



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

May 12, 2021

Senator Bill Kennemer  
900 Court Street NE S401  
Salem OR 97301

Re: Effects of eviction moratorium on a commercial landlord's suit to recover rent

Dear Senator Kennemer:

You asked for an opinion on whether section 5 of Enrolled House Bill 4213 (2020 first special session) (the commercial eviction moratorium)<sup>1</sup> would have prohibited landlords from suing commercial tenants<sup>2</sup> on claims for unpaid rent incurred after April 1, 2020, and before the bill's repeal on March 31, 2021.

We conclude that the answer is that landlords likely could have sued commercial tenants during the emergency and grace periods. However, we acknowledge that that answer is not without doubt.

**Background:**

In early March, as Oregon Legislature's 2020 short session was ending,<sup>3</sup> the COVID-19 pandemic had begun in Oregon. On March 8, Governor Brown first declared a State of Emergency with respect to the COVID-19.<sup>4</sup> With the virus continuing to spread, between March 20 and 22, the Governor issued successive orders prohibiting law enforcement from acting to enforce a residential eviction<sup>5</sup> and requiring that Oregonians to stay in their homes to the maximum extent possible<sup>6</sup> These orders were quickly followed up by another executive order, EO 20-13, that provided broader eviction protections, this time directed at landlords by prohibiting them from terminating a tenancy or charging a late fee based on a tenant's nonpayment.<sup>7</sup> These tenant protections applied both to residential and commercial tenancies.<sup>8</sup> During this time, due to court backlogs and concerns regarding transmission of the COVID-19 virus, all evictions, whether or not subject to any moratorium, were being postponed from mid-March through at least July 1, 2020.<sup>9</sup>

<sup>1</sup> Section 5, chapter 13, Oregon Laws 2020 (first special session).

<sup>2</sup> Technically, section 5 of the bill applies to all tenancies that are not residential tenancies within the definition of "tenant" in ORS 90.100 (47) and not exempted by ORS 90.110 or otherwise. This opinion uses the word "commercial" to refer to those tenancies not subject to ORS chapter 90.

<sup>3</sup> Lauren Dake, "Oregon's 2020 Legislative Session Ends With Little To Show After Republican Walkout," OPB (Mar. 5, 2020), <https://www.opb.org/news/article/oregon-2020-republican-walkout-legislative-session-ends/>.

<sup>4</sup> Or. Exec. Order 20-03 (Mar. 8, 2020), [https://www.oregon.gov/gov/admin/Pages/eo\\_20-03.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-03.aspx).

<sup>5</sup> Or. Exec. Order 20-11 (Mar. 22, 2020), [https://www.oregon.gov/gov/admin/Pages/eo\\_20-11.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-11.aspx).

<sup>6</sup> Or. Exec. Order 20-12 (Mar. 23, 2020), [https://www.oregon.gov/gov/admin/Pages/eo\\_20-12.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-12.aspx).

<sup>7</sup> Or. Exec. Order 20-13 (Apr. 1, 2020), [https://www.oregon.gov/gov/admin/Pages/eo\\_20-13.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-13.aspx).

<sup>8</sup> *Id.*

<sup>9</sup> Or. Chief Justice Order 20-016, 9-10 (May 15, 2020), [https://www.courts.oregon.gov/rules/ORAP/CJO%2020-016\\_Order-Imposing-Level-2-and-Level-3-Restrictions-on-Court-Operations.pdf](https://www.courts.oregon.gov/rules/ORAP/CJO%2020-016_Order-Imposing-Level-2-and-Level-3-Restrictions-on-Court-Operations.pdf).

