

**SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session**

SB 939 (Wiener)

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Fiscal: Yes

Urgency: Yes

TSG

SUBJECT

Emergencies: COVID-19: commercial tenancies: evictions

DIGEST

This bill establishes, for all commercial tenants, a temporary moratorium on evictions for the duration of the COVID-19 related state of emergency, and a yearlong period in which to make up rental payments missed during that state of emergency. In addition, for specified businesses that have been especially impacted by the public health protocols resulting from the COVID-19 pandemic, including restaurants and bars, the bill creates procedures for renegotiating or terminating existing leases that were based on pre-COVID-19 expectations. The bill contains an urgency clause.

EXECUTIVE SUMMARY

The COVID-19 pandemic led state and local public health officials to ban large public gatherings, to prohibit restaurants and bars from serving dine-in customers, and to order people to remain in their homes except when necessary to perform essential functions. Even as the state and some jurisdictions begin to ease these restrictions, it seems clear that “business-as-usual” will not return soon – if ever. The expectations, upon which many businesses and many commercial lease agreements were founded, have been upended. As a result, many businesses, but especially those in the restaurant or entertainment industry, have lost significant revenue or closed their doors entirely. That, in turn, has led some of these businesses to fall behind on their rental payments. They now risk forfeiting their leases and, ultimately, eviction. This bill attempts to provide some relief to commercial tenants through three related components: (1) a temporary moratorium on all commercial evictions for the duration of the state of emergency; (2) an opportunity for all commercial tenants to make up all rent payments missed during the state of emergency by about one year after it ends; and (3) procedures under which certain small businesses that have been particularly hard hit by the COVID-19 crisis, as specified, could trigger renegotiation of their leases and, if no agreement can be reached, terms on which the commercial tenant may terminate the existing lease with lesser liability than would ordinarily result.

The bill is sponsored by The Bay Area Hospitality Coalition. Support comes from small businesses, non-profit organizations, restaurants, entertainment venues, and other commercial tenants impacted by COVID-19. Opposition is from commercial landlords, who argue that the bill disrupts existing contracts and that financial protection is needed for commercial landlords as well as tenants. The bill contains an urgency clause.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Proclaims that, beginning March 4, 2020, a state of emergency exists across the entire state due to the COVID-19 pandemic. (Governor's Proc. of a State of Emergency (Mar. 4, 2020).)
- 2) Provides, until 90 days after the Governor lifts the state of emergency related to COVID-19 or until repealed or amended by the Judicial Council, for all of the following:
 - a) a court may not issue a summons on a complaint for unlawful detainer unless it finds, in its discretion and on the record, that the action is necessary to protect public health and safety;
 - b) a court may not enter a default or a default judgment for restitution in an unlawful detainer action for failure of defendant to appear unless the court finds that the action is necessary to protect public health and safety and the defendant has not appeared in the action within the time provided by law, including by any applicable executive order; and
 - c) if a defendant has appeared in a pending unlawful detainer action, the court may not set a trial date earlier than 60 days after a request for trial is made unless the court finds that an earlier trial date is necessary to protect public health and safety. Any trial set in an unlawful detainer proceeding as of April 6, 2020 must be continued at least 60 days from the initial date of trial. (Judicial Council, Emergency Rules Related to COVID-19, Emergency Rule 1.)
- 3) Suspends any state law preempting or restricting the authority of local governments to exercise their police powers to impose substantive protections against the eviction of tenants. (Governor's Exec. Order No. N-28-20 (March 16, 2020.))
- 4) Provides that a tenant is guilty of an unlawful detainer when the tenant remains in possession the leased property after the service and expiration of a three day notice demanding that the tenant pay past due rent. (Code of Civ. Pro. § 1161(2).)
- 5) Provides that a tenant is guilty of an unlawful detainer when the tenant remains in possession of the lease property after the service and expiration of a three day

notice demanding that the tenant correct the violation of a material lease term. (Code of Civ. Pro. § 1161(3).)

This bill:

- 1) Prohibits commercial landlords from terminating any tenancy, serving a notice to terminate a tenancy, use lockout or utility shutoff actions to terminate a tenancy, or otherwise endeavor to evict a tenant of commercial real property, including a business or nonprofit organization, during the pendency of the state of emergency proclaimed by the Governor on March 4, 2020, related to COVID-19, unless the tenant has been found to pose a threat to the property, other tenants, or a person, business, or other entity.
- 2) Provides that harassment or mistreatment of or retaliation against a tenant by a person, business, or other entity in order to force abrogation of a lease is punishable by a fine of not more than two thousand dollars (\$2,000) for each violation.
- 3) Specifies that if a commercial tenant does not pay rent during any or all months occurring during the state of emergency, the sum total of that rent shall be due 12 months after the date the state of emergency ends, unless the tenant has reached an agreement with the person, business, or other entity to pay the sum total of that rent at a date later than the end of the month containing the date 12 months after the end of the state of emergency.
- 4) Provides that the nonpayment of rent that would have been due during the state of emergency shall not be grounds for an unlawful detainer.
- 5) Specifies that no late fees may be imposed for rent that became due during the state of emergency.
- 6) Prohibits the enforcement of a writ of possession for commercial real property while the state of emergency is in effect.
- 7) Renders an eviction in violation of (1) through (6), above, void, against public policy, and unenforceable.
- 8) Clarifies that it is not a violation of (1) through (6), above, for a person, business, or other entity to continue an eviction process that was lawfully begun prior to the proclamation of the state of emergency.
- 9) Renders an eviction in violation of (1) through (6), above, that occurred after the proclamation of the state of emergency but before the effective date of this section void, against public policy, and unenforceable.

