Colorado COVID Legal Relief
Transcript of August 6, 2020 Commercial Leases and Eviction Webinar

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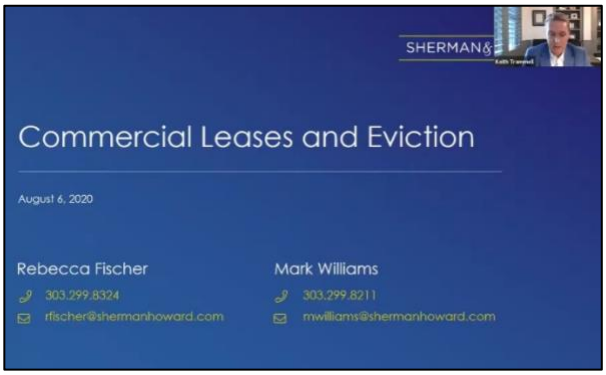
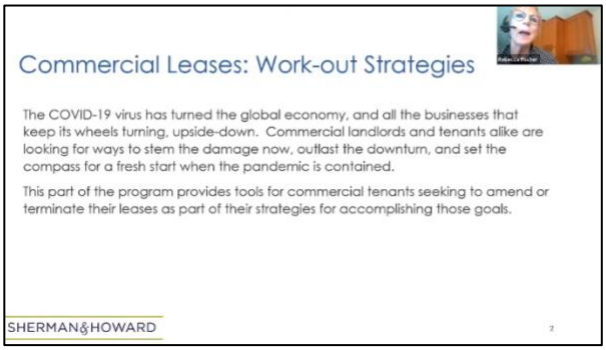


(Keith Trammell): Good afternoon, my name is Keith Trammell and I'm a partner at Wilmer Hale here in Denver and I practice corporate law and mergers and acquisitions, a topic unrelated to what we're going to cover today. It's my privilege today to welcome you to Colorado Covid Relief's eviction assistance webinar, being led today by Mark Williams and Rebecca Fischer of Sherman & Howard. Mark is a partner at Sherman & Howard and is a seasoned trial lawyer with almost 35 years of experience in commercial disputes and litigation, including commercial real estate matters. Rebecca Fischer, also a partner, focuses her practice on real estate matters. Together Mark, Rebecca, and their colleagues at Sherman & Howard have been closely monitoring and advising clients on many of the issues we plan to discuss today.



(Rebecca Fischer): Mark and I have tag-teamed to put together some guidance based on our experience in working with tenants over the years and very much lately. For myself I'll just say I've never seen anything like this and I sure did not see it coming. That's nothing unusual, we're all in that same boat. So, what to do?

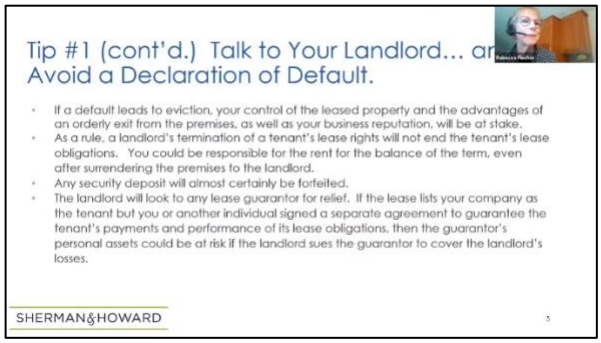
For the first part of this program, we're going to talk about some legal clauses and legal principles that will give you some background. Then, hopefully, we'll talk about some strategies for working through those clauses and principles, or working around them, to get to a result that works for you going forward. Some of these clauses are considered boilerplate and have been dismissed in the past as not worth reading (and certainly not negotiable), overlooked, or so routine that you didn't have to worry about them. This is one of those cases in life where you learn that's not the case with some of these clauses. It's true that a lot of these clauses may not particularly be helpful to a tenant because, after all, they are appearing in leases that were written by landlords and for landlords, so there's that hurdle to begin with. But I think our approach is forewarned and forearmed and the goal for the first part of this program is to cover some topics so that you're not blindsided and you're not cornered by these clauses. Maybe you'll find some tools that might be useful in these very different times and to think outside the box with some creative solutions. For the second part of the program, Mark is going to cover evictions. And while evictions loom, then once again, knowledge is power, and Mark is going to give you both.

Lease Clauses (4:26)

So to start, and to understand where a landlord is coming from when you're looking for rent relief, one of the first clauses you might encounter or you may be reminded of from discussions with the landlord is the one that says 'rent is due without set-off or deduction.' This clause has real teeth. Even if the landlord is not performing on his end, this kind of clause puts on the tenant the burden to still pay rent and then use the very questionable remedy when it comes to being helpful or going to court and suing the landlord to make him honor his obligations. But the good news is there are often some carve-outs, some exceptions, to this general rule about 'rent is always due no matter what.' One exception is where there are specific clauses in the lease, which we'll explore in just a minute.

And if you don't have clauses in the lease, there are some legal theories that could be useful. One theory is it's impossible to perform or it's so extremely burdensome to perform because of something out of everybody's control, or at least out of your control. It's where something unforeseen happens so that it just makes no practical sense to keep going, or the basic premise, the whole point of the lease, is now just tossed aside. The problem is those are arguments that are good in court but going to court is too long and too costly and the recovery is questionable. So, at the same time, it's good to have this background, so that as you look over your leases and assess your position with the landlords, you have your sense of bearings.