Beginning June 24, 2020, the Oregon Legislature convened a three-day (first) special session. During this special session Speaker Kotek introduced House Bill 4213 and the bill was considered by the Joint Committee on the First Special Session. The committee adopted the -14 amendments to the bill,<sup>10</sup> and that A-engrossed bill<sup>11</sup> passed both chambers, was enrolled<sup>12</sup> and then, on June 30, 2020, signed into law by the Governor.<sup>13</sup>

House Bill 4213, like EO 20-13, contained similar protections for both residential tenants in section 3 and commercial tenants in section 5 of the bill. Specifically, subsection (2) of the commercial eviction moratorium prohibited landlords from using nonpayment of rent or charges during the emergency period<sup>14</sup> as a reason for terminating a commercial tenancy, threatening to terminate the tenancy, or using force or any other action in order to obtain possession.<sup>15</sup> Section 5 (3) prohibited commercial landlords from charging late fees based on nonpayment. The bill also prescribed the information that a landlord could provide in a nonpayment notice to a commercial tenant<sup>16</sup> and provided a statutory penalty that a landlord would owe a tenant if the landlord did not comply with commercial eviction moratorium.<sup>17</sup> Section 6 of the bill repealed the commercial eviction moratorium entirely on March 31, 2021.

The bill did not explicitly address whether landlords retained the ability to seek a judgment against a nonpaying tenant for breach of contract. However, regarding whether the unpaid rent is due and collectable, subsection (4) of the commercial moratorium states:

Following the emergency period, a tenant with an outstanding nonpayment balance has a six-month grace period that ends on March 31, 2021, to pay the outstanding nonpayment balance.

Subsection (5), regarding the landlord notice, states:

Following the emergency period, a landlord may deliver a written notice to a tenant that substantially states:

...  
(c) That the nonpayment balance that accrued during the emergency period is still due and must be paid;

...  
(e) That the tenant is entitled to a six-month grace period to repay the nonpayment balance that ends on March 31, 2021[.]

On the same day that House Bill 4213 was signed, the Governor issued an executive order stating that HB 4213 “codified and extended the temporary evictions moratorium from Executive Order 20-13” and on that basis rescinded EO 20-13.<sup>18</sup>

In late September, before the expiration of the residential and commercial emergency periods, and in response to increased spread of COVID-19 as well as “significant displacement

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<sup>10</sup> -14 amendments to House Bill 4213 (2020 first special session).

<sup>11</sup> A-Engrossed House Bill 4213 (2020 first special session).

<sup>12</sup> Enrolled House Bill 4213 (2020 first special session).

<sup>13</sup> Chapter 13, Oregon Laws 2020 (first special session).

<sup>14</sup> *Id.*, section 5 (1)(a) (defining “emergency period” as April 1, 2020, to September 30, 2020).

<sup>15</sup> *Id.*, section 5 (2).

<sup>16</sup> *Id.*, section 5 (5) to (7).

<sup>17</sup> *Id.*, section 5 (9).

<sup>18</sup> Or. Exec. Order 20-30 (June 30, 2020), [https://www.oregon.gov/gov/admin/Pages/eo\\_20-30.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-30.aspx)

associated with the wildfire evacuations,” the Governor extended the residential eviction moratorium through EO-56, protecting only residential tenants until December 31, 2020.<sup>19</sup>

On December 21, the Oregon Legislature held a one-day (third) special session, which included adopting House Bill 4401 without amendments.<sup>20</sup> This bill extended and modified the first special session’s residential eviction moratorium, including, significant to this opinion, by adding “fill[ing] an action to recover the nonpayment balance” to the list of prohibited actions for residential landlords attempting to recover nonpayment during the residential emergency period or grace period.<sup>21</sup> Neither HB 4401 nor any other bill made changes to the commercial eviction moratorium.

On March 31, 2021, the grace period for the commercial eviction moratorium expired. To date, no executive orders<sup>22</sup> and no legislative actions have further extended the protections for commercial or residential tenants.<sup>23</sup> To our knowledge, during the eviction moratorium no federal or Oregon appellate courts have directly addressed the question as to whether the commercial eviction moratorium also prohibits commercial landlords from suing to collect unpaid rent.<sup>24</sup>