- 10) Provides that (1) through (6), above, shall serve as a complete affirmative defense in unlawful detainer proceedings.
- 11) Provides that a violation of (1) through (6), above, constitutes an unlawful business practice and an act of unfair competition within the meaning of Section 17200 of the Business and Professions Code and specifies that the remedies and penalties provided by this section are cumulative to each other, the remedies under Section 17200 of the Business and Professions Code, and the remedies or penalties available under all other laws of this state.
- 12) Requires that written notice of protections afforded by (1) through (6), above, be provided to tenants of commercial real property within 30 days after this bill enters into force.
- 13) Clarifies that (1) through (6), above, do not preempt any local ordinance prohibiting the same or similar conduct or imposing a more severe penalty for the same conduct prohibited by this section.
- 14) Defines a “commercial tenant” for purposes of (15) through (23), below, as a business that operates primarily in California and that meets all of the following:
 - a) its primary business is a small business, or is an eating or drinking establishment, place of entertainment, or performance venue;
 - b) it has experienced a decline of 40 percent or more of monthly revenue as compared to two months either before a state or local government shelter-in-place order took effect or as compared to the same month in 2019, and, if an eating or drinking establishment, place of entertainment, or performance venue, a decline of 25 percent or more in capacity due to a social or physical distancing order or safety concerns; and is subject to regulations to prevent the spread of COVID-19 that will financially impair the business when compared to the period before the shelter-in-place order took effect.
- 15) Clarifies that a commercial tenant that was prevented from opening or required to delay opening its business because of a shelter-in-place order shall not be required to demonstrate that it meets the definition set forth in (14), above.
- 16) Specifies that a commercial tenant described in (14), above, that wishes to modify its commercial lease, may engage in good faith negotiations with its landlord to modify any rent or economic requirement regardless of the term remaining on the lease.
- 17) Provides that a commercial tenant may serve written notice on the landlord, by affirming, under the penalty of perjury, that it is a commercial tenant described in (14), above, and stating the modifications the commercial tenant desires to obtain.

- 18) Provides that if the commercial tenant and landlord do not reach a mutually satisfactory agreement within 30 days of the date the landlord received the negotiation notice, then, within 10 days thereafter, the commercial tenant may terminate the lease by providing written notification to the landlord in a specified manner.
- 19) Specifies that a commercial tenant terminating a lease pursuant to (18), above, shall have no liability for future rent, fees, or costs that otherwise may have been due under the lease except for the following, which shall be paid to the landlord within 12 months of the termination notice:
 - a) a maximum of three months' worth of the past due rent incurred during the civil authority and regulations related to COVID-19 (or a lesser sum as may be actually unpaid); and
 - b) all rent incurred and unpaid during a time unrelated to COVID-19 through the date of the termination notice (payment).
- 20) Provides that, upon service of the termination notice described in (18), above, the lease and any third-party guaranties associated with the lease shall also terminate and shall no longer be enforceable.
- 21) Requires the tenant to vacate the premises within 14 days of the landlord's receipt of the termination notice described in (18), above.
- 22) Specifies that if a commercial tenant and landlord reach a mutually satisfactory agreement pursuant to the process set forth in (16) to (21), above, the commercial tenant shall not have a subsequent option to terminate its lease under the same process at a later date.
- 23) Becomes inoperative on December 31, 2021, or two months after the declared state of emergency ends, whichever is later.
- 24) Contains an urgency clause.

COMMENTS

1. Background

In late 2019 and early 2020, a novel coronavirus and the illness it causes, COVID-19 began to spread across the globe. The first cases detected in California came in late January 2020. The experience of other countries, where the coronavirus had spread earlier, indicated that the coronavirus was probably more lethal than most other viral infections, that it was more deadly for the elderly and medically vulnerable, and that, in the absence of measures to combat its spread, illness from coronavirus would likely overwhelm existing medical care capacity. The pathogen is believed to transfer most

easily through respiratory droplets: small quantities of saliva or mucus that travel through the air when people breathe, sneeze, or cough.¹ Human proximity, therefore, suddenly became dangerous.

The number of COVID-19 cases detected in California grew throughout February 2020, and the first California fatalities were recorded. In response, a number of local California governments began to issue local public health states of emergency, culminating with Governor Newsom's proclamation of a statewide state of emergency on March 4, 2020.

Early in March 2020, state and local public health authorities issued increasingly stringent guidelines restricting public gatherings and directing people to remain at home except when going out to perform essential tasks. That resulted in the cancellation of professional sports events, concerts, and theatrical performances. Many local jurisdictions began to restrict dine-in services at restaurants. Finally, on March 19, 2020, Governor Newsom issued a statewide shelter-in-place directive. (Governor's Exec. Order N-33-20 (Mar. 19, 2020).) At the same time, Governor Newsom ordered restaurants to operate on limited basis, providing only take-out, drive-thru, and delivery services to consumers.² This remained the status quo until mid-May 2020, when some state and some local restrictions are slowly being lifted.

The interim period has been devastating for small businesses generally and for the hospitality industry in particular. The slow reopening of the economy promises to help some of these businesses to regain some customers and some revenue. At the same time, it is widely understood that the hospitality industry is unlikely to return to anything resembling the pre-COVID-19 normal anytime soon. Public and occupational health guidelines will probably prevent full-capacity dine-in service at restaurants for months, if not longer.

As a result, the expectations upon which many businesses and non-profits planned their operations and executed commercial leases have been radically upended. Even those businesses and non-profits that survived the most stringent period of restrictions now face significantly reduced capacity for an indefinite period going forward.

2. Conceptual framework

The intent behind this bill is to help commercial tenants to weather the brunt of the challenges described in Comment 1, above. The basic conceptual framework behind the

¹ *Modes of Transmission of Virus Causing COVID-19: Implications for IPC Precaution Recommendations* (Mar. 19, 2020) World Health Organization <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (as of May 18, 2020).