Turning to the approach you want to take with your landlord, you need to be ready to make your case. Representing tenants recently, I've learned that it is reasonable for, and you should expect, the landlord to look for 'what are you doing to help me through this?' You need to be prepared by talking with your bookkeepers, your CPA. Be organized with financial statements, tax returns, sales records, whatever it is to show where you really are so that the landlord does not immediately suspect he is being chumped by a plea that may not be worthwhile. And then you should speak up with the efforts you are making to get things back on track. I am seeing a lot of clauses where a landlord looks for assurance that the tenant is trying, that the tenant has applied for the paycheck protection program benefits, or maybe negotiating with other creditors for comparable concessions. Talking with your lenders, talking to your insurance agents about any claims that might be viable, and coming up with ways you see going forward with a business, if that's your intent, might make sense. When you deliver this information, as I was reminded by one of Mark's partners, put in writing that you're expecting this information, this incident, be treated as confidential. Also, at the risk of being a little thin-skinned, make sure that you make it clear you're not waiving any rights or defenses just because you are undertaking some negotiations with the landlord to come to a good resolution. He would do the same and, approaching you, you should do the same. Make sure that you protect yourself by denying any kind of waiver of benefits that might come your way.

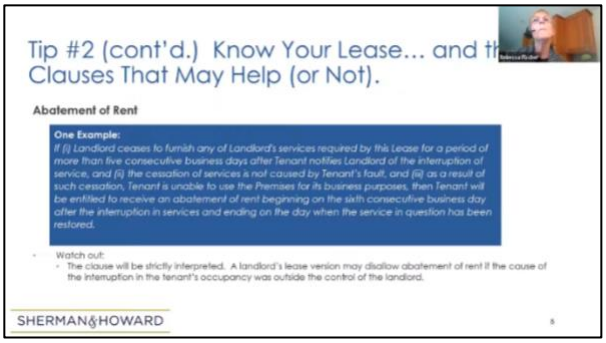


I'll get this part of the talk out right away and leave the hard part for Mark. The other thing about talking to your landlord is it's so much better to do this now before you end up getting formal notices of default if that's possible. If a default leads to eviction, then chaos is going to take over where an organized exit, reassessment, re-evaluation, or amendment to the lease might have been possible. A default and termination of the lease by the landlord before you can stop that is not going to end your obligations, perhaps under the lease. The lease is often written just like a contract so that if it's terminated because of your

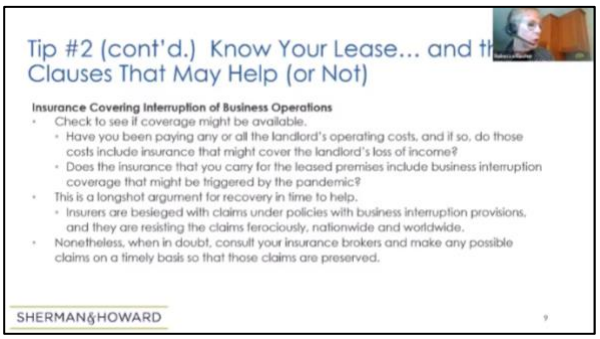
default, that doesn't let you off the hook. The rent that would have continued to accrue over the balance of the lease term is still your responsibility. There's good news there in that the landlord is supposed to mitigate those damages. And we'll get to that in a moment. But it's a position where the landlord has the leverage, and that's what you're hoping to avoid at this point by sitting down and talking early and often.

Force Majeure Clause. So coming to those lease clauses, the one that everybody talks about is the force majeure clause. It's consumed a lot of chatter in legal circles and outside of legal circles. Force majeure is roughly translated from the French to mean 'higher force' or 'superior force,' and it provides that a party's performance is excused because of some extraordinary event that was not foreseen and was not within the control of the party who is looking to be excused from performance. There's an example on your screen and that comes from a real lease. This is a key term in all the commentary, and I think it's going to probably come up in the discussions with the landlord. So, you'd think 'ok, this is a perfect example-a pandemic, unforeseen, out of everybody's control-I ought to have force majeure, right?'

Not so fast, not necessarily so. It's a clause in the contract and there's no such thing as a standard one even though we call this boilerplate. It's going to get picked apart. If you're in court it's going to get picked apart and if the landlord is looking to see if you are really deserving of taking advantage of this excuse, the landlord is going to pick it apart. There are examples where the clause lists specific types of events, like hurricane, flood, shortage of supplies, unavailability of labor, government mandates-that's a good one. But a lot of times, if something is not specifically mentioned, for instance a pandemic, then maybe that force majeure clause is just not available to you because that's not what the parties bargained for. And that's what this is-it is a bargained-for, at least supposedly bargained-for, contract provision in your lease. Some force majeure clauses are written to apply only to the landlord. The example is better in that it applies to both parties and that's something you always wish for in negotiating a lease on behalf of a tenant. Most force majeure clauses still say, though, that no matter what happens-if you can't get to the site, too bad, if you can't get your supplies, we're sorry-you may not have an obligation to repair as quickly as you would have absent that force majeure condition, but you still have to pay rent and that's one of the big hurdles in dealing with the force majeure clause that may make it not so useful.



Abatement of rent. Here's an example cribbed again from an actual lease. This is one of those carve-outs, again, that we look for when looking for an exception to the rule about 'rent is payable without deductions and without set-off.' Like force majeure, the clause is going to be pretty strictly interpreted and usually I find in the landlord's lease draft that abatement of rent is not going to be allowed unless the interruption cause to the tenant by these outside circumstances, were actually within the control of the landlord, like if the landlord fails to repair and you can't occupy the premises, then maybe the abatement of rent clause fits in. But still it's worth looking for in your lease because, again, like force majeure, I don't think any two clauses are alike.



