



**“TAMU Law Answers” Webinar Series:**  
**LEGAL ISSUES IN THE AGE OF THE CORONAVIRUS**

**“Commercial Tenant Considerations in the Age of COVID”**

**Presented July 8, 2020**

**Panelists:**

- Tisha Lynn Dodge, Attorney, Dodge Legal Group, PC
- Luz Herrera, Professor and Associate Dean of Experiential Education, Texas A&M University School of Law
- Kathryn D. McGlinchey, Attorney, Broude, Smith, Jennings, & McGlinchey PC
- Moderator: Peter Reilly, Professor of Law, Texas A&M University School of Law

While the panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.

**TRANSCRIPT:**

- All right, why don't we go ahead and get started. Welcome to today's hour-long webinar on commercial tenant considerations in the age of COVID-19. My name is Peter Riley. And I'm a professor at Texas A&M Law School. And I just want to say a few announcements before we begin.

We've got a whole series of past webinars in this COVID-19 series. We've dealt with the CARES Act, workplace implications, legal ethics, minority and women owned businesses. So there's a whole series of webinars if you want to look online to see past webinars. Tomorrow, on July 9th, we will have the second webinar in our immigration series. It's called the Supreme Court's DACA Decision and Its Impact. That'll be tomorrow, July 9th.

And then on July 16th, we will have a webinar on residential leases and evictions. You can find information on all of that at [TAMULawAnswers.info](https://tamulawanswers.info). And I'll just give a quick disclaimer. Everybody on today's panel is an attorney, but we're not offering legal advice. All attendees should consult their own legal advisors if they want legal advice.

So very quickly, we've got three panelists. They're all attorneys, as I've said. Let me just very briefly introduce them in the order they'll be presenting. First there is Kathryn McGlinchey, from Broude Smith Jennings & McGlinchey. Secondly, there's Tish-- excuse me-- Tisha Dodge, an attorney with Dodge Legal Group. And both Kathryn and Tisha are adjunct professors in our Entrepreneurship Law Clinic here at Texas A&M Law School. And then third is Luz Herrera, professor and Associate Dean for Experiential Education at the law school.

And just to give you a quick note about the schedule. Each of the three panelists will present for about eight to 10 minutes, and the rest of the time we'll be spending on Q&A. So if you have a question, please go to the bottom where there's the Q&A tab. Click on that, and write in your question. And we will be answering-- try to get to all those questions if there's time at the end after the presentations. So we won't be fielding questions as we move along. We'll be answering those at the end. So let's go ahead and start then with Kathryn McGlinchey.

- Hello. All right, hopefully, you can see my PowerPoint, which is going to be brief and painless. I'll let you know, I represent both landlords and tenants. So I've been party to some interesting discussions the last couple of months. And have seen what works in terms of negotiating with the landlord and what doesn't. I am going to do this presentation from the perspective of a tenant, but hopefully you'll get, along the way, some pointers if you happen to be a property owner and are looking at this from a landlord perspective.

All right, so the first thing you need to do before you can have a coherent conversation about your lease is read your lease. Because chances are, if you've read it recently you haven't read it from the perspective of a pandemic that we were never expecting to occur. So the first thing you're going to look for is a lucky for you provision that happens to be on point to this situation, a right to terminate the lease if you can't operate, maybe an affirmative abatement right if your landlord can't provide certain services. I'll tell you, you're not going to find a lot of that, but it's worth looking for.

And then you're going to want to review your force majeure clause. And that is fancy language for an out clause that addresses worst case scenarios. It excuses non-performance in situations where either the landlord or the tenant can't perform because of something outside of their control. I have seen these run the spectrum. On the tenant friendly side, you may actually have a force majeure clause that says, in the event of an infectious disease outbreak you're excused from performance. That's very unlikely.

More likely than not, it's going to be somewhere in the middle. It's going to generically reference acts of God. It's going to reference things outside of the landlord and tenant's control. Or you may be unlucky, and it may be very pro landlord, and specifically reference named perils, things we're used to dealing with, like floods, earthquakes, and hurricanes, to the exclusion of other events. So you're going to want to get a handle on what perils your force majeure clause covers.

Then you're going to look for carve-outs. Because what I'm noticing is a lot of landlords, either intentionally or through dumb luck, negotiated language that said no matter how bad things get you have to pay your rent. So if you have language that says no condition excuses your obligation to pay rent, what that translates into, if you were not an essential business and you

were closed for a couple of months, you're in violation technically of a continuous operation clause in your lease, if your lease said you had to continuously operate.

In that situation, your force majeure clause may help you. If it says you have to pay rent no matter what, that language is not available to provide you with a safety net. You're also going to look for other limiting language. These clauses run the gamut. Some of them say that performance has to be absolutely precluded for you to be excused from performance. They may say that the clause kicks in if your performance is delayed. It may reference preclusion in whole or in part.