### **Analysis:**

A commercial lease is a contract, under which a tenant agrees to make payments of rent in exchange for the possession of the leased property. Rent is due periodically and without demand.<sup>25</sup> A tenant’s failure to pay rent is a default and breach of the rental contract.<sup>26</sup> This breach would ordinarily authorize a landlord to impose statutory fees for nonpayment, sue to enforce the contract, and sue to evict the occupant from the premises.<sup>27</sup> Following a successful suit, a court would enter a general judgment and money award in favor of the landlord and against the tenant.<sup>28</sup> The landlord could enforce the judgment through debtor examinations; garnishing the debtor’s accounts, wages or income streams’ executing against eligible funds or properties; or foreclosing judgment liens.<sup>29</sup> While unpaid, the debt would accrue interest at the statutory rate of nine percent unless another rate was established by contract.<sup>30</sup>

In interpreting the meaning of statutory provisions, Oregon Courts begin by analyzing the plain meaning of the text of the provision in question and the context of that provision to ascertain the legislative intent of that provision.<sup>31</sup> A court must also consider any legislative

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<sup>19</sup> Or. Exec. Order 20-56 (Sep. 28, 2020), [https://www.oregon.gov/gov/admin/Pages/eo\\_20-56.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-56.aspx). This order was renewed twice. Or. Exec. Order 20-59 (Oct. 27, 2020), [https://www.oregon.gov/gov/admin/Pages/eo\\_20-59.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-59.aspx); Or. Exec. Order 20-67 (Dec. 17, 2020), [https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_20-67.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_20-67.pdf)

<sup>20</sup> Chapter 3, Oregon Laws 2020 (third special session).

<sup>21</sup> Section 3 (2)(f), chapter 13, Oregon Laws 2020 (first special session), as amended by section 8, chapter 3, Oregon Laws 2020 (third special session).

<sup>22</sup> Or. Exec. Order 21-05 (Feb. 25, 2021), [https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_21-05.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_21-05.pdf) (acknowledging expiration of EO 20-56).

<sup>23</sup> Section 1 of A-engrossed Senate Bill 282 (2021) would extend the grace period for the repayment of residential rent until February 28, 2022. As of May 11, 2021, the bill has passed both chambers but has not been signed into law. SB 282 would not affect the commercial eviction moratorium. Section 1 of A-engrossed House Bill 2966 (2021) would reinstate the commercial eviction moratorium and extend the grace period through September 30, 2021. As of May 11, this bill has passed the House and is before the Senate Committee on Labor and Business.

<sup>24</sup> It is possible that a state trial court has analyzed this matter, but the indexed opinions to which our office has access do not reveal any known cases.

<sup>25</sup> ORS 91.210.

<sup>26</sup> ORS 91.090.

<sup>27</sup> ORS 105.105 to 105.168 (action for forceable entry and wrongful detainer).

<sup>28</sup> ORS 18.038, 18.042.

<sup>29</sup> See generally ORS chapter 18.

<sup>30</sup> ORS 82.010.

<sup>31</sup> *Portland General Electric v. Bureau of Labor and Industries*, 317 Or. 606, 610-611 (1993).

history that is offered by a party, but need only give the history such weight that the court decides, in its discretion, that the legislative history is worth.<sup>32</sup> Finally, a court may resort to maxims of statutory construction to aid it in resolving any lingering uncertainty.<sup>33</sup> It is through this lens that a court would analyze whether the Legislative Assembly, in enacting the commercial eviction moratorium, prohibited a landlord from filing a claim during the emergency period or grace period seeking damages based on nonpayment of rent incurred during the emergency period.

### **Text and context:**

In interpreting a statute, a court must take the statute as it is written. The court is not authorized “to insert what has been omitted, or to omit what has been inserted.”<sup>34</sup> Nothing in the commercial eviction moratorium explicitly states that a landlord may not sue a tenant for nonpayment of rent. Instead, what is clear is that a landlord cannot evict or charge a late fee based on the tenant’s nonpayment. Equally clear is that following the third special session amendments to the residential eviction moratorium, a landlord could not sue a residential tenant for unpaid rent.<sup>35</sup>

To interpret the commercial eviction moratorium as prohibiting a landlord from suing to collect unpaid rent requires drawing inferences from the text and context. The best source of a potential prohibition is in subsection (4), which states that the tenant “has a six-month grace period . . . to pay the outstanding nonpayment balance.”<sup>36</sup> One implication of this provision is that until the end of the “grace period” commercial rent is simply not yet legally due. That the Legislative Assembly stated that a person has until such a time “to pay” also implies that before such a time there is no enforceable requirement to pay. Moreover, it could be argued that if the legislature meant only that a tenant has a “grace period to pay *in order to avoid eviction or late fees*” the legislature would have inserted the italicized language, yet it did not. Under such an interpretative theory, the omission means that the extended period to pay applies generally and that until that period expires, there exists no basis to sue for nonpayment.

