

# Landlords and COVID-19 — Getting Commercial Tenants Caught Up on Rent

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About this webinar:

*Are you a commercial property owner whose tenants are behind on rent from the impact of COVID-19? As commercial property owners ourselves, we understand the problems you face. Many businesses will fail due to the lasting effects of COVID-19 and the stay-at-home orders, leaving you with back rent due. With eviction moratoriums in place, the threats of Senate Bill 939 looming, and the sanctity of contracts threatened, being an owner can keep you up at night. Now is the time to start planning, so we've put together a webinar called "Landlords and COVID-19—Getting Tenants Caught Up on Rent." You can learn about the paths to solving these issues.*

All right, let's go ahead and get started. Thank you all very much for joining; my name is Tilden Moschetti. I'm the managing partner of Moschetti Law Group. We are a real estate law firm with our office in Calabasas, and we serve all of Southern California. We focus primarily on those high net worth individuals like yourselves, private equity firms and family offices. And as a lawyer, I come to the practice not only with a background in law, but with a background as a commercial real estate broker, and an education background in finance.

What we try to offer is a full package to take care of our clients, make sure that they meet all the legal requirements, and help them through the process, whether it's litigating or transacting. But we also look to make sure that your finances are right and we have a real focus on your ROI: does this plan make sense for you? Anything that we recommend, we want to make sure that it's something that's going to make good business sense. That's how we practice.

I am also a property owner, and so I have a lot of the same concerns that you do. I definitely have a major concern about mortgage obligations—with less rent coming in, are we still going to meet the mortgage? Many of you will have had a temporary abatement or deferment of your payments, but it won't be forever. Most of the time, it's three months. I have heard some banks and lenders are doing up to six months, but those three months are coming due. I believe the first payment for one of my properties is July 1<sup>st</sup>, so there's obviously a very major concern about making sure we can pay our mortgage.

There are also the requirements that some lenders have about notifying them and working with them on any lease modifications that take place. If there is a substantial lease modification, the bank may very well have in its loan terms that it needs to be a part of that discussion as well and be part of the underwriting, as it's going to change significantly. There are also some eviction moratoriums that can create civil and criminal penalties.

And what are also very important are PR concerns. If you draw a real fine line and say, "Okay, this is the line you cannot cross," is that going to cost you in the future? Is it going hurt not only your relationship with your existing tenants, but with tenants in the future,

if you have a vacant space for a restaurant and it becomes well known that you were very strict and went forward with evicting everybody? Is another restaurant likely to come into your space, or are they going to look at the space next door that also has a vacancy, and which would work just as well, so the terms may be better than for your space? The PR concerns may outweigh other issues, and so that's a very valid concern.

Lastly, there may be private causes of action, certainly for residential real estate or for multifamily properties. A lot of times there are penalties associated with lawsuits that can be brought under CA Business and Professions Code 17200, which is for unfair business practices. And that could cost you a lot. There you have not only mandatory damages, but also the attorney fees, which are part of the cost as well. That also is part of SB-939, which is something that we'll talk about here too. It's part of that bill, which, if it becomes law, automatically includes a 17200 claim.

What also makes it very hard for our landlords, and for everybody, is these more terms are very hard to track. We've got lots of rules from lots of different places, and it's hard to figure out what's what. So that's what we're here for.

I think that a lot of our landlords also have a concern that if the value of the property gets suppressed too much, does it even make sense to stay there? While that may be a great buying opportunity for some, it also can put a lot of strain on the property owner who's a little financially strapped, has mortgage obligations due, and really needs to sell, and sell quickly, in order to not get in trouble. One LA City Council member has seen this as good news for the city and for disadvantaged people. Mike Bonin has said that this is a great thing. His plan is to buy up that distressed real estate and use it for other issues that the city has, such as helping the homeless or low income housing, things like that. Well, that's good for them; it's not good for the property owner. The property owner has obligations, and a lot of us are using that money that comes in to take care of our families and plan our legacy—it's our money.

So, I'm very glad that you've decided to come and spend time with me today. My time is valuable, and I'm sure yours is too. Today is my son, Alexander's, fifth birthday. So I did definitely want to carve out some time to be able to talk to you all, but my time is very

valuable and yours is as well, and I hope to give you a lot of information that you find very useful, because I really do value your time.

My goal for this presentation is to help two kinds of people. The first is landlords; I value our commercial landlords. I think that commercial real estate is one of the most important things that is a driver of the US economy. I think that is that landlords are oftentimes looked down upon or seen as greedy when they're just part of the system making money, and actually acting as a place that houses these places that create money. I mean, where would Google be without its campus? The people wouldn't be able to collaborate. Or where would a store be—where would Starbucks be without any locations? And at the same time, for the residential people, where would those people be without homes, right? Our landlords who do multifamily and residential are providing homes for people. So, I believe strongly in Commercial Real Estate. I think it's a wonderful thing for the property owner, and I think it's a great investment. But I also think it's important for our economy.