Insurance. There's a lot of talk about insurance, in that a lot of parties to leases on both the landlord and tenant side thought, or think, that maybe they should have insurance coverage, commonly called business interruption insurance. So you should check your policy and check with your broker to see if you might have it. Look at your lease and see if maybe, in connection with your obligation to pay operating costs or your share of operating costs that the landlord is carrying under the lease, you are contributing to the landlord's premiums and he might be paying for business interruption insurance. But again, I always come back to 'but,' there's always a 'but' to these sentences. The insurance industry is ferociously fighting arguments about Covid-19 being covered in circumstances for business interruption insurance, and it's easy to see why. I saw a post on a webpage last week from the Community Associations Institute where somebody cited a University of Pennsylvania study that shows in the last few months there have been more than 700 lawsuits filed seeking to have insurers pay under business interruption insurance, and they're all being very hard-fought. And what struck me is that apparently there have been more claims in the last few months than claims that were litigated in hurricanes Harvey, Erma, Sandy and a couple of others combined. So the insurance industry is claiming that they're going to go bankrupt if they have to honor these claims. But, nonetheless, here is one lesson: when you're in doubt, talk to your broker and make sure to make a claim on a timely basis even if the broker is discouraging about it. You want to preserve any rights that might be there because you don't know what's happening. And as an aside, while you're talking to your insurance broker it would be well-advised to double-check the insurance obligations that you've got under the lease. Make sure that, even if you can occupy the space for the purposes you intended during the pandemic, your insurance is in place. The last thing anybody needs now is a catastrophe on top of a calamity and to have something happen in the premises for which you thought you were insured but you weren't because of some technical issue that you could have addressed or a premium that you could have paid.

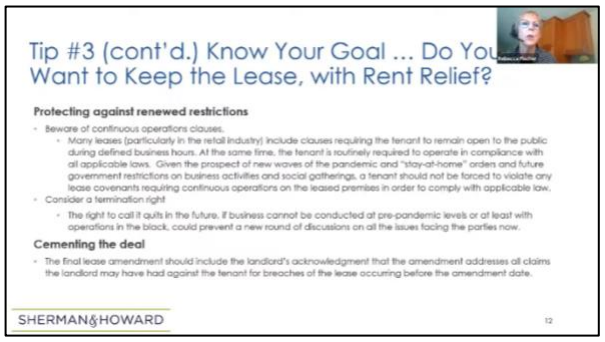
Co-tenancy clauses. This is something that's more common in the retail sector and a luxury for a tenant, so it's the kind of thing you see a big-box or big-ticket kind of tenant get. It basically says 'if this enterprise in the project does not conduct business, I'm so dependent on that business for my foot traffic that I have the ability to go dark or to suspend my rent payments.' It is such a tenant-favorable clause I'd be surprised to see it in any sort of small business lease, but it's worth looking for and it's worth remembering for the next time you get a chance to bargain this. Think about all the restaurants in the vicinity of Coors Field and know that every one of them is wishing they had some sort of co-tenancy clause that allowed them to go dark, such as if the ball players go on strike or there's a pandemic like this.

Negotiating Strategies (18:40)

We're going to leave the lease clauses and talk about some negotiating strategies and solutions given this background. First off, if you can find a replacement tenant to sublease the premises, even on a temporary basis or for part of the space, you can cut back your liability, assuming it's not completely unrealistic in this market and enough businesses are left operating. You will have responsibilities as a sub-landlord, and subleases are a bit tricky because you're between the landlord and between your subtenant, so get advice on that if this turns out to be an option. But it could be a good avenue out for you and for the landlord.

We're seeing a lot of negotiations where rent is abated now and then it's made up for later, such as by extending the term. Sometimes that's attractive to a landlord because his lender sees he's still got rent coming in for the 30 months that they thought they were going to see under this lease, now it just goes out farther.

Another strategy is to see if you can get rent relief now and then pay it back on top of the regular rent once the abatement period is over. That, also, I am seeing used with a good bit of success. There are issues; you know there's going to be fights about 'how long does this go on?' I think back in March nobody thought we'd still be having these tough discussions this late in the year and, given the news, it's going to keep going. There are a lot of business things to be worked out, but it's still a tool for both you and the landlord. One other item to keep in mind is sometimes I've seen landlords decide 'okay, we can take a hit for now on base rent but we still have to keep the building insured, we have to keep the building cooled in the summer and warm in the winter, so we still need you to pay your share of operating costs.' And that may give you enough relief to fight another day.

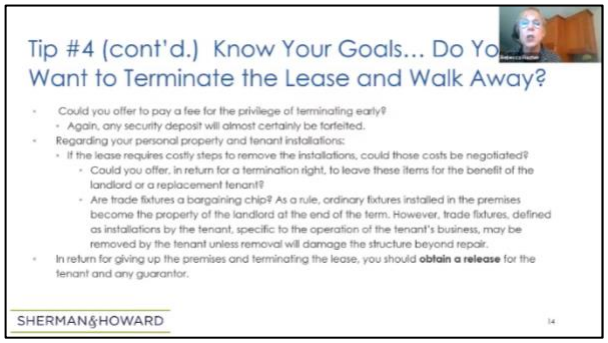


In your negotiations, one thing you might look for and see if you can get rid of as you get back on your feet is any concept that might be in there that operating hours are key to the lease. I see it not just in retail leases, where operating hours are key to the landlord because the rent and your sales are going to make him richer, but I see it too in office spaces where they expect you to be open during certain times, industrial leases, or any kind of lease. So watch for a continuous operation clause. Sometimes it puts the tenant in a bind because on one hand, you're supposed to stay open during normal business hours to bind in the lease, but on the other hand you might have government mandates like we've seen lately and can't be open, but still want to abide by applicable laws under that covenant.