So again, if it says that you are excused from those obligations that are precluded by an act of God, then continuous operation, if you were a non-essential business, that's something you can successfully argue your way around. But on rent, your landlord is going to say, hey, you weren't precluded technically from paying. You had the ability to go to your bank. Banks were open. Theoretically, you have other sources of funds. The mailman was still delivering checks to my mailbox. So you just want to kind of get a handle on that language.

Then you're going to want to look at your insurance provisions and see if you were required to maintain business interruption insurance. If you were required to maintain it, and you don't have it, that's obviously a problem. Hopefully, you do have it, and you can review the policy, and see if it helps you. What we're discovering is, again, most insurers either were ahead of the ball or got lucky, and they excluded from your coverage infectious diseases. And if that language is in there you're somewhat limited on what your recourse is.

This is something that it's a very new issue. There's not a lot of case law on it. People are looking at analogous case law. But one suggestion is, even if you can't collect proceeds for business interruption because you were shut down for two months under the county order, if you specifically had to shut down to clean your space, because somebody in your space actually had COVID, you were required to shut down for 14 days and deep clean, then you may have the ability to collect some funds. But it's very facts and circumstances.

So you'll need to review your business interruption insurance. And maybe go ahead and file a claim and see what the insurer says. That's something that people struggle with, if you don't want to file a claim and effect your premium. But your landlord is going to ask, well, did you at least try, did you have a dialogue with your insurance company? So that's something you're going to want to get ahead of.

Then you're going to consider external factors, like the availability of CARES Act and PPP loan money. This is something that your landlord is probably going to ask upfront when you approach him for relief, Did you apply? Were you eligible? If you applied, did you get any money? The period for application, as I understand it, has been extended. There is still some funds available. So that's something that you're going to want to look at. Because those funds, in addition to being applicable to payroll expenses, can also be applied to rent.

In Texas, unfortunately, we as commercial tenants don't have much to grasp on to in terms of tenant friendly legislation. California and other states got ahead of this and extended the

moratorium on evictions to cover commercial properties, as well as residential properties. There is also an attempt in California to gap fill into every single commercial lease an ability for a tenant or a landlord to terminate under certain circumstances. That was shut down by lobbyists. But certain states are being more proactive about trying to push that legislation through.

In Texas, the protection has been residential specific. So there is no preclusion under the law of your landlord's ability to pursue eviction. But skipping ahead a little bit, courthouse delays may work in your favor. Right now, jury trials are pushed until September. Non-jury trials just resumed in June by Zoom. There's a lot of technological issues. The judges are very far behind. So as a practical matter, what we're seeing is landlords don't want to file suit if they can avoid it, because they know their relief is going to be pushed that many more months out.

Going back up, even if you have no force majeure clause, or a force majeure clause that really doesn't work in your favor, there are some common law concepts, like impossibility, or impracticability, frustration of purpose, that kind of work the same way, that are legal arguments that you could present to your landlord. That hey, I'm unable to perform because conditions preclude me from doing so. So it's a good idea to kind of get ahead of some of those arguments.

Then you need to understand where you fall on the sympathy spectrum. And here, you need to understand that every tenant in a center is different. Every tenant in an office building is different. And what I'm seeing is landlords are showing more love to mom and pop businesses, as opposed to national chains that have the ability to move to an online footprint and get money through online sales. Restaurants, even if you're a mom and pop restaurant, versus a mom and pop dress shop, restaurants have been able to be open for takeout all along. So restaurants are going to be treated differently than general retail.

So this kind of-- and I'm skipping ahead-- whatever you do, ask for forgiveness. And ask for permission and not forgiveness. I got that backwards. What we're seeing is national tenants specifically are sending a global letter that says, we live in unprecedented times. And it's hard to make rent payments. So you may have noticed, we skipped our April one, and we're not paying May either, and we hope that's OK.

And that strategy is designed to see who really wants to advocate for themselves. So they send that to every landlord in the nation with which they have a lease. A certain percentage of them are going to push back and say, things are tough all over, you need to pay your rent. They eventually pay, but everybody else who is not so forthcoming with a protest gets stuck with that rent for a couple of months.

And my landlord clients hate that. They would much rather that someone pick up the phone and say, hey, here's what I'm proposing to do, then try to shove something down the landlord's throat. And even though it's hard to initiate eviction right now, landlords are being pushed to the breaking point in certain circumstances.

My own family drove up to the Michael's at Montgomery Plaza trying to pick up a pickup order and there was a lockout notice on the door. I don't represent that landlord, but I'm guessing that

they got one of those letters that said, hey, we're just not paying anybody this month, hope it's OK, and the landlord said, no, it's not OK, and called their bluff.

So you want to go to the landlord first, and say, hey, I've read my lease, and I have a proposal. And that proposal can be any one of the following. Application of your existing security deposit. If you already have funds on deposit with the landlord, tell them, hey, go ahead and keep it, I'll make it up later. If you're a good tenant, you've been there for a while, they may be willing to let you go without a security deposit, but it's definitely worth asking.

