



INSIDE AND OUTSIDE THE LEASE

**WHAT YOU NEED TO KNOW
TODAY ABOUT
ABATEMENT/DEFERRAL OF RENT
AND BUSINESS INTERRUPTION
INSURANCE**

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CO-HOSTED BY:

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TODAY'S PANELISTS



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01 Inside the Lease

Best practices shared by Jacob Bobek, CBRE

02 Outside the Lease

Best practices shared by Amnon Siegel, Miller Barondess

03 Q&A

Burning questions answered by the experts



HOW TO SUBMIT QUESTIONS

What are your most pressing questions about your lease?

- You can access Menti from your laptop or mobile phone
- Submit questions at any time throughout the presentation
- Submit as many questions as come to mind
- All submitted questions are anonymous
- Questions will be answered during the Q&A section
- Any questions we don't have time to address will be covered in future webinars and/or articles





INSIDE THE
LEASE

Force Majeure

- In the legal context, generally means an unforeseeable event that prevents a party from fulfilling a contract
- In the Leasing context:
 - Force Majeure is not in all leases, and leases that do have it define it differently
 - Even if there is a force majeure clause in the lease, it rarely excuses non-payment for rent



Failure of Services

Abatement of Rent for Failure to Provide (or Interruption of) Services to Tenant

- Rent abatement, if provided at all, is usually addressed in a “failure of services” provision
- Failure of Services - usually if Tenant cannot, and does not, occupy the Premises for a specified number of days (e.g. 5 business days), then Tenant gets rent abatement
- MANY different restrictions to rent abatement can apply, such as:
 - *Only applies to things within Landlord’s control*
 - *Only to the extent reimbursed by Landlord’s rental loss insurance*
 - *Only to the extent “services” are not provided*



Examine the Entire Lease Document

- Key Point: Need to review the ENTIRE Lease. The vast majority of leases will have pertinent language that falls within the areas described above, **but every lease is different**, and a particular lease may contain unusual provisions
- Brokers should assist their clients to the best of their ability, but clients may need to engage legal counsel as well



“The Reality” – What’s really going on...

CBRE Occupier Teams are on the front line of communication between tenants and landlords.

Requests:

- Despite no rights in the lease, most tenants are seeking forbearance or free rent.
- Landlords are inundated with requests and letters to defer and abate rent (challenge to determine real vs not real)
 - Large tenants
 - Small tenants
 - Office/Retail/Industrial
- Some tenants are refusing to pay rent (data below for April 2020)
 - Empire State Realty – 73% of office rents collected, 46% of retail rents collected (WSJ Article dated 4/28/2020)
 - SL Green – more than 90% of office rents collected, less than 65% retail rents collected (WSJ Article dated 4/28/2020)
 - On average, we are seeing 90% rent collected for office tenants, 50-60% of retail rents collected



Landlord Response(s):

- Large institutional ownerships are trying their best to delay
 - Proactive letters stating that buildings are open for business
 - Response letters requesting tedious information
 - For tenants not paying, notice of default and draws on LC/ Security Deposits
 - Tenants must be in true distress to gain LL attention
- Medium to small landlords
 - Most success in engaging to date
 - Closer relationships to the tenants
 - Smaller partnerships provide for more flexibility

Results:

- Leases expiring between now and 12/ 31/ 2023
 - “Blend and extend” – free rent in 2020, for additional lease term
 - Avg. about 1 to 2 months of free rent per additional year of lease term
 - “Free Rent” – no need to pay back
- Leases expiring after 12/ 31/ 2023
 - Rent deferrals are most successful
 - 60 to 90 days of rent deferral in 2020, to be paid back in later 2020, sometimes into 2021