The goal of this presentation is to make sure that those landlords understand some of the rules and how they work, can figure out how to resolve issues, and know when you need an attorney versus when you don't need an attorney. That's my goal for you. We also have a lot of attorneys on this call, and that's great. I love talking with my fellow attorneys, and my goal for you is to make sure that you have a basis of what the general laws are, so that when you have a client that you're talking to, you understand the general ideas about how to help them, advise them, or at least point them in the right direction.

So here's what we are going to cover today. First, I want to give you a brief overview of how we got here. I'm sure most of you already know, and you've been fretting over this as time goes on, but I think it sets the stage for what happens and what the rules are. Then we're going to go into a brief discussion on your lease vulnerabilities, and I'll go into more why we're doing that when we get there. Then we're going to talk about the rules, and we're going to start with California. Then we're going to funnel down to Los Angeles County, and then some of the cities. Now this can apply to any county and any city, but I think most of you have your properties in Los Angeles County, and it gives a good framework for the way to think about things. Then we're going to talk about the Judicial Council and what it did on the eviction moratoriums, and then we're going to talk about

future legislation and what may be coming down with Senate Bill 939. Then I want to discuss the strategies and tactics landlords can take.

What can you do, given this landscape of laws and where we're at right now? What sort of strategies are out there? What sort of goals should you be setting? What tactics can you start taking to achieve those goals? We're going to follow it up with some questions and answers. If this all sounds good, then we're ready to get started.

So, how did we get here? The shelter-in-place orders started in mid-March. Many businesses closed and experienced severe financial impact since then. Businesses, restaurants especially, have shuttered their doors or they've been trying to make do with curbside delivery. Other businesses, like boutiques, have been told to close completely; you drove by a shopping mall, it was completely empty. The malls were closed completely. A lot of offices stayed kind of open because there are a lot of essential businesses in the area. Law firms oftentimes are essential businesses, so we were open. But still, I wasn't in the office most of the time. Why? Because I had kids I needed to take care of, and with the day cares, and schools closed, a lot of people, even though they could be in their offices, couldn't be in their offices. They had to take care of their families. Also, some financial companies were open, and those sort of essential businesses stayed open.

What happened next was that Governor Newsom enacted an executive order, and many cities also followed suit by filing their own moratoriums on commercial leases. Many of these have been done by local governments in various cities and counties. Now fast forward, businesses are starting to reopen; reopening is staggered in California. Some cities have been much faster; cities in Ventura seem to have been faster at reopening than here in Los Angeles.

But there has still been a heavy impact. It's difficult to set back everything by two and a half months and suddenly expect everything to bounce back completely at full capacity. So, for example, restaurants can reopen now, but they can't. They have density requirements. Many restaurants are restricted to 25% capacity, some are restricted to 50% capacity. Haircuts are allowed to happen but nail salons are closed. Offices can be

open, but each office needs to come up with its own strategies in order to have a plan for reopening.

The COVID-19 situation is likely to be a concern for the upcoming year and maybe longer. We've heard varying news about whether there's going to be a new spike in the winter, maybe new cases or maybe not. Be that as it may, what would have to shut down? Another shutdown would be very detrimental to our economy; it would also be very detrimental to our tenants, which means it would be very problematic for our landlords as well. And that situation may go on longer. It may go on beyond a year. A lot of us are hoping for the vaccine shots in order to make sure that we can stave off this infection. But it's hard to say whether that's going to happen on time or not. It hopefully will, but it may not; vaccines are difficult to do.

So the cities, counties and states are all reacting to these things, and they're reacting based on what they think they need to do. New legislation in the California legislature is being enacted, which has great impacts on all of us—for example, Senate Bill 939, which we're going to talk about. New York, for example, has decided to extend its eviction moratorium. Its eviction moratorium goes through the end of August. And that may happen here as well; we haven't really heard word from the governor on what their plans are. They haven't come out with new orders, there hasn't been a press release as of this recording, so it may be that we won't be able to open up anytime soon, really, or have businesses go back to normal again.

I think before we talk about the rules, it's important to remember one thing: that your set of leases came into this situation already drafted, so it's important to look at your lease first. Your lease may have vulnerabilities that you need to think about, because no one really foresaw that this would happen when they were drafting your lease. There are a couple of code sections I want to point you to, which, if there was an eviction action or a lawsuit on your lease, I would expect this sort of thing to be brought up. I'm not saying that it will be valid, but we don't know for sure. Different judges will do different things, and we kind of have to let things sort themselves out. But these are certainly going to be some of the arguments that a lawyer representing the tenant is going to argue.

The first one that is a possibility is Civil Code Section 1441. It says, "A condition in a contract, the fulfillment of which is impossible or unlawful...or which is repugnant to the nature of the interest created by the contract, is void." So, that obviously is of concern. I don't think it's too likely to be successful for a tenant to bring that kind of argument. The reason is the difference between a commercial contract and a lease. A lease really is, as we learned in Law School, a whole bundle of sticks. So it's all these things: it's your use of the property, your use to advertise the property, making sure that nobody else can come in who you don't want to come in, and those types of things.

