

to keep the leased property in working condition. Under this traditional view, a landlord would not be required to make any repairs to a leased property during the life of a lease and a tenant would only be required to make those repairs necessary to keep the leased property in working condition. Under the traditional view, a tenant would have a legal duty to perform ordinary repairs on roads running through the property; perform lane scrapings and mowing to keep a leased property in ordinary working condition—all at the tenant’s own expense.

This traditional view can be altered by the lease agreement. Thus, the landlord and tenant can specify the types of repairs the landlord will be required to make and the level of maintenance the tenant will be required to do. For example, a lease could specify that the landlord is required to replace broken fences and that the tenant is required to keep all roads passable. The lease agreement could also specify how the tenant will be compensated for making necessary repairs, such as whether the tenant will receive a rent deduction for making repairs or whether the landlord will be required to provide supplies for repairs and the tenant contributes the labor.

## **Details Outside the Lease**

### **Recording Leases**

Recording of farm leases is not required under Maryland law. Currently only leases on residential property zoned for four or fewer dwelling units are required to be recorded in the county land records (MD. CODE ANN. REAL PROP. Section 8-702(a) (2013)). An agricultural lease would not qualify and does not need to be recorded in the county land records.

Farm Service Agency, U. S. Department of Agriculture (FSA) may require an agricultural producer to supply a copy of a written lease in certain cases to qualify for federal and state farm programs. For example, FSA may require the tenant to supply either a written lease proving that the rental arrangement is not a crop-share arrangement or a form signed by the landlord verifying she does not have a claim in the crop. Some programs may require copies of written leases or other documents to prove that the tenant has control of the land. Although not a formal requirement to record a lease, FSA may require a written lease to qualify for certain federal and state farm programs.

### **Insurance**

Both parties will want to carry liability insurance on the leased property. This is good business practice and will protect both landlord and tenant from possible liability claims. The landlord will want to carry insurance on all structures located on the leased property to protect against loss. The tenant will want to carry insurance on his own personal property located on the leased property. For example, Tenant rents farm from Landlord that has a huge barn and granaries located on the property. Inside the barn, Tenant stores farm equipment and tools. Tenant also stores grain inside the granaries. Landlord would want to insure the barn and the granaries to protect against loss. Tenant would want to insure his equipment and tools located in the barn and any grain located in the granaries.

As discussed earlier, crop insurance coverage will depend on the type of lease the landlord and tenant share. If a fixed cash rent lease or a flex rent lease is used, the tenant will be responsible for insuring the crop. A landlord may want to include a clause in the lease to ensure that the tenant carries a minimum level of crop insurance coverage in order to ensure the tenant can pay the rent. Use of a crop share lease will require the landlord and tenant to split the cost of crop insurance coverage based on the percentage of the crop owned by each party. With a custom farming contract, the landowner will need to insure the entire crop.

## Lease Assignments and Subleases



An *assignment* is when a tenant signs his/her rights and duties under the lease to a third party. In effect, the third party becomes the tenant, takes control of the rental property, and fulfills any duties owed to the landlord. By contrast, a *sublease* is when a tenant assigns part of the remaining term of the lease to a third party and the original tenant holds a right of reversion, an interest in the property, when the sublease expires.

For example, Tenant's lease has 6 months remaining and Tenant sublets the leased property to Third Party for the next four months. At the end of the four months, Tenant will regain the leased property for the last two months on the lease.

Traditionally, tenant has the right to assign or sublet the lease to any third party without the consent of the landlord (Julian, 1990). This right can be limited by the terms of the lease, although courts tend to dislike clauses preventing assignments or subleasing. Nevertheless, if properly drafted, a lease agreement can prohibit assignments or subleasing or require consent of the landlord before an assignment or sublease occurs.