However, this is not the only possible textual explanation of this section. “Grace period” is not defined in the commercial eviction moratorium. *Merriam-Webster* defines it as “a period of time beyond a due date during which time a financial obligation may be met without penalty or cancellation.”<sup>37</sup> Similarly *Black’s Law Dictionary* gives a definition of “[a] period of extra time allowed for taking some required action (such as making payment) without incurring the usual penalty for being late.”<sup>38</sup> Under either definition, a “grace period” does not refer to an extension of the due date, but the forgoing of a penalty notwithstanding the due date. These definitions are consistent with an interpretation that the rent is presently past due, and the tenant can be sued to enforce the obligation, even though the tenant is not subject to a “penalty” of late fees or the “cancellation” of eviction. Under this interpretation, “grace period” refers only to a period by which payment can be made without an additional penalty and there is nothing punitive about a landlord seeking to judicially enforce only the existing obligation that the Legislative Assembly has not explicitly suspended.

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<sup>32</sup> *State v. Gaines*, 346 Or. 160, 172-173 (2009).

<sup>33</sup> *Id.* at 171-172.

<sup>34</sup> ORS 174.010.

<sup>35</sup> Section 3 (2)(f), chapter 13, Oregon Laws 2020 (first special session), as amended by section 8, chapter 3, Oregon Laws 2020 (third special session).

<sup>36</sup> Section 5 (4), chapter 13, Oregon Laws 2020 (first special session).

<sup>37</sup> “Grace period,” *Merriam-Webster Unabridged Dictionary*, <https://unabridged.merriam-webster.com/unabridged/grace%20period>

<sup>38</sup> “Grace period,” *Black’s Law Dictionary* (11th ed., 2019).

There is another argument to be made that the text of subsection (4) of the commercial eviction moratorium favors a tenant's interpretation. Textual statutory construction also requires that a court assume that the Legislative Assembly intended for the parts of every statute to be read in context so that each part means something and serves the larger purpose that animates the statute as a whole.<sup>39</sup> Under this interpretive principle, a tenant could argue that unless subsection (4) of the commercial eviction moratorium prohibits landlord suits for rent, subsection (4) is meaningless. This would be because subsections (2) and (3) already prohibit evictions and late fees for nonpayment. The definition of "emergency period" and "nonpayment" in subsection (1) fixes the dates the nonpayment protections apply. And the section 6 sunset of the moratorium establishes March 31, 2021, as the date on which the tenant protections end. Thus, it could be argued that a conclusion that interprets subsection (4) to only restate the effect of the bill's repeal renders the subsection effectively redundant and meaningless surplusage and that a court should be hesitant to reach such a conclusion.<sup>40</sup>

However, this principle of a "rule against surplusage" is not a "hard-and-fast rule" since some level of redundancy is often common in legal writing.<sup>41</sup> This rule may be better thought of as an assumption.<sup>42</sup> Here, with two different end dates, September 30, 2020, as the end of the "emergency period" and March 31, 2021, as the moratoriums sunset date, the Legislative Assembly's inclusion of this subsection could merely have been to express clarity regarding the purpose and function of these mismatched dates. The subsection (4) grace period could help reinforce the argument that the dates were not chosen accidentally and that the legislature acted purposefully in giving tenants additional time following the end of the emergency period to avoid eviction for nonpayment.

