

A PRIMER ON REMEDIES FOR LANDLORD DEFAULTS —— (With Sample Clauses) ——

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*For every right, a remedy; for every wrong, a recourse?
Only if you knew what you were doing when you negotiated the lease.*

WHEN NEGOTIATING AND DRAFTING a lease for a tenant, it is particularly important to contemplate the consequences of a potential breach of the lease by the landlord. A variety of common law remedies are available to a tenant for a landlord's breach; but, the best time to think about a landlord's breach is before the

lease is signed. A commercial landlord will seek contractually—and perhaps subtly—to minimize the tenant's common law remedies. For its part, the tenant will want provisions in the lease ensuring the availability and adequacy of its remedies.

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COMMON LAW REMEDIES • For a landlord's breach, a tenant has a variety of equitable remedies. The tenant may also pursue an action at law for damages.

Equitable Remedies

Tenants may avail themselves of various equitable remedies for landlord defaults. Among these are:

- Rescission;
- Constructive eviction;
- Injunctive relief;
- Specific performance; and
- Declaratory judgment.

Rescission

If a landlord breaches a material term of a lease before the lease term commences, the tenant may seek to rescind the lease. See *Restatement (Second) Of Property, Landlord and Tenant* §§4.2 and 6.2 (1977 & Supp. 2003). In *S&D Group, Inc. v. Talamas*, 710 S.W.2d 680 (Tex. App. 1986), the court held that a sublessee could rescind because the sublessor failed to deliver possession. In *Draper Mach. Works, Inc. v. Hagerberg*, 663 P.2d 141 (Wash. Ct. App. 1983), however, a tenant waived its right to rescind for landlord's failure to deliver possession when the tenant occupied a portion of the premises. In *Blanc's Cafe v. Corey*, 188 P. 759 (Wash. 1920), a tenant maintained an action for ejectment against the landlord because the landlord failed to deliver possession in time. See also *Crown Plaza Corp. v. Synapse Software Sys., Inc.*, 962 P.2d 824 (Wash. Ct. App. 1997).

Constructive Eviction

After commencement, a tenant may seek to terminate a lease on a theory of constructive eviction. For example, the tenant may sue for constructive eviction if the landlord has failed to cure a misrepresentation of an environmental

condition. *Heritage on Lanier, Inc. v. Akins*, 454 S.E.2d 172 (Ga. App. 1995). In *Akins*, the tenant counterclaimed for rescission of the lease based on the landlord's misrepresentation of the environmental condition of the premises. The court remanded the question to the trial court for further fact finding. See also *Zwerdling v. Zack*, 202 A.D.2d 577, 609 N.Y.S.2d 259 (1994). A tenant may seek constructive eviction if the a landlord fails to provide an environmental audit and the premises turn out to be contaminated. See *Fla. Atlantic Marine, Inc. v. Seminole Boatyard, Inc.*, 630 So. 2d 219 (Fla. Dist. Ct. App. 1993) (tenant seeks rescission of the lease and damages for the landlord's failure to provide the tenant with an environmental audit as required under the lease, and the landlord's contamination of the premises).

Injunctive Relief

A tenant may petition for injunctive relief for continuous or repeated acts creating a nuisance. See 49 Am. Jur. 2d *Landlord and Tenant* §544 (1995). A tenant may also obtain injunctive relief for other types of breaches of the covenant of quiet enjoyment, including the following:

- Interference with tenant's alterations and sublease, if permitted under the lease; see *Med Mac Realty Co., Inc. v. Lerner*, 547 N.Y.S.2d 65 (N.Y. App. Div. 1989);
- Using a self-help remedy to block the tenant's customers' access to the premises during a rent dispute; see *Am. Warehousing Servs., Inc. v. Weitzman*, 523 N.E.2d 1082 (Ill. Ct. App. 1988);
- Enforcement of the landlord's remedies until the rights of parties can be settled, but only if requested before expiration of the cure period for the tenant's alleged default; see *S.E. Nichols, Inc. v. Am. Shopping Ctrs., Inc.*, 495 N.Y.S.2d 810 (N.Y. App. Div. 1985);
- Demonstrated inability to cure a default within the prescribed 30-day period; see *Long Island Gynecological Serv. v. 1103 Stewart Ave.*

Assocs. Ltd. P'ship, 638 N.Y.S.2d 959 (N.Y. App. Div. 1996);

- Constructing a restaurant in a shopping center parking area when the restaurant would interfere with tenant's nonexclusive parking easement; see *Madigan Bros., Inc. v. Melrose Shopping Ctr. Co.*, 463 N.E.2d 824 (Ill. App. Ct. 1984);
- Granting an access easement across the common parking area to a fast food restaurant; see *Pacemaker Food Stores, Inc. v. Seventh Mont Corp.*, 453 N.E.2d 806 (Ill. App. Ct. 1983);
- Turning a portion of a common parking area into restricted parking for another tenant; see *Mut. of Omaha Life Ins. Co. v. Executive Plaza, Inc.*, 425 N.E.2d 503 (Ill. App. Ct. 1981);
- Obstructing access to premises from a major road adjacent to the premises; see *Checker Oil Co. v. Harold H. Hogg, Inc.*, 380 A.2d 815 (Pa. Super. 1977); and
- Compelling landlord to repair a building that landlord had intentionally failed to maintain; see *Elfman v. Berman*, 56 Pa. D. & C.4th 171 (Pa. Comm. Pl. 2001).

Specific Performance

A tenant may also seek specific performance compelling landlord to cure landlord's breach of contract to lease. In *Ryan v. Stanger Inv. Co.*, 620 S.W.2d 505 (Tenn. Ct. App. 1981), for example, the court found that a contract to lease was specifically enforceable. *Wetherbee, Ltd. v. Allred*, 969 S.W.2d 756 (Mo. Ct. App. 1998).

A tenant may petition for specific performance if a landlord breaches its covenant to repair. See F.G. Madara, Annotation, *Rights and Remedies of tenant Upon landlord's Breach of Covenant to Repair*, 28 A.L.R. 2d 446, 473 (1953 & Supp. 1995 & 2003). In *Lucas v. Evans*, 453 So. 2d 141 (Fla. Dist. Ct. App. 1984), a court found a tenant entitled to specific performance of the landlord's repair covenant. In *Borochoff Props., Inc. v. Creative Printing Enters., Inc.*, 210 S.E.2d

809 (Ga. 1974), in contrast, a court found a tenant's right to make repairs and recover costs and its right to recover damages were adequate remedies at law. Likewise in *Continental & Vogue Health Studios, Inc. v. Abra Corporation*, 120 N.W.2d 835 (Mich. 1963), a court refused to grant specific performance, finding a tenant's remedies at law to be adequate.

