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Commercial Landlord's Remedies for Tenant's Breach

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Associate, MCGUIRE, CRADDOCK & STROTHER, P.C. Lauren's practice focuses primarily in the area of commercial real estate, representing buyers, sellers, landlords, tenants, borrowers and lenders in the acquisition, development, financing and disposition of commercial properties. Her expertise extends to the negotiating of commercial lease agreements, including those for retail, medical, industrial, office, mixed-use projects and lifestyle centers.

After graduating Magna Cum Laude from Southern Methodist University with a double major in French and Political Science, Lauren spent a year in Normandy working for the French Ministry of Education. Lauren then attended Southern Methodist University Dedman School of Law, where she graduated with high honors and served as an editor of the SMU International Law Review.

Education:

- Southern Methodist University Dedman School of Law (J.D., Cum Laude, 2013)
 - SMU International Law Review, Case Note and Comment Editor, Associate Editor
- Southern Methodist University (B.A., Magna Cum Laude, 2009)
 - Phi Beta Kappa
 - Mortar Board President

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BACKGROUND, EDUCATION, AND PRACTICE



Shareholder, MCGUIRE, CRADDOCK & STROTHER, P.C. Tom's practice encompasses a broad range of real estate transactions and commercial litigation emphasizing landlord-tenant, lender liability, brokerage, and other real estate related matters. He also is a Fellow of the American College of Real Estate Lawyers, is rated AV Preeminent by Martindale Hubbell, has been named a Texas Super Lawyer (2011-2016)

Representative Transactions

- Representation of private equity group in connection with its restructure of regional retailer's real estate holdings in anticipation of private equity transaction
- Representation of developer in negotiations with national retailers, national hoteliers, and condominium developers in conceptual development and drafting of covenants, restrictions, and easements governing a planned mixed use development of a regional mall, luxury hotels, and condominiums connected to two major professional sports venues
- Representation of developers in connection with entity formation and company agreements; negotiation and drafting of loan documents; covenants, restrictions, and easements for retail and mixed use developments; management agreements; utility contracts
- Representation of developers and owners in lease negotiations with national big box tenants, regional retailers, high end luxury retailers, and local retailers
- Representation of owner of specialty "to the trade only" center for interior design professionals
- Representation of international hardware wholesaler in negotiation of numerous warehouse and other leases throughout North America
- Representation of several restaurant chains in site acquisition and site leasing transactions
- Representation of office landlords in negotiation of office leases, including lease of over 250,000 square foot space to international tire manufacturer for its United States headquarters
- Representation of buyers, sellers, and lenders in real estate sales, purchase, and financing transactions
- Representation of servicers for conduit lenders in connection with collection, foreclosure, and restructuring of troubled loans
- Representation of borrowers in negotiations, foreclosure and receivership proceedings, and other litigation with servicers and special servicers in connection with lenders' defaults of post-closing funding and other obligations, borrowers' exercise of loan renewal options, and documentation of forbearance and discounted pay off agreements
- Representation of national theater chain in litigation with developer and developer's conduit lender
- Successful fist chair jury and non-jury trials in landlord-tenant, real estate contract, finance, and general commercial litigation experience, including in landlord-tenant, lender liability, and loan participation and loan service contract disputes; employment contracts and discrimination, international supply contracts

Mr. Whelan's credits as a speaker and writer include:

- Planning Committee Member, UNIVERSITY OF TEXAS LAW SCHOOL: WILLIAM W. GIBSON, JR. MORTGAGE LENDING INSTITUTE (2002-2016)
- Planning Committee Member, UNIVERSITY OF TEXAS LAW SCHOOL: BERNARD O. DOW LEASING INSTITUTE (2008, 2011, 2012)
- Co-Chair, CLE INTERNATIONAL: NEGOTIATING LEASES (2001-2002)
- Chair, SMU SCHOOL OF LAW: REAL ESTATE TRANSACTIONS IN DEPTH (2000)