Although subsection (5) of the commercial eviction moratorium does not contain substantive provisions regarding a landlord's duties, as a sanctioned explanation of the program, it does provide additional context that is useful for interpretation. Subsection (5)(c) supports the conclusion that the Legislative Assembly did not intend to change the present rights of landlords to collect debt other than through the particular means specified in the commercial eviction moratorium and refutes a reading that the subsection (4)'s "six months to pay" should not be taken literally. The language in subsection (5) sanctions the landlord to explain the moratorium by stating that the rent "is due" (present tense) and "must be paid" (modal imperative).<sup>43</sup> A suit for rent is simply a request that a court formally adjudicate that the tenant-debtor presently owes money to the landlord-creditor. If during the emergency period and grace period rent accrued "is due," it is difficult to see how a court adjudicating a landlord's claim could conclude otherwise.

Subsection (5)(e), however, does state that "the tenant is entitled to a six-month grace period to repay the nonpayment balance that ends on March 31, 2021." Because it is phrased as an entitlement, a tenant may argue that this language is consistent with an interpretation

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<sup>39</sup> ORS 174.010 ("[W] here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all"); *Force v. Dep't of Revenue*, 350 Or. 179, 190 (2011) ("Statutory provisions, however, must be construed, if possible, in a manner that will give effect to all of them").

<sup>40</sup> *State v. Cloutier*, 351 Or. 68, 97-98 (2011) ("an interpretation that renders a statutory provision meaningless should give us pause, both as a matter of respect for a coordinate branch of government that took the trouble to enact the provision into law and as a matter of complying with the interpretive principle that, if possible, we give a statute with multiple parts a construction that will give effect to all of those parts.") (citations omitted).

<sup>41</sup> Jack L. Landau, "Oregon Statutory Construction," 97 Or. L. Rev. 583, 666 (2019).

<sup>42</sup> *Id.* at 667.

<sup>43</sup> *Washburn v. Columbia Forest Prods.*, 340 Or. 469, 479 (2006) ("use of present tense indicates ... *presently*, as opposed to potentially or hypothetically.").

theory that subsection (4) grants additional rights to avoid rent payments entirely until the grace period ends.

To counter this argument, it is notable that a landlord cannot give the notice described in subsection (5) until the grace period begins after the end of the emergency period. Accordingly, any entitlement referenced in this subsection would make sense only within the grace period following the emergency period and not during the preceding emergency period. It would be illogical for landlords to have more legal rights to collect unpaid rent during the emergency period than during the grace period. But to the extent that either subsection (4) or (5)(e) implies the existence of additional protections or entitlements for tenants, it appears that they exist only during the six-month grace period following September 30, 2020, and ending March 31, 2021. It is more consistent with the overall scheme of the commercial eviction moratorium for any entitlement that exists during the grace period to refer only to the same explicit subsections (2) and (3) protections from termination, eviction and late fees existing during the emergency period.

One final textual argument that could be made in favor of a tenant's preferred interpretation of the commercial eviction moratorium could be found in section 7 of the bill.<sup>44</sup> This section tolls the one-year statute of limitations in ORS 12.125 for residential landlord-tenant claims until the end of the grace period. Claims arising from commercial tenancies are not subject to ORS 12.125.<sup>45</sup> It could be argued that this tolling was intended to accommodate what the Legislative Assembly intended as freezing attempts to file litigation over rent.

While the existence of a hypothetical litigation freeze is indeed consistent with section 7, the section does not make any explicit mention of the purpose of the tolling. The extension of the statute of limitations is equally consistent with other potential legislative purposes unrelated to prohibiting rent litigation. Those purposes could include acknowledging that due to the COVID-19 pandemic, access to the courts was generally unreliable. Therefore, by extending the statute of limitations, the Legislative Assembly might have intended to assist courts in managing their overextended dockets, to avoid inadvertently penalizing landlords who chose to follow the Governor's directive to stay home whenever possible and avoid going to court, or simply to incentivize landlords to consider postponing civil claims even though they were not barred from bringing them. Because the extension could serve a variety of purposes, it is hard to argue that it serves clear evidence of legislative intent to limit landlord lawsuits for rent over any other purpose.

