

# Acceleration of Rent in Oklahoma: What's a Landlord to Do? Framework for a Practical Approach

By Michael S. Laird and Jennifer L. Ivester Berry

**F**ew issues that arise in connection with a typical commercial lease relationship have been the subject of more commentary, disagreement and judicial "fairness" interpretations as the acceleration of rents remedy for the landlord in the event of a tenant default. Perhaps this is because the concept is typically analyzed at two levels: first, in the abstract as the provisions of the lease are being negotiated; and second, in a more practical context where the landlord is attempting to enforce the remedy while the tenant is aggressively contesting its exercise, usually on both legal and equitable grounds.

The intellectual discussion of rent acceleration has produced numerous articles and commentaries with an excellent overview having been published in this journal in 1995, authored by William E. Wallo.<sup>1</sup> A few jurisdictions (not Oklahoma) have passed legislation addressing the issue, but this is far from commonplace,<sup>2</sup> and courts continue to be presented with the issue of enforceability of acceleration clauses with mixed results.<sup>3</sup> Simply stated, why is it that parties to a commercial lease should not be held to an agreed upon remedy, in this case, rent acceleration?

The arguments advanced by landlords and tenants when the acceleration issue arises, whether in negotiations or litigation, can be both articulate and passionate. A landlord often starts with two undeniable truths: the only reason acceleration ever becomes an active issue is because the tenant has defaulted (the "bad actor" principle), coupled with the fact that the landlord is at risk of losing the "benefit

of the bargain." The tenant, rather than directly attacking these points since it is usually in a precarious legal position if it does so, parries with the argument of equitable fairness. This defense is usually aligned with one or both of the following legal principles: 1) to allow a landlord to accelerate and collect all remaining rent is clearly a penalty and therefore unenforceable under applicable law, and 2) the landlord has a duty to mitigate its resultant damages in any event.

"Fairness" has an interesting duality in this discussion. Some have argued that even a defaulting tenant has "rights" to be protected.<sup>4</sup> While perhaps true, should those protections trump the rights of the non-defaulting landlord?

The subtext of each party's argument is interesting and often intellectually stimulating, but even when taken together they do not offer a great deal of guidance towards a more

practical perspective from which to approach the acceleration issue. Furthermore, while many courts have declined to enforce acceleration clauses for one reason or another, the authors believe there is no reason a well-drafted and logical acceleration clause should not be enforceable in an arm's length, commercial environment, given that a broad rejection of such clauses could render a commercial lease nothing more than a month-to-month tenancy essentially at tenant's option, with only an actual damages remedy for landlord if tenant defaults.

### A QUESTION OF PERSPECTIVE

What are each of the parties looking for in the bargain of a commercial lease relationship? Generally speaking, the basics include the following:

LANDLORD	TENANT
A tenant (identity of varying importance)	A landlord (identity often inconsequential)
Definite term	Definite term
Specific leased premises	Specific leased premises
Quantified income stream	Quantified expense (rent) component

While some elements of the "benefit of the bargain" for landlord and tenant are common, others are not. The landlord loses its benefit of the bargain when the tenant stops paying rent and vacates the leased premises. Even if the landlord re-lets the leased premises, the original benefit is lost and a replacement tenant and income stream, sometimes better, sometimes not, are introduced. This distinction is critical in analyzing the issue from the landlord's point of view.

How does the mitigation issue fit in to all this, if at all? To be clear, parties to a residential lease in Oklahoma have a duty to mitigate.<sup>5</sup> In contrast, a landlord's duty to mitigate (or not to mitigate) when a tenant defaults under a commercial lease was addressed in *Carpenter v. Riddle*,<sup>6</sup> in which the Oklahoma Supreme Court held that when a tenant abandons the leased premises the landlord shall not be forced to re-enter, take possession of the leased premises and hence mitigate.<sup>7</sup> Rather, the appropriate remedy in this situation is for the landlord to choose.<sup>8</sup> Query whether *Carpenter* could be interpreted more broadly to capture situations in which something less than abandonment of

the leased premises occurred (e.g. tenant stops paying rent but continues to be in possession).