- Chair, SMU SCHOOL OF LAW: LEASES IN DEPTH (2000)
- Author and Speaker, *Getting Your Priorities Straight: Commercial Lease Terms Important to a Landlord's Lender*, 49TH ANNUAL WILLIAM W. GIBSON, JR. MORTGAGE LENDING INSTITUTE (SEPT. 2015);
- Author and Speaker, *Scattershooting While Wondering Whatever Happened Down at the Courthouse to Frequently Litigated Provisions in My Favorite Real Estate Sale Forms*, STATE BAR OF TEXAS: 26TH ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2015);
- Author and Speaker, *Annotated Office Lease*, STATE BAR OF TEXAS: 35TH ANNUAL ADVANCED REAL ESTATE LAW COURSE (2013); CLE INTERNATIONAL SEMINAR: NEGOTIATING LEASES (2000-2001)
- Author and Speaker, *Negotiating and Drafting Repair, Surrender, and Casualty Clauses in Commercial Leases*, UNIVERSITY OF TEXAS LAW SCHOOL: BERNARD O. DOW LEASING INSTITUTE (2012); STATE BAR OF TEXAS: 17TH ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2006)
- Co-Author with Jane Snoddy Smith, *Pigs Get Fed and Hogs Get Slaughtered – Lessons from the Financial Crisis*, American College of Real Estate Lawyers (2010); *Overreaching by Borrowers and Lenders*, ALI-ABA (2011)
- Author and Speaker, *Subleasing*, UNIVERSITY OF TEXAS LAW SCHOOL: BERNARD O. DOW LEASING INSTITUTE (2009)
- Author and Speaker, *Defaults and Remedies from Landlord and Tenant Perspectives*, CLE INTERNATIONAL: NATIONAL NEGOTIATING LEASES CONFERENCE (2008)
- Author and Speaker, *Texas Gross Margins Tax: What's in a Name?*, UNIVERSITY OF TEXAS LAW SCHOOL: 41ST ANNUAL WILLIAM W. GIBSON, JR. MORTGAGE LENDING INSTITUTE (2007)
- Author and Speaker, *Subordination, Non-Disturbance, and Attornment Agreements from the Lenders' Perspective*, UNIVERSITY OF TEXAS LAW SCHOOL: 40TH ANNUAL WILLIAM W. GIBSON, JR. MORTGAGE LENDING INSTITUTE (2006)
- Author and Speaker, *Landlord's Remedies for Tenant's Default*, UNIVERSITY OF TEXAS LAW SCHOOL: BERNARD O. DOW LEASING INSTITUTE (2005); SMU SCHOOL OF LAW: LEASES IN DEPTH (1999-2000); CLE INTERNATIONAL: NEGOTIATING LEASES (1991-1998)
- Author and Speaker, *Ad Valorem Tax Liens – Rights of Transferees, Mortgagees, and Subrogees*, UNIVERSITY OF TEXAS LAW SCHOOL: WILLIAM W. GIBSON, JR. MORTGAGE LENDING INSTITUTE (2005)
- Author and Speaker, *Selected Retail Leasing Issues – Usage Controls*, STATE BAR OF TEXAS: 16TH ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2005); CLE INTERNATIONAL SEMINAR: NEGOTIATING LEASES (2006)
- Author and Speaker, *Lender's Remedies Other than Foreclosure*, UNIVERSITY OF TEXAS LAW SCHOOL: WILLIAM W. GIBSON, JR. MORTGAGE LENDING INSTITUTE (2004 & 2009)
- Speaker, *Case Law Update*, UNIVERSITY OF HOUSTON LAW FOUNDATION: ADVANCED REAL ESTATE LAW (2004)
- Author and Speaker, *Tenant's Remedies for Landlord's Defaults*, CLE INTERNATIONAL SEMINAR: NEGOTIATING LEASES (2002, 2004)
- Author and Speaker, *Compensation, Duties, and Liabilities of Real Estate Brokers*, UNIVERSITY OF HOUSTON LAW FOUNDATION: ADVANCED REAL ESTATE SHORT COURSE (2003); SMU SCHOOL OF LAW: REAL ESTATE TRANSACTIONS IN DEPTH (1998-2000)
- Author and Speaker, *Negotiating and Drafting Leases for Small Businesses*, UNIVERSITY OF HOUSTON LAW FOUNDATION: ADVISING SMALL BUSINESSES (1999, 2001, 2003)
- Author and Speaker, *Real Estate Remedies*, UNIVERSITY OF HOUSTON LAW FOUNDATION: REAL ESTATE DOCUMENTS, WORKOUTS, AND CLOSINGS (2003)
- Author and Speaker, *Negotiating and Drafting Office Leases*, UNIVERSITY OF HOUSTON LAW FOUNDATION: REAL ESTATE DOCUMENTS, WORKOUTS, AND CLOSINGS (2000, 2002)
- Author and Speaker, *Office Leases: Operating Costs and Related Expense Allocations*, CLE INTERNATIONAL: NEGOTIATING LEASES (1999)
- Co-author, *Determination of Usury in Commercial Transactions*, DALLAS BAR ASSOCIATION (1993)
- Co-author, *Discovery of Commercial Documents*, SOUTH TEXAS COLLEGE OF LAW: ADVANCED LITIGATION COURSE (1991)
- Contributor, *Legal and Ethical Aspects of Tenant Representation and Agency Issues*, SOCIETY OF INDUSTRIAL OFFICE REALTORS (1989)