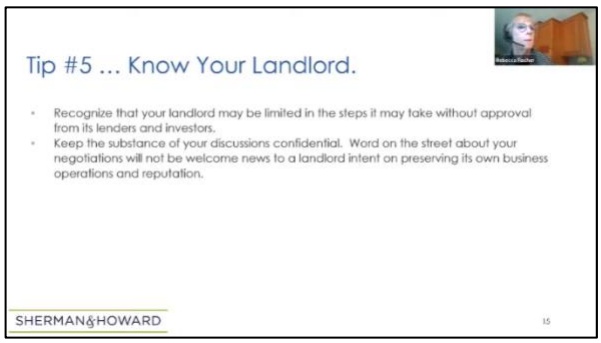
I think another thing to look at is a termination right looking forward. I haven't been able to do this yet but when I read a clause about how 'the tenant is going to pay rent no matter what,' I instead am trying to negotiate clauses that say 'look, another shutdown like we had earlier that prevents the tenant from operating through no fault of its own, or some period of time, means you can walk away and not have to live with this albatross that does not work under these conditions anymore.'

Finally, when you are negotiating under any circumstances, when you get things in writing at the end, make sure that you're starting with a clean slate. Make sure that you've addressed all past claims that the landlord might have and that those are resolved and waived and you're good to go going forward so that things you thought you had taken care of don't come back and bite you.

One of the interesting discussions that I've had with a few tenants is, and it's difficult being sort of paralyzed these days, to know your goals: do you terminate or do you walk away? If you'd like to terminate then perhaps you can buy out the lease by paying the premium and getting the landlord to agree in return that you are done and have no further future liability. If that doesn't work, like we talked a minute ago, try to find a subtenant or a signee, even on a temporary basis. That won't get you off the hook, but it will bring another party to the table who might be a source of recovery. The good news for a tenant who is in these dire straits is that the landlord has a duty to use reasonable efforts to reduce any losses that the landlord may be suffering because of the tenant's failure to perform. So that's an important point and that actually binds both parties, but an important point is that the landlord should be working with you.



If you do walk away, one of the things you can and should pay attention to is what happens to your personal property. There may be obligations to remove some personal property or fixtures that you've installed. If you take a look at the lease you can see if that is manageable, or if you can negotiate with the landlord and have some forgiveness about that. Or perhaps some of that property is valuable to him and if it's not leased from a vendor on your part, that may be a bargaining chip. At the end of the day, again, if you are able to terminate and negotiate to terminate you definitely want to get a release. One thing that occurs to me is, at the end of the day if you get nowhere and you just can't stand it and the landlord will not give you a written termination, there is the option of tossing the keys, which is slang for surrendering the premises. This does not get you out of the lease, but if you vacate the premises, leave them clean and in good order, and hand back the keys, you're essentially shifting to the landlord the burden of mitigating damages. Now it's up to the landlord to see if he can find a replacement tenant. You should participate in that effort as well because that will reduce your liability. But if all else fails there's always the surrender of the premises. The landlord has the obligation to use good faith efforts to find a replacement tenant and you should remind him of that in your surrender letter and probably have that surrender letter looked at by counsel so that you are best protected from surprise hits from the back.



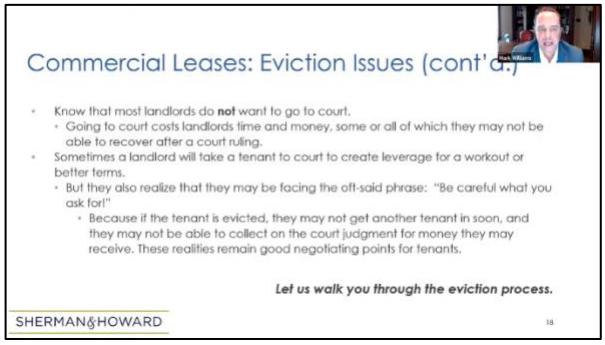
Finally, I'll wrap up with this. Your landlord is stressed too. There's no doubt that some lenders and investors had high expectations for the income stream, which is now missing. One important point is no landlord likes to be surprised by hearing on the street what negotiations he's undertaking or what he might have given away. So be sure to keep it confidential. Finally I'll just make a point that I bet Mark will make several times too: just because landlords can exercise a host of remedies doesn't mean that they really should do it. I think landlords hopefully are thinking hard about creative ways to work things out and if there's a chance of getting through this and coming back, it's critical that everybody keep that kind of goal in mind.

Mark that's all I've got, I'll turn it over to you.