² *CA State Regulations (Updates & Policies)* (May 15, 2020) California Restaurant Association <https://www.calrest.org/coronavirus-resources> (as of May 18, 2020).

bill consists of three elements: (1) a temporary ban on all commercial evictions; (2) some breathing room for commercial tenants to make up for rent payments they miss during the state of emergency; and (3) a mechanism through which the commercial tenants hardest hit by the COVID-19 crisis can try to renegotiate the terms of their leases or, if that is not successful, terminate their tenancies with fewer financial consequences than they would likely otherwise face.

3. Proposed Amendments

Within the basic conceptual framework described in the previous comment, some details about the way the bill is currently drafted create internal policy tensions. For example, as written, the bill states that it is not a violation of the commercial eviction moratorium for the landlord to continue an eviction process that was already underway before the state of emergency began. The bill also says that commercial evictions can proceed if the tenant has been found to pose a threat to the property or other people. At the same time, the bill forbids enforcement of any writ of possession, which is the culmination of the eviction process. If not completely contradictory, these provisions are, at a minimum, in tension with one another. As opponents of the bill have pointed out, it makes little sense to permit a landlord to proceed with an eviction process on the one hand, but prevent the commercial landlord from completing the process on the other.

Other aspects of the bill in print raise questions about whether it successfully achieves the author's expressed intent. For instance, the author states that the purpose of the bill is to protect businesses and non-profits that have been hard hit by the COVID-19 crisis from getting evicted before they have had a chance to recover. As some opponents to the bill accurately note, however, the commercial eviction moratorium and the one-year extension to pay rent accruing during the state of emergency are blanket provisions. As written, they would apply to all commercial tenants, whether struggling or not. The eviction moratorium would even shield commercial tenants remaining in the property after their lease has expired. The opponents to the bill point out that this goes beyond the author's expressed intent and could even lead some commercial tenants whose revenues have not been affected by COVID-19 to opt out of paying rent in order to stockpile cash.

Some terminology in the bill could also cause confusion and lead to disputes. For example, the word "eviction" could refer to any one of a number of stages in the process. Does it mean the moment when a landlord first notifies the tenant that the landlord intends to terminate the lease? The moment that the landlord files a complaint for unlawful detainer in court? The moment that the sheriff physically removes the tenant from the property? All of the above? The bill does not specify, leaving it unclear what landlords can and cannot do without violating the terms of the bill and, conversely, exactly what protections commercial tenants would have under the bill. Similarly, the bill makes "small businesses" eligible for the bill's proposed mechanism

by which COVID-19-impacted commercial tenants can trigger renegotiation of their leases and, if necessary, terminate those leases, but the bill does not define what exactly a “small business” is.

In response to these and other concerns, the author proposes to offer amendments in Committee that revise the bill in a number of significant ways.

First, the amendments invert the structure of the commercial eviction moratorium. Instead of banning all commercial evictions except for those relating to public health and safety, the amended bill would *allow* all commercial evictions, *except* those based upon non-payment of rent that accrued during the state of emergency and only where the tenant meets specified criteria indicating that COVID-19 has or will have significant financial impact on the tenant. At the same time, the amendments would extend duration of the proposed moratorium to 90 days after the state of emergency ends. The intent is to make the length of the moratorium proposed by the bill consistent with the existing moratorium established by the Judicial Council’s Emergency Rule 1.

Second, the amendments narrow eligibility for the component of the bill which gives commercial tenants a year after the state of emergency ends to pay rent accruing during the state of emergency. As mentioned, all commercial tenants qualify for this option under the bill in print. As proposed to be amended, the only commercial tenants eligible for the additional time will be those meeting specified criteria indicating that COVID-19 has or will have significant financial impact on them. This better trains the bill’s focus onto the commercial tenants it is intended to assist.

Third, the amendments further narrow the eligibility requirements that determine which commercial tenants may invoke the bill’s provisions regarding renegotiation and possible termination of the lease. Whereas the bill in print would allow any small business to qualify for that provision so long as they can show that they meet the bill’s definition of COVID-19 impact, the proposed amendments limit eligibility for the lease renegotiation and termination provision to small businesses that are eating or drinking establishments, places of entertainment, or performance venues.

Finally, the proposed amendments provide a number of definitions that help to clarify how the bill would operate and exactly what commercial landlords and tenants are covered by it.

A copy of the bill text as it would read after adoption of the proposed amendments is attached to the end of this analysis.

4. Big picture opposition concerns

The proposed amendments, as described in the preceding comment, answer many of the questions that opponents of the bill had about how it would work, to whom it

would apply, and whether there would still be an avenue for proceeding with commercial evictions having nothing to do with COVID-19. Even with these amendments, however, the opponents' more general concerns about the bill will likely remain. Those concerns can be broken down into two categories: policy arguments asserting that the bill will have detrimental knock-on financial impacts, and legal arguments contending that the bill unconstitutionally impairs existing contracts. Each topic is addressed in turn, below:

a. Policy arguments

The opponents of this bill are universally careful to acknowledge the incredibly challenging times facing commercial tenants. There is general agreement that commercial tenants need help and, in fact, many of the commercial landlords writing in to oppose the bill emphasized that they are already voluntarily working with their tenants to modify lease terms.

The opponents point out, however, that as to preventing evictions, some important protections are already in place for commercial tenants. In particular, they note that the Judicial Council's Emergency Rule 1 effectively prevents all new eviction cases from proceeding and significantly delays eviction cases that were already pending. (Judicial Council, Emergency Rules Related to COVID-19, Emergency Rule 1.) In fact, while the commercial eviction moratorium proposed by this bill lasts only through the pendency of the state of emergency, the Judicial Council's Emergency Rule extends for a further 90 days. Given this, and the several local ordinances in place that provide commercial tenants with even further protections, the opponents question the need for this bill.