Education

- University of Dallas (BA., *magna cum laude*, 1982)
- Southern Methodist University (J.D., 1987)
- Citations Editor, *Journal of Air Law & Commerce*
- Member, Wagner Labor Law Moot Court Team
- Blackwell & Patterson Legal Writing Award
- American Jurisprudence Awards in Constitutional Law II and Professional Responsibility

I. INTRODUCTION¹

Possession, the old saying goes, is nine-tenths of the law. But this old saying is only partly true when it comes to a landlord's remedies for a tenant's default under a commercial lease. Determining who is entitled to possession of the leased premises is only one among many legal issues that must be resolved when a tenant defaults; even so, the resolution of this one issue often decisively affects the others. Repossessing the premises—whether done rightly or wrongly—affects a landlord's claims for rent and its separate and distinct claim for damages. Doing so wrongfully, however, breeds unwanted offspring—the twins, defense and counterclaim—whose births complicate, and increase the cost of, recovering possession, rent, and damages.

A. SCOPE OF OUTLINE. This outline is intended to be a practical guide to the exercise of, and interplay between, a landlord's possessory and monetary remedies. Sections II-V cover a landlord's possessory remedies—judicial evictions, lock-outs, and dealing with personal property in the premises. Section VI.A covers a landlord's monetary remedies—recovering rent and damages—and points out the difference between the two. And Section VI.B reviews the first two decades of mitigation jurisprudence in Texas and the application of

mitigation to leases in other jurisdictions. Section VII covers a number of defenses and counterclaims commonly asserted by a tenant in response to a landlord's attempts to recover possession, rent, and damages.

B. DECIDING TO EVICT. A landlord should make the decision to pursue eviction only after carefully considering its business objectives, its legal options, and the risks and costs associated with the pursuit of each. Before beginning the lease enforcement process, a landlord should examine its dealings with its tenant to uncover, if possible, any areas of potential liability exposure. A landlord or its attorney ordinarily should review thoroughly the correspondence with the tenant; the lease; any lease amendments; guaranties; UCC filings; subleases and assignments; landlord's loan documents; subordination, attornment, and non-disturbance agreements; and tenant estoppels. Usage controls common in retail leases (*e.g.*, co-tenancy clauses, exclusive use clauses, *etc.*) may make it necessary to examine other tenants' leases to determine the effect of terminating one tenant's lease on the rights and remedies of other tenants in the shopping center.² Failure to conduct such a review is a source of many common missteps in the lease enforcement process, including perhaps the most common—failing to send proper notices to all of the parties entitled to receive them.³ An appropriate review of these materials and

¹ Unless otherwise specified, the text of all cited Texas statutes and codes through the end of the 2017 legislative session are taken from Vernon's Texas Rules Annotated (West 2017).

² Robert Harms Bliss, *The Exclusive Use Clause: The Agent Provocateur of Retail Leasing*, SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW—REAL ESTATE LAW: LEASES-IN-DEPTH (1999); William E. Blodgett, *Retail Lease Provisions*, STATE BAR OF TEXAS: 17TH ANNUAL ADVANCED REAL ESTATE LAW COURSE (1995); Timothy R. Brown, *Commercial Leases: Drafting and Modification – Shopping Center, Retail and Similar Leases*, UNIVERSITY OF HOUSTON LAW CENTER CONTINUING LEGAL EDUCATION: REAL ESTATE WORKOUTS, DOCUMENTS & CLOSINGS (2005); Bernard O. Dow, *Exclusive Use Clauses: Drafting and Enforcement Issues*, SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW –

REAL ESTATE LAW: LEASES-IN-DEPTH (1994); M. Rosie Rees and Theani C. Louskos, *Retail Leasing: Special Concerns & Sample Co-Tenancy Provision from Major Tenant Form*, NEGOTIATING COMMERCIAL LEASES 993-1068 (Practicing Law Institute 2003); Thomas M. Whelan, *Selected Retail Leasing Issues—Usage Controls*, STATE BAR OF TEXAS: 16th ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2005).

