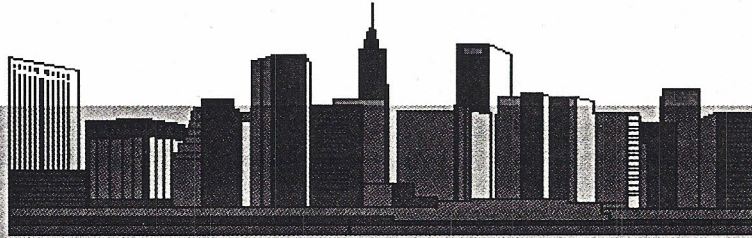


# EVICT I O N



## A Landlord's Best Friend

by Stan Mullin, SIOR, and Richard Riemer, Esq.

**A**lthough eviction should be used as a last resort, the landlord's right to evict is actually "the landlord's best friend." Before a landlord can evict a tenant however, the tenant must have violated the terms of his or her lease. Two of the most common types of violations leading to eviction are:

1. non payment of financial obligations (example, base rent, operating expenses, etc.) and
2. violations of any of the covenants and conditions outlined in the lease (i.e., storage of hazardous materials, using the property for something other than its intended purpose, or abandoning the premises.

Violations are commonly referred to as either a "default" or a "breach" and it is important to understand the difference between the two terms. First, a default is the failure of the tenant to comply with or perform one or more of the terms of the lease. A breach occurs when the tenant, after notice from the landlord, fails to cure a default within the applicable grace period provided for in the lease and the notice.

### Drafting the Agreement

A landlord's first step is to use care when drafting the lease agreement. Although the cost of consulting an attorney sometimes may seem extravagant, an attorney who specializes in real estate matters can review, negotiate, and modify the non-business terms of the document to ensure that the tenant's rights, responsibilities, and obligations, are clearly stated while simultaneously protecting the landlord. The lease should clearly define what constitutes a default or breach of the terms of the agreement and it should also list the remedies allowed to the landlord in the event of a default or breach. This type of assistance is an advantage to the landlord and is money well spent.

### Common Problems

#### Late Payments

Landlords should charge the highest possible late fee for past due payments. A high late fee gives the tenant who is considering paying the rent late an incentive to pay the full amount when due or at least within the grace period. If there is no penalty or if it is small or not imposed in a timely manner, experience shows that many tenants will delay their payments.

#### Returned Checks

If a tenant has a history (more than two payments) of payments returned for insufficient funds, it may be advisable to require that subsequent rental payments be made by money order or cashier's check. Most states allow landlords the right to charge their tenants an additional amount for checks returned for insufficient funds.

In order to make sure that the landlord has the right to impose such requirements and/or charges, these matters should be addressed in the lease. Also, because of security concerns and in order to avoid inconvenience, cash payments should be discouraged. Note: Banks will not credit you with the deposit if the funds are discovered to be counterfeit.

#### When Tenant Is in Breach

Ultimately, landlords should do everything possible to encourage the tenant to cure the default. Landlords should avoid litigation unless all other means of settlement have been exhausted. In most cases, due to the time and expenses involved, both the plaintiff and the defendant end up losing to some degree. If the landlord is having a problem with a tenant, the landlord should be sure to fully document all of his or her actions and where feasible, the actions or inaction of the tenant as well. For



example, if the tenant is using the premises for an improper use, document the tenant's activities with photographs. Thorough documentation will help verify the claims made by the landlord and assist the court in ruling in the landlord's favor. In addition, it will help the landlord to recall past events that may come up in a deposition, arbitration, or court appearance.

### When Eviction Is Unavoidable

OK, the tenant doesn't want to abide by the terms of the agreement. Now it's time to remove the tenant from the premises. Even if the tenant states that he or she will bring the rent current [your check is in the mail] and comply with the terms of the lease [I promise to stop\_\_], once the landlord decides to evict, postponing or changing the decision to evict may not be in the landlord's best interest. A great deal of time and money may be saved if a law firm that specializes in eviction services is engaged.

In California the following steps are required to evict and subsequently collect on any funds a defaulting tenant may owe a landlord.

#### —Notice To Cure or Quit

Serve the tenant with a notice to cure the default or vacate the premises. The length of the grace period in which to cure the default may vary according to law or the terms of the lease. Most standard industrial leases include provisions establishing different length grace periods for each type of default. Generally, a landlord will not need to employ the services of a professional process server or a marshal to serve the initial notice to quit. Serving the tenant personally is acceptable, and in California, the parties to a commercial or industrial lease may establish other methods not covered by the applicable statutes. For example, by mail (certified or registered mail may be required), or even better yet, via fax.