Eviction Process (27:50)

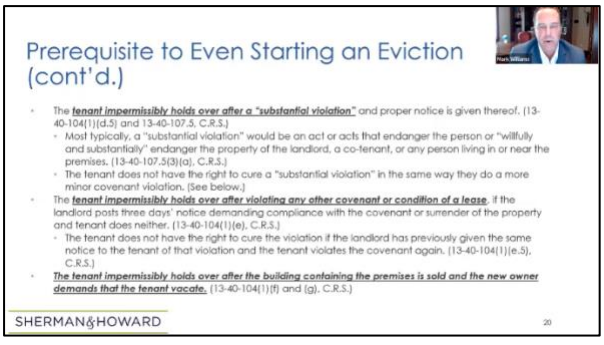
(Mark Williams): Thanks Rebecca, I appreciate it. Those are great strategies and we really encourage you to think about those as you move forward, and you'll see some of the themes in here as well. Once you go through all those strategies and it doesn't work, there will be times when the landlord will go ahead and issue a notice to leave the premises as Rebecca said.

And sometimes they will do that just as a negotiating point.



Most landlords don't want to go to court. It's a cost to them and it takes time and it takes effort, but sometimes they will take that step just to try to create leverage for a different kind of a work-out or to get you out so they can start mitigating their damages. You still want to try to work something out so you can get a release from the lease provisions, particularly if you have a guarantee on the lease. The reason that landlords need to really look at this is because they have to really be careful what they ask for, because if there's not a market for that space once you're out then there may be a problem. Now, with warehouse space being in demand, if you have a warehouse space or a space larger than an office space, that may be easier to re-lease. So it just depends on that process. But let's pretend that, unfortunately, a landlord has posted a notice to vacate your premises so we can walk through what that process looks like and so you can understand it as you're going through it and thinking through what your options are.

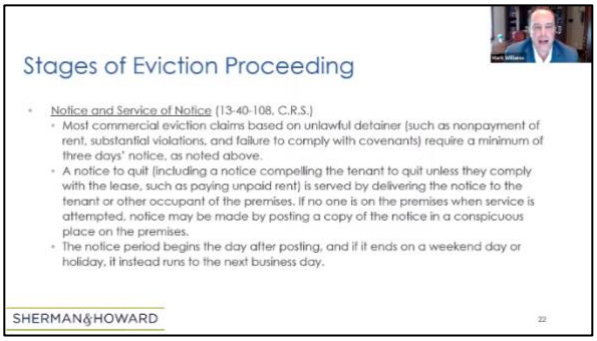
There's going to be a lot of legalese, unfortunately, in this part of the program and a lot of it's set forth in the statutes cited here. In order to be able to start the eviction, the tenant has to be unlawfully detaining, and that typically happens when a lease is expired or after there is a default in rent payments, and it's the second one that is particularly happening today. Typically, there is a three-day notice for commercial facilities, or non-residential facilities. The orders from the governor have extended those timelines, and certainly for residential facilities, for up to 30 days. Smart landlords are following that, and that's what I'm seeing for the most part. However, that's not always the case. But while some may say there's an argument under the orders that the 30-day notice period doesn't apply to commercial and non-residential facilities, the smart landlords and their smart lawyers will make sure that they use that 30-day notice. As I say here in red [on the slide], landlords can't charge certain late fees and penalties for non-payment incurred between April 30th and June 13th. The orders from the governor are posted on the governor's website so you can see those there.



Then there are other ways that someone can start an eviction proceeding. One way is when the tenant holds over after a substantial violation. These are typically cases where somebody is running an illegal operation in the space. I'm sure that's not a circumstance of the people on this call, but that's typically what happens. Another way is if the tenant holds over after violating a covenant or condition of the lease. So, there may be a provision in the lease requiring that you provide certain financial information, for instance if there's a repair that hasn't been made or some other type of covenant requirement under the lease. If that hasn't been provided, then they can start an

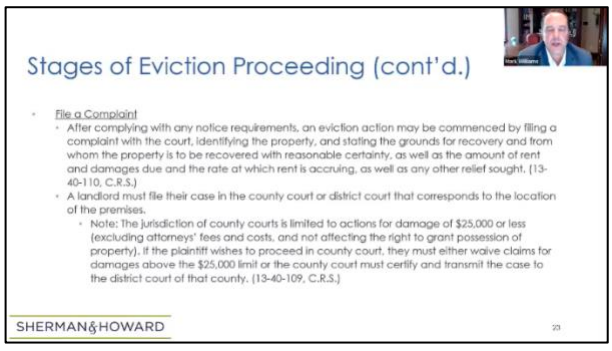
eviction proceeding, and part of that is they just want to know what's going on. But most of the time evictions start when a lease is finished or when there's been non-payment. The last point on this slide, which talks about when you hold over after the building containing the premises is sold, is typically when you have a foreclosure-type of proceeding and there's a new owner. That can apply, though it is not typically happening during this time.

You then have to have a notice to quit with a period of notice. It also depends on the length of the tenancy. So there's a statue that says if the landlord simply wants to get you out, there is a proceeding or process and a notice period you can take for that. Again, typically not what is happening these days, but it is one of the provisions.

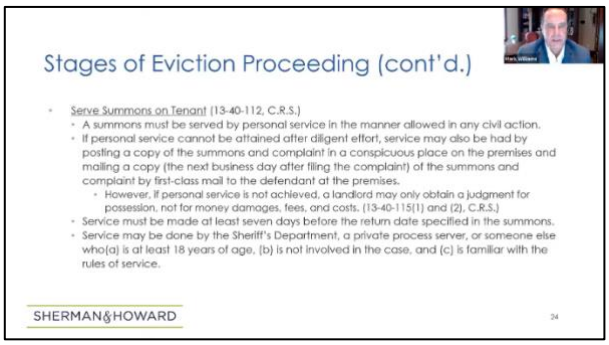


Notice. Then there has to be a notice, and typically what happens is they have to serve it on you, and they'll typically post a copy on the premises. So they'll post a notice to quit and some smart landlords are also posting the governor's orders along with it. They'll take pictures of it to show what they did and when they did it, and to date and time it. The notice period begins the day after posting. So if it's posted today, the notice period would start tomorrow. If the notice period ends on a weekend day, it goes to the next business day.

