

## **PROTECT YOUR RIGHTS AND REMEDIES WITH OWNER DEFAULT CLAUSE**

When negotiating a lease, many tenants are so focused on the sections that address tenant defaults and the owner's remedies in the event of a tenant default that they forget an important fact: An owner can violate the lease, too. Tenants often rely on the fact that state law typically gives them certain remedies if the owner violates the lease, says Milwaukee attorney Michael J. Ostermeyer. But those remedies are limited and can change if state law changes, he notes. And the owner's form lease may waive or further limit those remedies, Ostermeyer warns.

To protect yourself, try to negotiate language into the lease that spells out what events will be considered owner defaults and what remedies you'll get if an owner defaults, says Ostermeyer. We'll explain the typical state law remedies tenants get and the dangers of relying on those remedies alone. Also, we'll tell you what events should be considered owner defaults and what remedies you should ask for. And we'll give you a Model Lease Clause (see p. 3), spelling out those events and remedies, which you can adapt and use.

### **Typical State Law Rights and Remedies**

State law—either through court decisions or by statute—typically gives tenants certain rights and remedies they can pursue if an owner violates the lease, says Ostermeyer. Common state law remedies for tenants include the following:

**Damages.** You almost always have the right to sue the owner for damages—that is money meant to “make you whole” or compensate you for the owner's default. Damages can include the cost of curing the owner's default, as well as your lost profits, relocation expenses, and attorney's fees, explains Ostermeyer. Also, in extraordinary cases, he adds, you may have the right to sue for punitive damages—that is, damages meant to punish the owner. And you may have the right to offset damages, such as the cost of curing the owner's default, against your rent due, Ostermeyer notes.

**Rescission.** Rescission is the right to cancel or take back the lease so that it's as if the lease had never happened, explains Ostermeyer. This right is usually available to you only if the owner violates the lease before you take possession of the space by, say, failing to deliver the space on time or in the condition promised, he says.

**Injunction.** You may have the right to ask a court to issue an injunction against the owner. An injunction is an order telling the owner to stop committing a certain act that violates the lease, explains Ostermeyer. Tenants typically ask courts for an injunction if the owner is violating the tenant's right to the quiet enjoyment of its space by, for example, blocking the entrance to its space or interfering with its alterations, he points out.

**Specific performance.** If you have the right to specific performance, you can ask a court to order the owner to perform an act it's required to perform under the lease, explains Ostermeyer. Tenants typically ask for specific performance when, say, an owner fails to make necessary repairs, he notes.

**Declaratory judgment.** You may have the right to ask a court for a declaratory judgment—that is, a statement by the court resolving a dispute under the lease, says Ostermeyer. So if you have this right, you may ask the court to declare that, for instance, the removal of a previous tenant’s fixtures from the space was the owner’s obligation, not yours, he explains.

### **Danger of Relying on State Law Alone**

Don’t simply rely on the rights and remedies you’re entitled to under state law, advises Ostermeyer. Doing so is dangerous because:

- ‡ Some states give you very limited rights and remedies, which may not protect you sufficiently;

- ‡ State law can always change, eliminating or modifying rights and remedies you were counting on; and

- ‡ Many, but not all, rights and remedies available under state law can be limited or waived in the lease. Owners often try to do this, says Ostermeyer. And if you’re not careful, you could agree to lease language that does just that.

### **Spell Out Default Events, Remedies in Lease**

Instead of relying on the rights and remedies you’re entitled to under state law, include language in the lease that spells out all the events that will be considered owner defaults and the remedies you’ll be entitled to in the event of an owner default, suggests Ostermeyer. Your lease clause, like our Model Lease Clause, should do the following:

**List the events that will be considered owner defaults.** Say in the lease what events or acts—or failures to act—by the owner will be considered lease defaults by the owner, advises Ostermeyer. The list should include the following:

- ‡ The owner’s failure to pay—or to timely pay—any money it’s required to pay under the lease [Clause, par. a(i)];

- ‡ The owner’s failure to comply with any of the terms, provisions, or covenants in the lease—such as its obligation to make repairs or to deliver the space on time [Clause, par. a(ii)]; and

- ‡ The owner’s making of a representation or warranty that proves to be false or inaccurate in any material respect, such as its warranty that the space is suitable for your use or that the space is free of environmental contamination when it isn’t [Clause, par. a(iii)].

**Practical Pointer:** If an owner agrees to this language, it’s likely to require you to give it notice of its violation and an opportunity to cure—that is, correct—it before it’s considered a lease default that triggers your right to certain lease remedies, notes Ostermeyer. Such a request is reasonable, he says. So say that an owner’s violation is a default only if it doesn’t cure such violation within, say, 20 days of getting notice of it from you. For monetary violations, you may want to set a shorter cure period of, say, five days, suggests Ostermeyer.

**List your remedies if an owner default occurs.** List what your remedies will be in the event of an owner default, advises Ostermeyer. This list should include the following:

- ‡ The right to terminate the lease [Clause, par. b(i)];
- ‡ A “self-help right”—that is, the right to cure the default yourself and offset the costs of doing so against any money you owe or will owe the owner [Clause, par. b(ii)]; and
- ‡ The right to pursue any and all rights and remedies available to you at law or in equity [Clause, par. b(iii)]. By adding this language, you make it clear that the other two rights are in addition to—not instead of—the remedies available to you under state law.

**Practical Pointer:** Our Model Lease Clause is a basic owner default clause that many tenants—both office and retail—can use. But certain types of tenants or types of leases may need additional, specialized default language, cautions Ostermeyer. For example, if your lease is being funded by a source that imposes its own covenants, you may need additional remedies in the lease. That’s because the owner’s violation of one of those covenants could be disastrous for you, he explains.‡

---

*Insider Source*

**Michael J. Ostermeyer, Esq.:** Partner, Quarles & Brady LLP,  
411 E. Wisconsin Ave., Milwaukee, WI 53202-4497; (414)  
277-5521; [mjo@quarles.com](mailto:mjo@quarles.com).