

---

# Rent Obligations on Retail Space in the Midst of a Pandemic: A Path Forward for Landlords and Tenants

---

By: Ted Zangari, Esq.  
Sills Cummis & Gross P.C.

## DISCLAIMERS:

The opinions expressed herein are those of the author and do not necessarily reflect the position of his firm, colleagues, or clients.

The information provided herein does not, and is not intended to, constitute legal advice; instead, all information is for general informational purposes only.

[www.TheShoppingCenterLawyer.com](http://www.TheShoppingCenterLawyer.com)

a law blog hosted by **Sills Cummis & Gross P.C.**  
focused on Shopping Center Legal Issues



Business conditions in the wake of the COVID-19 pandemic are deteriorating so rapidly and on so many levels for retailers and shopping center owners in the U.S. that it would be economic suicide for landlords and their tenants to simply retreat to their corners and take intractable positions.

Retail landlords should not be taking an across-the-portfolio “pay your rent or else” response to tenant requests or demands for rent relief, without any regard for asset or tenant-specific conditions or any concern that half the country’s retailers have cash-burn rates that could lead to insolvency within a matter of months in the absence of shared, collective sacrifice by creditors – *necessarily including landlords*.

Likewise, retailers should not be making blanket statements refusing to pay rent on any of their leases, without any regard for store location particulars or the fact that landlords are answerable to their lenders/partners and have their own bills to pay.

The harsh fact is that landlords and their retailers need each other now more than ever. The pressures of e-commerce presented a *common challenge* over the last decade. Now, the COVID-19 crisis presents an *existential threat* to both parties if its aftershocks are not handled calmly, soberly and wisely by landlords and their tenants, starting with a case-by-case, store-by-store, review of each situation—not kneejerk, rigid blanket pronouncements.

This presentation, authored by a commercial real estate attorney with over 30 years' experience representing dozens of regional and national retailers and shopping center owners in lease transactions (including lease restructurings) across the country, is an attempt to find ***common ground***.

But first, here's a brief review of where each party is coming from...

## LANDLORD'S PERSPECTIVE:

There are certainly legitimate reasons for landlords to hesitate before considering rent relief requests/demands:

- some tenants, especially mom-and-pop businesses and heavily leveraged retailers of all stripes, may not survive no matter what amount of rent relief is offered—why throw good money after bad or spend time structuring rent relief with a tenant who is doomed to failure anyway?
- on the flipside, landlord must weed-out tenants who don't actually need the relief and are merely seeking to take advantage of the situation or hoard cash reserves
- lenders, servicers, investors and jv partners will have approval rights over any reductions or changes in the rent stream, especially where so many tenants are impacted;

- coverage ratios or other loan requirements must be maintained to avoid triggering non-recourse carve outs, default interest rates, acceleration of debt service, time-of-the-essence declarations, and a host of other penalties and remedies;
- ICSC has asked Congress and the White House to require all regulated mortgage lenders to offer a 90-day forbearance on all commercial loan obligations—unless and until that happens, the landlord cannot be expected to offer rent relief without the cooperation and approval of its mortgage lender (more difficult in the case of securitized loans where a servicer is involved);
- tenant has other sources of financial relief: government assistance programs (including the federal CARES Act, which provides loan forgiveness for up to 8 weeks of paid qualified expenses including the payment of rent and utilities) and new conventional loans;

- tenant's other landlords, as well as any franchisor and all other significant creditors, must also be part of any overall forbearance or restructuring plan – one landlord, or even one type of expense, should not bear all the burden of assisting the tenant;
- tenant should also look to its insurance policies: business interruption insurance coverage may ultimately be available under existing policy language or via proposed legislative or regulatory mandates.

## TENANT'S PERSPECTIVE:

There are certainly legitimate reasons for *many* tenants to request (not demand) that their landlords shoulder *some* of the financial pain at *some* store locations:

- landlord may have closed the shopping center earlier than governmentally mandated (or closed more of the center than governmentally mandated)—counsel may be telling the tenant “this is a ‘taking’ under the lease’s condemnation clause”;
- a portion of the center’s common area may have been contaminated by a visitor or employee, thereby causing the closure of the center—counsel may be telling the tenant “this is a property damage incident under the lease’s environmental or casualty clauses”;



- the lease may require the landlord to carry rent loss insurance—counsel may be telling the tenant “it’s landlord’s problem if the policy doesn’t cover pandemics or viral contamination”;
- the lease’s “force majeure” clause is unlikely to expressly excuse the payment of rent or provide that a pandemic is an uncontrollable event, but the language may be silent or unclear—in which case counsel may be telling the tenant “take your chances and let the court decide.”

