Interrogatories.* Garnishment interrogatories can be an effective way to obtain additional information regarding the finances of the tenant. In many instances, a landlord can discover additional bank accounts or other debtors of the tenant by issuing interrogatories to the Garnishee. (See Appendix 20.)
- (g) *Property Subject to Garnishment.* Not all property is subject to collection or garnishment. Landlords must be cognizant of what types of property are exempt when analyzing collection feasibility prior to commencing an action. Additionally, knowledge of what types of property are exempt from collection will assist in keeping collection efforts on track and improve efficiency and likelihood of success.
- (h) *Hit On Account.* Landlord will be made aware a Garnishment Summons was successful or not upon receiving the financial disclosure form back from the financial institution. In the event the bank has frozen funds of the defendant, it will reference the amount being held on the disclosure form. The debtor has fourteen (14) days after the date of the letter transmitting the Exemption Form to claim an exemption or the landlord may proceed with collection.



NOTE: A financial institution is relieved from its garnishment duties one hundred eighty (180) days after service of the Garnishment Summons. Accordingly, landlord and its counsel should be cognizant of this deadline and proceed with levying on the account where the garnished funds are located as swiftly as possible.

- (i) *Joint Accounts.* Under the Minnesota Multiparty Account Act, a landlord may not garnish funds in a joint bank account that have not been contributed by the tenant and/or guarantor. See Minn. Stat. § 524.6-203, subd. (a) (2009). However, if the landlord can prove by clear and convincing evidence that the depositor intended to confer ownership of the funds on the tenant and/or guarantor, those funds are garnishable.

See *Enright v. Lehmann*, 735 N.W.2d 326 (Minn. 2007). Consequently, it may be critical for a non-defendant account owner to assert ownership rights to funds in a joint account and the landlord to subsequently show by clear and convincing evidence that account holder intended to confer ownership of the funds on the tenant and/or guarantor.

- (j) *Writ of Execution.* In the event the tenant and/or guarantor has not claimed an exemption and the account is not jointly held, the landlord can proceed with collecting the garnished funds. The first step in doing so is obtaining a Writ of Execution from the district court. In doing so landlord must merely send a letter requesting that a Writ be issued and enclosing a check for the applicable fee.
- (k) *Levy on Account (Working with Sheriff).* After receiving a Writ of Execution from the court, the landlord must either have its attorney or the applicable county sheriff serve the Writ on the applicable bank in order to levy on the garnished funds. If the amount garnished is less than \$10,000.00, the landlord's attorney may levy on the account. However, in the event the amount garnished is greater than \$10,000.00, landlord must have the applicable county sheriff levy on the account. To do so, landlord must send, via personal messenger, the original Writ of Execution (along with a copy), a copy of the applicable disclosure form indicating there are funds being held, and a check made payable to the county sheriff for its efforts (this amount varies county by county). Additionally, the landlord should provide the sheriff with the address of the financial institution where the Writ of Execution should be served.
- (l) *Property Not Subject to Garnishment.* The following property is not subject to garnishment:
 - (i) any indebtedness, money, or other property due to the debtor, unless at the time of the garnishment summons the same is due absolutely or does not depend upon any contingency;
 - (ii) any judgment in favor of the debtor against the garnishee, if the garnishee or the garnishee's property is liable on an execution levy upon the judgment.
 - (iii) any debt owed by the garnishee to the debtor for which any negotiable instrument has been issued or endorsed by the garnishee
 - (iv) any indebtedness, money, or other property due to the debtor where the debtor is a bank, savings bank, trust company, credit union, savings association, or industrial loan and thrift companies with deposit liabilities;
 - (v) any indebtedness, money, or other property due to the debtor with cumulative value of less than \$10; and
 - (vi) any disposable earnings, indebtedness, money, or property that is exempt under Minnesota or federal law.

Minn. Stat. § 571.73(4).

(m) *Exempt Property.*

- (i) Minnesota Family Investment Program (“MFIP”);
- (ii) MFIP Diversionary Work Program and subsequent Work;
- (iii) General Assistance;
- (iv) Emergency Assistance;
- (v) General Assistance Medical Care;
- (vi) Emergency General Assistance;
- (vii) Minnesota Supplemental Aid;
- (viii) MSA Emergency Assistance;
- (ix) Food Support;
- (x) Supplemental Security Income;
- (xi) MinnesotaCare;
- (xii) Medicare (part B) Premium Payments;
- (xiii) Medicare (part D) Extra Help;
- (xiv) Energy or Fuel Assistance;
- (xv) Government Benefits (Social Security, Unemployment, Workers’ Comp, VA Benefits, and Other Need-Based Assistance);
- (xvi) Accident, Disability or Retirement Pension or Annuities;
- (xvii) Life Insurance Proceeds;
- (xviii) Child Earnings (under 18);
- (xix) Child Support;
- (xx) Property Insurance Proceeds;
- (xxi) Death Benefits; and
- (xxii) Specific Property Exempt Under § 550.37.