If you have an existing rental abatement, say at the three year mark, you're entitled to three months of free rent, ask the landlord to accelerate that and move that up. You don't get the benefit of that abatement three years from now. But you're moving around dollars within an existing universe, and landlords tend to be pretty comfortable with that.

You could also ask for a new or additional rental abatement. And the concept behind the abatement is I'm not paying this rent ever. I'm getting X number of months of free rent. My landlord clients are saying, that's great, but please extend your lease at the back end for an equivalent number of months so ultimately I get those dollars. They are also being pretty consistent about saying I'll abate your base rent, but I still expect you to pay taxes, and insurance, and common area maintenance.

You may ask your landlord, are your common area maintenance charges less now because you're not using as much electricity? There's not as much need for services at the leased premises. If so maybe the estimate that you're paying on the basis of is too high, and your landlord would consider recalculating it. So that's something else to consider.

And then finally, a rental deferral is I'm not going to pay rent for the next three months, but when I get back on my feet I'm going to pay it, say, two years from now, at a stated rate of interest. That's basically the equivalent of the landlord giving you a short term loan and agreeing to let you defer those payments. But understand that with a deferral, you'll be double paying. Because you'll be paying rent at that period of time in the future, but you'll also be paying some back rent.

Again, don't forget about paycheck protection dollars. If you've already borrowed money, you don't necessarily want an abatement that kicks in now, because it's to your benefit to go ahead and spend the federal dollars up front. So approach your landlord and say, I have money through the Paycheck Protection Program that will cover the next couple of months. I'd like the deferral to kick in after that.

Be prepared for your landlord to request financials, to ask did you file a claim on business interruption, have you applied for loans. They're going to want to ask those questions. Even if your lease doesn't obligate you to deliver that information, as a practical matter, you should be prepared to give it. And understand your landlord's position. If you don't pay them, and they have a mortgage, they're having a hard time paying their lender. So they're having the same conversations with the lender about forbearance that you're having with them.

If you go to them and say, this is what I propose to do, and they say that's great, but my lender has already approved the following workout terms, you may want to work within their universe because it makes their life a lot simpler. Otherwise, just be prepared that there's going to be a third voice at the table when you're saying I can't pay rent for a couple of months. Your landlord may be willing to agree to that, but they're going to have to run it up the flagpole and get approval from their lender as well.

So if none of that works out and you're still struggling, you may be looking at selling your business. You may be looking at bringing in an equity partner or a capital infusion. And that is where Tisha comes in, because she will explain the larger workout context if your attempts at working out your lease fail.

- Hey. Hi, my name's Tisha Dodge. I'm one of the adjunct professors at Texas A&M's Entrepreneurial Clinic. And I'm also a lawyer here in the Metroplex. And I look at leases all the time. I looked at one last night. And I've got a new one in my inbox this morning. So this is something that we are actually experiencing as lawyers.

So today, we're going to talk-- I only have a few minutes. This is part of a larger series that I'm doing for another client. So I'm not going to cover everything on every slide. But I'm going to hit just the highlight points. And there's also time for you all to ask us any questions.

So the first thing you want to do before you ever meet with a potential buyer or investor is you want to prepare your own business. I tell my clients it's like going out on a blind date. Before you ever start the date, there are certain things that you want to do to prepare yourself. So if you're going out on a blind date, you're going to take a shower and put on a clean shirt at the least, right?

So what I tell people is you start with the six C's. And so each C has a step that we will do to prepare your business. One of the things, and it's not sexy, but you need to do it, the first C is clean out, clean out your business. Make sure that the books, your bookkeeping is clean. Look around for unpaid invoices and clean all of that up.

The second C that I talk about all the time is to cut back on unnecessary expense to increase your cash reserve, so you look in the best possible shape for your potential buyer or investor. And one of the examples I had for cleanup-- I'm sorry, for cut back-- is look at your insurance premiums. Not a lot of people know that the Texas Department of Insurance has authorized insurance carriers to consider grace payments for payment-- grace periods for payments, or temporarily suspending premium payments.

If you can do that for your own insurance that's going to increase your cash reserves. Or if you want to go to your landlord, like Kathryn was saying, and go to your landlord and say, hey, has your [INAUDIBLE] decreased? Did you know that you could possibly put a decrease of your insurance premiums?

The second way you might consider cutting back on unnecessary expenses at this time is that there is some relief, legal relief for forbearance for mortgages. So if you have a mortgage that is

federally backed, there is some relief there for you. Or if you're trying to work with your landlord on suspending or decreasing your rent, like Kathryn was saying, a lot of landlords are in a rock and a hard place, because they have to deal with their own lenders.

Give this information to your landlord and say, hey, if your mortgage is federally backed, you could have some relief, and work with your landlord. Because we really need to stick together when times are tough.