## THE HARSH, URGENT REALITIES CONFRONTING **LANDLORDS**...

Shopping center owners and their lenders, investors and partners have various practical realities to consider before refusing to grant rent relief—even where the tenant has boldly sent a blanket “refusal to pay rent” form letter (as difficult as it may be to accept such behavior). These realities include:

- eviction proceedings are being frozen in many jurisdictions and when courts finally return to “normal,” dockets will be clogged for months or years —so litigation may not be desirable;
- even if lease language is favorable to the landlord, a judge could be receptive to novel “equitable” theories (such as the defenses of “impossibility” and “frustration of purpose”) in an effort to find relief for the tenant;

- even assuming lease termination/eviction proceedings move forward quickly and favorably for the landlord, would landlord's mitigation efforts even yield sufficient re-letting proceeds?
- the answer is “unlikely” primarily because of these additional harsh realities:
  - regardless of whether pad, in-line, big box or other store format, there will be fewer “back-up” retailers, especially credit tenants, waiting in the wings to take over store locations—and those prospects will likely be chased by many landlords in the same market;
  - “fair market rental value” for retail premises has just been dramatically re-set across the country...no market is immune;

- future tenants may seek shorter lease terms than the typical 10-year lease, and early termination/kick-out rights and “pop-up store” license agreements will become more commonplace.
- for the landlord fortunate enough to find a replacement, that tenant would no doubt insist on rents below the newly-reset “fair market” rents and negotiate very tough lease provisions, and there would be significant upfront financial expenditures required of landlord for a tenant improvement allowance, brokerage commission, etc. (not to mention a free rent fit-out period);
- as a result, the landlord would have a colossal monetary judgment against the defaulting tenant—but would that tenant survive long enough and have enough cash left for landlord to collect the amount owed?;

- ...which, of course, leads us to the “B”-word: waiting too long before acting on a tenant’s rent relief request may contribute to or even precipitate a tenant **bankruptcy** filing, the end of which would potentially result in landlord receiving only the statutory maximum of one year’s rent if the lease were to be rejected—not to mention the lost rent until a new tenant is secured and opens for business, and the added upfront landlord expense of a new tenant improvement allowance, brokerage commission, etc.;
- further, a new wrinkle has come to light in the *Modell’s Sporting Goods* bankruptcy case: a liquidation or going-out-of-business sale has been postponed (it’s difficult to run a “store closing” sale when a store is temporarily closed)—as a result, the court has permitted rent payments to be delayed over the protests of landlords.

## THE HARSH, URGENT REALITIES CONFRONTING TENANTS...

There are also various practical realities for tenants to consider before failing or refusing to pay rent. These realities include:

- litigating lease language (when the courts finally re-open) would be unlikely to result in a favorable ruling for the tenant:
  - a tenant seeking rent relief on the theories of takings, casualty, force majeure, etc. will be hard-pressed to prevail in the absence of clear and unambiguous lease language (rare);
  - the chances of a judge rendering a favorable ruling on novel equitable grounds (such as the defenses of “impossibility” and “frustration of purpose”) are equally unlikely;

- in any event, to unclog the judicial system, courts may resort to Alternate Dispute Resolution or “small claims”-type forums with no little or no opportunity for discovery—likely giving landlords a distinct tactical advantage.
- late charges and interest on late payments will continue accrue and be honored by the court;
- for chain retailers, leases with the same or related landlords may be cross-defaulted, so top-performing store locations could be jeopardized by a strategy of selective rent payments;
- if a landlord moves quickly following a rent default and the lease language and law of the jurisdiction are favorable, the tenant could find its lease suddenly terminated;

- refusing to pay rent will not only be less likely to motivate a landlord to cooperate but could be interpreted by the landlord as a threatened breach of the lease and, worse, could result in an *involuntary* bankruptcy filing by a group of landlords and other creditors;
- seeking *voluntary* bankruptcy protection while government-ordered store closings are in effect is not ideal because going-out-of-business sales are impossible—and proceeds from liquidation sales typically help a retailer pay rent and other expenses.



