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## Key Legal Considerations in Obtaining And Defending Against ‘Yellowstone’ Injunctions

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For business enterprises, a commercial lease often represents one of their most valuable assets—obtaining and keeping a lease is critical to the success of the enterprise. An alleged lease violation can represent an existential threat to a business because once a lease is terminated it typically cannot be revived. When a landlord serves a notice to cure an alleged default, a commercial tenant may only have a matter of days to resolve the problem before facing termination, making it nearly impossible for the tenant to challenge the validity of the alleged default without losing the lease. New York courts have created a legal remedy to avoid this Hobson’s choice—the *Yellowstone* injunction, which tolls the tenant’s time to cure the alleged

default while the tenant pursues a legal determination as to whether cure is in fact required under the terms of the lease. This article provides an overview of the key legal considerations in obtaining or defending against a *Yellowstone* injunction.

### Elements of a ‘Yellowstone’ Injunction

Tenants seeking a *Yellowstone* injunction must show:

The existence of a commercial lease;

The tenant received a notice of default, a notice to cure, or a threat of termination of the lease;

The tenant sought the injunction prior to the termination of the lease and the expiration of the specified cure period; and

The tenant is willing and able to cure the alleged default.

See *225 East 36th Street Garage v. 221 East 36th Owners*, 211 A.D.2d 420, 421 (1st Dep’t 1995). Unlike with a typical preliminary injunction, a tenant need not show a likelihood of success on the merits, irreparable injury or that the balance of the equities favors



preliminary relief. *Jemaltown of 125th St. v. Leon Betesh/Park Seen Realty Assocs.*, 115 A.D.2d 381, 381 (1st Dep’t 1985).

It is of paramount importance that a tenant seeking a *Yellowstone* injunction file its motion before the termination of the subject lease and prior to the expiration of the cure period. *Riesenburg Properties v. Pi Associates*, 155 A.D.3d 984, 985-86 (2d Dep’t 2017). Where a tenant fails to file a timely motion for a temporary restraining order, “a court is divested of its power to grant a *Yellowstone* injunction,” and the tenant risks losing its interest in the lease. *Id.* at 986.

While courts can typically resolve the first three requirements of a *Yellowstone* injunction

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quickly, the fourth requirement—a tenant's willingness and ability to cure—will often be the central disputed issue in a *Yellowstone* proceeding. A tenant can generally meet its burden by submitting an attestation of willingness and ability to cure in support of its request for emergency relief. *Koedderitzsch v. 541 Const.*, Index No. 0602562/2007, 2008 WL 1998656 at \*3, (Sup. Ct. N.Y. Cnty. April 28, 2008). If a tenant fails to explain how it would cure the alleged lease violation or indicate its willingness to do so, however, the court may refuse to grant the requested relief. *Bliss World v. 10 W. 57th St. Realty*, 170 A.D.3d 401, 401-02 (1st Dep't 2019).

New York case law provides many examples of denied injunctions where a tenant was unable to demonstrate an ability and willingness to cure the default, including where the tenant failed affirmatively to declare its ability to cure, made no offer to cure, or continued violating the lease during the cure period. See, e.g., *Zona v. Soho Centrale*, 270 A.D.2d 12, 14 (1st Dep't 2000); *Metropolis Westchester Lanes v. Colonial Park Homes*, 187 A.D.2d 492, 493 (2d Dep't 1992); *IP Int'l Prod. v. 275 Canal St. Assocs.*, 139 A.D.3d 464, 464 (1st Dep't 2016). *Yellowstone* relief is also unavailable where the terms of the lease expressly identify the alleged default as incurable—such as by providing for automatic termination of the lease in the event of an improper assignment or sublease. *Excel Graphics Tech. v. CFG/AGSCB 75th Ninth Ave.*, 1 A.D.3d 65, 71 (1st Dep't 2003).

On the other hand, demonstrating past or present efforts to cure the alleged default generally strengthens a tenant's application for a *Yellowstone* injunction. Even in situations where the alleged default is typically viewed as incurable, *Yellowstone* relief may still be available based on the tenant's demonstrated efforts to remedy the situation. For example, in one case involving the failure to maintain liability insurance, the court

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granted a *Yellowstone* injunction because the tenant demonstrated that it was willing and able to obtain retroactive insurance for the breach period. *Great Wall 384 v. 384 Grand Street Housing*, Index No. 654198/2016, 2016 WL 5672959, at \*1 (Sup. Ct. N.Y. Cnty. Sep. 29, 2016).