#### —Commencing Litigation

If the default is not cured within the grace period the tenant is in breach and the landlord may file an unlawful detainer action (the legal procedure for eviction) in the appropriate court of local jurisdiction. The unlawful detainer action is then served

on the tenant giving notice that the suit has been filed. Service should be done by a professional process server or marshal. Service may not be done by anyone who is a party to the action (i.e. owner, manager, agent, etc.). The tenant must be served personally or by using one of the methods set out by statute. Alternative service methods established in the lease may not be used to serve the unlawful detainer action.

#### —Defendant's Answer

If the Defendant (tenant) wishes to contest the unlawful detainer action, he must file appropriate pleading with the court within five days of the effective date of service of the unlawful detainer action. Note that different methods of service have different effective dates. If the tenant does answer the unlawful detainer action, a hearing date is scheduled for the parties to argue their respective cases before the local magistrates. If the tenant does not file an [Answer] the court will award a default judgement for possession and issue a writ of possession directing the marshal (or sheriff) to remove the tenant from the premises.

Assuming either the landlord is successful in his court hearing or if the tenant defaults once the writ of possession is issued, the marshal will post a five (5) day warning notice on the door(s) of the tenant's business. This is to allow the tenant to vacate the property. If the tenant fails to move despite the notice, the marshal will make an appointment to meet the landlord and a locksmith at the property to change the locks. If the tenant is still physically present, the marshal will remove him or her from the premises. Having the marshal present also ensures that conflicts do not occur during the eviction.

*"A great deal of time and money may be saved if a law firm that specializes in eviction services is engaged."*

### After Eviction

#### Personal Property of Tenant:

Once the tenant has vacated the property, any personal property remaining on the premises, as a rule, initially cannot be used because they are not the landlord's assets. Usually the law requires the landlord to store the property at the tenant's expense, for at least 15 days following the lockout. The property may be at the premises or removed

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*Be sure that the tenant has a financial incentive to pay the full rental amount, on time, when due. For example, when I structure my leases I stipulate that rent is considered late, and a penalty due, if payment is received by the landlord after the 5th of the month. Why the 5th and not the 10th as commonly practiced? Often the landlord's payment on his promissory note is due on the 10th or 15th. If a tenant's rental check comes back marked insufficient funds this can have an effect on the landlord's cash flow and perhaps on the landlord's loan payment also.*

from the premises and put into storage (i.e. to accommodate a replacement tenant). The landlord should arrange a mutually convenient time for the tenant to retrieve the property. If 15 days have passed and the tenant has not retrieved the personal property and such property is collectively worth more than \$300, the landlord must arrange for the items to be stored until the he/she can hold an auction to sell them. If the personal property is worth less than \$300, the law allows the landlord to take ownership, use it, dispose of it, or sell it and keep the proceeds.

*“Generally, the strict enforcement of the terms of a lease results in timely rental payments. . .”*

### **Money Judgement**

Once the tenant has vacated the property and the tenant's personal property has been dealt with, the landlord is finally in a position to calculate the full amount of money owed by the tenant. Assuming that the security deposit is insufficient to fully satisfy just debt (see below) the landlord will, at this point in time, need to go back to court and request a money judgement for the remaining monies owed (unpaid rent, personal property storage charges, attorney's fees, and court costs minus security deposit, and auction proceeds). Once issued, such judgement is then enforced (collected) in the same manner as any other civil judgment.

### **Accounting for the Security Deposit**

Unless the lease states otherwise, the landlord must notify the tenant within 30 calendar days of the date that possession of the premises is returned to the landlord as to how the security deposit will be disbursed (applied to late fees, past due rent, legal costs, costs for cleaning the building, etc.) and return any unused portion. Bad faith retention of the security deposit may result in the imposition of monetary damages against the landlord.

## **Be Familiar with Your State Laws**

Become familiar with your basic rights as a landlord so that the moment that your tenant is not in compliance with the terms of the lease, you can immediately step in to rectify the violation and minimize the degree to which you, as the landlord, will be damaged. The process is more time consuming than difficult... just get it started immediately. Generally, the strict enforcement of the terms of a lease results in timely rental payments and fewer disputes with the tenants. ♦



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