Regardless of their legal rights, landlords are usually pragmatists particularly in a soft rental market, so mitigation, even if not legally mandated, often results in a better situation for both parties. The landlord collects at least some portion of the benefit it had bargained for in the form of rent from the new tenant and, at least in theory, retains the ability to seek reimbursement from the defaulting tenant for the costs and losses the landlord incurred in the re-letting. The tenant on the other hand, no longer faces the claim from the landlord for all remaining rent.

### BUILDING A BETTER MOUSETRAP

It has been said that transactional lawyers prepare written "how-to" instructions for resolving issues, while litigators have to both build the machine contemplated by the instructions, and then try to make it work. That contrast is certainly evident when it comes to the issue of acceleration of rents. This fact is overlaid by the differing expectations of the respective parties as to how the remedy would actually be implemented in the event of a tenant default. When you add the component of the factual realities, such as market forces, vacancy rates, current rental rates, etc., at the time the landlord attempts to exercise the remedy, it is easy to see why the ultimate outcome in litigation is usually very difficult to predict. Given this reality, it would make sense from both parties' perspectives to craft a contractual remedy with the fewest number of variables, and with a clear and concise narrative of how the remedy would be implemented at the time of tenant default.

When crafting an acceleration clause, here are a few suggestions:

- If you provide in a lease that the landlord can pursue both acceleration and possession — in other words — landlord gets to accelerate all remaining rent for the lease term and recover possession and control of the leased premises, understand the possible ramifications of this approach. No matter how one tries to address it, this argument typically looks to a court like the landlord is getting double recovery, the accelerated rent from the defaulting tenant and a new rental income from the replacement tenant.



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- Set out an acknowledgement by the tenant in the lease that whatever the acceleration formula may be, it is deemed to be fair and equitable as liquidated damages and not as a penalty. At a minimum, this will put the tenant in the posture of having to explain such a statement while being questioned about the language of the lease and why at the time of default (and resulting litigation), the tenant feels quite differently about the remedy.
- Build in the concept of economic balance to the acceleration remedy, either by providing for an offset in favor of the tenant of the “fair market rental value” of the leased premises for the remainder of the term or a reduction to present value of the total remaining rent, or agreeing on a predetermined amount to be accelerated which is something less than the entire remaining term (but still significant insofar as landlord’s recovery is concerned, perhaps 12 to 18 months worth of rent). This latter approach is akin to what is commonly called a “break up fee” in the mergers and acquisitions context.
- Consider limiting the acceleration of rent remedy to situations where the nature of the tenant default is significant (and perhaps only to situations where the landlord is also terminating the lease).

The real reason for limiting the playing field when it comes to crafting acceleration of rent provisions is to provide some degree of certainty in the event a court ends up scrutinizing the enforcement of this remedy. Such limitations would decrease the likelihood that a court would meander far afield on the basis of what is 1) “unreasonable,”<sup>9</sup> 2) or is not a “minute or unimportant” default<sup>10</sup> or 3) in keeping with “public policy.”<sup>11</sup> Also, landlords need to understand the possibility that given

the proper factual context, a court may decide that the acceleration of all rents without any applied credit or discount is an operative remedy only if the lease itself is not terminated.<sup>12</sup> Similarly, if the tenant has exercised an option to extend the term of the lease and such option term does not include an acceleration clause, a court will likely find that such remedy is unavailable.<sup>13</sup>

One thing attorneys often fail to question is whether landlord clients even want an acceleration remedy to be part of their default arsenal, given that the remedy can be fractious to negotiate and difficult to apply. For instance, there are numerous situations where, for all practical purposes, a landlord (or its successor), will not seriously consider exercising the remedy because the particular tenant is not that critical to the overall financial viability of the project in question (in other words, not an anchor tenant or critical provider of goods or services in the particular project tenant mix). In Oklahoma, acceleration of rents is a contractual and non-statutory remedy, so without the specific remedy, at the time of tenant default the landlord would simply seek its actual damages, such as loss of rent, cost of refitting the leased premises for a new tenant, brokerage commission, etc.