A tenant may also seek specific performance for a landlord's breach of a restrictive covenant. For example, in *N.H. Donuts, Inc. v. Skipitaris*, 533 A.2d 351 (N.H. 1987), a court ordered a landlord to remove a building that blocked the premises from a view of the highway, in violation of a recorded covenant.

Declaratory Judgment

Finally, a tenant may petition for a declaratory judgment. In *Sun Ins. Services, Inc. v. 260 Peachtree Street, Inc.*, 385 S.E.2d 127 (Ga. Ct. App. 1989), a tenant obtained a declaratory judgment finding that asbestos removal was the landlord's obligation to be performed before the tenant began the renovation work allowed by the lease. In *Times Square Stores Corp., Inc. v. Bernice Realty Co., Inc.*, 529 N.Y.S.2d 148 (N.Y. App. Div. 1988), a court held a landlord's refusal to cooperate with the tenant's expansion of the building to be unreasonable, so the court ordered the landlord to sign an application for a new certificate of occupancy. See also, *Middle Village Assocs. v. Pergament Home Centers, Inc.*, 708 N.Y.S.2d 840 (N.Y. Sup. Ct. 2000).

Legal Remedies

Legal remedies, as opposed to equitable remedies, include the enforcement of any liquidated damages agreement and pecuniary damages for any breach of the landlord's obligations.

Action For Damages

A tenant may enforce a liquidated damages clause for the landlord's failure to deliver pos-

session. See 49 Am. Jur. 2d *Landlord and Tenant* §501 (1995); *Moses v. Autuono*, 47 So. 925 (Fla. 1908); *Omohundro v. Ottenheimer*, 127 S.W.2d 642 (Ark. 1939); *Boltz v. Crawford & North Aves. Theatre Co.*, 13 N.E.2d 844 (Ill. App. Ct. 1938). The tenant may also seek money damages for any other breach of a landlord's obligations.

Measure Of Damages

On the subject of the measure of damages, the *Restatement (Second) of Property, Landlord and Tenant* §10.2 (1977 & Supp. 2003) is highly instructive. See also, Eugene L. Grant, *Disturbing Concepts: Quiet Enjoyment and Constructive Eviction in the Modern Commercial Lease*, 35 Real Prop. Prob. & Tr. J. 57 (2000); Eugene L. Grant, *Avoiding the Risks: Subrogation, Indemnification, and Exculpation in the Context of Commercial Leases*, 21 Rel. Est. L. J. 255 (1993); Richard M. Frome *et al.*, *Tenant Remedies: An Oxymoron*, 12 Prob. & Prop. 39 (Jan./Feb. 1998). Generally speaking, however, a tenant's measure of damages may include the following:

- The difference between the rental value of the premises in the condition required by the lease and the rental value of the premises in defective condition. See *Madison Assocs. v. Bass*, 511 N.E.2d 690 (Ill. App. Ct. 1987) (no damages awarded when tenant failed to present evidence of rental value of defective premises); *Sigsbee v. Swathwood*, 419 N.E.2d 789 (Ind. Ct. App. 1981); *Quebe v. Davis*, 586 N.E.2d 914 (Ind. Ct. App. 1992).
- Actual expenses incurred by the tenant in curing the landlord's default. See F.G. Madara, Annotation, *Rights and Remedies of tenant Upon landlord's Breach of Covenant to Repair*, 28 A.L.R. 2d 446, 473 (1953 & Supp. 2003); *KPW Assocs. v. S.S. Kresge Co.*, 535 So. 2d 1173 (La. Ct. App. 1989); *Anchor Inn of Mich., Inc. v. Knopman*, 246 N.W.2d 416 (Mich. Ct. App. 1976).
- Relocation expenses and possibly a greater rental cost at a new location. See *Gardner v.*

Jones, 464 So. 2d 1144 (Miss. 1985); *Restatement (Second) Of Property, Landlord and Tenant* §10.2, comment d (1977 & Supp. 2003).

- Consequential damages. In *Williams v. Hittle*, 629 N.E.2d 944 (Ind. Ct. App. 1994), for example, a court held that a tenant may recover consequential damages for indirect injuries resulting from the breach of a lease covenant. See also *Hidden Ponds of Ontario, Inc. v. Estate of Hresent*, 654 N.Y.S.2d 532 (N.Y. App. Div. 1997); *124 In-To-Go Corp. v. Roundabout Theatre Co., Inc.*, 698 N.Y.S.2d (N.Y. App. Div. 1999); *The Gap, Inc. v. Red Apple Cos., Inc.*, 725 N.Y.S.2d 312 (N.Y. App. Div. 2001); *A. Brown, Inc. v. Vermont Justin Corp.*, 531 A.2d 899 (Vt. 1987); *Suburban Propane v. Proctor Gas, Inc.*, 953 F.2d 780 (2d Cir. 1992); *Sigsbee v. Swathwood*, 419 N.E.2d 789 (Ind. Ct. App. 1981); 62 Am. Jur. 2d *Premises Liability* §§13-18 (1990 & Supp. 2003).
- Lost profits resulting from the interruption or impairment of the tenant's business. As an illustration, *Tiegs v. Boise Cascade Corp.*, 922 P.2d 115 (Wash. App. 1996), *aff'd*, 954 P.2d 877 (Wash. 1998), a tenant recovered its lost profit when the landlord breached a renewal option and an implied covenant for supplying uncontaminated water. See also, *Ransburg v. Richards*, 770 N.E.2d 393 (Ind. Ct. App. 2002); *Parkside Ctr., Ltd. v. Chicagoland Vending, Inc.*, 552 S.E.2d 557 (Ga. Ct. App. 2001); *Executive Sandwich Shop v. Carr Realty Corp.*, 749 A.2d 724 (D.C. 2000); *R & A, Inc. v. Kozy Korner, Inc.*, 672 A.2d 1062 (D.C. 1996); *Williams v. Hittle*, 629 N.E.2d 944 (Ind. Ct. App. 1994); *Paul v. Camden Motor Co.*, 221 Ark. 702, 255 S.W.2d 418 (Ark. 1953); *Richker v. Georgandis*, 323 S.W.2d 90 (Tex. Civ. App. 1959); *Pollock v. Morelli*, 369 A.2d 458 (Pa. Super 1976); *Restaurant Operators, Inc. v. Jenney*, 519 A.2d 256 (N.H 1986);
- In certain circumstances, the tenant may recover attorneys' fees. In *Dennison v. Marlowe*, 775 P.2d 726 (N.M. 1989), for example, the court enforced contractual provision for attorneys'

fees. Be aware, however, that the landlord may also be entitled to attorneys' fees if it prevails. In *Hedicke v. Gurville*, 2003-NMCA-32, 62 P.3d 1217 (2002), the court awarded the landlord statutory attorneys' fees because of the landlord's successful defense; and, finally,

- Punitive damages. See 49 Am. Jur. 2d *Landlord and Tenant* §563 (1995).