So the other thing you want to do to prepare your business is what we call due diligence. And due diligence, it's just the legal term for do your homework, get your ducks in a row. So grab your original lease and all the amendments. Second, contact your landlord early. And I know a lot of tenants are like I don't want to talk to my landlord about this. They're going to freak out that I'm thinking about selling my business or bringing on investors, but it's really important to get your landlord involved from the beginning. And I'll show you why on the next slide.

And then plan for a new lease. If your lease is six months, nine months out, even a year out, anybody who's looking to invest or buy your business is going to want to know that there are options to extend the current lease on favorable terms. You don't want-- from the buyer perspective, the buyer doesn't want to know that in nine months your lease is stale, so they're going to have to negotiate a new lease on potentially higher terms. So plan for a new lease. And that's another reason why you want to contact your landlord early.

So next to prepare your business, once you pull out your original lease and all the amendments, these are the key provisions you're going to want to look at when you're selling your business or you're taking on investors. And I'm not going to go through all of these terms, but the top two terms are the reason why you need to contact your landlord early.

So permitted use is the use you have for your space. And then a memorandum of lease deals with exclusive use with other tenants maybe in the same complex or shopping mall. As an example, because this really happened, I represented the buyer of a business and there was a commercial lease involved. The permitted use under the lease was a bakery. And my client was a coffee shop that was also going to bake pastries, and little cupcakes, and a bunch of other little things to go with the coffee. But they were basically a coffee shop.

My client had negotiated for almost a year to buy this business and they brought me in on the last 30 days. And I said, has anybody talked to the landlord? And of course, no one had. So we went to the landlord. And we found out that the landlord had an exclusive use provision with another tenant. So this shopping mall had two spaces with a street in the middle. And there was another coffee shop on the other side of the street.

So the landlord was unable to extend the use of the lease here where my client wanted to buy the business because he had an exclusive use provision that the landlord said to this tenant, hey, I'm going to make sure that you are the only coffee shop in this entire complex. So all that work that my client had done with months of his time, including his energy and his money, to work out the buying of the business just fell short in the last 30 days.

So that's the reason why you want to check with your landlord early. There is something called a memorandum of lease, where the landlord's supposed to file that kind of stuff in the deed records. But honestly, most landlords don't. So that's the reason why you want to bring in a landlord early. And you want to look at all of your provisions.

The other thing I wanted to point out, because not a lot of people know this, is take a look at your guaranty, especially when you're doing a buy-sell, or investors who also may be on the hook for personal guaranty, there is a law in Texas, and it's by our Texas Supreme Court. It's not statutory on the books. It says, if you sign a guaranty that waives defenses, all defenses, other than full and complete payment, you're also waiving your defense to offset.

So if you've partially made payment on the guaranty, but not all of it, you may not get credit for that offset if the guaranty language in your lease has language like this, where it says you're waiving all of your defenses other than full payment.

And then the other part of due diligence is basically to then start negotiating with your potential buyer or investor. So you want to check out the buyer or investor and make sure that they are credit worthy. You want to consider an exclusivity period for negotiations, so you're only negotiating with one buyer or one investor at a time. And then decide which party is responsible for the draft of the first set of relevant documents. Your lawyer will thank you, I promise.

And then if you're the buyer, you will conduct normal due diligence, which is basically looking at the finances, looking at the operations, looking at the legalities of buying the business. And then if you are an investor, you will do all the same due diligence. You do all the same homework. And then you would consider some additional factors.

For instance, is the investment going to be equity or non-equity? Is there a potential for third-party financing that you have to take into consideration when you do the investment? Because that's going to affect your asset and debt ratio. Also, with the investment is the investor going to have any operational or managerial control? And then you always want to plan for worst case scenarios and an exit strategy in case things don't go well.

So hopefully, you have successfully sold your business or you've brought in investors with an infusion of good capital. But if you don't do so well, then you're looking at the last resort, which is to look at the eviction process. So I'm going to turn it over to Dean Herrera who's going to talk to you about evictions.

- There we go. Can you hear me now? Great. Thank you, Tisha. Appreciate that. So I'm going to talk a little bit about commercial tenant evictions. And they are, in terms of protections, they're definitely different from residential, particularly because-- I think Kathryn mentioned in the first part of the presentation, that they're not-- they were not treated the same, at least in Texas, under COVID moratoriums.

And so that's the first part of my slide. Most moratorium evictions did not explicitly include commercial tenants. There were some exceptions. I think it was Collin County had some exception. I think there were some limited exceptions in Austin as well, or Travis County. So

there were some pockets where there were some extension that was provided to commercial leases. But for the most part, in Texas they're not.

And one of things you want to remember with landlord-tenant work is that you have to look at your local jurisdiction in terms of how it's being interpreted. And that's really-- I mean, it becomes even more dependent on the terms of your lease. For the most part, you're going to find the terms of any commercial lease are going to be generally pretty friendly to landlords, unless you've negotiated some tenant friendly provisions before all this happened.