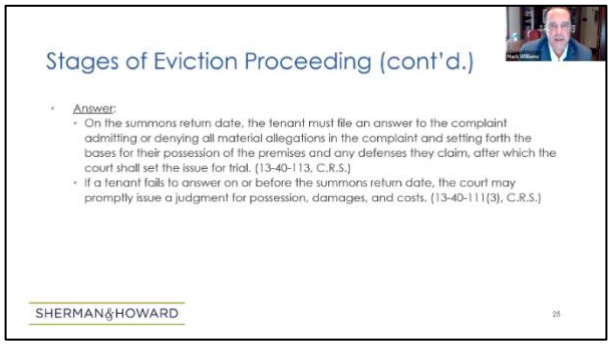
Once you get the notice, you need to contact your landlord and continue to work things out. As I indicated, a lot of times landlords will use this to get leverage on you in a negotiation and sometimes, as Rebecca indicated, they'll want to see some sort of financial information on what you can do. You need to be prepared to be able to demonstrate that you just don't have the ability to pay that rent or that you have a certain amount you can use to buy out the lease or to pay some just to get a release. But once the landlord evicts you, once you leave, then they have a duty to mitigate. As Rebecca said, you may just go ahead and throw in the keys and leave. However, it is critical, as Rebecca indicated, that you leave the premises in great shape. Hopefully before you leased it you had a checklist or you took a video of the space so that you can compare what it looks like now to its original state and fix everything. If there's personal property of yours, you need to take it out. If they're fixtures where you screwed things into the wall, you need to fix those. But make sure you're only taking your property, not the landlord's property. Leaving it in very good shape helps out because then the landlord can't claim additional damages and it may be an opportunity to say 'listen let's use our security deposit as part of the lease buy-out.' So once you get the notice to quit, it's very, very critical to contact your landlord immediately and say 'listen, can we continue to talk about this?'



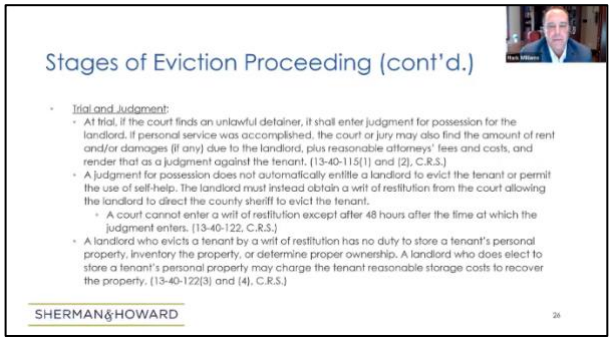
Filing of Complaint. After that, they have to file a complaint, an eviction action, and it can be filed in district court or county court. If it's filed in county court, there's a limit on the amount of damages that they can get for past rent, limited to $25,000. A lot of times landlords will file in county court because they feel it can speed up the process, and there's some truth to that. But there is limit in going to county court for damages.



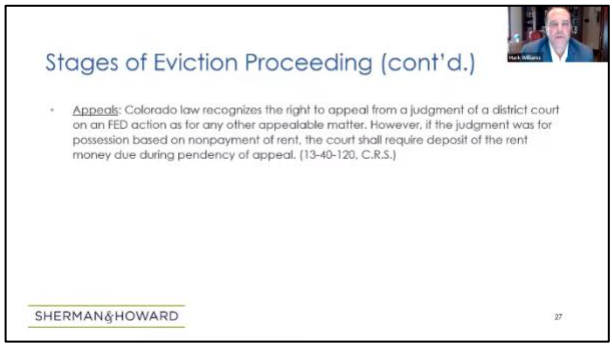
Service. Then, the complaint has to be served in a manner like every other civil action. They have to personally serve you with those papers. If they can't do that, then they have to post it. All this has to be done at least seven days before a hearing, which is called a forcible entry and detainer hearing, or FED hearing. If they want money damages, they have to personally serve you, so it'll be served by a sheriff's department or process server that may come to your door. If that happens, contact your counsel if you have them or contact the landlord and try to continue to work something out.



Answer. There is a return date, which can't happen less than seven days before you were served or no more than 14 days after you were served. The idea is it gives some speed to the landlord but also gives some time to the tenant to get prepared. If the tenant does not show up to court, then a court typically will enter a judgment for possession. After that, if there is personal service, they may get damages and costs. So, as soon as you get served with something, you need to contact counsel or you can go through coloradocovidrelief.org to see if they can help you seek counsel. But if you already have counsel please contact them. And, I keep saying this I know, but contact your landlord to see what you can work out.