As to the one-year period to make up missed rent payments and the bill's mechanism for renegotiating or terminating the lease, the opponents make the straightforward point that they, too, have bills to pay, and that there are consequences if they cannot. In the words of one commercial real estate executive who wrote to the Committee:

SB 939 will unreasonably deny commercial real estate lessors income which will push many into foreclosure, force them to lay off staff, and will set a bad precedent that undermines all contracts in the state. Furthermore, a series of foreclosures will only help depress property values across the industry, resulting in lower property tax revenues for those local governments which desperately need them.

In addition, the opponents voice concern that the damages commercial landlords could recover after a lease termination under the bill do not come close to reflecting the money that some landlords will have lost. Under both the bill in print and the proposed amendments, if the tenant terminates the lease, the landlord is limited to recovering three months' worth of unpaid rent corresponding to the state of emergency plus any

unpaid rent corresponding to time outside of the state of emergency. The opponents contend that this is insufficient when compared to what the tenant would otherwise owe. In particular, they point out that this formula does not take into account leases in which landlords initially front the cost of customizing the space, and the tenants slowly pay this back over the term of the lease. Assuming that the bill passes out of Committee, the author may wish to consider further refining the obligations of tenants who elect to terminate their lease so that they better reflect situations in which the landlord's losses may go beyond lost rental income.

b. Constitutional arguments

The bill sets forth a process by which commercial tenants can initiate a period of lease renegotiation after which, if no mutually agreeable terms can be reached, the tenant may terminate the lease and the landlord is restricted to recovering only a limited amount of the rent that would otherwise have been due. Opponents of the bill contend that these provisions are unconstitutional.

The Contracts Clause of the U.S. Constitution provides that “[n]o state shall … pass any Law impairing the Obligation of Contracts.” (U.S. Const. Art. I, § 10, cl. 1). The California Constitution, similarly, declares that “[a]… law impairing the obligation of contracts may not be passed.” (Cal. Const., art. 1, § 9.) Because the two provisions are parallel, the same legal analysis applies to both. (*Campanelli v. Allstate Life Ins. Co.* (9th Cir. 2003) 322 F.3d 1086, 1097, citing *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805.)

Though the contract clauses speak in absolute terms, courts have long held that they do not prohibit all state action that results in the modification of a contract. (*Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 782.) Instead, as the U.S. Supreme Court recently articulated in *Sveen v. Melin* (2018) 138 S. Ct. 1815, whether a state law violates the Contracts Clause must be determined through a two-step test. The threshold question is whether the state law operates as a “substantial impairment of a contractual relationship.” If not, the state law does not violate the Contracts Clause. If so, then the state law may still be constitutional if it is drawn in an “appropriate” and “reasonable” way to advance “a significant and legitimate public purpose.” (*Id.* at 1821-22.)

i. Is the impairment substantial?

In deciding whether a state law substantially impairs a contract or not, courts consider the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating the party's rights. (*Sveen*, 138 S. Ct. 1815, 1821-22.)

Applying this standard to the bill, it seems likely that a reviewing court would find that the bill works as a substantial impairment on existing contracts. Commercial landlords and tenants are generally free to renegotiate the terms of their lease at any time.

Frequently, the tenant's stated or implicit position is that it will break the lease if it cannot obtain more lenient terms. Ordinarily, however, both the landlord and tenant know that if the tenant makes good on this threat, the landlord will have all its legal and contractual remedies available to it. This bill would alter that calculation. Indeed, that seems to be the point: to incentivize commercial landlords to get serious about finding a way to keep the commercial tenant, because they have more to lose if an agreement cannot be reached.

In determining whether this bill would substantially impair commercial leases, a reviewing court would also consider whether the industry in question has been regulated in the past. (*Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, at 242, n. 13, citing *Veix v. Sixth Ward Bldg. & Loan Assn.* (1940) 310 U.S. 32, 38 ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.").) Unlike residential tenancies, which are the frequent subject of both state and local regulations, the state generally treats commercial tenancies with a hands-off approach given the greater perceived bargaining parity between the parties involved. In fact, California state law prohibits the imposition of local commercial rent control. (Civ. Code § 1954.27.)

ii. Is the bill drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose?

Modern case law makes it clear that the state and federal contracts clauses do not strip states of their police powers:

[T]he Contract Clause does not operate to obliterate the police power of the States. "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 241, citing *Manigault v. Springs* (1905) 199 U.S. 473, 480.)

Even where a state law does substantially impair a contract, therefore, it still passes constitutional muster so long as it is drafted in a reasonable and appropriate way to advance a significant and legitimate public purpose. (*Sween*, 138 S. Ct. 1815, 1821-22.) Responding to a public health crisis and unprecedented economic downturn would appear to be adequate justification. As the U.S. Supreme Court has noted:

It cannot be maintained that the constitutional prohibition [on impairment of contracts] should be so construed as to prevent limited and temporary interpositions with respect to the

enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts, as is the reservation of state power to protect the public interest in the other situations to which we have referred. And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes. (*Home Bldg. & Loan Asso. v. Blaisdell* (1934) 290 U.S. 398, 439-40. Internal citations omitted.)

Opponents argue that the bill is one-sided because it offers protections to tenants, without providing anything equivalent to landlords. Yet the interest advanced by the bill is not to give tenants an advantage over landlords but rather to stave off what might otherwise be a wave of business closures and evictions. Moreover, looking so narrowly at the bill arguably ignores the broader context: state and local government have already interfered with the expectations that the commercial tenants rationally held when they entered into these leases. They have done so by imposing necessary public health guidelines that fundamentally undermine the bargain commercial tenants thought they were entering into. A commercial lessee might even argue that the government's response to the COVID-19 crisis has frustrated the purpose underlying the contract, something that could justify releasing the tenant from it. Viewed with this wider lens, it could be argued that this bill is less one-sided and more like balancing of a burden that would otherwise fall exclusively on the commercial tenants' side of the ledger.