## SO WHAT SHOULD TENANTS DO NOW?

- Review store leases, one by one, in consultation with counsel, with an eye towards two objectives:
  - Immediately--for the rent relief request: Identify any language that is helpful to a claim of rent abatement;
  - For subsequent use in any potential lease re-negotiation: Identify any valuable lease provisions that can be traded such as limitations imposed on tenant (e.g., radius and use restrictions) and rights in favor of tenant (e.g., use exclusives, renewal options and co-tenancy protections) that can be diluted or waived;

- Review store by store performance, with the goal of preparing two deliverables for landlord's review and consideration (either in the initial rent relief request or subsequent lease re-negotiation):
  - A “Four-Wall Analysis” that provides a snapshot of each store location's set of key revenue and expense line items;
  - A list (with input from store and district managers) of “on the ground” factors beyond tenant's control that may have previously contributed to the store's demise or that may exacerbate sales declines going forward, such as high vacancy rates, loss of anchor tenants, poor tenant mix, etc.

- Consider your *near-term* liquidity needs and prepare an overarching restructuring plan that: (1) states, with as much specificity as possible, the reasons for the rent relief request, (2) assures the landlord that your request is not merely an effort to take advantage of the situation or hoard cash reserves but rather a legitimate effort to “stay afloat,” and (3) explains *how* the company intends to maintain liquidity and continue to operate for the next 12-18 months, until a coronavirus vaccine is widely available and consumer behavior reverts to semi-normalcy.
  
- Components to a persuasive restructuring plan should specifically address:
  - Anticipated “shared sacrifice” (forbearance/forgiveness) by significant creditors, including landlords, as well as any franchisors (if applicable);

- Anticipated utilization of governmental assistance (grants and loans);
  - Plan for phased-in re-opening of stores as states/regions ease social restrictions—how is the company preparing the work force, preparing the workspace (including potential employee testing), and intending to manage in-store physical distancing (including any contemplated “curbside” order intake or delivery activities)?
- Review insurance policies, including endorsements, for business interruption or rent coverage and consider filing a claim in consultation with counsel.

- Apply for government assistance but beware:
- program funding has been limited and mostly consists of loans, not grants;
  - CARES Act loans (Paycheck Protection Program or “PPP”), which provide for forgiveness of that portion of a loan used to pay qualified expenses for the 8 week period after the loan is funded, are problematic because:
    - 75% of the loan amount must be utilized to fund payroll—for many retailers, that percentage is prohibitively high;
    - at the same time, only 25% of the loan amount can be used to pay operating expenses including rent & utilities;

- the forgiven amount of the loan applicable to operating expenses requires the *actual payment* of those expenses, so any deferral or waiver of rent by landlord must be structured carefully to avoid tenant either being ineligible for the loan or inadvertently falsely certifying the amount of rent actually paid to its landlord.

- Finally, establish a dialogue with each landlord...
  - Whether it's an initial phone call, e-mail or letter, it is generally unwise to *refuse* to pay rent for the reasons noted above, among other reasons.
  - Nor is it productive to use a “one size fits all” approach to rent relief requests;

- Instead, tailor each communication with due regard to the particular landlord and specific location, and consider:
  - mentioning (without too much posturing) any helpful lease language that might favor a rent abatement in the absence of landlord cooperation;
  - noting any aberrational negative results of the “Four-Wall Store Analysis” in contrast to tenant’s other stores, including any “on the ground” facts beyond COVID-19 and beyond tenant’s control that may have been harming sales or that may harm sales when the center and store re-open;
  - providing the restructuring plan described above;

- assuring landlord that tenant is (1) seeking “shared sacrifice” (forbearance/forgiveness) from *all* of its landlords and other significant creditors, (2) obtaining government assistance, (3) pursuing an insurance claim, and (4) planning a phased-in re-opening of stores as states/regions ease social restrictions;
- hinting (if landlord balks at any notion of relief) at the possibility of trading valuable lease provisions in exchange for rent relief; and
- requesting “rent relief.”