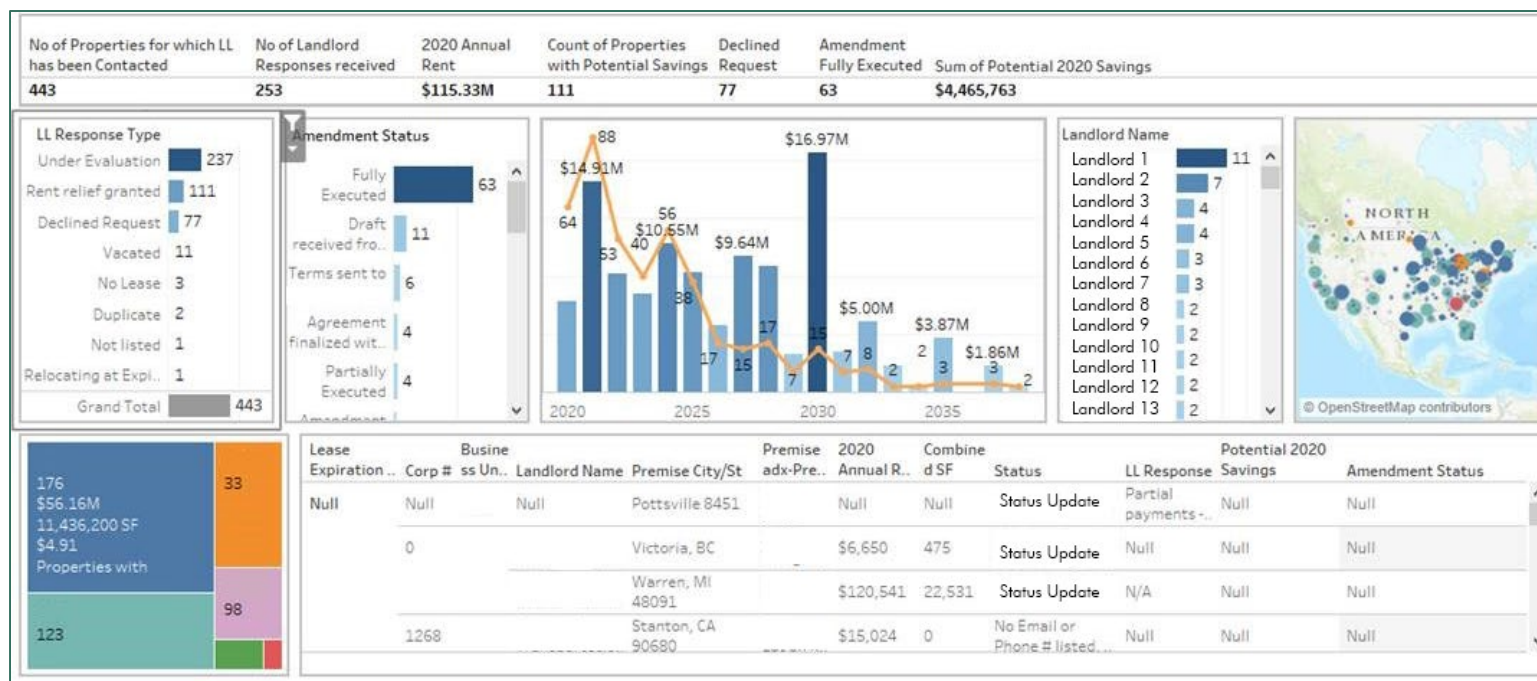


INSIDE THE LEASE

Client Profile

600 owned and leased properties throughout North America; includes office, warehouse, call center, retail and land. Publicly traded company with \$7.71B market cap.

Results:

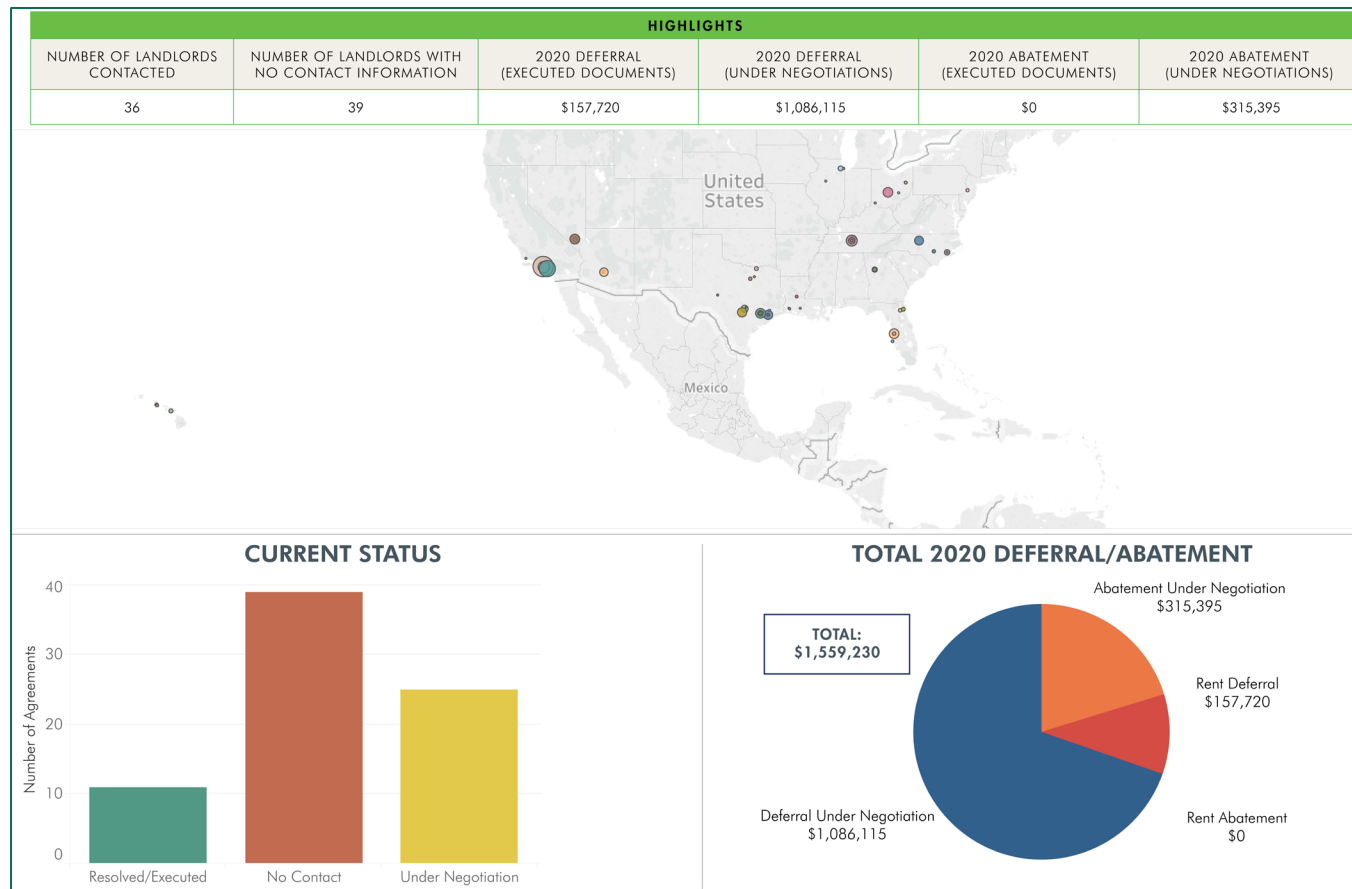


- **\$4,465,763** rent deferrals/abatements attained May-August 2020 across 111 leased properties
 - The average deferral is 2 months of 2020 rent with full repayment in 2021
 - Represents 16.8% savings of 2020 full year rent across these 111 properties with rent deferral agreements
 - Represents 10.1% savings of May-July rent across the full portfolio
- **443 landlords** have been contacted to date and we continue to work through the balance
- **253 responses** sourced to date, including:
 - 111 acceptances @ 44% of responses sourced to date
 - 77 declines @ 30% of responses sourced to date
 - Balance still under consideration/negotiation.
- Since launching this program 25 business days ago, we have achieved the following on average per day:
 - 4.5 landlord agreements secured per day
 - \$178K rent deferrals/abatement agreements secured per day

INSIDE THE LEASE

Client Profile

150 leased properties throughout North America; includes office, medical office, and call center. Identified 75 landlords to pursue.