Indeed, the subject of punitive damages has generated much case law. In *Ramirez v. Baran*, 730 P.2d 515 (Okla. 1986), for instance, a court awarded punitive damages for the landlord's "wanton, malicious, and intentional" acts in unjustifiably locking its tenants out of premises, while in *Stern's Gallery of Gifts, Inc. v. Corporate Prop. Investors, Inc.*, 337 S.E.2d 29 (Ga. Ct. App. 1985), the court held that punitive damages are appropriate if the evidence shows wanton and willful conduct by the landlord in refusing to deal fairly with the tenant's demand for reimbursement of expenses arising from the landlord's failure to repair. See also, *Ciraolo v. Miller*, 525 N.Y.S.2d 861 (N.Y. App. Div. 1988), refusing to award punitive damages when the landlord's acts did not indicate a "high degree of moral turpitude."

Tenant's Duty To Mitigate Damages

The tenant's recovery of damages could be limited to those that would be recovered by a tenant who has taken reasonable steps to mitigate its damages. See *Restatement (Second) of Property, Property, Landlord and Tenant* §10.2, cmt. i (1976 & Supp. 2003); *Sigsbee v. Swathwood*, 419 N.E.2d 789 (Ind. App. 1981). But see *T & W Building Co. v. Merrillville Sport & Fitness, Inc.*, 529 N.E.2d 865 (Ind. Ct. App. 1988) (although a party injured by a breach ordinarily has a duty to mitigate its damages, if the breaching party has indicated that it will perform its obligations, the injured party does not need to mitigate).

Tenant's Right To Deduct Damages From Rent

Finally, if a tenant has a right to remedy a landlord's default by the tenant's own efforts, the tenant may deduct the cost of the remedy from the rent due. See Jonathan M. Purver, Annotation, *Tenant's Right, Where Landlord Fails to Make Repairs, to Have Them Made and Set Off Cost Against Rent*, 40 A.L.R. 3d 1369 (1971 & Supp. 2003); *Restatement (Second) of Property, Landlord and Tenant* §11.2 (1977 & Supp. 2003); *American Nat'l Bank & Trust Co. of Chicago v. K-Mart Corp.*, 717 F.2d 394 (7th Cir. 1983) (applying Illinois law).

Drafting: Example Of Landlord Default Clause

Consider avoiding the uncertainty of relying on the courts to enforce a tenant's right to deduct damages from payments due the landlord by including a provision similar to the following:

Landlord's Default. *The following events shall be deemed to be events of default by Landlord under this Lease:*

- Landlord fails to pay when or before due any sum of money required to be paid by Landlord under the Lease;*
- Landlord fails to comply with any term, provision or covenant of this Lease other than by failing to pay when or before due any sum of money required to be paid by Landlord under this Lease, which failure is not cured within 20 days (or forthwith, if the default involves a hazardous condition or provision of an essential service necessary for the use and occupancy of the Premises by tenant) after written notice thereof from tenant to landlord; or*
- Landlord makes a representation or warranty in this Lease, or in any certificate, demand, or request made under this Lease, that proves to be incorrect, at any time, in any material respect.*

Upon the occurrence of any of the events of default described above or elsewhere in this Lease, Tenant

shall have the option to pursue any one or more of the following remedies without notice or demand whatsoever:

- (a) Tenant may, at its election, terminate this Lease;
- (b) Tenant may, without being obligated and without waiving the default, cure the default, whereupon Landlord shall pay to Tenant, upon demand, all costs, expenses, and disbursements incurred by Tenant to cure the default. Tenant shall be permitted to offset said costs, expenses, and disbursements incurred by Tenant against any amounts due or becoming due by Tenant to Landlord under this Lease; or
- (c) Tenant shall be entitled to pursue any and all other rights or remedies available at law or equity with respect to Landlord's default.

The tenant may be successful in asserting a damage claim as a counterclaim when the landlord sues for delinquent rent. See *Slovak Catholic Sokol, Inc. v. Ryff*, 4 A.2d 849 (N.J. Dist. Ct. 1939).

CONTRACTUAL CONSTRAINTS ON TENANTS' COMMON LAW REMEDIES •

Naturally, landlords seek to limit their liability through provisions in their leases. Typical provisions in commercial leases include the following.

Limits On Landlord's Contractual Responsibilities

A landlord will want to limit the contractual responsibilities it undertakes.

Landlord's Covenant To Alter, Maintain, Or Repair

A landlord's covenant to alter, maintain, or repair leased premises and common areas may contain limitations on liability for breaches of that duty. The scope and timing of a landlord's duty to make the premises suitable for occupancy before the lease term commences are commonly limited by work letter. See 2 Milton R. Friedman, *Friedman on Leases* §§23.1, 23.2,

23.3 (Practising Law Institute, 4th ed. 1997); but see also *Levitz Furniture Co. of the Eastern Region, Inc. v. Cont'l Equities, Inc.*, 411 So. 2d 221 (Fla. Dist. Ct. App. 1982) (holding a landlord's agreement to build or complete a building for tenant's occupancy creates an implied warranty of suitability that is not terminated for latent defects when tenant takes possession of premises).

Likewise, the tenant's remedies for breach of a landlord's repair responsibilities may be limited by requiring the tenant to waive any right to claim constructive eviction, and by giving tenant only the right to make repairs and recover costs from the landlord. See *Bazzel v. Pine Plaza Joint Venture*, 491 So. 2d 910 (Ala. 1986).