It's a whole bunch of rights that you include in a lease, while a commercial contract tends to be just for one thing. It's "you build this," or "I'm going to sell you this and you're going to get delivery of that," and that's really what impossibility is supposed to cover. Impracticability is similar. It's that the performance is not possible because it's excessive and unreasonably difficult to do. But that's not actually in fulfilling the contract; you still gave the use of the property to your tenants. So they still technically have the use of it. You haven't acted to take it away, and the performance of giving it to them hasn't been taken away. It's just that all their plans, of what they wanted to do with it, are not there anymore, and so there may very well be some Takings Cases that are filed.

Again, there is the right not to have your property seized or over-regulated by the government, so there probably will be some lawsuits. It's unsure how successful that's going to be. The main case on it, which I think would apply, is the Tahoe Sierra case, which was done in about 2002. Tahoe Sierra said that regulation from the government is allowed in most situations, and so I think that probably the Takings Cases won't be successful either. There may also be a frustration of purpose argument, which is a common law argument, saying that the point of the contracts has become pointless or valueless. Well, that may be, but it also isn't. The point of the contract was you giving the property and the use of it to the tenant. It hasn't become pointless in that respect.

So I don't think that that's likely to prevail, but these are the things that you need to worry about. These are the things that need to be at least thought of, because if there is a lawsuit or an eviction, this is the argument that your tenants are going to be making. So let's go through a little bit more about how we got here from the last slide.

On March 16th, Governor Newsom enacted State Executive Order N-28-20. What that did was give the local authorities the ability to increase their police power, to make certain rules about eviction moratoriums, or closing of commercial spaces. Before, they weren't able to do that, so Governor Newsom overrode that order because of the emergency. What's also important—what you need to keep in the back of your mind about this, and what should be part of all of your discussions with your tenants as well—is that consistently through this executive order, through what the county has said, and through pretty much what every city has said as well, it is very clear: nothing in this order shall relieve a tenant of the obligation to pay rent, nor restrict the landlord's ability to recover the rent due. That's really important, because your rent is due to you, and so you should be able to get it. It's just how do we get to that, is what becomes more of a question.

State Executive Order N-66-20 extended N-28-20 until July 28. That's the moratorium, and maybe it will get extended into late August. It all depends on how we reopen. So we started with California, but let's talk about the context as it relates to Los Angeles County. There are a lot of properties in LA County, and a lot of you also have properties in Ventura. But I think because of how Los Angeles has done it, it will give you a little bit more context to see what some of those strategies are. Two things are important for LA County: first, it has a very narrow set of rules. It's very, very strict against landlords, but it also only applies in certain areas; it only applies to the unincorporated areas, and cities which do not have an eviction moratorium. Most cities do. So really, more often than not, it's your unincorporated areas; for example, the north side of the 101 in Calabasas is mostly an unincorporated part of Los Angeles County, even though it has an address of Calabasas.

What does the rule say? Well, first it gives the tenants 12 months to pay back unpaid rent, so after the the moratorium ends, they have 12 months to pay the landlord backwards. 12 months is a very long time, and in one respect it makes sense, because after two and a half months of not paying rent, it would be difficult to bump that up and get that all paid up immediately, when they haven't had those sales. On the other hand, 12 months is a very long time for us as landlords.

Two things that, I think, are the worst part of this bill, are: number one, in order to make this claim and get that deferment, if the tenant has less than 10 employees, it may self-certify. So anybody could just write to their landlord and say, "I've been impacted by

COVID-19, I'm not able to pay my rent, and so I'll pay you back within 12 months after the order stops." That's very onerous because you could have somebody who has quite a lot of money, and we'll talk about an example of that, who is just deferring because they can. It makes good cash flow sense for the tenant. It is a horrible impact on landlords. If they have more than 10 employees, they just need to show some sort of financial impact within seven days.

I think the worst part is number two. Number two is that this bill prohibits landlords, or those acting on their behalf, like their lawyers, from harassing or intimidating tenants, and the problem with that is that it's so vague. I mean, is it harassing or intimidating for me to call a tenant on behalf of my landlords? Is it harassment for me to call them once a week to say, "Checking on you, want to see where you're at, want to make sure that you're paying your rent?" A judge could very well say that's harassment, and there's a penalty which goes with that. In Los Angeles County, the penalty is \$2,000 per occurrence. Well, if I'm making a phone call a week, that's a lot of penalties that are getting racked up just for me protecting my clients' interests, or for you protecting your own.

So let's talk now about cities, and how the cities have reacted. We're going to get more into the elements here because I think that's a little bit better way to understand it. So we started with California, which said that local municipalities can make these rules. Then we zoom down to the county, which says, okay, this only applies to those unincorporated areas, and we've got very strict rules. But now the cities have all sort of reacted.

First off, when does this moratorium end? The city of Los Angeles is actually one of the most generous on when the moratorium ends, probably. They have said that it is three months after the local emergency period as declared by the mayor. Not to get on a political discussion here, but it seems like the city of Los Angeles is very tenant-friendly, and may very well decide to put off declaring the local emergency period as long as possible. It's certainly within their ability, and they may. Some cities have decided, well, we're just going to do it by proclamation of the city council, and some have a fixed date. For example, Thousand Oaks is June 30. Now, they could extend it, and they may. It's a little too early to say they haven't extended it, but they could.

