

## Navigating the Eviction Process

Current economic conditions have caused our office to see an increase in the number of debtor liability litigation, such as foreclosures, simple money judgment actions, and evictions. Careful consideration of the legal process relating to these actions provides a realistic perspective on whether it makes sense to pursue such claims in court. Today, we explore evictions, which employ a simplified legal process and, for that reason, often are enticing to landlords as an efficient means of obtaining a remedy – the return of property and a money judgment.

An initial consideration in determining whether to pursue eviction of a tenant is the economic impact of an eviction. A landlord can seek to evict a tenant for a material breach of a lease. Typically, that breach consists of a failure of the tenant to pay rent, common area maintenance (CAM) charges, or other amounts described in the lease. Often, a tenant will have breached the lease by failing to make *full* payment as required under the lease. In other words, the tenant may be making partial payments and may be making payments later than required by a lease. Under certain conditions, however, such partial or late paying tenants may be preferable to no tenant at all or a judgment against an uncollectible debtor.

In such situations, it may make most sense for a landlord to negotiate favorable terms from a tenant in addition to those contained in an original lease. For example, the landlord and tenant can agree upon a lease amendment that would require the tenant to increase the amount of security for the payment of rent, or redefine the form of security that would secure the obligations of the tenant under the lease (*e.g.*, a guarantee, a pledge of collateral, a general business security agreement in personal property, a mortgage on other property owned by the tenant, etc.). The landlord should consider the possibility of obtaining other items of value, even if not immediately quantifiable, that it may be able to obtain from a tenant short of commencing an eviction action.<sup>1</sup>

If such a negotiated resolution is not immediately available, an understanding of the eviction process is important to completing an analysis of the costs and benefits of an eviction action. In Wisconsin, eviction actions initially proceed through small claims court. Small claims court holds several advantages for the landlord. For example, and as opposed to "large" claims, a landlord need not be represented by an attorney in small claims court; instead, the landlord can be represented by any full-time employee. Moreover, the rules of procedure and evidence are relaxed in small claims court, making it more accessible to the

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landlord who chooses to eschew legal counsel. Also, the small claims process is much faster than the "large" claims process. In "large" claims, the time between the filing of a summons and complaint and full adjudication often exceeds a year. In small claims, it is not unusual for the process to play out through a conclusion in one or two months.

Despite the relative informality of eviction actions, it is important for a landlord to carefully prepare for an eviction claim with acute attention to detail. Generally, the steps of a successful eviction action include a factual and legal investigation of the claim for eviction, the issuance of a notice of default to the tenant, and the commencement and prosecution of the eviction action.

First, a landlord who believes a tenant to be in default of a lease must scrutinize the lease to confirm the default and identify the remedy. Often, leases contain terms regarding the amount of rent and the deadline for payment, as well as a provision describing events of "default." It can be, therefore, easy to demonstrate that a tenant's failure to pay rent in full and on time violates a clear provision of the lease. Other kinds of perceived "defaults" may be more difficult to confirm in the lease language. For example, a complicated CAM charge provision may lead to different interpretations of the appropriate CAM charge, both of which may be legitimate. Similar complications may arise in any number of lease provisions.<sup>2</sup> After determining that a default has occurred, the landlord should gather all pertinent documentation supporting the existence of that default.

After defining the default and gathering the pertinent documents and information supporting the claim of default, the landlord should turn back to the lease. Commercial leases often contain sections identifying the remedies available to a landlord upon an event of default. Remedies often (and should) include at least the right of the landlord to terminate the lease and, alternatively, terminate the tenant's right to possess the leased premises but continue the existence of the lease. The subtle distinction between these two remedies can become quite important. When a landlord terminates a lease, the landlord may be terminating the tenant's obligation to make future rent payments beyond the date of termination. Therefore, if a landlord terminates a five-year lease after one year, the tenant will not be obligated to pay the remaining four years of rent due under the lease. On the other hand, if the landlord only terminates the tenant's right to possess the leased premises one year into a five-year lease, the tenant remains obligated to pay the remaining four years of the lease, unless the landlord is able to find a new tenant to mitigate its lost rent damages. The lease may contain other remedies available to the landlord, and the landlord should consider each

remedy and determine which one is most advantageous to it.

