

**MAY**

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**KEVIN F. JURSIANSKI, ESQ.**  
**COMMERCIAL LEASE NEWSLETTER**

**Remedial Provisions and Expediting Eviction and  
Judgment in Light of Today's Crowded Court Docket**

This month I would like to address an issue that is facing all businesses including Commercial Landlords and Commercial Property Managers, which is the over crowding of our Court docket.

A. Court Docket Delays. In Lee County (as in many other Counties throughout Florida), the Court dockets have become increasingly over crowded as a result of foreclosure actions. For example, in Lee County, Florida, in April of 2008 there was a record 2,160 mortgage foreclosures filed which is a staggering number of foreclosures to put into the Court system.

Add that to the fact that the Courts in Florida are some of the most over crowded Courts (with our Judiciary handing more cases per Judge than many of the other States), as well as the fact that many of the Counties, such as Lee County, are even further over crowded and with a higher case load resulting in an extremely slow Court docket. This is not because the Judiciary isn't working hard, but simply due to the fact that the Judiciary is inundated with Court cases.

Further, and as compelling, are the potential State budgetary cuts being considered throughout Florida. If the current State budget cuts are initiated, there has been some suggestion that the Judicial staff in the Twentieth Judicial Circuit (five County area of Lee, Collier, Hendry, Glades and Charlotte Counties) might have their staffs cut by up to one-third (1/3).

B. Impact on Commercial Leases. What does this all mean to you as a Commercial Property Manager or Commercial Property Owner? It means that there is a possibility that your case for eviction and damages against the Commercial Tenant could be delayed substantially simply due to the market realities of what is taking place in our real estate market causing over crowding of the dockets and reducing the ability of the Courts to handle cases.

The question posed is what can be done by a Commercial Landlord and Commercial Property Manager to avoid these long delays in light of the recent market realities? One suggestion is to consider redrafting your Commercial Lease Agreements so that the Lease Agreements provide for additional remedial provisions and alternate dispute resolution procedures in regard to the damage claims.

C. Current Procedures Under Non-Residential Statutes. Current non-residential tenancy statute, in my opinion, is properly set up to allow for expediting Landlords' claims, especially the provisions provided for in Florida Statute §83.232, which is the "Pay to Play" provision requiring Commercial Tenants to deposit rents into the Court Registry if they wish to raise defenses to an eviction action. This also allows the Landlord to schedule and set evidentiary hearings to determine the amount of rents which need to be deposited in the Court Registry. Most of the time the Courts have been accommodating in regard to this matter and I would not suggest that anything be changed in regard to Commercial Leases which would impact and affect the rights to pursue the eviction action, especially given the fact that in addition to Florida Statute §83.232 the Summary Procedure Statute of §51.011 allows for maintenance of expedited proceedings and requires a five (5) day response time by the Defendant-Tenant relating to an eviction action, during which time the Defendant-Tenant must answer and raise all Affirmative Defenses as precluded from engaging in motion practice and, further, is required to either (a) deposit all disputed rents in the Court Registry; or (b) file for an immediate §83.232 Hearing to determine the amount of rents that need to be placed in the Court Registry.

However, the remaining provisions of the Non-Residential Tenancy Statute do not have such expedited procedures relating to damages, which damages must be litigated as any damage case which would require discovery and a Notice for Trial before the case is set for Trial. Further, in the Twentieth Judicial Circuit, most cases being set for Trial are referred to Mediation certainly at some stage of the proceeding.

D. Result: Case Delays. As such, in a situation involving the issue of damages, the Commercial Landlord does face and may be facing further extended delays simply as a result of the market realities of the over crowding of our Court System due to a number of factors, as well as the potential further delays which may be inherent as a result of budgetary cuts. Even without those budgetary cuts, our Court System and Judiciary is working harder with more cases than most of the other Court Systems in the United States.

E. Solution – Alternate Dispute Resolution Provision. One suggestion is to carve out from your Lease Agreement the obligations of the parties to litigate damages in Court and to commit to an alternate dispute resolution proceeding as it relates to damages.

This would require your current Leases to be reconstructed and divided up into two (2) separate remedial provisions: (a) the first is a remedial provision relating to the eviction process which would allow the parties full and complete access to the Court for the limited purpose of determining the amounts of rents to be placed in the Court Registry and the right of the Court to determine eviction and possession of the Tenant in accordance with the provisions set forth in the Non-Residential Tenancy Statute; (b) the second would be drafted to require the Landlord and Tenant to submit to alternate dispute resolution procedures as it relates to any potential damage claims.

## **Next Month: Procedures to Separating Out the Eviction Claim vs. Damages Claim in the Lease**