The second element of one of these moratoriums is notice. Almost all cities require some sort of notice, except, interestingly enough, Los Angeles. Los Angeles is silent on the issue of notice; a tenant in Los Angeles does not need to give notice to their landlord that they've been affected and so they're going to be withholding rent. That's unusual, and we're going to talk a little bit about that in a minute, but I also want to talk about some of the other cities first. In most of the other cities, the tenant needs to give 30 days notice and have evidence of the hardship. Interestingly, some cities have said there's actually seven days to furnish notice, and then 30 days to provide that evidence. For example, Burbank and Beverly Hills both say seven days for the notice, and 30 days to show the hardship.

Now why is this important? Because it is important. It is extremely important because if the tenant hasn't provided you notice as they are required to, then they are late on their rent beyond just a default under the moratorium, so the eviction rules do not apply if they have not given notice, and they are in within one of these things, and they are not a residential tenant. This only applies to commercial tenants. Make sure that you're documenting whenever your requests come in, so that you can not only know about them, but also know when the notice comes due. For example, if your tenant in Burbank didn't tell you until May 15, you have a valid claim in Burbank for it being late in May. But if they gave you notice on May 15th for June, that becomes more of a protected class. You couldn't evict them in Burbank for June, but you could evict them in Burbank for May—that is, when you can evict them, because right now you can't.

Let's talk a little bit about that evidence they need to show. Most often, it is a substantial decrease in the business income caused by the pandemic or the government. This probably is not going to be a very substantial thing for them to have to show. But, for example, a restaurant doing curbside delivery probably has a substantial decrease in their income, but not all. If you look at what the news has been about Burger King, for example, they did not have a substantial decrease. In fact, their sales rose in most locations during the pandemic, because people still wanted to go out and get food that they didn't have to make themselves, and so they were going to Burger King. So Burger King had substantial sales, and they wouldn't be able to show that they've had a substantial decrease in their business, and even if they decided not to pay their rents, that would not be in accord with the rules here and so they would be responsible. So, it's important that

you also keep a record of that communication that you receive about their financials, as well as how you decided that they didn't meet the burden that they had, and whether they had a substantial decrease in their business income.

Let's talk about which tenants this applies to, because there actually are some cases where it doesn't apply. In the city of LA, Burbank and Beverly Hills, for example, there are certain exceptions where they say, "Okay, these are eviction moratoriums, and giving them more time to pay back their rents doesn't apply." For example, a lot of times it's a public company that it doesn't apply to, or in the case of Beverly Hills, for Fortune 1000 companies it also doesn't apply. It's important to consider, does it even apply to these tenants? Because if it doesn't apply to the tenants, or if they didn't do the notice, or if they didn't do the showing of evidence, it doesn't apply to them, and so they still owe you that money right now.

There is time to pay back in most of these rules. In fact, every city that I've looked at, and every county, has different rules. The city of LA actually seems to be one of the shortest. City of LA's timing is three months from the time that the mayor has declared the local emergency period over. The rest can range from 120 days, like Camarillo, to six months, which is most of them, to a year for Beverly Hills. And then there also is the issue of late fees. I get a lot of questions: can I charge late fees? And the answer is: no, except sometimes. So sometimes in the city of Burbank, yes, you can charge late fees. In Camarillo, you probably can charge late fees; their rules actually don't say you can charge late fees and they don't say you can't charge late fees. So I would assume that you can charge late fees, and you can charge late fees if they didn't apply for anything up above; if they didn't give their notice, if they didn't do their showing, or if it's one of those tenants that doesn't qualify, you can definitely do late fees.

Now, I'm talking just about commercial. This is not about the residential tenants. No charging late fees to residential tenants: you cannot do that. The rules are different for residential, and they get a lot more complicated. Really, if you have any questions about how to do it—how do you get notice from those tenants? do they meet the criteria for residential tenants?—the rules are so strict against landlords, so you really have to talk to an attorney to look at your individual case because one mistake can cost you very, very dearly. There are some very bad things happening and the rules are very, very generous

towards those tenants; for example, if your residential area speaks predominantly Spanish, but you know that one of your tenants speaks English, and he hasn't paid his rent and you give them that notice just in English—no, you didn't give the notice at all because you have to give it to him in Spanish as well. You are required to give notice, not only for the language that you know that they speak or believe that they speak, but also the same in the general language of your community. The best practice is to serve that notice, which is formal and on the city website, in every single language; there can be no argument that you've done it properly. But let's go on.

We've set the stage for what the state does, and then what the county does and what the city does. So now, before we get to what to do about it, we have to talk about what the Judicial Council does, because the Judicial Council tells the courts what they can do. On April 6th, the Judicial Council made Judicial Council Emergency Order Number One. They said, "a court may not issue a summons on a complaint for unlawful detainer unless the court finds in its discretion and on the record, that the action is necessary to protect public health and safety." So that really is only if someone is, for example, manufacturing drugs; they're not going to do it for any other reason. They went on to say that the rule will remain in effect for 90 days after the governor declares the state of emergency related to COVID-19 pandemic is lifted, or until amendment. They went beyond the order that Governor Newsom set, so they've told their courts that not only can they not issue a summons, but in the case of commercial tenants—this was not part of Governor Newsom's order—they may not issue that eviction until 90 days after it's been lifted. They're not going to issue a summons, even though it would have been allowed under Governor Newsom's orders.