In addition, a landlord generally may require a tenant to waive claims for consequential damages resulting from burst water pipes, roof leaks, and similar occurrences, even if those occurrences are the result of the landlord's negligence. See *Zion Indus., Inc. v. Loy*, 361 N.E.2d 605 (Ill. App. Ct. 1977); *Swisscraft Novelty Co., Inc. v. Alad Realty Corp.*, 274 A.2d 59 (N.J. Super. Ct. App. Div. 1971); *Smith v. Smith*, 375 So. 2d 1041 (Miss. 1979); *Meyer v. Caribbean Interiors, Inc.*, 435 So.2d 936 (Fla. Dist. Ct. App. 1983); *Fena v. Wickstrom*, 348 N.W.2d 389 (Minn. Ct. App. 1984). On the other hand, a clause purporting to protect a landlord from consequential damages may not shield the landlord from damages if the work goes beyond the scope of alterations permitted under the lease. *Bijan Designer for Men, Inc. v. St. Regis Sheraton Corp.*, 536 S.2d 951 (N.Y. Sup. Ct. 1989), *aff'd*, 543 N.Y.S.2d 296 (N.Y. App. Div. 1989).

Landlord's Covenant To Furnish Services To The Leased Premises

Note that courts may impose on landlords an implied obligation to provide a certain quality of service. For example, if a landlord is obligated to provide the tenant with water under the lease, the landlord may be liable for breach

if the water is contaminated. See *Tiegs v. Boise Cascade Corp.*, 922 P.2d 115 (Wash. Ct. App. 1996), *aff'd*, 954 P.2d 877 (Wash. 1998) (tenant may recover lost profit when landlord breaches renewal option and implied covenant for supplying uncontaminated water). In other instances, however, an exculpatory clause may protect a landlord for failing to perform certain services. See 2 Milton R. Friedman, *Friedman on Leases* §12.1 (Practising Law Institute, 4th ed. 1997 & Supp. 2002). In *Midland Carpet Corp. v. Franklin Associated Props.*, 216 A.2d 231 (N.J. Super. 1966), for example, an exculpatory clause shielded the landlord from liability for damage to the tenant's property when the landlord's breach of a covenant to provide heat caused the water pipes to burst. *Topp Copy Products, Inc. v. Singletary*, 626 A.2d 98 (Pa. 1993).

Shifting Risks To Tenant

The landlord typically will also seek provisions that purport to eliminate or shift the risks of damages or claims.

Basic Building Services

The landlord will want various waiver clauses related to interruption of utility services or basic building services provided by the landlord.

All-Inclusive Waiver

Many landlords seek an all-inclusive waiver of all claims by the tenant against the landlord. The waiver may specifically cover claims related to landlord's negligence (and negligence of landlord's agents, employees, and contractors), or it may implicitly cover negligence claims by use of broad language defining scope of waiver. See Ann Peldo Cargile, *Implied Waivers of Subrogation in Leases*, 12 Prob. & Prop. 22 (Jan./Feb. 1998); Eugene L. Grant, *Avoiding the Risks: Subrogation, Indemnification, and Exculpation in the Context of Commercial Leases*, 21 Rel. Est. L. J. 255

(Winter, 1993); William K. Jones, *Private Revision of Public Standards: Exculpatory Agreements In Leases*, 63 N.Y.U. L. Rev. 717 (1988); John D. Perovich, Annotation, *Validity of Exculpatory Clause in Lease Exempting Lessor from Liability*, 49 A.L.R. 3d 321 (1973 & Supp. 2003); *Princeton Sportswear, Corp. v. H & M Associates*, 507 A.2d 339 (Pa. 1986); *Topp Copy Products, Inc. v. Singletary*, 626 A.2d 98 (Pa. 1993) (finding that the term "all" includes "everything" and is broad enough to include negligence). Few state statutes affect the enforceability of clauses purporting to exculpate a landlord from liability for its own negligence, although the common law affords theories for avoiding the enforcement of a general waiver of claims.

If, however, a lease is deemed a contract of adhesion, a court may not enforce a general waiver of claims in the lease. A finding of unconscionability may be based on an uneducated tenant's lack of understanding and the landlord's failure to explain. For example, many cases involve sole proprietors leasing filling stations from large oil companies. For instance, in *Weaver v. American Oil Co.*, 276 N.E.2d 144 (Ind. 1971), the court applied an unconscionability analysis to invalidate the general waiver and a general indemnity clause. However, in *Freight Service, Inc. v. Canadian Imperial Bank of Commerce*, 776 P.2d 35 (Or. App. 1989), the court held that tenant's failure to read a waiver clause before signing a lease was no defense to the enforcement of the waiver clause against a corporate tenant.

Unlike the residential lease context, unconscionability based on unequal bargaining power is difficult to establish in commercial lease cases. See *Midland Carpet Corp. v. Franklin Associated Properties*, 216 A.2d 231 (N.J. Super. 1966).

Void As Against Public Policy

A waiver purporting to exempt a landlord from liability for failure to perform a duty im-

posed on landlord by a statute that exists for the purpose of public protection may be held void as contrary to public policy. See *Swisscraft Novelty Co. v. Alad Realty Corp.*, 274 A.2d 59 (N.J. Super. Ct. App. Div. 1971); *Am. States Ins. Co. v. Hannan Constr. Co.*, 283 F. Supp. 988 (N.D. Ohio 1966), *aff'd* 392 F.2d 171 (6th Cir. 1968); *John's Pass Seafood Co. v. Weber*, 369 So. 2d 616 (Fla. Dist. Ct. App. 1979).

A waiver purporting to exempt a landlord from liability for willful or wanton acts could be held void as contrary to public policy. In *Richker v. Georgandis*, 323 S.W.2d 90 (Tex. Civ. App. 1959), for example, a waiver was no shield when a landlord intentionally breached a covenant of quiet enjoyment.

It also may be that a waiver clause will insulate the landlord from liability arising out of passive negligence, but not active negligence. See *Queen Ins. Co. v. Raiser*, 135 N.W.2d 247 (Wis. 1965); *Plastone Plastic Company v. Whitman-Webb Realty Co.*, 176 So. 2d 27 (Ala. 1965). In addition, a general waiver may not apply to liability arising out of design or construction defects. See *Ultimate Computer Services, Inc. v. Biltmore Realty Co.*, 443 A.2d 723 (N.J. Super. 1982).

Indemnification For Claims By Third Parties

Landlords should include in their leases indemnity clauses that cover claims by third parties. In *Mitchell v. Moore*, 406 So. 2d 347 (Ala. 1981), the court upheld a tenant's indemnifying a landlord against a third-party claim resulting from the landlord's negligent maintenance of a common area. See also, *Northwest Airlines v. Hughes Air Corp.*, 702 P.2d 1192 (Wash. 1985); *Mutual Employees Trademart, Inc. v. Armour Service*, 70 So. 2d 64 (Fla. Dist. Ct. App. 1964).