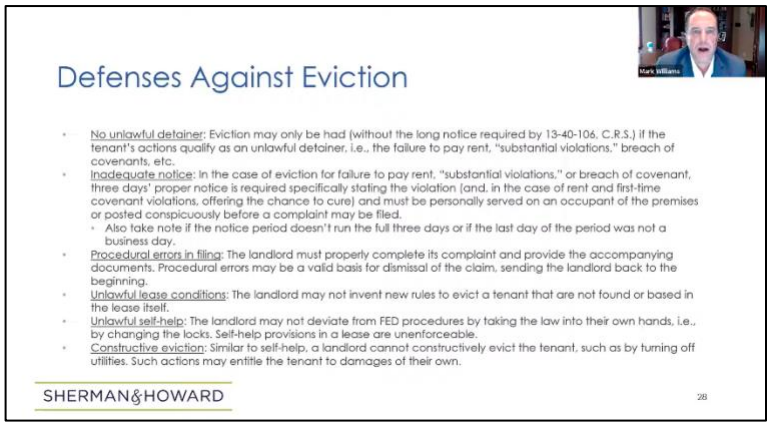


Court Order. If the court files an unlawful detainer, in other words there is a default, like the rent hasn't been paid or some other default, then the court will enter a judgment for possession. But it doesn't automatically mean you have to be out that day. They have to get a writ of restitution and it can't be exercised for another 48 hours. The reason being is to allow a tenant time to get out. A landlord that evicts a tenant by a writ of restitution has no duty to store a tenant's personal property or determine ownership of property. And I, unfortunately, saw that in real life when my wife and I were walking last week on a long walk over the weekend. Somebody had been evicted and all their possessions were in the front yard and the house was boarded up. So it does happen, it's unfortunate. But that's why I say if you're going to move out and throw in the keys, please take everything out. Make sure it's clean so you don't lose your personal property.



Appeal. You do have the right to appeal, but if you're going to do that you're going to have to require a deposit of the rent and other potential costs going forward. Appeals take some time, and so if you can deposit the full amount of the rent going forward, that's great, but that's typically a very rare occurrence and doesn't happen.

Defenses Against Eviction (40:21)



These are some key things you want to think about now and think about them honestly. You want to discuss them with your counsel, because any defenses that you raise need to be within the law and you should only assert them if you have a legal and factual basis to do so.

You can assert that there really is no unlawful detainer, in other words you paid rent and you have proof of that. That happens sometimes.

Another is there's no breach of a covenant. If there was inadequate notice when they were posted and then they filed a lawsuit that required you to get out early, that may be an issue. There may be some procedural errors in the filing. However, those two things, inadequate notice and procedural errors, rarely happen with a sophisticated landlord. They pretty much have the system down, so I wouldn't count on that.

Sometimes a landlord will invent new ways or new rules that you weren't made aware of that are somehow outside the lease, or try to be imposed via an email or something like that, that are not part of the lease. Make sure you are aware of those and look through your lease very, very carefully to see if there are other defenses, and that's something you should look through with your counsel. Again, there needs to be an honest factual or legal basis to do so.

The landlord also can't deviate from the FED procedures by taking law into their own hands. They can't do that, and that's why we have these FED statues.

A last defense is a landlord can't just turn off your utilities or do other things before taking all of these steps in order to constructively evict you. Again, that's rare, but it has happened and it's something to be aware of.

So again, if you get served, the time to be thinking about this is before you have the notice to quit served on you. The period of time that you're thinking through the strategies Rebecca talked about is a good time to think through this process of eviction and what that looks like in your situation. Think about what can you do to forestall it legally and honestly, or other ways. And see if you can work something out with the landlord because, again, they would rather work something out then not.

That's where this last slide comes in. The real question that you ask a landlord is 'who else are you going to get to rent this space?' When it's a commercial office space, that may be a difficult thing to do. Restaurant space would be pretty difficult to do right now too. Warehouse space may be a little bit easier to do for a number of reasons, because a number of businesses may be able to go in there. But a landlord these days will also try to work things out. There are a lot of really good landlords who do want to work things out for this very reason. Rebecca gave a lot of great advice, but the best advice was to go talk to your landlord early. If you see that you're going to have a problem paying rent later on, go to your landlord early and start talking to him or her about that. It's our experience that when you do so, it's easier to work things out at that point then waiting until the last minute.

Questions (44:27)

(Keith Trammel): Thanks Mark and Rebecca. We're going to try and cover a few of the questions that have come in over chat and the Q&A line.

Question: The first is a question, Rebecca, about whether a lack of money, that is lack of money to pay rent, that can be tied directly to a force majeure is the type of situation that would be covered by a force majeure clause.

Answer: (Rebecca Fischer): I think unfortunately no, but it's worth arguing. I would be surprised if a landlord's lease didn't have the kind of provision that was in the example: that lack of money is not a circumstance of force majeure. While force majeure is good to talk about, it's really an argument for the courts. It's not a strong suit on negotiating because I think every landlord understands that because of the pandemic people are bleeding out and going broke. I think a more realistic way is to figure out how to get both parties back on track with a little bit of compromise on both sides.

Question: How can I determine if I'm personally signed on a lease? For example, the lease may be old and the documentation that was entered into at the time the lease originated may not be available. I guess the question is, are leases, like other property documents such as mortgages, matters of public record?

Answer: (Rebecca Fischer): I'll take a stab and Mark you join in too. Typically leases are not a public record. Most landlords don't want them recorded because if the lease terminates under any kind of circumstances, good or bad, that lease on title to the landlord's property could present problems to the landlord if you wanted to sell the building or if you wanted to get new financing for it. So no, I don't think you're going to find your lease in the public record. I also don't think there's any harm in asking your landlord for a copy of it to make sure you're both working from the same song sheet. Mark do you have anything to add?

Answer: (Mark Williams): You're absolutely right. Sometimes more sophisticated tenants will have a memorandum of the lease recorded. But that is because if the building is sold they want to make sure that the purchaser knows about the lease, and there's typically provisions in the lease that say that the new owner will take it over.