### Additional Considerations

There are other legal considerations litigants should keep in mind when seeking *Yellowstone* relief. For example, a tenant must satisfy the requirements of venue and personal jurisdiction, including proper service of process, in

order to obtain a *Yellowstone* injunction. *Pergament Home Ctrs. v. Net Realty Holding Tr.*, 171 A.D.2d 736 (2d Dep't 1991). Although improper service will not necessarily void the tenant's claim for substantive relief, it creates the risk that in the event of an unfavorable ruling, the cure period will not have been tolled. *Norlee Wholesale v. 4111 Hempstead Tpk.*, 138 A.D.2d 466, 468-69 (2d Dep't 1988). Because the New York City Civil Court does not have jurisdiction to grant injunctive relief, *Yellowstone* applications should be brought in New York Supreme Court, although they may also be maintained in the Surrogate's Court where the commercial lease at issue is an asset of an estate. 14 Warren's *Weed New York Real Property* §154.04.

Tenants should also be aware of the financial requirements that may accompany a *Yellowstone* injunction. If relief is granted, the tenant typically must pay a monthly use and occupancy fee in the amount of the rent stated in the subject lease and post a bond while the case is pending. *Dublin Underground SP v. Harmony Mills S.*, 36 Misc. 3d 1229(A) at \*4 (Sup. Ct. 2012). The amount of the bond is subject to the discretion of the court, however, and under certain circumstances—such as where the tenant has made significant investments in improving the property—the court may forgo this requirement. *WPA/Partners v. Port Imperial Ferry*, 307 A.D.2d 234, 237 (1st Dep't 2003). It is also within the court's discretion to award costs for the premium paid

on a bond secured in connection with the *Yellowstone* injunction. *Two Guys from Harrison, N.Y. v. S.F.R. Realty Assocs.*, 186 A.D.2d 186, 189 (2d Dep't 1992).

Once a tenant has obtained a *Yellowstone* injunction, it must take proactive steps to preserve that relief throughout the pendency of the dispute. The tenant should seek extensions of any temporary restraining order tolling the cure period and obtain a temporary stay pending any appeal. Failure to do so could cause the cure period to lapse and the lease to be terminated, thereby divesting the court of the ability to extend the cure period in the event of an adverse ruling. *166 Enterprises v. I G Second Generation Partners, L.P.*, 81 A.D.3d 154, 159 (1st Dep't 2011).

Finally, parties should be aware that a *Yellowstone* injunction does not affect all substantive rights and remedies. Importantly, a *Yellowstone* injunction will not nullify a landlord's remedies—such as self-help—under the terms of the lease. *Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 19 A.D.3d 148, 149 (1st Dep't 2005). Further, independent agreements, such as a letter of credit, may still be enforceable even where a *Yellowstone* injunction has been granted. *Titleserv v. Zenobio (Case I)*, 210 A.D.2d 311, 313-14 (2d Dep't 1994).

### Recent Developments

In recent years, it had become common practice for landlords to insist upon waiver provisions in commercial leases that would foreclose a tenant's ability to seek

*Yellowstone* relief. Although the Court of Appeals held in 2019 that such waivers were enforceable, *159 MP v. Redbridge Bedford*, 33 N.Y.3d 353, 368 (2019), this victory on behalf of landlords was short-lived. In response to the ruling, the New York legislature quickly enacted Real Property Law §235-h, which provides that “[n]o commercial lease shall contain any provision waiving or prohibiting the right of any tenant to bring a declaratory judgment action with respect to any provision, term or condition of such commercial lease. The inclusion of any such waiver provision in a commercial lease shall be null and void as against public policy.” Some commentators have pointed out that the legislation may have inadvertently left the door open to such waivers under certain circumstances. In litigation over waivers, New York courts would likely weigh the policy behind RPL §235-h and the express terms of its legislative history before deciding to enforce such a waiver.

More recently, the COVID-19 pandemic has upended the commercial real estate market and has unsurprisingly left an impact on *Yellowstone* jurisprudence. At the outset of the pandemic, Gov. Andrew Cuomo issued Executive Order 202.28, which suspended the initiation of all eviction and foreclosure proceedings for residential and commercial tenants as a result of nonpayment of rent. Since that time, courts have cited the order as additional support for the granting of *Yellowstone* injunctions in the context of alleged

default via nonpayment. *188 Ave. A Take Out Food v. Lucky Jab Realty*, 2020 WL 7629597 (N.Y. Sup. Ct. Dec. 21, 2020). Although the eviction moratorium ended on Feb. 26, 2021, it was extended through May 1, 2021 for tenants who were able to demonstrate hardship. The expiration of this moratorium is expected to bring with it a flood of new foreclosure and eviction proceedings as a result of nonpayment, and consequently, a raft of new *Yellowstone* injunctions.

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*Yellowstone* injunctions allow commercial tenants to avoid termination while they contest the validity of an alleged default, and they represent a thorn in the side of the landlords. It is important for both tenants and landlords to understand the key issues surrounding *Yellowstone* injunctions before evaluating the merits of the relief available.