Basic Building Services

For example, as previously mentioned, a landlord should consider waiver clauses that limit liability for losses arising out of interrup-

tion of utility services or basic building services provided by the landlord.

Additional Limitations On Remedies

Landlords may employ various clauses waiving rights to claim consequential damages or constructive eviction in the event of a defect in the premises or interruption of utility services or basic building services provided by the landlord.

Limitation On Common Law Right To Set-Off

The covenant to pay rent is separate and independent from other leasehold covenants, so a landlord's breach of a covenant generally does not permit the tenant to withhold rent. See *Interstate Restaurants, Inc. v. Halsa Corp.*, 309 A.2d 108 (D.C. 1973); *Norris v. Green*, 656 A.2d 282 (D.C. Ct. App. 1995) (landlord's failure to abate flooding not grounds for tenant to withhold rent); *Earbert Restaurant, Inc. v. Little Luxuries, Inc.*, 99 A.D.2d 734, 472 N.Y.S.2d 359 (1984); *Green v. Rainbow Properties, Ltd.*, 496 A.2d 178 (Vt. 1985) (holding that a landlord's repair obligations are suspended while the tenant wrongfully withholds rent); *but see also Reed v. U.S. Postal Service*, 660 F. Supp. 178 (D. Mass. 1987) (applying Massachusetts law and holding that tenant could withhold rent while the landlord was in default of duty to make repairs agreed on, finding that the tenant's covenant to pay rent and the landlord's covenant to make repairs are interdependent); *Davidow v. Inwood North Prof'l Group-Phase 1*, 747 S.W.2d 373 (Tex. 1988) (finding a covenant to pay rent dependent on the landlord's obligation to make the premises suitable).

Drafting Note: When you are representing a tenant, consider adding a "Landlord Default Clause" like the one above to deal with this issue.

Broad, General Waiver Of Tenant's Right To Claim Constructive Eviction

A general waiver of constructive eviction claims may be included as part of the tenant's general waiver of claims against the landlord. See *Barton v. Mitchell Co.*, 507 So. 2d 148 (Fla. Dist. Ct. App. 1987). A broad, general waiver will not necessarily cut off the tenant's right to seek damages for breach of covenant of quiet enjoyment, although, if the claim for breach of the covenant of quiet enjoyment does not require constructive eviction first. See *Northern Terminals, Inc. v. Smith Grocery & Variety, Inc.*, 418 A.2d 22 (Vt. 1980); *Isbill Assocs., Inc. v. City and County of Denver*, 666 P.2d 1117 (Colo. Ct. App. 1983).

Drafters should also consider a force majeure clause to excuse delays in the landlord's performance, as well as non-recourse provisions to insulate the landlord from personal liability for tenant claims and to limit the tenant's recovery to the value of the leased premises. See 2 Milton R. Friedman, *Friedman on Leases* §17.3 (Practising Law Institute, 4th ed. 1997).

ELEMENTS OF A CLAIM OF CONSTRUCTIVE EVICTION • Constructive eviction occurs when a landlord or someone acting under a landlord's authority so disturbs the tenant's possession or enjoyment of the premises that it renders the property unfit for occupancy for the purposes for which the property were leased. See Eugene L. Grant, *Disturbing Concepts: Quiet Enjoyment and Constructive Eviction in the Modern Commercial Lease*, 35 Real Prop. Prob. & Tr. J. 57 (Spring 2000); Peg A. Williams, *Cause of Action for Breach of Covenant of Quiet Enjoyment of Leased Premises*, 9 Causes of Action 449 (2003); Thelma Jarman-Felstiner, *Mold is Gold: But, Will it be the Next Asbestos?*, 30 Pepp. L. Rev. 529 (Apr. 2003); *First Wis. Trust Co. v. L. Wiemann Co.*, 286 N.W.2d 360 (Wis. 1980); *Baley & Selover, Inc. v. All Am. Van & Storage, Inc.*, 632 P.2d 723 (Nev. 1981); *Yee v. Weiss*, 877 P.2d 510 (Nev. 1994);

Dennison v. Marlowe, 744 P.2d 906 (N.M. 1987); *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993); *Downtown Realty, Inc. v. 509 Tremont Building, Inc.*, 748 S.W.2d 309 (Tex. Ct. App. 1988); *West Broadway Glass Co. v. I.T.M. Bar, Inc.*, 658 N.Y.S.2d 162 (N.Y. Supp. Ct. 1996); *Winrock Inn Co. v. Prudential Ins. Co.*, 928 P.2d 947 (N.M. 1996); *Shop 'N Save Warehouse Foods, Inc. v. Soffer*, 918 S.W.2d 851 (Mo. Ct. App. 1996); *Taha v. Thompson*, 463 S.E.2d 553 (N.C. Ct. App. 1995); *Barton v. MTB Enterprises, Inc.*, 889 P.2d 476 (Utah Ct. App. 1995).

To establish a claim for constructive eviction, a tenant may have to show that the landlord's wrongful act was intended to disturb the tenant's possession or quiet enjoyment. However, this element may be satisfied by the common law presumption that a person "intends" the natural consequences of his or her acts. See 49 Am. Jur. 2d *Landlord and Tenant* §645 (1995 & Supp. 2003); *John Munic Meat Co. v. H. Gartenberg & Co.*, 366 N.E.2d 617 (Ill. App. 1977); *Shaker and Assocs. v. Medical Technologies Group, Ltd.*, 733 N.E.2d 865 (Ill. App. 2000); *Eskanos & Supperstein v. Irwin*, 637 P.2d 403 (Colo. Ct. App. 1981); *Deseret Federal Savings and Loan Assoc. v. U.S. Fidelity and Guaranty Co.*, 714 P.2d 1143 (Utah 1986); *Fidelity Mutual Life Ins. Co. v. Kaminisky*, 768 S.W.2d 818 (Tex. Ct. App. 1989); *Homes v. P.K. Pipe & Tubing, Inc.*, 856 S.W.2d 530 (Tex. Ct. App. 1993); but see also *Wausau Underwriters Ins. Co. v. Dane County*, 417 N.W.2d 914 (Wis. Ct. App. 1987) (refusal to adopt presumption).