## CONCLUSION

Landlords are typically in a less than desirable position when exercising remedies for tenant default, especially acceleration of rents. Unfortunately, the landscape of decisions pertaining to rent acceleration clauses is peppered with uncertainty. However, such a clause that takes into consideration the benefits of mitigation (e.g. re-letting the leased premises), includes an acknowledgment from the tenant that the agreed upon formula is reasonable, and incorporates an offset in favor

of the tenant (either for the “fair market value” of the leased premises, a reduction of the gross accelerated rent amount to present value), or a predetermined amount to be accelerated, is more likely to be deemed enforceable than a wide open acceleration of rents provision. The best advice is to establish a straight forward exit strategy that courts will be more likely to understand and enforce, so as to let the parties decide the price to be paid for a tenant’s default.

1. William E. Wallo, *Remedy or Penalty: The Enforceability of Acceleration of Rent Provisions in Commercial Leases in Oklahoma*, 66 Okla. B.J. 2951 (1995).

2. See e.g., FLA. STAT. ANN. § 727.112 (West 2007); MICH. COMP. LAWS ANN. § 600.5714 (West 2007); Va. Code Ann. § 55-248.35 (West 2007), WASH. REV. CODE ANN. § 704.17 (West 2007).

3. See e.g., *Seidenbach’s v. Crown Drug*, 102 P.2d 186, 188 (Okla. 1940) (declining to enforce the accelerator clause because it was not included in the option terms, under which the relationship was operating); *Andrews v. Liberty Nat’l Bank & Trust Co. of Oklahoma*, 463 P.2d 953, 958 (Okla. 1969) (awarding only the amount of rent due at the time plaintiff filed its petition because the lease did not expressly provide for all rents to become due immediately); *Ross Realty v. V&A Iron Fabricators, Inc.*, 787 N.Y.S.2d 602, 603 (N.Y. App. Div. 2004) (declining to enforce acceleration clause because lease did not require landlord to re-rent); *IPC Retail Properties, L.L.C. v. Oriental Gardens, Inc.*, 86 P.3d 543, 549 (Kan. Ct. App. 2004) (holding acceleration clause unenforceable as a penalty because it applied to both minor and major breaches); Cf. *Cummings Properties, LLC v. Nat’l Communications Corporation*, 869 NE.2d 617, 622 (Mass. 2007) (upholding acceleration clause where parties had agreed failure to pay would be significant breach of the lease).

4. Wallo, *supra* note 1 at 2957.

5. 41 OKLA. STAT. § 105 (2001).

6. 527 P.2d 592 (Okla. 1974).

7. *Id.* at 594.

8. *Id.*

9. See e.g., *Nobles v. Jiffy Market Food Store Corp.*, 579 S.E.2d 63, 66 (Ga. Ct. App. 2003) (finding acceleration clause to be “manifestly unreasonable and oppressive” because landlord was not required to re-let the premises and future rent was not reduced to present value).

10. See e.g., *IPC Retail Properties*, 86 P.3d at 549.

11. See e.g., *In re Admetric BioChem, Inc.*, 284 B.R. 1, 10 (Bankr. D. Mass. 2002) (agreeing with the bankruptcy trustee that acceleration of rent clause was contrary to public policy and constituted a penalty where damages sought were in excess of 80% of the total rent).

12. See e.g., *Benderson v. Ross*, 530 N.Y.S.2d 362, 363 (N.Y. App. Div. 1988) (holding that once the lease was terminated, the contractual acceleration right was similarly terminated and that all the landlord could possibly collect from the tenant was its actual damages after proof, related to the tenant’s default).

13. See *Seidenbach’s v. Crown Drug*, 102 P.2d at 188.

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