### Failure to Pay Rent

Maryland law does provide some protections for landlords when a tenant fails to pay rent. With a cash rent lease or a flex rent lease, landlords will not have an automatic statutory liens for unpaid rent. When a tenant has failed to pay rent for three months with a tenancy for a term of years or failed to pay rent for a periodic tenancy that has continued for more than three months a landlord can file a motion for distress for rent (MD. CODE ANN. REAL PROP. SECTION 8-302(c) (2013)). Only if a court grants the motion will a landlord gain a lien on all growing and harvested crops. Obviously, using the court system to try and recoup unpaid rent can be an expensive, long, and laborious process.

A better way for a landlord to protect himself from the risk of unpaid rent is to *perfect*, validating a security interest by filing a financing statement with the Maryland State Department of Assessments and Taxation, a security interest in the crops. A security interest can be created by the lease and, if filed appropriately with the state and in conformity with other statutory requirements, may give the landlord preference over the tenant's other creditors if the tenant has financial difficulties (MD. CODE ANN. REAL PROP. SECTION 8-307(a)(6) (2013)). If a landlord has a perfected security interest in the tenant's crops and the tenant fails to pay rent, the local sheriff can remove growing or harvested crops to sell at a public auction to recoup the rent owed (MD. CODE ANN. REAL PROP. SECTIONS 8-319 to 8-320 (2013)).

If a landlord includes language in the lease to provide a security interest in the crops as collateral for unpaid rent, the lease will need to describe the crops to be taken as collateral, the tenant will need to sign the lease, and the landlord will need to perfect the security interest. Landlords considering including specific language for a security interest for unpaid rent should consider talking with a licensed attorney in their area to make sure all requirements of perfecting their security interest are met.

While a perfected security interest is the best form of protection for landlords, Maryland law does provide for a lien in growing crops when a crop-share lease is used in some counties. When a crop-share lease is used for rent, a landlord will have a lien for rent in the crops, for all counties except for Calvert, Charles, Prince George's, St. Mary's, and Worcester counties (MD. CODE ANN. REAL PROP. Section 8-115(a) (2013)). In Calvert, Charles, Prince George's, St. Mary's, and Worcester counties, a lien in growing crops would exist with a crop-share lease and when landlord advances to a tenant are made on the faith that crops are being grown (MD. CODE ANN. REAL PROP. Section 8-115(b) (2013)). An *advance* would be any money, production inputs, or equipment the landlord gives to the tenant in return for an additional share in the growing crops. For example, Landlord and Tenant have a crop-share lease and Tenant's banker has reduced Tenant's operating loan. Tenant and Landlord agree that Landlord will advance Tenant the additional capital necessary to produce the crop in return for an extra share of the crop. In these five counties, landlords need to make sure they have a valid agreement for the advance in writing and signed by both parties (MD. CODE ANN. REAL PROP. Section 8-115(b) (2013)).

### **Financial Failure of Landlord/Tenant**

When either a landlord or tenant is facing or has filed for bankruptcy, a lease will continue. In the case of the landlord filing for bankruptcy, the tenant may continue to farm the rented property as if nothing has changed. Or, in the case of the tenant filing for bankruptcy, a tenant will still be able to farm the rented land. A landlord dealing with a bankrupt tenant would want to talk with an attorney to ensure that neither a landlord's nor tenant's rights in bankruptcy are violated.

Even if the lease has language that terminates the lease upon one party becoming insolvent or filing for bankruptcy, this language will be invalidated. When a debtor (tenant or landlord who has filed for bankruptcy) files for bankruptcy, an automatic stay or automatic injunction goes into place to preserve the status quo. However, this automatic stay can be lifted by application to the bankruptcy court by a creditor (11 U.S.C. § 362(a)). The automatic stay would allow a tenant to continue operating on the leased property, regardless of who files bankruptcy or the terms of the lease. One exception to the automatic stay is when the lease is a tenancy for a period of years and the lease expires before or during the bankruptcy proceedings. In these cases, bankruptcy courts will allow the lease to terminate (11 U.S.C. § 362(b)(10)).

