

Bad Actors Of All Kinds are Taking Advantage of Rent Relief Initiatives

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JUNE 1, 2020 | BY TONY NATSIS, PARTNER AT ALLEN MATKINS

Everywhere you turn, there is media coverage—and rightfully so—of how small business and individual tenants are negatively affected by the pandemic. Consequently, when viewing the commercial real estate property owner-tenant relationship, many insist that the property owners should bear the significant brunt of the pandemic’s economic downside.

This focus on property owners is fueled by the inaccurate assumption that landlords are fundamentally large corporate entities with strong balance sheets that can absorb these losses and can work with their lenders to restructure debt more easily than small business owners and individuals. Such assertions are far from the truth. Pension funds own a significant portion of the country’s commercial properties, and CalSTRS and CalPERS, the country’s two largest pension funds, own an aggregate of properties worth in excess of \$65 billion. Many of the beneficiaries of pension funds are working people, many of whom may be out of jobs, as well as retirees who rely on monthly payments from pension funds to survive. CalSTRS and CalPERS provide pension benefits to retired California teachers, firefighters, police, and other public and government employees.

REITs own commercial properties that are valued at over \$3 trillion, including 25% of the Class-A office space in the country. REITs are directly or indirectly owned by individual investors who hold REIT shares in their brokerage

accounts, 401(k) plans, and IRAs. It is estimated that nearly 87 million Americans own REIT stock in their retirement and other investment funds, and roughly 46% of California households own REIT stocks.

Property owners also employ a significant work force of small businesses and individuals that work in property management, engineering, security and custodial services, and many other property related operations. These landlords are also still required to make current payments that are typically not excused by the existence of a pandemic. These may include payments to lenders, service providers (such as security and engineers personnel), utility companies, real property taxing authorities, tenants (for improvement allowances), or brokers (commissions).

Also, while there are numerous governmental assistance programs set up to help tenants, there are almost no government assistance programs available to assist property owners. Once you look behind many of the landlord entities, you see that commercial property owners are individuals as well—individuals that also need help during the pandemic. Since property owners are actually substantially comprised of individuals, retirees, and small business owners, when we inflict economic pain on them in favor of small business and individual tenants, we are literally “robbing Peter to pay Paul.” The financial downside for such tenants is already being

mitigated by legislation geared towards providing economic aid to businesses and individuals in an effort to allow them to survive the pandemic. This effort is coupled with state and local orders that place a lengthy moratorium on evicting these tenants and provides an elongated period of time for tenants to repay their past due rent. This can be seen as a kind of built-in rent deferral program that benefits tenants and unilaterally burdens every property owner.

The California legislature is also contemplating enacting SB-939, which would further expand the eviction moratoria to include all commercial tenants, regardless of size and financial wherewithal, and create a significantly elongated period of time for all commercial tenants to repay any rent owed prior to the end of the eviction moratorium. Shockingly, such legislation would essentially allow “small businesses, restaurants, bars, and entertainment/performance venues” to walk away from their leases with very little recourse by notice to their landlord at any time up to December 30, 2021. Obviously, SB-939 would be a huge and potentially crippling blow to property owners and would undoubtedly cause many landlords to lose their properties to their lenders.

It is clear that tenants are the overwhelming and almost singular focus of the massive federal financial aid and one-of-a-kind protective legislation that is now in place and perhaps expanding dramatically.

Although many tenants have a legitimate need for such protection during the pandemic, such a large focus on and empathy for tenants is also being abused by certain “bad actor” tenants that are aggressively demanding rent relief from their property owners and—in many instances—unilaterally refusing to pay rent. As a central supporting theme, these tenants are merely citing the existence of the pandemic as support for such requests or nonpayment of rent, without regard for any actual inability to meet their rental obligations as a result of the pandemic. They are simply seeking to take

advantage of a social and political environment in which “rent relief” is seen as a near universal “market” entitlement.

Despite the fact that these “bad actor” tenants don’t need or deserve financial help, they are aggressively harassing property owners for rent relief and oftentimes threatening legal action. Not surprisingly, these are not the types of small businesses or individuals that federal, state, and local legislation is aimed at protecting and assisting—these are entities trying to use the pandemic dysfunction as a mechanism to economically advantage themselves.

Although there are tenants in virtually every field that have a legitimate need for rent deferral or relief, there are certain sectors that appear to have more of these “bad actors” than others, including co-working companies (the dot.com busts of this decade), major entertainment companies (many of which are deemed “essential businesses” and allowed to operate during the pandemic), certain national retail chains that have not been forced to close their doors (many with significant financial worth), and law firms of all sizes with regional and national presence (as they seek to protect partner profit levels).

For the most part, these tenants are aggressively demanding rent relief based on unsupported claims that inaccurately rely on lease language or the inappropriate application of common law doctrines, followed by the threat of legal action if their demands are not met. There are also tenants who totally fail to pay rent and refuse to discuss any such action or respond to property owners’ communications regarding such actions (this is the favorite “rent abatement and silence” approach of many national retailers).

Obviously, when the effects of the pandemic pass, landlords will band together and view these tenants with great apprehension in future relationships and transactions.

Even in view of the current massive focus on assisting tenants, some of which is inappropriately being driven by the tenants themselves,

most property owners are and have always been receptive to offering rent deferment relief to tenants with real financial problems, under appropriate circumstances. When granted, this rent relief is the product of careful analysis by a landlord, which involves a review of a tenant's current and projected financial conditions and a series of internal and external discussions with tenants, investors, and lenders.

However, such efforts to assist tenants in real need are being stifled by the actions of the cadre of bad actor tenants that cause property owners to expend considerable resources to deal with them—resources that are scarce and could otherwise be spent dealing with tenants in dire straits. Property owners are understandably forced to focus their attention on these financially solvent tenants, as such tenants often make up a significant amount of a landlord's cash flow and are often threatening legal action. This preoccupation with bad actors does not allow property owners much time, if any, to engage needy tenants and craft rent relief plans that will help such tenants survive.

As if these bad actors were not enough of an additional problem and distraction for property owners, the business community is now being flooded by "Alerts" from law firms that seek to entice tenants to target landlords with lawsuits for rent refunds and/or rent abatement based on a myriad of baseless and completely misplaced legal theories. Again, and once again not surprisingly, a portion of the legal community is attempting to profit by targeting property owners and thereby deterring their attention from matters that could help tenants in need. Obviously, this is not a philanthropic endeavor for these law firms, but yet another instance of pandemic opportunists seeking to line their pockets at the expense of property owners and needy tenants alike.

However, these law firms do have company in this selfish and greedy pursuit. This dynamic is further exacerbated by real estate brokers who are constantly hounding property owners with aggressive claims to the right of rent relief—which they have promised their tenant clients—without any legal or factual basis for these claims. They are plastering the real estate community with emails claiming they will extract rent abatement and/or deferment from property owners with ease because that is the "market" for tenants of all sizes and financial capability.

Ironically, many of these brokers are members of national brokerage companies that also represent a significant number of property owners.

The economic burden of the pandemic should be shared collectively. Tenants should receive the benefit of governmental aid and appropriate, well-reasoned legislation. Opportunistic, bad-acting tenants, lawyers, and brokers should step aside and do their part during the pandemic by allowing property owners to focus on the tenants in need.

We should view property owners with a renewed level of empathy and respect, as they are already bearing a significant portion of the economic burden created by the pandemic. They are every bit as at-risk as small business and individual tenants; they are not protected by federal, state, and local legislation; and they are the target of overzealous and greed-driven tenants, lawyers, and real estate brokers. Let's be thoughtful and cut them some well-deserved slack.

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