The disturbance of the tenant's possession or quiet enjoyment must be of a substantial nature and of such duration that it deprives the tenant of the beneficial enjoyment of some or all of the premises for a material period of time. See 49 Am. Jur. 2d *Landlord and Tenant* §644 (1995 & Supp. 2003); 52 C.J.S. *Landlord and Tenant* §455 (1968 & Supp. 2002). In *Tenn.-Tex Props. v. Brownell-Electro, Inc.*, 778 S.W.2d 423 (Tenn. 1989), for example, a landlord's unfounded declaration of tenant's default and demand for ac-

celerated rent was enough to constitute a constructive eviction. In some cases, courts have held that, to constitute constructive eviction, the landlord's acts must be of a "grave" and permanent character. See *Advertising Checking Bureau, Inc. v. Canal-Randolph Assocs.*, 427 N.E.2d 1039 (Ill. App. Ct. 1981); see also *Metro. Life. Ins. Co. v. Nauss*, 590 N.E.2d 524 (Ill. App. Ct. 1992).

If other factors contribute to the tenant's decision to move, the tenant may not be able to claim constructive eviction. See *Equitable Tower Assocs. v. El Paso Natural Gas Co.*, 511 N.Y.S.2d 197 (N.Y. Supp. Ct. 1986); *Kuiken v. Garrett*, 51 N.W.2d 149 (Iowa 1952); but see also *Jaffe-Spindler Co. v. Genesco, Inc.*, 747 F.2d 253 (4th Cir. 1984) (applying South Carolina law, and holding that a tenant who already had vacated premises could claim constructive eviction when leaky roof prevented subleasing); *Western Assets Corp. v. Goodyear Tire & Rubber Co.*, 759 F.2d 595 (7th Cir. 1985) (under Illinois law, tenant could claim constructive eviction after abandoning premises when landlord's failure to install sprinkler system as required by law prevented re-entry or subleasing).

Landlord's Reasonable Opportunity To Cure

A landlord may be entitled to notice of a defective condition and a reasonable opportunity to cure the defect. See *Restatement (Second) of Property* §7.1 (1976 & Supp. 2003); Eugene L. Grant, *First Class Condition: Responsibilities, Rights, and Remedies Respecting the Condition of Commercial Leasehold Premises*, 29 Real Prop. Prob. & Tr. J. 735 (1995); *Benitez v. Restifo*, 641 N.Y.S.2d 523 (N.Y. City Ct. 1996); *Kaplan v. McCabe*, 532 So. 2d 1354 (Fla. Dist. Ct. App. 1988). Indeed, in *In re Sunbelt Vacation Travel, Inc.*, 94 B.R. 715 (Bankr. S.D. Ala. 1988), the court held that the tenant could not recover its repair expenses without a showing that the tenant gave the landlord notice of a need for repairs. When, however, a "defective condition" follows

from a direct act of the landlord, no notice or cure period may be required. See *Restatement (Second) of Property, Landlord and Tenant* §7.1, cmt. d (1977 & Supp. 2003).

Tenant Abandonment After Reasonable Time

To maintain a claim for constructive eviction, the tenant must abandon the premises within a reasonable time after the disturbance. In *Chicago v. Am. Nat'l Bank and Trust Co.*, 408 N.E.2d 379 (Ill. App. Ct. 1980), the court held that what is a reasonable time usually is a question of fact, but may be a question of law if reasonable minds would not disagree. See also R. W. Gascoyne, Annotation, *Time Within Which tenant Must Yield or Abandon Premises After Claimed Constructive Eviction*, 91 A.L.R. 2d 638 (1963 & Supp. 2003); *McNamara v. Wilmington Mall Realty Corp.*, 466 S.E.2d 324 (N.C. Ct. App. 1996); *Doll v. Rapp*, 660 N.E.2d 542 (Ohio Mun. Ct. 1995); *In re Cornwall Paper Mills Co.*, 169 B.R. 844 (Bankr. D.N.J. 1994); *Cavalier Square v. Va. Alcoholic Beverage Control Bd.*, 435 S.E.2d 392 (Va. 1993).

How much time is reasonable depends on facts and circumstances, such as:

- The timing of recurring or cumulative disturbances that constitute the asserted basis for constructive eviction. See R. W. Gascoyne, Annotation, *Time Within Which tenant Must Yield or Abandon Premises After Claimed Constructive Eviction*, 91 A.L.R. 2d 638 (1963 & Supp. 2003); *Southern Motors, Inc. v. Virginia Nat'l Bank*, 73 B.R. 261 (W.D. Va. 1987), *aff'd without op.*, 829 F.2d 1120 (4th Cir. 1987).
- Delays while waiting for corrective work to be done as promised by landlord. See R. W. Gascoyne, Annotation, *Time Within Which tenant Must Yield or Abandon Premises After Claimed Constructive Eviction*, 91 A.L.R. 2d 638 (1993 & Supp. 2003); *Am. Nat'l Bank and Trust Co. v. Sound City, USA, Inc.*, 385 N.E.2d 144 (Ill. App. Ct. 1979); *El Paso Natural Gas Co. v. Kysar Ins. Agency, Inc.*, 645 P.2d 442 (N.M. 1982); *Lafayette*

Realty Corp. v. Vonnegut's, Inc., 458 N.E.2d 689 (Ind. Ct. App. 1984); *T&W Building Co. v. Merrillville Sport & Fitness, Inc.*, 529 N.E.2d 865 (Ind. Ct. App. 1988) (tenant had no duty to mitigate damages by making repairs itself before claiming constructive eviction on account of the landlord's failure to make promised repairs).

- The time required for finding a new location. See R. W. Gascoyne, Annotation, *Time Within Which tenant Must Yield or Abandon Premises After Claimed Constructive Eviction*, 91 A.L.R. 2d 638 (1963 & Supp. 2003); *Dell'Armi Builders, Inc. v. Johnston*, 526 N.E. 2d 409 (Ill. App. 1988); *Shaker and Assocs. v. Medical Technologies Group, Ltd.*, 733 N.E.2d 865 (Ill. App. 2000); *JMB Props. Urban Co. v. Paolucci*, 604 N.E.2d 967 (Ill. App. Ct. 1992).