(n) *Garnishing Earnings.* In the event a landlord proceeds against a guarantor, garnishment of wages may be an available remedy to enforce a judgment.

- (i) Process. The landlord must serve an earnings exemption notice on the guarantor-debtor no fewer than ten (10) days before service of the first Garnishment Summons on a garnishee (if for earnings). Minn. Stat. § 571.924(1) (2009). The notice must be in substantially the same form as set forth in Minn. Stat. § 571.925 (2009). The notice must be served personally (similar as a summons and complaint) or by first class mail to the last known address of the guarantor. The notice must also inform the debtor that a Garnishment Summons may be served on the guarantor's employer after ten (10) days. The notice must inform the guarantor of the earnings garnishment exemption. Finally the notice must advise the guarantor of the possible relief the guarantor may be entitled to if the landlord abuses the process or the penalty the guarantor will face if he/she abuses the process. The landlord may proceed with the garnishment if no statement of exemption is received on an earnings garnishment within ten (10) days of from service of the notice.
 - (ii) Limitations. All unpaid, nonexempt disposable earnings either owed (or to be owed) by the garnishee or earned (or to be earned) by the debtor within the current pay period and within all subsequent pay periods within seventy (70) days after the date of service of the garnishment summons are subject to garnishment. Minn. Stat. § 571.73, subd. 3(1) (2009).
- (o) *Post–Judgment Discovery.* In some instances, the debtor's financial and/or employment information may be difficult to decipher without additional discovery. Additionally, in most instances, a debtor is unlikely to voluntarily supply a landlord with its financial information. Accordingly, Minnesota law provides creditors with a number of post-judgment discovery mechanisms to effectively locate a debtor's assets.
- (i) Demand for Disclosure. Typically, the first step in locating the assets of a particular debtor is by having landlord's counsel serve a Demand for Disclosure form. Minn. Stat. § 550.011 (2009). This form may be sent to either the debtor individually (in the case of a guarantor) or an officer of an entity. The Demand for Disclosure requires that the party served fill out the attached financial disclosure form indicating the location and amount of the debtor's assets. The debtor has ten (10) days within which to serve the Disclosure form on the landlord or its attorney. See Appendices 21 and 22.

In the event the tenant and/or guarantor fail to complete the financial disclosure form within the aforementioned ten (10) day period, the landlord may request an Order to Show Cause hearing with the district court. To schedule an Order to Show Cause hearing, landlord must pick a date (typically two weeks in advance) and have the Order to Show Cause signed by a district court judge. Thereafter, the landlord must personally serve the original Order to Show Cause and a copy thereof (the original needs to only be shown to the tenant and/or guarantor and should be retained by the process server) on the debtor. If the tenant

and/or guarantor served with the Order to Show Cause fails to attend the Order to Show Cause hearing or, prior to the hearing, remits the completed financial disclosure form to the landlord, the tenant and/or guarantor may be held in contempt of court and a warrant may be issued for their arrest. See Minnesota Statutes Chapter 588, and Minnesota Rules of Civil Procedure 45.07 and 69. See also Appendix 25.

- (ii) Post-Judgment Interrogatories/Production of Documents and Depositions. Rules 69 and 33 of the Minnesota Rules of Civil Procedure also allow a landlord to draft extensive interrogatories to be answered under oath, similar to those of pre-judgment discovery. The post-judgment interrogatories may be served upon the tenant and/or guarantor by mail or personal service. If the tenant and/or guarantor fail to respond to the interrogatories, under oath, within thirty (30) days of the date of service, they may be subject to a motion to compel, followed by a possible contempt of court motion.

Additionally, Minn. Rule 69 provides that in post-judgment collection proceedings, the landlord may examine any person, including the judgment debtor, in the manner provided by the Rules of Civil Procedure for taking depositions or other discovery. Indeed, there is no requirement that the Writ of Execution be returned unsatisfied, which is typically a condition precedent to obtaining a court order in supplementary proceedings. Landlords may also utilize both subpoenas (directed at individuals) and subpoenas duces tecum to compel production of itemized documents along with a notice of taking deposition (directed at entity officers or individuals). When a landlord obtains judgment against an individual guarantor, a person of suitable age and discretion living in the guarantor's home may be served with subpoenas and notices of taking depositions directed at the guarantor. Otherwise, service may be effectuated on an entity as typically required by the Minnesota rules of Civil Procedure.

- (p) *Satisfaction of Judgment.* Minn. Stat § 548.15 requires that if a judgment is satisfied (otherwise by return of execution), the landlord or its attorney must give a certificate of satisfaction within ten (10) days, or within thirty (30) days of payment by check or other non-certified funds.