- The “ask”—what sort of rent relief to request?
  - Recall that up to 8 weeks of paid rent (up to a maximum of 25% of the total loan amount) is eligible for loan forgiveness under the CARES Act;
  - Recall further that in order for the loan to be forgiven, the rent must be incurred and paid during the 8 week period after the loan is funded, thus leaving tenant liable for all other rent due before and after that 8-week period;

- Hence, the tenant could open its dialogue with landlord with a request for several weeks' rent relief reflecting the period of pandemic-related store closing occurring PRIOR TO AND FOLLOWING the period of relief (loan forgiveness) covered by the CARES Act (assuming the tenant will qualify for a PPP loan and will not be back in operation upon the expiration of the CARES Act relief/forgiveness period);
  
- What form of rent “relief” request is realistic?
  - Landlords—and its lenders, servicers, investors and/or jv partners—will be unlikely to waive or reduce rent...*deferral* of rent is much more likely;

- Deferred rent will most likely be limited to base or minimum rent.

## WHAT SHOULD LANDLORDS AND THEIR PROPERTY MANAGERS DO IN RESPONSE TO TENANT'S REQUEST?

- assure the tenant that you understand its predicament;
- remind the tenant that landlord also has financial obligations— mortgage debt, utilities, insurance, real estate taxes, payroll, etc.;
- also remind the tenant that landlord has lenders (including, possibly, CMBS servicers), investors, and joint venture partners to whom it is accountable and who have various approval rights over changes in the rental stream;
- congratulate tenant for seeking (or encourage tenant to seek) an insurance claim and government assistance;

- assure tenant that landlord is taking steps to reduce CAM expenses where possible due to closed or underutilized common areas and is considering an appeal of real estate property taxes if the center becomes over-assessed;
- most importantly, RESIST the understandable temptation to dismiss out of hand any notion of rent relief—except, perhaps, in the case of “financially healthy” chain retailers and those retailers who are still operating semi-normally in their premises (think grocery stores and pizzerias, delis or coffee shops with few seats and a mostly take-out/delivery business).

- INSTEAD, EITHER:
- invite the tenant to submit evidence of its actual and projected losses at the particular premises and evidence of its efforts to seek relief from government, insurance carriers, etc. (if not included with the tenant's request),
  - commit to reviewing tenant's request with landlord's lender, investors, etc.,
  - note that rent remains due and that landlord is not making any promises of rent relief, and
  - consider, in the meantime, waiving late fees and/or postponing the date when interest begins to accrue under the lease,
- OR-
- cut right to the chase and propose a specific offer of rent relief (with lender/investor/partner approval).

## WHAT KINDS OF “RENT RELIEF” ARE WE SEEING?

- **SOME CONTEXT:** With the CARES Act implicitly setting a “financial suffering” start date of February 15, 2020 and a target “re-opening of the economy” date of July 1, 2020, and offering a maximum of only 8 weeks rent relief (loan forgiveness), there’s a “rent gap” of 2.5 months under the best circumstances and a 4.5 month gap if tenant is unable to apply or qualify for a PPP loan.
- Landlord rent relief accommodations appear to be on the short-end of that range, with most owners (and the parties to whom they are accountable) figuring they can always grant additional rounds of relief in future months if government-ordered store closings are extended or customer traffic is sluggish and additional government (or insurance) relief is not forthcoming.

- Rent relief can come in various forms, including deferred, waived, reduced or alternate rent, or permitted drawn-downs of any cash security deposits:
  - DEFERRED RENT: Arrangements for pay-back of the deferred rent have varied widely in terms of the installment payment intervals vs. a lump sum “balloon” payment at a defined date in the future (or a combination of the two). Another variable is whether interest will accrue on the deferred amount. Regardless, the deferred amount should become immediately due in full if any item of non-deferred rent is not timely paid or some other lease default arises.
  - WAIVED/REDUCED RENT: In those occasional instances where rent has been waived or reduced, landlords have been requiring a commensurate extension of the lease term (usually at a higher rent rate).



