



# Lease Triage Strategies During the Pandemic

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Rationing Economic and Legal Interventions  
Lease Modification Therapies  
Legal and Contractual Remedies



**Thomas M. Whelan**  
**McGuire Craddock & Strother PC**  
[twhelan@mcslaw.com](mailto:twhelan@mcslaw.com)

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## Materials

- Annotated Lease Amendment
  - It is not a form. Sample provisions provide templates to highlight important issues that tend to get overlooked when people are focused on immediate problems, like nonpayment of rent.
  - It also annotates and shows revisions to some common lease terms to address common COVID-19 related problems
  - And finally, it annotates common terms in commercial leases and lease amendments that affect the parties' exercise of rights and remedies after a default or a landlord or tenant's bankruptcy.
- Memo on Force Majeure, Impossibility, and Frustration of Performance
- Additional Materials: [twhelan@mcslaw.com](mailto:twhelan@mcslaw.com)
  - Texas Annotated Office Lease
  - Selected Retail Usage Issues
  - Landlord Remedies for Tenant Default

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# I. Lease Triage

- **Assess Landlord's Resources**
  - Landlord's Financial Condition
  - Landlord's Lender
  - Landlord's Loan Covenants
    - DSCR
    - LTVR
    - Consent Requirements
    - Leasing Restrictions
    - Non-Recourse Carveouts
    - Loan Maturity
    - Additional Collateral
  - Rent Adjustment Budget
  - Financial & legal hygiene
  - Contract Tracing—Retail & Mixed Use
    - Co-Tenancy Pitfalls
- **Assess Tenant's Viability**
  - 3 categories of Tenants
    - Tenants who will fail with or without help
    - Tenants who will survive with or without help
    - Tenants whose survival depends on help
  - Can Landlord help?
    - Financial Limitations
    - Legal Limitations
  - Landlord should use its resources to keep
    - Landlord healthy
    - Landlord's lender happy
    - Tenants contributing to the first two objectives
- **Crisis Management Protocols & Communication**
  - Layoffs
  - Working Remotely
  - Siloed Employees
    - Asset Manager working leases
    - Financial Manager monitoring Loan covenant compliance
  - Siloed Lawyers: Ask B4 Act

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# Tenant Financial Disclosures & Covenants—Part of the Price of COVID-19 Rent Relief

- Tenant must make full financial disclosures as condition to consideration of any Lease Amendment
  - The Usual (Tenant and Guarantor Financial Statements, Tax Returns, Sales Tax Reports)
  - COVID-19 Specials
    - PPP Loan Status
    - Line of Credit Status
    - Line of Credit and Letter of Credit renewal posture
    - Forward looking projections . If a Tenant seeking rent relief is not looking forward with a plan, projections, and a survival budget, it has its head in the sand
- Tenant must agree to additional financial covenants in Lease Amendment
  - Periodic Reporting (including status of any business interruption claims)
  - Financial Covenants
  - Separation Agreement if Financial Covenants are not satisfied or another Default occurs
    - Landlord gets right to re-tenant space and reposition project
    - Tenant gets negotiated termination price
    - Landlord and Tenant get a peaceful transfer of possession without litigation
- Purposes of Covenants
  - Improve Tenant's and thus Landlord's chance of survival
  - Improve Landlord's position vis-a-vie other unsecured creditors if Tenant does not survive
    - Take control of Lease by terminating it before Tenant files Bankruptcy
    - Maximizing Landlord's claims in Bankruptcy
- Comply with Landlord's Loan Covenants

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## Waiver of Right to Jury Trial

- No jury trial waiver means little, if any, chance of any trial during this pandemic. To delay trial, a defendant simply requests a jury trial.
- The party seeking to enforce a jury trial waiver bears the burden to make a prima facie showing that the right to a jury trial was knowingly, voluntarily, and intelligently waived
- Absent an allegation of fraud, a conspicuous waiver of the right to jury trial is presumed to be knowing and voluntary
- The fact that of 20 provisions only 5 had “bolded introductory captions similar to the waiver provision in *Prudential*” and that the “Waiver of Trial By Jury” caption was one of the 5 with a bolded captions; and the fact that the caption was hand-underlined, as was the word “waiver” and the words “trial by jury” within the provision were sufficient to establish the waiver was conspicuous

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## Waiver, Estoppel, *et al*

- **Waiver** is an intentional relinquishment or surrender of a right that, at the time, is known to the party.
  - *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987)
- Ordinarily, waiver is a question of fact.
  - *Andrews v. Powell*, 242 S.W.2d 656, 662 (Tex. Civ. App.— Texarkana 1951, writ ref'd n.r.e.).
- Ordinarily, questions of fact mean a trial (*i.e.*, no summary judgment)
- Waiver by Oral Agreement
- Waiver by Prior Conduct in similar circumstances
- Waiver by Conduct on issue in question
- Estoppel
- Accord and Satisfaction
- Novation
- Negotiating a Check
- Waiver by Acceptance of Rent

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