A tenant's failure to abandon may prevent the tenant from claiming constructive eviction, regardless of how severely tenant's possession or quiet enjoyment of premises is disturbed. See *Infinity Broad. Corp. of Illinois v. Prudential Ins. Co. of Am.*, 869 F.2d 1073 (7th Cir. 1989) (applying Ill. law); *RNR Realty, Inc. v. Burlington Coat Factory Warehouse of Cicero, Inc.*, 522 N.E.2d 679 (Ill. App. Ct. 1988); *JMB Properties Urban Co. v. Paolucci*, 604 N.E.2d 967 (Ill. App. Ct. 1992); *Barash v. Pa. Terminal Real Estate Corp.*, 256 N.E.2d 707 (N.Y. 1970); *Meerbaum v. Crepes D'Asie, Inc.*, 378 N.Y.S.2d 874 (N.Y. Sup. Ct. 1975). An exception to this general rule arises out of a line of Massachusetts cases that develop the theory of equitable constructive eviction, without abandonment, if the tenant seeks a declaratory judgment that abandonment would be justified by the landlord's default. See, *Charles E. Burt, Inc. v. Seven Grand Corp.*, 163 N.E.2d 4 (Mass. 1959); *Charlotte Theatres, Inc. v. Gateway Co.*, 191 F. Supp. 834 (D.C. Mass. 1961), *vacated*, 297 F.3d 483 (1st Cir. 1961); *Siegel v. Terminal Realty Corp.*, 216 N.E.2d 445 (Mass. 1966).

Waiver Of Constructive Eviction Claim

Tenants must avoid anything that might constitute a waiver of a constructive eviction claim. A court may find waiver in any of the following:

- Express consent to a specific act of landlord that disturbs the tenant's possession or quiet enjoyment of the premises. See *Restatement (Second) of Property, Landlord and Tenant* §6.1, comment f (1977 & Supp. 2003); *Hardwick, Cook & Co. v. 3379 Peachtree, Ltd.*, 363 S.E.2d 31 (Ga. Ct. App. 1987) (no constructive eviction without showing that landlord's renovation work went beyond scope of work permitted under lease); *Stinson, Lyons, Gerlin & Bustamante v. Brickell Building 1 Holding Co.*, 923 F.2d 810 (11th Cir. 1991).
- Failure to abandon the premises within a reasonable time after the disturbance. See *S.L. Motel Enterprises, Inc. v. East Ocean, Inc.*, 751 S.W.2d 114 (Mo. Ct. App. 1988); *Brugger v. Fonoti*, 645 P.2d 647 (Utah 1982); *Barton v. MTB Enterprises, Inc.*, 889 P.2d 476 (Utah Ct. App. 1995); *Kenyon v. Regan*, 826 P.2d 140 (Utah Ct. App. 1992); *H&K Automotive Supply Co. v. Moore & Co.*, 657 P.2d 986 (Colo. Ct. App. 1982); *Metroplex Glass Center, Inc. v. Vantage Properties, Inc.*, 646 S.W.2d 263 (Tex. Ct. App. 1983).
- Returning to the premises after abandonment. See 49 Am. Jur. 2d *Landlord and Tenant* §646 (1995 & Supp. 2003).
- Contractually waiving the right to claim constructive eviction. See 3 Milton R. Friedman, *Friedman on Leases* §29.303 (4th ed. 1997 & Supp. 2002).

A contractual waiver of constructive eviction may be effective to prevent a tenant from claiming constructive eviction if the tenant has other remedies available to compensate it for its damages. Such a waiver probably will not be effective for the landlord's failure to observe or repair per covenant or the landlord's failure to provide services; moreover, a contractual waiver

er of constructive eviction probably will not be effective to prevent a tenant from claiming constructive eviction when the tenant's possession or quiet enjoyment is disturbed by malicious, willful, or wanton acts of the landlord.

SOME THOUGHTS ON REMEDY ISSUES FOR THE TENANT WITH BARGAINING POWER • If you represent a commercial tenant, you may well want to bargain for the following types of clauses.

Preparing The Premises For Tenant's Use

First, consider a provision that expressly provides remedies related to preparation of premises for tenant's use and occupancy.

Deadline For Delivery Of The Premises

You will want a deadline by which premises are to be delivered to the tenant for occupancy along with:

- A right to rescind the lease following notice of intent to rescind and last opportunity for landlord to make the premises available for the tenant's occupancy;
- A liquidated damages provision for delay (consider a letter of credit or other form of security); and
- A right to require specific performance of landlord's obligation to deliver possession.

Suitability Of The Premises

The tenant will want a warranty from the landlord concerning the suitability of the premises for the tenant's intended use with special regard to:

- Structural improvements;
- Access and utility services;
- Zoning and building codes; and
- Work letters or any plans or specifications approved by the tenant.

The tenant may also want the right to compel the landlord to complete the work, or the right to complete work at landlord's expense and offset expenses (plus interest) against rent payments and other sums due to the landlord. Alternatively, the tenant may want the right to rescind the lease if the premises cannot be made suitable for the tenant's intended use, or the right to recover damages for delay in delivery of possession of premises to the tenant, including:

- Actual, out-of-pocket expenses; or
- Lost profits or liquidated damages (if lost profits will not be ascertainable with a required degree of certainty).

Remedies For Landlord Defaults

The tenant will want to ensure that it has adequate remedies for landlord defaults that may occur during the term of lease after the tenant takes possession of the premises.

- The tenant will want to preserve its right to set-off or deduct claims against the landlord from rent and other payments due to the landlord by making the covenant to pay rent depend on the landlord's covenants to make repairs, provide services, and so forth.
- The tenant will want remedies for the landlord overcharging on its assessment of the tenant's share of the common expenses.
- The tenant will want to be compensated for the cost of auditing the landlord's common expense records.
- The tenant will want interest on the amounts it was overcharged.
- The tenant will want the right to claim constructive eviction for the persistent pattern of material overcharges after the landlord has notice of the overcharges.

Remedies For Failure To Maintain Premises

The tenant will want remedies for the landlord's failure to repair or maintain the premises

to the standards specified in the lease. Among these remedies may be the following:

- To perform the landlord's work and charge the expenses back to the landlord after notice and opportunity to cure;
- To require specific performance of the landlord's repair obligations;
- To assert constructive eviction when the failure to repair makes the premises unsuitable for the tenant's intended use; and
- To claim damages for the diminution of rental value, pending repairs, consequential damages to the tenant's property, lost profits, relocation expenses, and actual out-of-pocket repair expenses.