As to the requirement that the bill be drafted in a reasonable and appropriate way, it appears to be met. Though the opposition fervently disputes that it is the wisest approach, there is a logical relationship between the interest advanced – preventing eviction and closure of a large number of small businesses and restaurants – and the mechanism employed. The bill's lease renegotiation provisions are not open to just any commercial tenant. The bill contains a set of eligibility criteria designed to ensure that only those businesses that are most directly and obviously upended by COVID-19 can benefit from its provisions. The amendments that the author proposes to offer in Committee further focus this nexus. Whatever the policy disagreements, therefore, as a legal matter it seems hard to argue that the bill is drawn in a way that is either unreasonable or inappropriate for the interests it seeks to advance.

c. *Conclusion*

Though opponents of the bill argue that it violates the state and federal constitutional prohibition on impairment of contracts, the weight of jurisprudence appears to suggest

that the existence of such a violation is not so clear. A reviewing court might well conclude that the bill results in a substantial impairment of the commercial leases in question, but it could very well also rule that the bill is an appropriate and reasonable way to advance the public interest in ensuring that California's small businesses, restaurants, bars, and theaters have a realistic opportunity to adjust and recover now that their operations have been radically constrained.

It should be noted that some opponents of the bill contend that the two-part *Sveen* test is not the legal standard a court would apply to a constitutional challenge of this bill. Though *Sveen* is far more recent, and reflects jurisprudence accumulated in the interim, these opponents believe that the legal standard laid out in *Home Building and Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, is more appropriate because the facts in *Blaisdell* relate more closely to the context behind this bill. Specially, in *Blaisdell*, the U.S. Supreme Court upheld a state act that placed a moratorium on foreclosures during the Great Depression.

As the California Supreme Court has formulated it, under *Blaisdell*, four factors are significant in justifying a state law that impairs contractual obligations: (1) an emergency exists, as declared by the Legislature; (2) the legislation is addressed to a legitimate end – the protection of basic interests of society – and is not enacted for the advantage of particular individuals; (3) the legislative changes are appropriate to the emergency and are based on reasonable conditions; and (4) the legislation is temporary in operation and limited to the emergency. (*Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 384.)

Unlike the *Sveen* test, the *Blaisdell* factors suggest that only an emergency can justify government impairment of a contract and that application of the law must be limited in duration to the emergency itself. Still, the bill appears to meet the spirit, if not the exact letter, of these additional criteria. The existence of a state of emergency is plain and official, albeit proclaimed by the Governor rather than the Legislature. In addition, all of the protections afforded by the bill expire when the state of emergency is lifted or shortly thereafter, though this does depend somewhat on exactly how long the state of emergency lasts.

5. Arguments in support of the bill

According to the author:

California's small businesses and non-profits are critical components not only of our local economies but of our vibrant civil life, as well. Rather than letting the pandemic wipe out large numbers of these organizations, many of which are pillars of their communities, SB 939 will ensure that no commercial tenants (businesses, non-profits, and other non-residential lessees) will be

evicted during the State of Emergency declared to help fight the COVID-19 pandemic, during which economic activity has been deliberately suppressed and a business or non-profit may prove unable to pay the rent through no fault of their own. This important measure will help ensure that California emerges from this pandemic with our rich ecosystem of businesses, non-profits, and other institutions intact and thriving.

As sponsor of the bill, The Bay Area Hospitality Coalition writes:

Restaurants, bars and entertainment venues are the backbones of our communities, designed to bring people together and the very nature of this crisis requires everything counter to our existence. These businesses often represent a community's identity and are the anchors for many commercial corridors or shopping centers. Their reach is far into the agricultural community, which is suffering from restaurant closures. Many of us made the painful decision to completely shutter our businesses, uncertain as to whether our closure will be temporary or permanent. Without addressing the ongoing fixed and often expensive cost, rent, many independent small businesses will shutter permanently.

In support of the bill, the Greenlining Institute writes:

SB 939 will ensure that no commercial tenants (businesses, non-profits, and other non-residential lessees) will be evicted during the State of Emergency declared to help fight the COVID-19 pandemic, during which economic activity has been deliberately suppressed and a business or non-profit may prove unable to pay the rent through no fault of their own. The impact of SB 939 will be that many businesses that would have otherwise closed, especially vulnerable businesses owned by people of color, will be able to remain open in their communities.

In further support, the California Association of Non-Profits writes:

Because of life-saving shelter-in-place orders, nonprofits have been unable to continue business as usual and are struggling with significant revenue losses. [...] As a result, many nonprofits are facing extreme economic hardship. Despite good-faith efforts, they may be unable to pay their rent. Yet these nonprofits provide invaluable services to their communities. This important measure will help ensure that nonprofits survive this emergency period so

they can continue to provide vital services during and after the crisis.

6. Arguments in opposition to the bill

In opposition to the bill, a coalition of 23 business and real estate trade associations writes:

While we agree with the author that COVID-19 economic impacts have been severe, we worry that the short-term solution of forcing commercial space lessors to provide rent-free space for an extended time will have even worse long-term consequences resulting in a slower recovery. [...] [T]his bill would unreasonably deny commercial real estate lessors income which will push many into foreclosure, and will set a bad precedent that undermines all real estate contracts in the state. [...] [W]hat's been missing, to date, in the various discussions about ensuring business solvency, are protections or solutions for property owners who are being harmed by rents not being paid. There are numerous costs borne by property owners, including service contracts, utility charges, mortgage/finance payments, as well as numerous government fees and taxes, including property taxes. When rent is not paid, these other obligations become difficult to fulfill.