That's very frustrating for landlords, who should be able to file if they're complying with the rules. You should be able to file that eviction when you need to file it, but they won't issue it, which kind of highlights where this is all going. The legislature is working on a bill right now called Senate Bill 939. This is an extremely important bill primarily for your commercial tenants. That's where it has the majority of the effect, and even more so for restaurants. If you have a restaurant tenant, this is extremely important to pay attention to. For Senate Bill 939, first we'll go over the general things, and then we'll get to the bad things, and then we're going to get to the really bad.

So the general idea is it prohibits commercial landlords from terminating tenancy or endeavoring to evict a tenant of commercial real estate property during the state of emergency. Now, that's not too bad because you couldn't get a summons anyway, during the the state of emergency. So there really isn't a lot of loss there. There are also fines for harassment and mistreatment, so now they're taking that idea from the county of Los Angeles and applying it across the board; that would be the problem of, if I'm reminding my tenant every week and checking in on where they're at on paying their rent, is that harassment? The way that our court system is, I think it's going to be much more likely to be very, very tenant-friendly, even on the commercial side. I'm not sure if it'll be to the same point that it is on the residential side, but it's going to be very tenant-friendly. That means you could very well be fined for harassment. It also extends the time when that back pay could be paid back, up to 12 months after the state of emergency ends. There's no restriction on company size. This could be the Google complex, if they're your tenant and they've got 1000 employees in there. I'm not sure that Google has any real estate in California that is not owned by them, but they would be accepted and they do not need to pay their back pay for 12 months.

That's part of Senate Bill 939. Important to note, SB-939 is not enacted yet. I'll talk about where it is right in just a minute, but it is not law yet, but it could be. It also specifies that no late fees of any kind can be can be imposed for the rent that came due during the state of emergency, and that's even after the 12 month period has ended. So they have 12 months to pay back their rent from June. If this is enacted, and they don't pay back that rent, you still can't charge late fees on it.

Now, let's go from even worse to even worser. You can be sued for unlawful business practice under 17200 if you do anything to try and enforce your rights that is in disagreement with Senate Bill 939. It requires written notice, so it's taking that same idea that exists for many residential tenants, and putting it on your commercial tenant. It requires written notice from landlords to the tenants within 30 days after the bill entrance. Well, that which puts an enormous burden on you. You will have to give that notice to law firms, law firms that specialize in commercial real estate. I mean, I'm a tenant in a building; I own other buildings but I don't own the building that I'm in. I'd have to be getting that notice, and here I am talking about it, but I would still be required to get that

notice or I would be exempted. (I've been paying my rent, so there hasn't been wouldn't be an issue on me specifically. But if I hadn't, I'd have to get that notice.)

For eating and drinking establishments, now, here's the absolute worst. For eating and drinking establishments, places of entertainment, and performance venues, if they're at the end of the emergency period, the tenant can come to you and you have to discuss how you're going to work this out. You have 30 days to resolve it. If you don't come to an agreement, the tenant can just say, "No, I'm going to pay you nothing." There's no discussion of reasonableness. They do not need to be reasonable. Then, within 10 days thereafter, they can terminate their lease; they can just tear it up and walk away. And all they have to do is pay their three months back rent, adjust up to three months, and if there's any more they don't have to pay it. This is just base rent that they would need to pay you. They can just tear the lease up, and they have 12 months to pay you back, and they walk away clean.

I mean, that's scary, right? They could have 10 years left. And this also doesn't apply to that. They say it applies for small business, but because of how these companies are set up and how many of the larger restaurants are set up, they're in single purpose entities. Even those single purpose entities are considered small businesses. So they can just tear it up, underperforming storage just a little bit. Tear it up, just walk away, doesn't matter. This is obviously horrific.

So where is Senate Bill 939 at? Right now it has gone through the Senate and it's passed the Senate. They did have a quorum, but many of our local senators did not vote on it. For the City of Los Angeles, the senator did not vote on it, and it is shocking that something this important could just be ignored. It's gone past the Judiciary Committee—and how it's gone past the Judiciary Committee is beyond me, because on its face, this looks like a gross violation of our constitution and our right to contract. I find it awful that that they could clear that. It's now in the Appropriations Committee of the Senate, and then it will go to the assembly, and then go to the governor. It looks right now like it has a very, very high likelihood of passing.

Many organizations are opposed to it. Politically, it's a lot harder. I mean, we saw the political fight on rent controls in the election previously, and it just makes a much better

message politically for them to support it than to oppose it. So, this could very well become law. Now, if it does become a law it is retroactive, but lawyers like myself are poised and ready to file onerous. This does not hold constitutional muster. It is a very, very, very onerous law. It punishes landlords for being landlords, and it's a shame. So there's my rant about SB 939. I think it's shocking. Call your congressman, tell him that you're adamantly opposed to it, it's just wrong.