Second, once confident that a default has occurred and comfortable with the preferred remedy, the next step typically involves the landlord providing some form of notice to the tenant. Again, the lease should contain provisions regarding the issuance of notices, including what actions require that a notice be issued, how the notice must be sent, and to whom the notice must be sent.<sup>3</sup> Moreover, the lease may contain provisions that grant the tenant a "cure period" in which to cure any default, and which typically must be included in the notice. Therefore, the landlord may not be able to declare the lease terminated, or the tenant's right to possession terminated, until after issuing a notice of default and after allowing any cure period to lapse. The notice should state with specificity the alleged default, a demand that the tenant cure the default (if the tenant is granted a cure period under the lease), and a statement of the consequences that will result if the tenant fails to cure the default within the cure period, (e.g., "if the default is not cured within ten days of the date of this letter, your right to possession of the leased premises shall be considered terminated effective the day after the cure period.")

Third, if the tenant fails to cure the default within a prescribed time period, or if the tenant is not granted a cure period for the particular default at issue, the landlord may now proceed to commence an eviction action. The clerk of courts for most counties make available simple "summons and complaint" forms needed to commence an eviction action in small claims court. After completing the form, the landlord can file the summons and complaint, along with a modest filing fee, and proceed to "serve" tenant with these legal documents.<sup>4</sup>

Whereas in "large" claims cases a defendant must serve a written answer to a complaint within a prescribed period of time, eviction actions typically set forth a "return date." The return date is a date, between 5 and 30 days after the issuance of the summons and complaint, on which the tenant must appear in court to admit or deny the allegations in the complaint. What is required to take place on the return date and what happens thereafter can vary widely from county to county.

In some counties, if a tenant fails to appear in court on the return date or admits the allegations in the eviction complaint, a judgment of eviction is immediately entered against the tenant, a "writ of restitution" is issued to the landlord that would allow the landlord to ask the sheriff to remove the tenant from the premises, and any money damages sought are immediately awarded (subject to

the landlord's ongoing duty to mitigate its damages by attempting to re-rent the premises). In other counties, such as Dane County, if a tenant fails to appear on the return date or admits the allegations in the complaint, the landlord may be granted a judgment of eviction but the landlord would not be awarded any damages until after he has secured a new tenant on the property.

The practice in the event the tenant denies the allegations in the complaint also varies from county to county. In some counties, if the tenant appears on the return date—say, a Tuesday—and denies the allegations in the complaint, the court will set a trial to take place on Friday. At that trial, the court will require the plaintiff to prove its case with exhibits and witness testimony and allow the defendant an opportunity to defend itself, then issue an appropriate decision.

Not all counties, or all cases, allow for such expeditious resolution. In some counties, the time between the return date and the trial could be a matter of weeks. Moreover, if the court is convinced that an eviction case is sufficiently complicated, or if other circumstances exist that weigh against an expeditious resolution and in favor of further investigation and more deliberative consideration, the eviction trial can take place months after the return date.

If there were a limitless supply of good tenants, it would be easy to decide to evict a defaulting tenant to make room for the "good" tenants waiting in the wings. Unfortunately, "good" tenants can be rare, especially in the current economic climate. Therefore, before proceeding directly to eviction, consider the economic ramifications of that decision. Perhaps eviction is not the best medicine for a landlord's bottom line, in which case negotiating acceptable lease amendments may prove to be a better resolution. If a landlord decides that eviction is the appropriate course to take, attention to detail and good record keeping can make the eviction process move along efficiently and expeditiously, and allow the landlord to move on with its renting activities.

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<sup>1</sup>Of course, the threat of eviction can be used as a tool to persuade a tenant to adhere more closely to the requirements of the lease or agree to favorable terms in a lease amendment.

<sup>2</sup>Of course, you can consult with an attorney with experience regarding leases and evictions to get a better sense of whether any tenant act or omission constitutes a breach or default of the lease.

<sup>3</sup>Wisconsin Statutes contain default provisions that apply in many situations where a lease is silent on a certain subject, such as notices.



<sup>4</sup>Retaining a process server typically is the safest way to ensure proper service of documents on a tenant. However, under certain circumstances, service by mail may also be appropriate. To ensure that the summons and complaint are properly served, consult with the lease, state statutes, and any local rules for the county in which the eviction action is commenced.

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