Question: Another question that came in is if a tenant would have a better chance in negotiating lease termination simply by offering the landlord $25,000, which is the max amount that they might get in county court. Any thoughts on that?

Answer: (Mark Williams): I don't think that you'll have a better chance of negotiating. I think what you need to do is assess what you can pay and start the negotiation at a lower amount and see what they will do. Some landlords won't take it and will push you to the brink to try to get you out and then try to negotiate with you. I wouldn't offer them $25,000 out of the box because then a landlord is probably going to push it some more to see if you have more. So I would be prudent in the way that you negotiate the lease from that perspective.

Question: Another question that came in is if a landlord agrees to reduce our rent amount, what type of documentation should we get for our records?

Answer: (Rebecca Fischer): The landlord should put together a formal lease amendment, something that would be called 'first amendment to the lease.' It would recite the parties and recite the background. What I am seeing is some recitals that say 'these are unprecedented times and so there are good reasons on both sides to make these concessions for each other.' Then spell it out very carefully: how long will the rent abatement or rent concession last and what are the amounts. It doesn't have to be complicated, it doesn't have to be nearly as complicated as the lease, frankly. I see these amendments done in a couple of pages and they ought to be in plain English. Again, I would just make sure that there is a provision in there that says 'this is it; going forward the tenant will be in good standing as long as it complies with these new terms of the lease and the landlord agrees that in taking the tenant's revised payment schedule, the landlord is not going to call an old default.' Mark anything you want to add?

Answer: (Mark Williams): Just to document it. That was a great answer.

Question: There are a couple questions that have come in around unreasonable or even hostile landlord behavior. One individual has been locked out since mid-July, has never received any posting or notice to quit, no court subpoena, nothing other than just sort of seeing the premises shut. How would you recommend small business owners in that situation deal with either hostile or unreasonable landlords?

Answer: (Mark Williams): Certainly the first thing to do is to look at your lease and go get counsel. That appears to be very unreasonable and while I've seen it before, it's unusual. I don't know what other circumstances are there but you should really seek counsel and see what kind of steps you can take, particularly to get your personal property. Sometimes they might have a lien on your personal property, but if they do it'd have to be in writing and there are other legal requirements in order to be able to have a lien. But if they don't have such a lien and they're locking you out, that's a good negotiating point, or leverage point, and you should go seek counsel.

Question: Assuming more notice or more reasonable behavior from landlords, once a notice of eviction has been posted on a premises, does it have to stay posted or can the business owner/tenant remove it?

Answer: (Mark Williams): You can take it off but you should take a picture or pictures of it and keep it in a safe place. They've done the same thing, they've taken pictures of the posting and the time of posting. You ought to take a picture of a pan of the front building and then of the door where it's at, take it off, keep it in a safe place, and note the time because they've done the same thing and you want to make sure that everybody's clear on what that time is. So yes, you can do that.

Question: And then a question I think, Rebecca, related to force majeure that you covered earlier: have you ever seen a tenant successfully argue impossibility or impracticability of performance due to the pandemic?

Answer: (Rebecca Fischer): You know I have not seen it successfully argued, I've never been up close and personal to it. I'm reading a lot about it, and Mark you may want to weigh in as a litigator, but it strikes me as a real uphill battle. I mean the doctrine is there for a situation where the lease does not address it. I understand that if you've got a force majeure clause in your lease, that's the deal, and if the force majeure clause doesn't speak to your lease or your circumstances, that's too bad. That impossibility/impracticability of performance, that's not a contract remedy but what they call a common law remedy that's sort of made up by the courts and held up by the courts. I'd say it's a bit of a crapshoot and there's probably a lot to prove and it's an expensive way to go. But, it doesn't hurt to throw those phrases out when you're talking to the landlord. Mark help me out here.

Answer: (Mark Williams): I agree with you. First of all, I want to complement the person who put the question in, that's a sophisticated question. Thank you for doing that. As Rebecca said, these arguments are being made in various places, but it is an uphill battle. A court is going to look at the lease and see what the object of the lease is and see if there's language in there where it can be argued that the basis for the lease and consideration for the lease was tied to what operations you have. If there's an impossibility or impracticability of operating, then perhaps a court may do that. But in typical form leases you're not going to have that and I'd be surprised to see that. But it's possible. So it is an uphill battle and there's some facts you would have to demonstrate that you can fulfill the impracticability or impossibility defense. Again, go seek counsel with the facts and see if you have a good, honest, factual, legal defense to that.

Question: We've got a couple questions as well just about this program.

Answer: (Keith Trammell) I'll try to answer those in a bundle. Coloradocovidrelief.org is offering legal services through pro bono volunteer lawyers. The idea behind the website is for it to serve as a matching program so businesses can sign up for assistance and lawyers can sign up to provide legal assistance. Behind-the-scenes we try to coordinate that matching program between lawyers who have a certain expertise and the clients that might need their help. So if you need legal assistance please go to www.coloradocovidrelief.org to submit your information there, and if you're interested in volunteering, including for the clinic on August 20th, please go there as well. And it's important to bear in mind that while the topic and focus of this particular webinar is on eviction-related issues, predominantly from the tenant side, there are a number of small businesses that we are supporting who are actually smaller landlords. We are not excluding, by any means, providing legal assistance for small business owners who happen to be landlords. We're here to provide support to landlords as well. I just wanted to say thank you one more time to Mark Williams, Rebecca Fischer, and Sherman & Howard for their tremendous support and help putting on this program. Thank you everyone.