Another point that Kathryn made that I want to make sure that folks understand is that when an eviction moves forward, they might have already served you with a three-day notice, and we'll go into that, that doesn't mean that you are going to be out of your spot tomorrow. It could be, but trials are backlogged.

I think right now they are barely-- I think they're still doing evictions that were still filed in May, I believe. So they're definitely backed up. And as was mentioned before, any jury trial-- and not every eviction trial has a jury trial, but a jury trial, those are not going forward until after September 1st.

So as I said, most leases are landlord friendly. Few of them have provisions that allow a tenant to withhold rent. So if you have the money, pay the rent. Because if you don't pay the rent, there are a lot of ways-- a lot of -- a lot of things that can happen. Maybe the eviction process takes longer to initiate, but it doesn't mean that the landlord cannot lock you out. And so, a landlord can begin an eviction process for non-payment of rent. And can begin a lockdown for any partial non-payment of rent.

So if you are having difficulties paying your rent, attempt to negotiate a payment plan or new lease terms. And I've had a few discussions with some of the folks on the call. There are a number of tenants who are willing to work with-- sorry, a number of landlords that are willing to work with their tenants, and there are others that are just not. And not only are they not willing to work on rent, there are also a number of late fees and penalties that the lease might provide for. And they are allowed to-- those things keep adding up.

And so you want to make sure that you understand your lease and you understand what late fees and penalties may also be affiliated with any decision to not go forward and pay rent and these things usually accumulate with some interest. And again, whether it does or it doesn't is going to depend on the particulars of your lease.

And I put here an example. There was a Dallas County order that talked about landlords capping late fees. But for the most part, these are not common. And so, unless you know that there is an order that limits a late fee or penalty, assume that you will be having to pay for those if you are late with your rent.

I mentioned lockouts, and they're generally not recommended. But a landlord, and this is part of the color, a landlord may not intentionally prevent a tenant from entering the lease premises, except if there's a court process. Unless, and there's a number of exclusions, one of them is

changing the locks of a tenant who is delinquent paying at least part of the rent. And so the example that Kathryn used earlier on, about Michael's, is really-- I think that this is the underlying law behind some of that.

For residential lockouts, the provisions-- there are more protections for residential lockouts than there are for commercial ones. And so you might say, well, so and so, my family member, they had a lockout, but they were able to challenge it in court. That's fine, but if it was your relative's residential lease, then it might be-- it's going to be operating under different laws.

So generally, a landlord must place a written notice on the tenant's front door, stating the name, the address, or phone number of the individual or company that can provide the tenant with a new key. Sometimes that's a landlord, sometimes it's a property manager. And the key must be provided during the tenant's regular business hours. And only if the tenant pays the delinquent rent. And so you can go in, and you can negotiate something, but it's usually going to be-- it's usually going to require some payment of rent, or full payment of rent, not some.

I'm going to talk a little bit about the eviction process. I know it's a very small font. But there are two forms that you'll become familiar with as this process is initiated. One is a three-day notice to vacate. And the second is an eviction complaint. The notice of eviction usually is this notice to vacate that says, you have three days to pay me what you owe me, otherwise I'll initiate an eviction proceeding.

And so it doesn't necessarily mean that the minute you get the notice, you've got to be out tomorrow. But it does mean that you either have to pay or get ready to defend the reason for not paying in court. So after the three days are over, unless, again, there's some order in place that protects you as a tenant, as a commercial tenant, which I don't know of any right now, the landlord would be able to file an eviction in court.

Once that's filed, the court provides a date for you to appear where there's going to be a trial. And at that point, the landlord has the obligation to present their case. And so, we will-- a lot of times, what people do is they say, well, yeah, I do owe the money, so what's the point of showing up? I think it's important to show up to the trial whenever it's set, because then you're able to maybe possibly find a way to reach an agreement, at least on some portion, perhaps a payment plan of some of the moneys owed with the landlord.

So you want to try to show up whenever possible. If you do not show up, there will most likely be a default judgment taken against you, which means that the landlord gets whatever the landlord asked for in that petition, in that claim for eviction. And so you want to make sure that you show up. If you're not able to show up, you could still file an answer. And you can do that by sending a written statement to the court. But for the most part, we recommend that folks show up.

Now what's happening in terms of court appearances is that a lot of them are being done by Zoom. So you have to put in a request to the court if there's some reason you can't appear. My understanding is that most of the justice of the peace courts have that option. But there has to be a written request for it. And they are limiting the number of evictions per hour, so that you don't

have as many people in one courtroom, to really preserve the social distancing. But know that the Zoom court appearance could be a possibility.