Remedies For Landlord's Failure To Deliver Services

The tenant will want remedies for the landlord's failure to deliver utility or base building services as repairs by landlord's covenant in the lease. Suitable remedies may include:

- The right to obtain services from alternative sources, if feasible, and to set-off or deduct the expense of making alternative arrangements from rent or other payments due to the landlord; or
- The right to require specific performance of the landlord's service delivery obligations; or
- The right to claim constructive eviction when failure to provide services makes premises unsuitable for the tenant's intended use; and
- The right to claim damages for diminution of rental value pending restoration of services (full or partial abatement of rent during interruption of delivery of services), consequential damages to the tenant's property at the premises, lost profits, possibly relocation expenses, and actual out-of-pocket expenses.

Remedies For Landlord's Breach Of Covenant Of Quiet Enjoyment

Finally, the tenant will want remedies for the landlord's breach of the covenant of quiet enjoyment:

- The right to remain in possession and obtain injunctive relief to enjoin the landlord from trespassing, and the like, and to enjoin the landlord from failing to enforce remedies against other tenants or other third parties;
- The right to claim constructive eviction when a violation of the covenant makes the premises unsuitable for the tenant's intended use; and
- The right to claim damages for any diminution of rental value during periods of a violation of the covenant, consequential damages, lost profits, possibly relocation expenses, actual out-of-pocket expenses, and possibly punitive damages, whether or not the tenant remains in possession of premises.

Special Concerns

Finally, when drafting and negotiating a commercial leases, for a tenant with bargaining power:

- Do not waive the tenant's right to claim constructive eviction or to pursue any other remedy available at law or in equity;
- Do not allow the tenant to indemnify the landlord against claims or damages resulting from acts of landlord, its employees, or its agents or from acts of third parties;
- Do not waive the tenant's right to pursue remedies for latent defects in the premises;
- Do not waive the tenant's right to elect to continue in possession of the premises if landlord's trustee in bankruptcy elects to reject the lease;
- Do not allow the landlord to make its obligations nonrecourse;

- Do not give the landlord the option of holding tenant on a year-to-year basis if the tenant holds over after expiration of lease term;
 - Do not give the landlord the right to accept a sum tendered as full payment in satisfaction of claim and apply it as partial payment on claim;
 - Do not allow the landlord to except the acts of other tenants or third parties from the possible reasons for alleging a breach of the covenant of quiet enjoyment;
 - Do not allow the landlord to limit its duty to mitigate damages in the event of a default by tenant;
 - Do not allow the landlord to have a one-sided indemnification or waiver of subrogation clause; and
 - Do not waive tenant's right to trial by jury.
- On the other hand, you should most certainly give careful thought to the following:
- Using arbitration or some other type of alternative dispute resolution process to settle disagreements or claims between the landlord and tenant;
 - Providing that the prevailing party in any dispute shall be entitled to recover its attorneys' fees and other expenses from the other party;
 - Specifying a reasonable interest rate to apply to either party's damage claim against the other, and to any payments overdue from either party to the other.
 - Making the tenant's obligations non-recourse.
 - Requiring the landlord, in appropriate circumstances, to obtain an environmental audit report on the premises before the tenant takes possession.
 - Specifying reasonable liquidated damages if the tenant holds over after expiration of lease term (to avoid statutory presumptions that calculate damages as a multiple of normal rent).
 - Requiring the landlord generally to use good faith and act in a commercially reasonable manner and—whenever the landlord's consent is required, it should not be withheld or delayed unreasonably.
 - Requiring the landlord, in appropriate circumstances, to provide a leasehold title insurance policy to tenant.
 - Requiring the landlord to give the tenant written notice of any assignment of all or any portion of landlord's interest in the premises.
 - Using special default provisions to deal with issues that might arise as a result of violation by either party of environmental statutes or regulations, ERISA and its regulations, or tax laws pertaining to tax-exempt entities; and
 - Giving tenant a right to terminate the lease in the event of a default by the landlord, even if the circumstances would not justify a claim of constructive eviction.

APPENDIX

Sample Provisions

1. *Repair Clause That Ties Covenant To Pay Rent To Landlord's Covenant To Make Repairs:*

"The undersigned further agree(s) *in consideration of the aforesaid rental* to maintain the premises and items furnished in this agreement in good repair and proper condition during the continuance of the lease." (*emphasis supplied*)

Reed v. U.S. Postal Service, 660 F. Supp. 178, 183 (D. Mass. 1987).

2. *Clause By Which Landlord Indemnifies Tenant Against Third Party Claims Involving Common Areas:*

"...landlord shall indemnify and save harmless the tenant from any claim or loss by reason of an

accident or damage to any person or property happening on or about all common areas (including parking area) of the shopping center....”

Mitchell v. Moore, 406 So. 2d 347, 353 (Ala. 1981).

3. *Clause By Which Landlord Covenants Not To Block View Of Tenant's Premises From Adjoining Streets:*
 “[N]o improvements shall be erected on such land of the Lessor that will materially interfere with the...visibility of the Lessee’s shop and its sign to approaching automobile traffic traveling on adjoining highways or streets.”
New Hampshire Donuts, Inc. v. Skipitaris, 533 A.2d 351, 352 (N.H. 1987).

PRACTICE CHECKLIST FOR A Primer On Remedies For Landlord Defaults (With Sample Clauses)

A tenant may choose from a vast array of common law remedies for landlord defaults. Equitable remedies include rescission, termination, specific performance, injunction, and declaratory judgment. Legal remedies include enforcement of any liquidated damages provisions and an action for damages for a breach of any of the landlord’s covenants.

- Landlords often seek to limit or eliminate various tenant remedies through lease provisions. Some of these may not be enforceable, but some clearly are; hence, a tenant must be careful not to waive key remedies when negotiating its lease. The tenant will not want to rely on its common law remedies, but instead will want certain provisions of its own placed in the lease:

- ___ The tenant will want a right to set off against or deduct from the rent for claims against the landlord;
- ___ The tenant will want remedies for landlord overcharges on common area assessments, including audit costs, interest, and the right to claim constructive eviction for persistent overcharges;
- ___ The tenant will want remedies for the landlord’s failure to repair or maintain the premises including the right to perform necessary work at the landlord’s expense and the right to claim constructive eviction, and the right to claim lost profits;
- ___ The tenant will want remedies for the landlord’s failure to deliver services promised in the lease, including the right to obtain such services from another source at the landlord’s expense, through a reduction from the rent; or the right to specifically enforce the landlord’s service delivery obligations; and
- ___ The tenant will want remedies for the landlord’s breach of the covenant of private enjoyment, including the right to claim constructive eviction and to claim damages for diminished rental value and lost profits.

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