In further opposition to the bill, the Building Owners and Managers Association of Greater Los Angeles writes:

[SB 939] will put small property owners into foreclosure by forcing them to float rent for all tenants and gives restaurants the right walk away from a lease without squaring up for owed rent nor paying for property improvements.

The COVID-19 virus continues to infect populations around the world, putting the health and safety of our communities here in California at serious risk. All businesses are impacted by this pandemic. However, this bill only provides protection to a small segment, while shifting economic harm to other private businesses and removing rights from those who happen to be in the business of leasing space.

SUPPORT

The Bay Area Hospitality Coalition (sponsor)
1337 Mission LLC
2nd Street Bar LLC
Almanac Beer Company
American Civil Liberties Union of California
The Argentum Project, LLC
Audrey Joseph Presents
Bamboo Asia
The Bar on Dolores
Barrelhouse
Berrylime, Inc.
Bet Tzedek Legal Services
The Bewildered Pig
The Brew Coop
Bierhaus, Oakland and Walnut Creek
Birba
Blackbird
Blue Line Pizza
BONMOT Clothing
Brick & Mortar Legal PC
Bridges Restaurant & Bar
Butters Enterprises LLC
CALA Restaurant
California Association of Nonprofits
California Teamsters Public Affairs Council
Camper
Carousel Consignment SF
Cassanego Enterprises, LLC
CHICA
Coalition of California Welfare Rights Organizations
Cocina Hermanas
Commis Restaurant
The Crepe Pan
Danville Harvest
DECANTsf
DeeZeeTee Investments
The Detour
Dogpatch Saloon and 83 Proof
Easy Breezy Frozen Yogurt
The Edge
El Lopo, LLC
El Rio

Elda
Equality California
FDR Brewing Company
Fort Point Beer Company
Gee Bee Burgers
The Greenlining Institute
Golden Gate Restaurant Association
Hi Tops
Hi Tops West Hollywood
Hogwash
Hughes Marino, Inc.
ICHI Sushi
Independent Hospitality Coalition
John Colins Lounge
Kagawa-Ya Udon Restaurant
Kantine
KitchenTown
Last Call Bar
Liholiho Yacht Club/Nopa/Nopalito/Dear Inga
Little Gem
Local Roots
Lookout, WesBurger N' More, and Casements
Lundberg Design
Madrone Art Bar & Pops Bar
Maker's Mark
Mani's Test Kitchen
Mau Restaurant
Maven Restaurant
Media Noche
Mi Inc.
Midnight Sun
Mikkeller Bar / Good Oel Inc.
Mission Bar
Mission Bowling Club
Moby Dick's Bar
Molotov's
Mom's Body Shop
Monarch Management Group
Mr. Dewie's Cashew Creamery
Mr. Tipple's
Native Co.
Nuvo Step Group
Oaktown Restaurant Group
One Market Restaurant Partners

Onigilly
Pacific Coast Federation of Fishermen's Associations
Park Tavern
Per Diem
Pizza My Heart
Pour Guys Inc.
Private I Salon
Prizefighter Bar
The Progress
Prubechu
Public Counsel
Public Law Center
Quelquefois Press
R Venue Inc.
Rooster & Rice
Rosamunde Sausage Grill
ROY
San Francisco Athletic Club
San Francisco Bar Owner Alliance
San Francisco Cocktail Company
The Serpent & The Ox, Inc.
Shovels Bar
Slate Bar
Southside Spirit House
Specs' Twelve Adler Museum Café
State Bird Provisions
The Sunset Cantina
Tacolicious
Therapy Lounges
Tin Vietnamese Cuisine
Tosca Café
Tres Tequilas Lounge & Mexican Kitchen
Tribune Tavern
United Food and Commercial Workers Western States Council
Vine Dining Enterprises
Vinyl Room
Virgil's Sea Room
Wine Down SF
Zoetic Digital
18 individuals

OPPOSITION

225 Bush Street Partners, LLC
AIR Commercial Real Estate
ASM Property Management
Apartment Association, California Southern Cities
Apartment Association of Orange County
Building Owners and Managers Association of Greater Los Angeles
Building Owners and Managers Association of California
California Association of Realtors
California Association of Retailers
California Bankers Association
California Business Properties Association
California Business Roundtable
California Builders Alliance
California Chamber of Commerce
California Downtown Association
California Land Title Association
California Mortgage Bankers Association
Centennial Real Estate
Central Coast Builders Association
Century | Urban
Chico Builders Association
Commercial Real Estate Development Association, NAIOP
Conroy Commercial
Duke Realty
Dollinger Properties
East Bay Rental Housing Association
EPR Properties
F1 Stevenson, LLC
GM Properties
Goodman North America Hill Properties
Healthpeak Properties
Hughes Investments
Imperial Valley Mall II, LP
International Council of Shopping Centers
Kidder Mathews
Lamb Partners, LLC
Makai West, Inc., AMO
Maudlin Real Estate, LLC
MSM Global Ventures, LLC
NAIOP Commercial Real Estate Development Association – Inland Empire Chapter
Nareit
Newmark Knight Frank

Orange County Business Council
PGI Management
PJMB Commercial
Placer County Contractors Association & Builders Exchange
Prologis
Sacramento Regional Builders Exchange
Seagrove Property Group
Shasta Builders' Exchange
Talley & Associates, Inc.
Tierna Real Estate Service, Inc.
Toeniskoetter Development, Inc.
Transwestern Real Estate Service
United Chamber Advocacy Network
Valley Contractors Exchange
Ventura County Contractors Assn Bay Area Builders Exchange
Westwood Interests
5 individuals

RELATED LEGISLATION

Pending Legislation:

SB 915 (Leyva, 2020) establishes, for mobilehome residents impacted by the COVID-19 pandemic and the resulting economic fallout, a temporary moratorium on evictions as well as parameters for repayment of unpaid rent accumulated during the state of emergency. SB 915 is currently pending consideration before the Senate Judiciary Committee.