Here, after you if you file, there's an eviction filed, and you have a court date, if you wanted to request a jury trial because you want more time-- usually, that's really why people do it-- you would have to file a notice three days, at least three days before the trial is set. And there is an additional cost, I believe of \$22 to do that. Let me see. Why can't I move to the next slide? Give me a minute here. I'm kind of stuck. Here we go.

Once the court makes a decision, there is a writ of possession, which is basically an order that gives the landlord the right to recover the premises, the property, that you're occupying. And that writ of possession is given over to the constable, who then will post a notice, and give you 24 hours notice, generally, that they will come and remove all of your things if you have not already removed them. And so please keep an eye on those notices after a trial date that has entered a judgment against you.

Before a writ of possession is implemented or executed, you have five days to file an appeal as a tenant. Also as a landlord, they can file an appeal. An appeal does require you to post a bond. And the amount of that bond really is dependent on a number of circumstances. So I won't go into those details.

The final thing here that I'll say on the eviction process is that once there is an order and there's usually a judgment for money owed, then some of this will go into debt collection, which could be an abstract of judgment or a writ of execution that puts a lien on property, including residential property that you might own. So be aware of that.

And then my final slide is not to go into detail, but to maybe also-- some of you have-- I've talked with a number of tenants that have had problems with income stream and have many months left on their leases. And they just don't see a way forward. It might be that bankruptcy is an option if recovery isn't. And there are different options. And the CARES Act has extended what's possible under the options. And a lot of-- what kind of bankruptcy you file will depend on whether you want to liquidate or reorganize your business.

And also, it depends on the kind of entity that you're operating your business under. If you're a sole proprietor, you have to be prepared for your business and personal assets to be attacked if you owe money. If you're a corporation or a limited liability company, depending on your gross income and your financial status, a Chapter 13 or Chapter 11 might be a possibility.

So I've gone on longer than I thought I would. But I wanted to provide a link here to our clinics. If you need some assistance, we won't be able to cover all of these issues in our in our clinics, but we will be taking clients over the next month so that we can get ready for fall semester. And I think we're going to turn it over to questions now.

- So there are no questions in the queue. If you have any questions at all as a participant, please write in your question now. There's a little tab that should be at the bottom of your screen, Q&A.

Click on that and give us your questions. But while we're waiting for questions, did any of the panelists have anything to add on to what another panelist might have said? Kathryn.

- All right, I will preface this by saying I'm not a litigator, but the few times that I've been forced to go to JP court for a forceable entry and detainer case, early in my practice, when you are facing eviction at the JP level, the only thing the JP can rule on is right to possession. So typically, it's a slam dunk.

The landlord walks in and says, this payment was due, I gave the appropriate notices, payment wasn't made. And so, now, I get to evict them. With COVID and the issues surrounding force majeure, typically when you bring up other excuses, like well, but my landlord's horrible, and they haven't fixed this or fixed that, covenants generally are independent in a lease. So the JP is going to say, I don't care about that.

The question is, do I have the right to grant them possession. And based on the terms of the lease-- you may have a million reasons to sue them separate from this, but they have the right to possession, at which point, then you can appeal it to another level, and you can bring in those countervailing factors.

If you have a force majeure clause, then maybe it's not a slam dunk that the landlord has the right to possession. Because you could raise the argument that, well, yes, I missed that payment, stipulated and agreed. I wasn't obligated to pay it because of this language in my lease. I would not wait to raise all of that until you get to the appeals level.

Even if you've been through this process before and you have a general understanding the JPs don't want to hear all that extraneous stuff, I would throw it all on the wall and see if it sticks. Because if there's enough of a question that the judge can't rule, that, yes, the landlord has a right to possession, that could help you. So that's another reason to go through, look at your lease, and get all of your arguments, and don't throw mud where mud doesn't exist, but find your mud. And be ready to throw it, because it can't hurt you, and it can only help.

- I think something else that has come up in talking with tenants that are in difficult situations, is they say, well, I don't have any assets. So maybe I should just let the landlord go forward. And it's like, well, that's fine, but you have to remember that there's still going to be an underlying debt that will continue to follow you, even if you're out of your space. And debt's going to impact your credit.

And it might impact whether you're able to start a new business, buy a house, get a car, get a lease. And so that becomes an important aspect of this, that we can just hide under a rock until this all goes away, and hope that when we come out, things will go back to normal. But unfortunately, that's not the reality. In addition to any credit or other issues that may come up, you also have to think about who it might impact.

So perhaps you don't have anything to your name, but maybe your spouse does. And there's some community property that could be interpreted as such. And so, I think the question

becomes, well, are you married? Do you have any community property? And do you want to stay married, right?

And then the other is that oftentimes, if you don't have a whole lot of assets already, it's possible that you didn't have a whole lot of assets when you started your business. And so somebody else might have served as a guarantor. And so if you don't have any money to collect, perhaps your guarantor does. Perhaps they have a family home that there'll be a lien on. And so you also have to consider how any of your debt will-- how your debts will impact those around you in that. So that's something else too to consider.