- USE OF SECURITY DEPOSIT: In lieu of or following deferred rent relief, some landlords are permitting tenants to dip into all or part of their cash security deposits to pay rent—with the amount of the depleted security deposit to be restored, with or without interest, at a defined period in the future (or becoming due immediately if any item of non-deferred rent is not timely paid or some other lease default arises).
- ALTERNATE RENT: Once the tenant is able to resume operating its store, landlord could convert all or some of the monthly base rent to *percentage rent* based on sales placed at or fulfilled from the premises.

- **TRADE-OFFS BY TENANT:** In exchange for providing any of the foregoing forms of rent relief, landlord may require (or, conversely, tenant may induce a landlord's cooperation by offering) a renegotiation of the lease to:
- extend (or shorten) the term of the lease;
  - if none exists, provide a landlord recapture right upon the store “going-dark”;
  - revise/eliminate any tenant kick-out rights and/or provide landlord with kick-out rights—where a kick-out right is based on gross sales, consider adjusting same to include sales filled from the store in recognition of stores becoming mini-fulfillment facilities and the trend towards BOPIS (buy on-line, pick-up in store);

- provide a landlord right to relocate or “shrink” the store;
  - dilute or eliminate any tenant renewal or expansion options, co-tenancy protections, use exclusives, pylon/monument signage rights, or controls on the use of parking fields and other common areas, etc.;
  - impose or strengthen restrictions on tenant’s ability to open competing stores (radius restriction), assign the lease/sublet the premises, change or expand its permitted use, etc.
- FOR THE TENANT WITH LEVERAGE: Resist any dilution or elimination of valuable rights and protections, and perhaps insist on some new ones. Moreover, consider recasting the lease term and schedule of rent increases (possibly adjusting to the “new” fair market rental value).

## “PAPERING” THE RENT RELIEF:

- If landlord is concerned that news of its willingness to offer rent relief will spread throughout the center’s tenancy, landlord should consider requiring an upfront non-disclosure agreement or pre-negotiation agreement before *proposing* rent relief.
  
- Within the lease amendment or letter agreement, landlords should consider adding:
  - (1) a non-disclosure provision, if landlord is concerned that the details of the *agreed-upon* rent relief will spread throughout the center’s tenancy;
  
  - (2) estoppel-type language wherein tenant certifies as to the validity of the lease, accuracy of past CAM and other charges, absence of landlord defaults, etc.

- During the course of rent relief discussions—even any preliminary dialogue—both parties (especially landlord) should keep in mind that statements made in an e-mail or text could be construed to constitute an amendment to or waiver of the other party’s lease obligations, or may be used in any ensuing litigation. As such, be sure to always note that the lease can only be modified by a written agreement executed by both parties and consider with counsel whether any such communications should be designated as being “for settlement purposes without admissibility as evidence.”

## ABOUT THE AUTHOR

TED ZANGARI is a member of the law firm of Sills Cummis & Gross P.C. in Newark, New Jersey where he sits on the firm's Executive Committee and is Chair of its Real Estate practice group. He concentrates his practice on the development and leasing of commercial real estate throughout the United States. Specifically, Mr. Zangari has extensive experience representing landlords and retailers in lease transactions involving enclosed malls, strip shopping centers, mixed-use redevelopment projects, "street" retail store locations, lifestyle centers, department stores, theatres, themed-restaurant and entertainment attractions, big-box stores, and supermarkets.

Mr. Zangari is active in several commercial real estate trade associations including the International Council of Shopping Centers (ICSC). He is past Chair of ICSC's North American Government Relations Advisory Committee and is the founding member and past chair of ICSC's state political action committee, having previously served as co-chair of the ICSC NY/NJ Alliance Program, co-chair of the ICSC's State Government Affairs Committee for the Eastern Division, and chair of the ICSC's State Government Affairs Committee in New York and New Jersey. Mr. Zangari is also a frequent contributor to numerous professional publications and conferences.

Mr. Zangari received his law degree from Georgetown University Law Center and his undergraduate degree, with special honors, from George Washington University.

He can be reached at 973-643-5781 or by email at [tzangari@sillscummis.com](mailto:tzangari@sillscummis.com)