So let's talk about how to solve this. I mean, how can we get some level of comfort? That's probably why most of you are here. Right before we do that, I think it's important to talk about those tenant concerns that you have, so that we can understand when we go to the negotiating table: what is the other side thinking? Tenants have extremely valid concerns. First off, do they have the ability to pay their rent? Their businesses probably have been severely impacted. That's absolutely true. The lockdowns have been detrimental to most businesses, and the PPP loans that were promised were not very effective. They came very late; EIDL is just starting to flow out now. And even that amount is just not enough, so your tenants have been severely impacted.

They're also concerned about their performance obligations. Some of them have operating covenants for retail; you probably have mandatory open hours. I haven't heard of a single landlord that's being a stickler on this. It would be quite an argument to say, "well, your lease says that you need to be open 350 days a year, and you've been closed for two and a half months, so you owe me rent at 150%." I don't think any landlord is doing that, because even if you did, you're not going to win in court there. That is an example of the *force majeure* argument, which we can talk about more if you have questions. Completion on tenant improvements have also been, and are, of great concern: not only that you may have with them, but also that they may have with their franchise owner. They probably haven't been able to do their work to do that.

And then they have concerns about their employees. I mean, they want to make sure that their employees and their customers and their suppliers are all safe. There are density issues, and if they're not allowed to operate at 100% capacity, how are they able to make the same amount of money that supports their business plan, to pay the rent? CDC guidelines are a concern, and those other concerns about how much social distance we need to have. Is there going to be enough commerce coming in? If you're in downtown

LA or the lunch places, are they able to open with what traffic there is going to be? Are they even going to meet their density? Then they're balancing the safety issue for their employees, versus that for customers, versus that density that they need to grow—a restaurant in downtown has to be very dense in order to be successful.

So, let's start talking about strategies. I'm one that defines strategies and tactics differently, but they interrelate. Strategies are those big picture ideas: they're your long term goals and how you get to those long term goals. This is what I want, this is how I'm different, this is how I set myself apart, this is how my building is special: these are the part of strategies. Tactics are those individual moves that you make, how you deal with each tenant, which strategy you do: am I going to evict them? Am I going to not do anything? What are those moves? Those are tactics.

We can go over this strategy, despite the fact that the tenants absolutely have a legal obligation to pay rent. This is has been a default: if they are late on their rent, there has been a default in rent, and I'm going to talk about why that's very important in a minute. There's been a default, they have to pay rent.

However, you have to look at it in the context of where we're at in the economy, what your capabilities are of recovering money from that tenant, and what the judge is likely to order if you were to evict or sue. When the emergency declaration has expired, tenants may be unwilling or unable to pay rent as a large lump sum. Imagine if you had to come up with a three months lump sum, all of it at the drop of a hat; it may be really hard to do for some of those tenants. If you modify the rents, even if you extend it out over three months, it still may be difficult for them to meet their rent obligations over that period. So, you have to consider in your strategy the economic reality of the situation. If you decide that the right tactic for you is an eviction process, courts are going to be backlogged, so what you need to be considering is: what does this mean in terms of how long until I can get my money?

Ultimately, you've got to plan for the distinct possibility that you may not receive rent payments for a long time. It may not be right after the emergency declaration period is over; the six month repayment period in these cities may not be enough. And that repayment period delay is the eviction period as well in some of those cities. Of course,

there's the issue of whether or not it's constitutional for these eviction moratoriums to take place. And those are valid questions. But a constitutional case takes a very long time to prosecute. So it still delays your figuring out what you need to do.

And then you've got your concerns as well, which is not only whether that rent is coming in, but you probably have mortgage obligations. We don't know whether those financial institutions are going to be able to adapt to make sure that property owners are covered. I mean, there may be a three-month deferment on your payment right now, but if those payments are starting in July, what if in July you're still getting half rent? Maybe there's going to be future legislation that will try and fix this; we don't know at this point. All those are unknowns. You should anticipate that we don't know, and that you need to figure out, "How am I going to do this with my mortgage obligations?" I mean, you are all very sophisticated owners, and you probably have a good sense of this. But it may help to get a better timetable from a real estate attorney who can guide you and say, "Well, here's where you're really at, given your lease and where the court system is. And I've looked at your loan, and here's what I think you should be thinking about." That may be very helpful to talk to a lawyer about.

Some things to keep in mind are that defaults happen, so the consequences of that default are at your discretion. Now there are things, in many leases, that get triggered when the defaults happen. Sometimes they're things like ability to sublease. There'll be things like obligations put on a guarantor, like a guarantee, like that guarantee may be extended if a default happened. Or you may need to notify the franchisor of a tenant because there's been a default. That is important to keep in mind, because sometimes those can give you leverage and sometimes help you with that decision about: "Okay, I can modify my lease in this way automatically because the default happened, but I should probably just send them notice that a default did happen, as I continue to work it out." Now, I wouldn't do this work for a residential lease. This part is very, very specifically on a commercial lease only. For a residential lease, talk to a real estate attorney because sending a notice that there's been a default could be very detrimental to your long-term purposes.

