

# Article

## Texas Landlords and Tenants: Get Prepared to be Reasonable

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The challenges facing our nation as a result of the rapidly spreading coronavirus are unprecedented in modern times. Compounding the public fear of the virus is an ever-changing regulatory regime with governmental entities at every level issuing overlapping guidance and/or restrictions on a daily basis. Here in Dallas, we have moved from "social distancing" to "shelter in place" orders in a short period of time. Individuals and businesses alike are required to rapidly adapt to this (hopefully temporary) new way of life, and endure economic hardship for the general health and welfare of the nation overall.

Landlords and tenants of all types of real property, whether retail, multifamily, office, industrial or hospitality, have been acutely affected by COVID-19 and the resulting regulatory environment. In many cases, tenants are prohibited from operating their businesses, and landlords are prohibited from exercising some rights and remedies whether due to governmental regulation or contractual agreement. Parties are already feeling the financial pain, as revenues and income plummet with no clear end in sight.

So, what path should landlords and tenants take in hopes of moving towards a more economically viable future? No lease document or business is the same, and each landlord/tenant relationship must be handled on its own particular facts and circumstances. To help you get started, please keep these considerations in mind in when trying to navigate these difficult times:

### **BE PREPARED**

Before taking any steps, both landlords and tenants must be attuned to the most current regulatory restrictions, and fully understand how they apply to the their building and the tenant's business operations therein. While a health club tenant may be required to cease operations, grocery store, pharmacy and hospital tenants have been deemed essential businesses which are permitted (or required) to continue operating. For ease of reference, the most up-to-date information can be found on the Dallas County and Dallas City Hall websites.

Even though a building and/or any number of its tenants may be required or forced to close or cease/reduce operations due to applicable law or sheer need, the effects of such a closure or ceased/reduced operations between landlord and tenant will be largely governed by the contractual agreements affecting the parties.

In addition to their lease, license or other use agreement, landlords and tenants should review all applicable documents, which may include ancillary documents such as a subordination, non-disturbance and attornment agreement (aka SNDAs) with the landlord's lender, loan documents secured by the building, lease or tenant's business or FF&E, tenant's franchise agreements, and any applicable insurance policies.

Moreover, after inventorying and understanding the documents affecting the lease relationship, it will be crucial for landlords and tenants to consider all relevant stakeholders who may have a say in the parties' respective business obligations, before the parties can negotiate and finalize a mutually beneficial solution.

For example, a landlord may have debt covenants to its lender regarding rental relief which are independent of a tenant request, while a tenant may need to consider its covenants to its franchisor who permits it to operate its business under a particular tradename before agreeing to any changes to its lease or operations.

Further still, insurance claims may require coordination with multiple carriers and insureds to maximize any applicable policy coverage, whether under business interruption insurance or otherwise, and ensure the best recovery for all interested parties.

## **BE REASONABLE**

In dealing with COVID-19's effects on a landlord/tenant relationship, both sides need to appreciate this is an unprecedented event for each of them. Unique circumstances like these can result in each side taking completely different approaches on an issue and having dramatically different expectations, each out of sheer need for survival. However, both sides must be reasonable and be prepared to compromise in working with applicable stakeholders to weather this uncertain storm.

Neither party wins if the landlord loses the property because it afforded too much tenant accommodation or a tenant goes out of business due to full lease and payroll obligations with little or no revenue.

To better reach a compromise, each side should proactively mitigate its damages. You will have difficulty asking for and getting a compromise from the other side if you have not done your best to minimize your own losses. The parties should also keep communication lines open on certain issues like delays in a buildout or decisions to close or partially close operations as a result of COVID-19.

By avoiding surprises and keeping the other side informed, the parties can increase their chances for a mutually workable solution. Since circumstances are changing weekly (or daily!) due to many factors, including government ordinances and market conditions, each side must remain nimble. The dynamics for standard of care and conduct are constantly changing and you may find yourself being held to a different standard.

No one knows the ultimate scope or timeline of this unprecedented event, but there is a strong likelihood that the customary rules and approaches that have driven leases will change. In extreme environments like these, parties will go to great lengths to apply legal doctrines that may not have been traditionally applicable, and some of those might succeed.

These efforts, if successful, could have a transformative effect on public policy and common law doctrines, and further influence the real estate market and how leases are negotiated in the future. We already know that lease forms will be updated to address the current situation.

However, parties should remain aware of the context in which their claims are advanced. For example, a tenant should be very cautious about using an out-of-place legal doctrine as a long shot defense to paying rent when it has recently received a substantial lease incentive from Landlord, such as a tenant improvement allowance or a particular buildout.

Due to the market's uncertainty, a bad deal today may be a great deal in a few weeks. Additionally, customary lease enforcement actions a few weeks ago, might be subject to a moratorium tomorrow.

In the end, both parties share the same goals of surviving this event and avoiding expensive, time-consuming litigation (with our apologies to the litigators). As a result, don't overplay your hand, but be reasonable and be prepared to compromise.

By gathering all relevant information and consulting with your team of knowledgeable advisors, you should be well positioned for the negotiating table.

Michael Krywucki is a shareholder whose practice spans all major types of real estate. Drew McDonald and Drew Palmer are associates who also specialize in real estate. All three work in the Dallas office of Munsch Hardt.

To read the full article in the Dallas Business Journal, [click here](#).

## Primary Contacts



**Andrew Palmer**

Dallas  
214.880.7648  
[apalmer@munsch.com](mailto:apalmer@munsch.com)

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**Michael Krywucki**

Dallas  
214.855.7522  
[mkrywucki@munsch.com](mailto:mkrywucki@munsch.com)



**Andrew McDonald**

Dallas  
214.855.7546  
[dmcdonald@munsch.com](mailto:dmcdonald@munsch.com)