Results:

- **\$1,559,230** rent deferrals/abatements total
 - \$157,720 in rent deferral obtained for 2020
 - \$1,559,230 in rent deferral under negotiation
 - \$315,395 in rent abatement under negotiation
- **36 landlords** have been contacted to date and we continue to work through the balance

What's Happening On the Ground

- CA: Gov. Newsom's Executive Orders: rent deferral; moratorium on residential evictions only
- NY: Gov Cuomo's 90-day moratorium on residential and commercial evictions
- City of Los Angeles: moratorium on residential and commercial evictions; three months to pay any back rent
- Fannie and Freddie for Multifamily Properties: Mortgage forbearance on condition of no evictions for renters
- Small Business Loans/Grants under the CARES Act. Proceeds may be used for payroll AND:
 - *Mortgage interest payments for mortgages existing before Feb. 15, 2020*
 - *Rent payments for leases in place before Feb. 15, 2020*
 - *Interest on other loans obtained prior to Feb. 15, 2020*
- **KNOW YOUR LOCAL LAWS!** *Most cities have passed some type of rent deferral ordinance.*
 - Example: CITY OF BEVERLY HILLS (Ordinance No. 20-0-2805)
- However, tenants not relieved of obligation to pay rent. DEFERRAL, NOT ABATEMENT.

Other Legal Issues: Impracticability of Performance; Frustration of Purpose

- Impossibility/Impracticability of Performance: Implied by law into every contract
 - Performance made impracticable by an unforeseeable event not caused by non-performing party
 - Temporary Commercial Impracticability: temporarily suspends performance until event passes
 - Reasonable extension of time to perform (think moratorium on evictions)
- Frustration of Purpose:
 - Supervening event frustrated the fundamental reason of both parties entering the contract
 - Frustration not fairly contemplated within the risks of the contract
- Potential Application to all contracts: leases; real estate purchases; construction contracts; loan documents
- Lessons from 2008 Recession: “Once-in-a-century credit tsunami” (Greenspan)



OUTSIDE THE LEASE:

**BUSINESS INSURANCE
AMID COVID-19**

Business Interruption (“BI”) Insurance – Part of Property Policies

- Disruption of business operations due to “*direct physical loss of or damage to*” business property
- Common Applications: fire, severe weather
- Can cover: lost income; increased expenses; restoration costs; losses from disruptions to your customers or suppliers
- Open Question: Is visible damage or structural alteration required to trigger coverage?
- Coronavirus may constitute damage to property, albeit at a microscopic level or in the air
 - Cases no physical damage: Contamination in HVAC system; ammonia in workplace; gasoline in the soil around building
 - Bottom Line: Has a business suffered “loss of” or damage to property
- Science suggests that the virus can survive briefly in the air and on surfaces for days



“Civil Authority” Coverage – COMMON EXTENSION TO BI COVERAGE

- Purpose is to recover losses sustained if access to insured property is restricted by government decree
- Requires:
 1. “physical loss of or damage” to property within close proximity of insured property;
 2. government prohibits access to area; and
 3. insured property is within area affected by government order.
- “Ingress and Egress” coverage is similar – recovery caused by restricted ingress/egress to insured property
- Check:
 - Sub-limits of liability for Civil Authority Coverage (often less than full policy limits)
 - Duration of Coverage (often limited time period: 30 days)
- Example: Coverage granted to business prohibited from accessing its property when authorities closed downtown Manhattan after 9/11 (terrorism exclusion now standard)

Common Exclusions – Virus/Bacteria, Communicable Diseases, Pollution, Fungi/Mold

- Law: Exclusions interpreted narrowly; coverage interpreted broadly in favor of policyholder.
- Virus/Bacteria Exclusions: prevalent since SARS, H1N1, and Ebola
 - NOT A DEAD-END
 - DON'T RELY ON YOUR INSURANCE BROKER FOR LEGAL ADVICE
- Communicable Diseases: some policies exclude, while others specifically cover; some don't mention at all.
- Pollutants: "any solid, liquid, gaseous, or thermal irritant or contaminant"
- Fungi/Mold: "any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or byproducts produced or released by fungi"
- Exclusions may only apply to certain coverages or jurisdictions

Advice for Business Policyholders: NEXT STEPS

- Promptly and carefully review policies
- Notify insurers of claims (figure out theory of recovery first)
- Track all business losses
- Be careful about communications regarding losses (caused by virus vs. caused by government order)
- Engage coverage counsel



Q&A

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THANK YOU

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