Part of your strategy should also be that cost element. It probably goes without saying, but how much is it going to cost you? And what's the likelihood of prevailing? Those

things are very, very important. You know, we're business people here, and we need to determine: is this worth the investment? Is it worth the risk? Am I going to get the return on the money that I outlay on?

So let's talk about four strategies that may help you. Number one is evicting. Right now, you're not allowed to serve it. You wouldn't be able to file it for 90 days after the emergency period is over. That period may be July 28. It may be extended out further, so it's 90 days after that period. So eviction isn't really even an option at this point, but it certainly could be something that you're gearing up towards. For your commercial tenants, you may very well want to serve that three-day notice, just so that when you can file an eviction, you are able to. But really, it's whether you decide that eviction is the right route for you. The other problem with eviction is that judges, by the time this gets heard, may be very inclined to lean towards the tenant anyway. The rules are already stacked that way; judges could easily lean very, very strongly towards tenants.

That said, there is kind of a way around eviction; an eviction is to really remove the tenant from the property, but you still can sue on the lease, and this is a possibility for you. As courts begin to reopen you can file it, and they will issue a summons on the lease contract itself. It will not give you the right to retake the property or to remove that tenant. But you can collect based on time. The downside is it could be very expensive. So it all depends on the other side: how much money they have, how likely are they going to be able to do things. They may decide to leave anyway. The other side of the coin is that judges may be inclined to be tenant-centric, and they may say that the eviction moratoriums are in place—that even though this isn't a lawsuit on the eviction, as a matter of equity, it should be interpreted as such. They could do that; it would be probably within their discretion to make that decision.

But you could also use it as leverage. You could file a lawsuit, then use it as leverage in order to get your money and make things happen. Now, it can be worth it if it's worth it. It's a money thing, and it's a long-term strategy. This could make sense for your specific situation; in some cases it absolutely will make sense. If it's a large-credit tenant and they're not paying their rent, it might make sense to do it. I would say if you've got a Burger King tenant, it might very well make sense; they have the ability to pay but aren't

paying. I've heard of some Starbucks that haven't been paying rent also. I haven't actually seen one of those yet, but they may do it.

Again, for suing, this is very specific, I have to say it over and over just to make sure I'm very clear: I'm not talking about your residential tenants. For residential tenants, you have to talk to a lawyer, and make sure you tread very carefully, because the rules are very strict.

Another option, number three, is just waiting to see what happens; hoping rent comes in, reminding them every so often that their rent is due, and sort of letting things go. This is a completely valid option, if you can afford it, and if your mortgage obligations aren't requiring that rent to come in, that may be what you want to do. If you do decide this, the only caution I would have is look over your lease and make sure that there's a waiver provision. Almost every lease does have a waiver provision, which says that if the landlord just accepts partial payment or doesn't collect rent during that month, that it doesn't automatically become a waiver for the tenant. Just make sure that that's in your lease. If it's not in there, then you definitely need to consider something other than this.

And that gets us to what I think is the best option, option number four, and that's renegotiating. This is a time to reset your leases. You've got tenants with leases that are just not quite perfect. So, a great example is that I have a lease in one of my buildings from 1990. It's very old, how it talks about pass-throughs is old. It doesn't make it very clear that property taxes are due. If my tenants know this, this is a time to take advantage of that and to renegotiate. You're giving something in exchange—you're entitled to get that back rent, you're entitled to get that money. But this is an opportunity, by affording some time or giving something that the tenant needs, to get something that you need too. It could be something like sales reporting numbers. I mean, if they're in retail and you're not getting sales numbers, this is definitely a good time to negotiate that. I would only do this if people are in default. If everybody's been paying, then this would be kind of strange to go to. But look at those things that you want and how you can improve your lease, because you can add value to your building just by improving the lease.

The approach to renegotiation is very important. You'd be very surprised at how incredibly well a good approach from an attorney can be taken by a tenant who's in

default. Yesterday, I approached two very different tenants. One was a retail tenant, and one was a residential tenant. I went to each of them and I said, “Hey, I represent these people, and I would love to talk with you on your phone about your situation, and understand what your situation is and see how we can resolve this.” Very simple, honest. And the response I got, you'd be surprised—it was extremely excited. These tenants have been scared about you coming to them and saying things like, you're demanding the rent and things like that. The tenants are scared, and by approaching them in the right way, it sets the whole negotiation process on the right track. It sets it in problem-solving mode, rather than, “Well, we're going to just sue you and we'll see you in court.” Both of the people who I contacted were positive; one of them specifically said, and I'm quoting here, “I'd be very happy to talk with you. Give me a call.” So, great! I love a response like that, because then it's okay, and I don't need to be adversarial. I need to protect my client's interests, but we can solve this problem. And I think we can; my clients are very reasonable, and we've now set it up for the tenants to be reasonable as well.