During a bankruptcy proceeding, bankruptcy courts will be able to approve the rejection of any unexpired lease of a debtor (11 U.S.C. § 365(a)). The purpose of bankruptcy is to allow the debtor a fresh start, and allowing for the rejection of burdensome unexpired leases is one way to accomplish this purpose. For example, Tenant has filed for bankruptcy and has a cash lease with Landlord with a rental rate two times the county rental rate. Tenant may decide to reject this lease because the rental rate is too burdensome on Tenant to allow for a fresh start once the bankruptcy has concluded.

A rejected unexpired lease is viewed as a lease breached on the day the bankruptcy action was filed. The non-breaching landlord or tenant would be able to bring a breach of contract claim against a debtor landlord or tenant. Any damages awarded would be considered a pre-bankruptcy unsecured claim and a non-breaching party may only get pennies on the dollars owed in damages.

When one party files for bankruptcy protection, the other party to the lease should retain an attorney specializing in creditor's rights immediately. The party not filing for bankruptcy will want to ensure that his/her interest is protected without depending on the bankruptcy court. Seeking legal counsel in these situations can prevent large losses or costs in the future.

## **Recreational Use on Rented Property**

As stated earlier, a landlord will have no right to enter the property during the life of the lease unless that right was reserved in the lease. This applies also to recreational uses of the property. A landlord will not be able to enter his/her property to hunt, fish, or for any other recreational purpose without reserving that right. Nor may the landlord allow others to use the property for recreational purposes without first reserving the right in the lease.

If a landlord's property has additional value for recreational purposes, the landlord may want to reserve a right of reentry for these recreational purposes. A landlord in this situation should also consider language in the lease limiting a tenant's right to use the land for recreation purposes. A tenant renting land to farm with recreational value should consider language in the lease that requires those entering to shut gates, respect fences, keep vehicles on established roads, and to shoot away from people or livestock. The tenant might also want language requiring for the landlord to pay for any livestock accidentally killed or crops destroyed by the landowner's hunters.

## **Mineral and Wind Leasing**

Mineral and wind leasing can provide the landowner with additional sources of income. Mineral leasing by the mineral owner (whether the landlord or another third party) could cause issues for a farming tenant. In cases where the mineral owner would like to develop the mineral estate, a tenant will be able to do very little to stop the mineral owner. The mineral estate is the dominant estate—in other words; it prevails over the surface estate, i.e. the farm. The owner of the mineral estate has the right to use the surface as reasonably necessary to extract minerals. The tenant will have some rights to subadjacent support of the surface, the right to have the surface supported in its natural state by the adjoining land and underground structures. If the mining operation will affect the surface of the rented property and interfere unreasonably with the farming operation, a tenant may be able to receive a reduction in the rent owed or maybe able to negotiate a new rental rate.

With oil and gas exploration, the typical lease should include language for the oil or gas company to pay any damages caused to growing crops. If the landowner owes the mineral rights, a farming tenant may want to require the landlord himself to seek compensation for damages to the tenant's crops by the mineral extractions. The tenant may have a harder time collecting damages from third parties. Tenant and landlord would also want to make sure that "growing crop" means the crops or grazing practices currently utilized by a tenant. For example, if Tenant uses the property for grazing cattle. Tenant should make sure that the oil and gas lease clearly defines growing crops to include grasses used for grazing. When the landlord does not own the mineral owner, a tenant may have a harder time collecting for damages caused to a tenant's crop.

In areas of Maryland where leasing to wind energy companies is an option, landlords should consider reserving a right of reentry for the purpose of developing wind energy turbines on their leased property. In order to best protect his rights, a tenant should also consider language that allows the lease to be terminated if wind energy development causes the leased property to become unusable as farmland or greatly impairs the leased property for farming purposes. Such language may aid a tenant whenever a leased property is subject to multiple economic uses.