I think we have a couple of questions. OK, so we have a couple of comments. Let's see, here's-- any suggestions on advising a client where a reduction in services to a subtenant have taken place-- is this the one you answered already, Kathryn? Have taken place due to COVID-19, such as reduction in access to kitchens, mail rooms, reception areas, conference rooms, and sub-landlord is still on the hook to the landlord? So this is really about a sub-tenant.

- Yeah, and that's something that talk about being between a rock and a hard place, there, hopefully, you have some passthrough language that says, as the sub-landlord you can only provide the services that your landlord gets, because clearly it's a chain. But that raises the larger issue, when you're negotiating with your lease, do you have some countervailing arguments that you could lob at the landlord about things that you're not getting out of the relationship. And that really is true more in an office context.

Shopping center landlords don't do a whole lot. But in an office building context, if you have reduced elevator capacity, or if certain building amenities are not being made available, that's additional wiggle room for approaching your landlord about relief that you want. And saying, hey, things truly are tough all over, and we're not giving you everything you want, but you're not giving us everything that we want either.

In a sub-tenant context, I think you definitely need to coordinate your efforts. And what I'm finding is 90% of the time people are willing to work out some arrangement. I haven't had anybody that's just really dug in their heels and been difficult, unless they felt like they were being taken advantage of. Which is why, as Tisha says, you want to go-- I've never had a landlord, in 20-- gosh-- 25 years of practice, react that badly when somebody came to them and said I'm struggling. Your landlord knows when you're struggling.

Generally, they know everyone is struggling now, but even in the past, they know. And so the one thing, if you're reluctant to go and talk to your landlord, I think you will expect that most of them have a proposal. If you don't have one, they have one ready. They've given two months rent abatement or three months rent to somebody else in the building. Now, financially they're not going to be motivated to offer that to you until you ask.

But using some of my landlord clients as an example, they've got a throw-down document ready, a one-page lease amendment, that they've already thought through. They have it ready to go, but you do have to ask for it. Because they're not going to say, hey, are you suffering? You're not to pay rent this month. Ideally, they want everybody to pay.

So don't be afraid to have the difficult question, and the more conversant you are on what your exact issues are. I think if you just say things are tough all over, that's the reaction-- I keep defaulting to we live in unprecedented times. We see it in commercials. And it's trite. And so you need to be prepared to say, this is specifically how we've been impacted. These are our employee issues. These are our sales numbers. Everything is down. But have your data ready. Do your due diligence, like Tisha said.

- There were a couple of comments that came in through the Q&A, which is where we're taking our questions, for those of you-- I know there was a comment about the chat is disabled. I think we've done that on purpose, so you can go to the Q&A. But a couple of comments. One is that the justice of peace courts, a judge can grant possession and past due rent, but it's currently limited to \$10,000, unless there's accruing damages, and then that could exceed the \$10,000. So if it's a larger lease amount, it might be-- it might go through a different court, is probably what we'll need to consider there.

And then the other thing was a correction or an additional note, that the notice to vacate has to-- cannot be conditioned on pay or move. But usually what happens, when you get a notice to vacate you can oftentimes negotiate during that timeframe with your landlord. And so that's part of what you might want to do. And there are going to be landlords that say, well, it's not a COVID issue. You're just a bad tenant. You haven't been paying for the last three years on time. So I think those two points are really important.

The relationship that you have with your landlord before this all started is really going to impact what they'll be able to agree with you on. And there was also-- we know that there are some landlords that have been great about working with folks. There are other landlords that have not been so great. And I've unfortunately worked with a group of tenants who have not had a very friendly landlord on these issues. And sometimes it has something to do with their own loan obligations, as Kathryn mentioned. So I'm not sure if there are other questions, but I wanted to make sure I addressed those.

- And Luz, can I just pick up on that just for a minute, because it's kind of a theme that all of you have touched on, this aspect of negotiation. Kathryn specifically said, be sure to ask for permission instead of forgiveness. But along those lines, and if any of the-- or all of the panelists could address this, I would think that so many of these problems are going to be dealt with through just the relationship that they already had before all of this happened, and just your basic negotiation skills.

And I teach a class in negotiation. And the literature suggests it helps a lot if you can-- I know in these times of COVID maybe you don't want to be face to face, but if you can, go to their office with social distancing, that might be a very, very different negotiation that takes place. I would think that the last thing you want to do is send off an email. At least try to telephone them or have a Zoom conversation.

It might be more difficult for you, but I bet that the outcome would be very, very different if they can actually see you and talk to you, hopefully in person, but if not in person, at least on Zoom.

And I wonder if any of you could comment on your experiences with that. Because I think it plays a huge role in the deal you will end up with in the end. Tisha.