There are two types of deferment that you can do as part of your renegotiation. One is amortization, which is when the rents are repaid over a period of months, and that begins at some point in the future, e.g., in three months it becomes due. So one of my clients is a very large franchisee; he owns 30 stores. He came to me at the very beginning of the crisis and said, “I'm very worried about making my April rent. Can we negotiate?” I said, “Yeah, we can discuss that. Let's see what we need to do. What are you asking for first?” And he said, “Really, all I'm asking for is up to three months.”

And I said, “Okay, well, up to three months. It's kind of vague, so how about we do something like: I'll give you up to three months to defer your rent. You still need to pay all of your CAMs, but up to three months, you can do a deferment. But I know you're applying for all of the SBA loans—as soon as those SBA loans come in, you need to start paying your rent.” And that was acceptable. The deferment we negotiated was, beginning in April, any rent that's past due gets repaid over a period of three months, beginning in July. So that was a dream come true. It was a very easy negotiation: he was happy, I was happy, that worked out very well. So that's the amortization.

The other way to do it is a lease extension. Basically, you'd say, “Okay, your lease ends in June of 2021, so we're going to extend it by three more months, and then the lease

amount will be that additional amount to make up for the past.” That's a little bit less common, but it is happening right now.

So, let me talk with you a little bit about me and my practice. I've been running Moschetti Law Group for quite a while. I come from a background primarily in litigation. I was a litigator for a long time; I practiced primarily up in the Bay Area. I had a lot of great clients. I was very fortunate that out of law school, I had some notable names, and I'm very thankful for being able to represent them. I've represented Some C level executives from some major banks and investing institutions that you've heard of, and some extremely prominent technology CEOs. I was lucky to build a very fast reputation amongst those people and get to represent them: some high-level investors, a lot of multifamily.

So I practiced there for ten years, and then I moved down here. I have been working a lot in the brokerage space as well, learning the the finance side and bridging to my financial education. What I really enjoy doing is looking at it from both ends, because all these decisions for commercial real estate owners are not just legal decisions, they're financial decisions as well, so you need to have an eye toward growth and you need to have an eye toward how your cash flow is going to work—making sure you're profiting properly.

All those things need to be met in order for it to be a good action, and that's what my firm brings to the table: the ability to look at it more holistically than then some other law firms do. I also try to operate more as a boutique; I try to make sure that you're able to get a hold of one of our attorneys right away. We are here for you, we're here to serve. I believe communication is extremely important. You have the right to be updated with your matter, anytime you want. We have systems in place to make sure that our communication is excellent, and we also have systems in place to make sure that your specific goals are met, that our legal strategy needs to match up with your business strategy. That's what sets us apart.

So in conclusion, the rules can be really complicated because there's so many layers: you've got your state rules, your county rules, your local rules, your court rules, and then just general rules as well. You also have your laws and things like that, you have your leases, and all those things have to mesh together. It can be complicated. And if you need help with strategy, my firm is is ready, willing and able to help you with that, or any

prominent real estate attorney can help you with it as well. But I'm happy to have those conversations with you, and make sure that we can get you on the right track. Now, if you can renegotiate your lease, that's great. I really do believe that your best outcomes happen by renegotiating; I'd much rather see a very successful negotiation, where everybody walks away at least somewhat happy, than have to take it to court where nobody is going to walk out happy at all. That's the best situation.

I will caution, on the residential side—before you have those renegotiation talks, please talk to an attorney first. Even trying to get to an agreement can be a violation of the rules, which is punishable and you can be fined for. For residential people, you have definitely got to talk to an attorney. But I'd encourage commercial owners as well to talk to an attorney, even if it's just to say, “Hey, this is what I'm thinking about doing, does this make sense? Am I going to get into hot water?” I'm happy to have those conversations with you.

So with that, let's go to some question and answer and see where we can go:

Okay, somebody wanted me to go a little bit more into *force majeure*. *Force majeure* can be thought of as the act-of-God claim. It can excuse performance, but it's really a very specific thing. Almost every lease says it does not excuse the performance of paying rent. What it is designed to do is to excuse performance of certain things; for example, your ability as a landlord to deliver to the tenant may have been interrupted by the coronavirus situation. And so a *force majeure* is a valid claim to defend against holdover penalties or the operating covenants, like you need to be open certain hours or do tenant improvements. When those have to be done, *force majeure* can be a valid excuse.

Great, security deposit burn-down. So security deposits can be burned down; I would say this is something to consider in the commercial space, I would not do it in the residential space without talking with an attorney. The security deposit burn-down is when you take some of that security deposit as partial rent. Do it in writing—it should be written out. It would be most helpful if you had an attorney write this, because it's a substantial change to your lease. On the residential side, do not do this without talking with an attorney. And I think that's it.

So I want to say again, I really value your time today. Thank you so much for letting me talk with you. We are going to be doing these webinars every month on different topics. We are recording this and so this will be made available to you, as well as a transcript, as well as the local rules. A lot of you have been asking for the rules: yes, I will send those out to you and I will also put them up on our website, so you have a nice place to find them. So again, thank you for your time. I appreciate the opportunity to talk with you about this, and have a great rest of the day.