SB 1410 (Gonzalez, 2020) establishes the COVID-19 Emergency Rental Assistance Program, which would pay participating residential landlords 80 percent of the monthly rent as payment in full on behalf of tenant households demonstrating an inability to pay all or any part of the household's rent due between April 1, 2020, and October 31, 2020, due to the COVID-19 pandemic. SB 1410 is currently pending consideration before the Senate Housing Committee.

AB 828 (Ting, 2020) establishes a temporary moratorium on foreclosures and residential evictions, for homeowners and residential tenants impacted by the COVID-19 pandemic. The bill also establishes procedure for court-supervised repayment of unpaid rental balances accumulated during the state of emergency. AB 828 is currently awaiting referral in the Senate Rules Committee.

Prior Legislation: None known.

2019-2020 SB-939 (Wiener (S), Lena Gonzalez (S))

AS REVISED BY AMENDMENTS PROPOSED TO BE TAKEN IN COMMITTEE

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1951.9 is added to the Civil Code, to read:

1951.9. (a) The following definitions apply for the purposes of this section:

(1) "Commercial real property" means all real property in this state except dwelling units made subject to Chapter 2 (commencing with Section 1940) of Title 5 of Part 4 of Division 3 of the Civil Code, mobilehomes as defined in Section 798.3 of the Civil Code, or recreational vehicles as defined in Section 799.24 of the Civil Code.

(2) "Commercial tenant" means a tenant occupying commercial real property pursuant to a lease, including, but not limited to, businesses or non-profit organizations.

(3) "Commercial tenancy" means the occupation of commercial real property pursuant to a lease.

(4) "Commercial landlord" means any person, business, or other entity that owns or manages commercial property, or their agent.

(5) "State of emergency" means the state of emergency proclaimed by the Governor on March 4, 2020, related to COVID-19.

(6) "Eligible COVID 19 impacted commercial tenant" means a commercial tenant that operates primarily in California, that occupies commercial real property pursuant to lease, and that meets one of the following criteria:

(A) It is a commercial tenant that has experienced a decline of 20 percent or more in average monthly revenue over the two most recent calendar months when compared to one or both of the following:

(i) Its average monthly revenue for the two calendar months before a state or local government shelter-in-place order took effect; or

(ii) Its average monthly revenue the same calendar months in 2019.

(B) It is a commercial tenant that was prevented from opening or required to delay opening its business because of the state of emergency.

(C) It is a commercial tenant that has suffered a decline of 15 percent or more in capacity due to compliance with an official public health order or occupational health and safety guideline for preventing the spread of COVID 19.

(b) Until 90 days after the state of emergency is lifted, it shall be unlawful for a commercial landlord to serve a commercial tenant with a notice pursuant to subdivision (2) of Section 1161 of the Code of Civil Procedure if both of the following apply:

(1) the notice requires payment of rent that accrued during the state of emergency; and

(2) the commercial tenant has served written notice on the premises landlord affirming, under the penalty of perjury, that the commercial tenant is an eligible COVID 19 impacted commercial tenant as defined by this section.

(c) Until 90 days after the state of emergency is lifted, it shall be unlawful for a commercial landlord to serve a commercial tenant with a notice pursuant to subdivision (3) of Section 1161 of the Code of Civil Procedure if both of the following apply:

(1) The notice requires replenishment of a security deposit that the landlord has applied to an outstanding balance corresponding to unpaid rent that accrued during the state of emergency.

(2) The commercial tenant has served written notice on the premises landlord affirming, under the penalty of perjury, that the commercial tenant is an eligible COVID 19 impacted commercial tenant as defined by this section.

(d) Subdivision (b) and (c) shall apply prospectively.

(e) A notice served by a commercial landlord to a commercial tenant pursuant to subdivision (2) of Section 1161 of the Code of Civil Procedure is void if both of the following apply:

(1) The notice requires payment of rent that accrued during the state of emergency.

(2) At the time the notice was served, the commercial tenant was an eligible COVID 19 impacted commercial tenant as defined by this section.

(f) A notice served by a commercial landlord to a commercial tenant pursuant to subdivision (3) of Section 1161 of the Code of Civil Procedure is void if both of the following apply:

(1) The notice requires replenishment of a security deposit that the landlord has applied to an outstanding balance corresponding to unpaid rent that accrued during the state of emergency.

(2) At the time the notice was served, the commercial tenant was an eligible COVID 19 impacted commercial tenant as defined by this section.

(g) Subdivision (e) and (f) shall apply retroactively. In any action for unlawful detainer in which a judgment for possession has been entered in favor of a commercial landlord, the commercial tenant may move to have that judgment set aside on the basis of this section. No writ of possession shall issue while the motion to set aside is pending. If a writ of possession was issued prior to filing of the motion to set aside, the court shall stay execution of the writ while the motion to set aside the judgement is pending.

(h) The failure of an eligible COVID-19 impacted commercial tenant to pay rent that accrues during the state of emergency shall not be grounds for an unlawful detainer. The unpaid balance of any rent that accrued on the commercial tenancy of an eligible COVID-19 impacted commercial tenant during the state of emergency shall be due at the end of the month containing the date 12 months after the end of the state of emergency, unless the tenant has reached an agreement with the person, business, or other entity to pay off the balance at a later time.

(i) Notwithstanding any lease provision to the contrary, no late fees may be imposed for rent that accrued on the commercial tenancy of an eligible COVID-19 impacted commercial tenant during the state of emergency unless that rent remains unpaid after it becomes due pursuant to the terms of subdivision (h).