- OK, so I'm a little bit more-- I look at things more than just the legalities. And so, one, I agree exactly with what you were saying, Peter. I think if you can do a face to face, or a Zoom, or a phone call, that's much better than an email or something in writing where people don't get your intent and your energy that you may be bringing into the room, or on the phone, or video wise.

I actually prepare my clients to say, it is a tough conversation to approach your landlord, but you gotta do it. And when you do it, come into the room with the right energy. Because half the time, your landlord's stressed out too. And so if you come into the room with the energy of, hey, I want to work with you, versus an adversarial position, you're much more likely to have an easier time negotiating what will work for everyone.

- No, I absolutely agree. Because I think oftentimes in these situations, the landlord will have more power. That's kind of how these things are set up in the contract language and everything else. And some of you have alluded to it. And in some instances, all you're going to have is the sympathy factor, the violin that you showed. And that's going to come through much more, I think, in these face to face conversations. But I don't know if anybody else has something to say along those lines.

- Well, and on top of that, so I worked with-- for a time with a chain of frozen yogurt franchises, on the tenant side. And a lot of times, leases will come. And this is not COVID related, but analogous. You'll have a construction schedule that says, you need to get your permits by this date, and you need to be open by this date. And a lot of tenants would approach it as, well, if it says that that's the timeframe, then I've got to live in that universe.

And the first question I always have is, well, have you talked to your construction personnel, to your space planner? What does it look like in your municipality? How long does it take to pull permits? How long is it going to take to actually do construction? Have you built in any time for a rainy period or some sort of delay?

Figure out how much time you need, and then actually go to the landlord up front, and say, hey, I've looked at this, and I don't think this is going to work for either one of us. And I think there's a reluctance to say, no, I can't do that. But what I experience with my landlord clients is an educated tenant, that comes to them and says, this requires me to get permits in 30 days, and be open in 120.

I called the city. And they suggest 45 days for this. And I've talked to my construction personnel, and they've suggested this phasing of the work. That's a different approach than I just need all the time in the world because I'm a nervous person. That doesn't inspire confidence. But coming to somebody upfront and saying, hey, I've done all of my homework, and now I'm working with you as a partner, and I'm being honest and upfront with you.

That tends to set up, as you say, the relationship that unfortunately, it's a day late and a dollar short now, but if you have that kind of relationship, or going forward if you establish that

relationship, when these little glitches happen, and you pick up the phone, or you go in and you talk to them, and say, I'm having this issue, they know that you're not a sky is falling person.

They know that you've already jumped through all the hoops to figure out how to fix this on your own and you're going to them with true problems. So I really encourage people-- nothing bothers a landlord more than somebody who hasn't even taken the time to review the lease and isn't conversant in what they've already signed. So understand where you are. And do come a little bit hat in hand, but don't be trite about it. Be specific and definitely be collaborative.

- Good, yeah. Luz, did you have something?

- No, I think it's all been covered. I think we're good.

- OK, I don't think there are any more questions. Yeah, did anybody else have anything else to add? We've got four more minutes. Otherwise, we can conclude.

- Yeah, I think there was a question that I answered on the chat separately. And that one was really about what kind of work our clinics do. We generally don't have sufficient resources to provide an attorney for every commercial or residential tenant that comes to us. And that's true for landlords as well, because there might be some situations where we could advise a landlord.

So most of what we'd be able to do is help advise someone on the process and perhaps help guide them through the paperwork involved. But as of now, I'm just not sure what kind of capacity we'll have. We don't start handling cases until August 17th. And so some folks might not be able to wait. And so for that, I really suggest people call the Tarrant County Bar lawyer referral service for an attorney that might be able to help them.

- And there was a question from Sonya about did you say the code will be emailed? And I'm not sure what code.

- No, I didn't say. So it's the property, Texas property code, Section 93, is the one that governs the residential leases. But no, we're not emailing that. You can do a Google search, and it should pop up.

- Sounds good. And I also just want to thank Kathryn, Tisha, again for being an adjunct professor in our entrepreneurship clinics. We deeply appreciate all the work that our adjunct professors do. And I want to thank all three of the panelists today. And this webinar will be available on the Internet. It'll go up soon. You can go to [TAMULawAnswers.info](http://TAMULawAnswers.info) and get this webinar and any of the previous webinars that we've done.

So with that, I just want to thank our panelists. This has been very helpful. And thanks everybody for joining us today.

- Thank you.

- The PowerPoints will be available at [TAMULawAnswers.info](http://TAMULawAnswers.info). Again, that's [TAMULawAnswers.info](http://TAMULawAnswers.info), as well as all of our other upcoming webinars, including one on residential evictions and landlord-tenant issues. That will be on July 16th for residential.

OK, and I think we're now at our time. So again, [TAMULawAnswers.info](http://TAMULawAnswers.info) for all the upcoming webinars. One of them is a CLE, if you need CLE credit. Take a look there, and you can register for all of our upcoming webinars. And we're adding more all the time. So take a look there. Thank you for joining us.

While the panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.