

Focus | Construction/Real Property Law

Commercial Lease Abandonment? They Were There Last Week!

BY CRAIG R. NOVAK

Commercial leases have little coverage in the Texas Statutes but are directly addressed in Section 93 of the Texas Property Code (TPC). Section 93, which primarily addresses security deposits and lockouts, otherwise effectively regards the proper scope of a commercial lease as anything agreed to in the lease. Such deference to the lease terms and conditions places a significant burden on the drafter to ensure that all elements setting forth the respective duties, rights, and liabilities of the landlord and the tenant are clearly stated within the four corners of the document.

An exception to the TPC's paucity of specific requirements for commercial leases is the arcane matter of commercial tenant abandonment. Here, Section 93.002(d) and (e) define the concept and provide a potential landlord response. Essentially, an abandonment occurs when a tenant has

vacated the premises so that it is obvious to a normal observer that operations have permanently ceased at that location. What does this look like in actuality? Most of our client landlords encounter abandoned premises that look like the tenant left in a "tornado is coming" rush, or where the landlord is faced with business consumables in staggering quantities and in terrible condition. Importantly, however, landlords face a double-barrel of damages in abandonment. Not only do they have extensive clean-up costs, but they also face up to hundreds of thousands of dollars in unpaid prospective, and potentially overdue, lease payments.

Leaving the matter of litigating against the abandoned tenant for another time, this article will address how to help a landlord client with the immediacy of an abandoned commercial lease. The progression should be divided into three parts: 1) Notice, 2) Remediation, and 3) Reestablishment.

Notice is critical to preserve landlord

rights for any potential litigation. Most commercial leases have cure notice provisions, even if the tenant leaves the landlord a "we're out of here" communication. Generally, the landlord is obligated to place a conspicuous notice within the premises, giving the tenant 10 to 30 days to call either the landlord or attorney to contest their abandonment. Furthermore, an additional tenant notice is generally required if the landlord wishes to terminate the lease.

The second step, Remediation, is the hardest for landlords to absorb emotionally and financially. We have seen cases where tenants have left the leasehold with an expensive hazmat chemical cleanup site or with decaying foodstuffs left for weeks, if not months, in unpowered cooling units. Obviously, until the detritus is removed, the landlord cannot advance to the third stage, Reestablishment.

Furthermore, unless difficult or dangerous to move, the TPC requires the landlord to remove any business property from the leasehold and hold it in storage for 60 days for tenant retrieval (accruing the cost to future damage claims). In our experience, most commercial landlords want the premises ready to relet as soon as possible. Well-written leases state that the landlord may relet the premises without termination, and the abandoning tenant will be obligated for any difference in lease payments should the new tenant pay less than the old.

Dealing with landlords who have a commercial lease abandonment, the attorney must be prepared for the universal reaction of shock and anger. The reality of a valued tenant who seemed so trustworthy leaving the landlord with untold costs hits very hard. An attorney who desires to be a trusted advisor in the immediate aftermath should try assisting the landlord by providing a template for proceeding through

cleanup, hazmat if necessary, and toward reestablishment. Our firm has found that commercial abandonment has increased by 200 percent in the past few years. In some cases, the assisting attorney should establish or assist in delineating what evidentiary records be made for future litigation.

Prevention is an excellent method to minimize occurrences of abandonment. Some tenants simply run instead of trying to resolve the situation with the landlord. Landlords are far better off working out a reduced lease payment structure than remediating and reestablishing an abandonment. This requires the landlord to be proactive in managing its tenants. One suggested approach is to insist on a lease provision requiring the commercial tenant to regularly provide financial statements. The landlord also should have an accountant examine the tenant's financial statements in an effort to identify financial issues.

Another essential preventative measure is simple and ongoing communication between landlord and tenant. It is frequently worth the effort for the landlord to establish a personal connection with the commercial tenant. A conversation about how the business is going mixed in with other pleasantries, or perhaps friendly arranged visits, may give clues of potential issues the tenants face. This approach may avoid panic abandonment, which seems to be the prevailing manner we have encountered.

In all, understanding the hidden costs of abandonment and how, with little effort, many costly commercial abandonments could be avoided provides general practitioners with another tool with which to serve their clients.

HN

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