(h) Notwithstanding Civil Code Section 1479, a landlord shall apply any rental payment made by a eligible COVID-19 impacted commercial tenant after the state of emergency is lifted toward the current month's rent before applying any residual to any unpaid balance corresponding to rent that came due during the period of the state of emergency.

(i) Written notice of protections afforded by this section shall be provided to tenants of commercial real property within 30 days of the effective date of this section. If the commercial landlord customarily communicates with the commercial tenant in a language other than English, the commercial landlord shall provide the written notice required by this section in that other language.

(j) This section does not preempt any local ordinance prohibiting the same or similar conduct or imposing a more severe penalty for the same conduct prohibited by this section.

(k) In addition to the prohibitions contained in subdivisions (a) and (b) of Section 789.3 of the Civil Code Section, a commercial landlord shall not willfully harass, intimidate, threaten, or retaliate against a commercial tenant with the intent to terminate the occupancy. Any commercial landlord who violates this section shall be liable to the tenant in a civil action for all of the following:

(1) Actual damages of the tenant.

(2) An amount not to exceed two thousand (\$2,000) for each incident constituting a violation. In determining the amount of such award, the court shall consider proof of such matters as justice may require; however, in no event shall less than two hundred fifty dollars (\$250) be awarded for each separate cause of action. Subsequent or repeated violations, which are not committed contemporaneously with the initial violation, shall be treated as separate causes of action and shall be subject to a separate award of damages.

(l) In any action under subdivision (k) the court shall award reasonable attorney's fees to a prevailing tenant. In any such action the tenant may seek appropriate injunctive relief to prevent continuing or further violation of the provisions of this section during the pendency of the action.

(m) Willful violation of this section shall constitute an unlawful business practice and an act of unfair competition within the meaning of Section 17200 of the Business and Professions Code. The remedies and penalties provided by this section are cumulative to each other, the remedies under Section 17200 of the Business and Professions Code, and the remedies or penalties available under all other laws of this state.

(n) The remedies set forth in this section are not exclusive and shall not preclude the tenant from pursuing any other remedy which the tenant may have under any other provision of law.

SEC. 2. Section 1951.10 is added to the Civil Code, to read:

1951.10 (a) For purposes of this section, the following definitions apply:

(1) "Commercial real property" means all real property in this state except dwelling units made subject to Chapter 2 (commencing with Section 1940) of Title 5 of Part 4 of Division 3 of the Civil Code, mobilehomes as defined in Section 798.3 of the Civil Code, or recreational vehicles as defined in Section 799.24 of the Civil Code.

(2) "State of emergency" means the state of emergency proclaimed by the Governor on March 4, 2020, related to COVID-19.

(3) "Small business" means a business that is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which has 500 or fewer employees.

(4) "Eligible COVID 19 impacted commercial tenant" means a small business that operates primarily in California, that occupies commercial real property pursuant to lease, and that meets one of the following criteria:

(A) It is an eating or drinking establishment, a place of entertainment, or a performance venue that has experienced a decline of 40 percent or more of average monthly revenue over the two most recent calendar months when compared to one or both of the following:

- (i) Its average monthly revenue for the two calendar months before a state or local government shelter-in-place order took effect; or
- (ii) Its average monthly revenue the same calendar months in 2019.

(B) It is an eating or drinking establishment, a place of entertainment, or a performance venue that was prevented from opening or required to delay opening its business because of the state of emergency.

(C) It is an eating or drinking establishment, a place of entertainment, or a performance venue that has suffered a decline of 25 percent or more in capacity due to compliance with an official public health order or occupational health and safety guideline for preventing the spread of COVID 19.

(b) An eligible COVID 19 impacted commercial tenant who wishes to modify its commercial lease, may engage in good faith negotiations with its landlord to modify any rent or economic requirement regardless of the term remaining on the lease.

(c) A commercial tenant that is an eligible COVID 19 impacted commercial tenant may serve written notice on the premises landlord affirming, under the penalty of perjury, that the commercial tenant is an eligible COVID 19 impacted commercial tenant as defined by this section and stating the lease modifications the commercial tenant desires to obtain.

(d) If the eligible COVID 19 impacted commercial tenant and landlord do not reach a mutually satisfactory agreement within 30 days of the date the landlord received the negotiation notice then, within 10 days thereafter, the eligible COVID 19 impacted commercial tenant may terminate the lease by serving notice of termination on the landlord. The tenant shall have 14 days from service of the notice to vacate the premises. Once the eligible COVID 19 impacted commercial tenant vacates the property, all of the following shall apply:

- (1) The lease shall terminate.
- (2) No further liability for any rent, fees, or costs shall accrue under the lease.
- (3) Any third-party guaranties associated with the lease shall terminate and shall no longer be enforceable.

(4) In lieu of any other damages, the eligible COVID 19 impacted commercial tenant shall be obligated to pay the landlord, within 12 months of vacating, all of the following:

(A) Three months' worth of the past due rent incurred during the state of emergency or a lesser sum as may be actually unpaid.

(B) All unpaid rent that accrued outside of the state of emergency.

(e) The notices in subdivisions (c) and (d) shall be served in accordance with the notice provisions of the lease. If no notice provisions exist in the lease, the commercial tenant shall provide the notice through certified mail, return receipt requested, recognized overnight carrier, personal delivery, or any other manner where actual receipt occurs to the landlord or landlord's designated agent.

(f) If a commercial tenant and landlord reach a mutually satisfactory agreement pursuant to this section, the commercial tenant shall not have a subsequent option to terminate its lease under this section at a later date.

(g) This section shall not apply to any publicly traded company or a company that is owned by or is affiliated with a publicly traded company.

(h) This section shall be inoperative on December 31, 2021, or two months after the declared state of emergency ends, whichever is later.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to mitigate the economic hardships to tenants of commercial real property, including businesses and non-profit organizations, resulting from COVID-19, it is necessary that this act take effect immediately.