³ See, *e.g.*, *Gill Sav. Ass'n v. Chair King, Inc.*, 783 S.W.2d 674, 676 (Tex. App. – Houston [14th Dist.] 1989) (noting that the landlord failed to send notice of tenant's default to tenant's creditor as required by agreement subordinating landlord's lien to creditor's lien on tenant's inventory), *aff'd in part and modified in part per curiam*, 797 S.W.2d 31 (Tex. 1990), *on remand sub nom.*, *Resolution Trust Corp. v. Chair King, Inc.*, 827 S.W.2d 546 (Tex. App.—Houston [14th Dist.] 1992, no writ).

a probing interview of the property manager should put a landlord in a far better position to choose the remedy, or combination of remedies, which will most effectively accomplish its legitimate business objectives.

C. NEGOTIATING WITH DELINQUENT TENANTS. Negotiation can be the least costly and most effective way for a landlord to resolve a dispute with a delinquent tenant. But missteps in negotiations with a delinquent tenant can seriously impair a landlord's remedies. One landlord, for example, negotiated a repayment plan with its tenant and, in the process, partially released the guarantor of the lease by accepting a note from the tenant for the past due rent.⁴ Another landlord's conduct during negotiations about the tenant's non-payment of rent contributed to a large judgment against the landlord for wrongful eviction and fraud.⁵

D. ANATOMY OF A LEASE ENFORCEMENT CATASTROPHE. *Gill Sav. Ass'n v. Chair King, Inc.* illustrates some pitfalls of an ill-considered and poorly executed eviction after failed settlement discussions.

The tenant claimed its landlord failed to repair defects in the premises, treated this failure as a breach of the lease, and notified the landlord it would withhold payment of rent. The landlord balked. The tenant then offered to place the rent into an escrow account, and the landlord agreed to the escrow arrangement. But for some unexplained reason, the escrow account was never established.⁶

Meanwhile, temptation in the form of Toys "R" Us, a nationally known and

creditworthy tenant, came calling. To the landlord's chagrin, the troublesome, delinquent tenant occupied the only space in the shopping center suitable to Toys "R" Us. The landlord asked the president of its troublesome tenant to relocate to comparable space in the same shopping center so that the landlord could enter into a lease with Toys "R" Us. While negotiations for comparable space were ongoing, the tenant received a letter demanding payment of the delinquent rent. The tenant's president claimed a representative of the landlord told him not to worry about the demand letter. The tenant's president then rejected an offer from the landlord for substitute space, and the tenant's president left town for a week, believing negotiations with the landlord for substitute space would continue after he returned. In his absence, the landlord hired a moving company and evicted the tenant. The landlord, of course, claimed the tenant should have known it would be evicted because the landlord had told the tenant's president, before he left town, that "other alternatives would have to be considered" if the tenant rejected the landlord's offer.⁷

In a *nonjury* trial, the trial court found the landlord liable for \$144,309 in actual damages, \$355,277 in punitive damages,⁸ and \$54,862 in attorneys' fees.⁹ The trial court also ruled that the landlord's conduct during these negotiations estopped the landlord from asserting any right to recover rent.¹⁰ The court of appeals and the Texas supreme court both affirmed the trial court's liability findings, although the damage awards were ultimately remanded for a new trial.¹¹ In any case, the landlord's apparently cavalier attitude toward

⁴ *Glasscock v. Console Drive Joint Venture*, 675 S.W.2d 590, 592 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

⁵ *Gill Sav. Ass'n*, 783 S.W.2d at 674-80.

⁶ *Id.* at 676.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 680.

¹⁰ *Id.* at 679.

¹¹ *Id.* at 680 (affirming trial court's judgment on liability, modifying award of attorneys' fees, and remanding for new trial on damages), *aff'd in part and modified in part per curiam*, 797 S.W.2d at 32-33 (affirming judgment on liability,

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