Additional context for House Bill 4213 (2020 first special session) was explicitly provided by legislative findings in section 1 of the bill.<sup>46</sup> Those findings did not weigh in directly on the issue at hand, but did state that "the provisions have a limited scope and duration and are necessary to protect the public health, safety and welfare."<sup>47</sup> This phrase tends to favor a stricter reading of the scope of the landlord prohibitions. The findings also state that the Act is "appropriate and reasonable to carry out the significant and legitimate public purpose of responding to the declaration of a state of emergency issued by the Governor on March 8, 2020."<sup>48</sup> This phrase makes clear that the Act is deeply tied to the historical context of the COVID-19 emergency, even though the bill does not go further to explain the relationship between the it and the response to COVID-19. The bill's use of April 1, 2020, as the beginning

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<sup>44</sup> Section 7, chapter 13, Oregon Laws 2020 (first special session).

<sup>45</sup> *Vollertsen v. Lamb*, 302 Or. 489, 496 (1987).

<sup>46</sup> Section 1, chapter 13, Oregon Laws 2020 (first special session).

<sup>47</sup> *Id.*, section 1 (2).

<sup>48</sup> *Id.*, section 1 (3).

of the emergency period also tends to support that it is intended as a continuation and modification of the Governor's April 1, 2020, EO 20-13.<sup>49</sup>

Although the bill is light on explaining its purpose, EO 20-13 offers some hints. In EO 20-13 the Governor declares that the residential eviction moratorium is aimed at "ensuring [that residential tenants] can stay home to the greatest extent possible, consistent with my prior directives."<sup>50</sup> With respect to the commercial eviction moratorium, the Governor views it as necessary so that "businesses that are permitted to operate can continue to provide necessary goods and services, and other businesses can continue to comply with necessary closures and restrictions mandated by my prior Executive Orders."<sup>51</sup> The Governor further stated that "[w]ithout further action, many businesses across the state may face termination of leases or eviction, which could interrupt the provision of necessary goods and services during this emergency, and impact the livelihood of Oregonians."<sup>52</sup>

These purposes, although not explicit in House Bill 4213 (2020 first special session), provide context and a clear link between keeping people in their homes to protect them from contact with others and limiting the spread of disease. It is also straightforward how allowing rapid business closures could impact Oregonians' ability to weather and recover from the pandemic. A court reasonably may be reluctant to impute the Governor's purpose directly to the Legislative Assembly. However, it might also be reluctant to extrapolate from the Governor's clear and stated purpose that links the commercial eviction moratorium to potential broad social and cascading economic impacts that could come from widespread permanently shuttered businesses to a more generalized purpose of immunity from lawsuits that target only the commercial tenant's cash flow.

It is also notable that the EO 20-13 explicitly stated that "Nothing in [EO 20-13's commercial eviction moratorium] relieves a nonresidential tenant's obligation to pay rent, utility charges, or any other service charges or fees, except for late charges or other penalties arising from nonpayment which are specifically waived by and during this moratorium." The Governor did not use any language that could be interpreted to require that a landlord delay suing for rent. Again, although it may be dubious in ordinary circumstances to ascribe the intentions of the Governor to those of the Legislative Assembly, it seems reasonable that if a different result were intended, the legislature might have articulated a sharper distinction than by indirectly stating that the tenant has a grace period before the tenant "has . . . to pay the balance."

Although it is not entirely unambiguous, on balance, the text and context better support the conclusion that the commercial eviction moratorium does not prohibit a landlord from suing a tenant to collect unpaid rent.

### **Legislative history:**

In Oregon, courts have a responsibility to determine legislative intent by an examination of the legislative history.<sup>53</sup> Legislative history includes primarily the statements made and actions taken by the enacting legislature while the bill is under consideration.<sup>54</sup> Information prior

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<sup>49</sup> Section 1, chapter 13, Oregon Laws 2020 (first special session) also draws much of its language from the final paragraph of the preface to EO 20-13, 3.

<sup>50</sup> Or. Exec. Order 20-13, 2-3 (Apr. 1, 2020).

<sup>51</sup> *Id.* at 3.

<sup>52</sup> *Id.*

<sup>53</sup> *State v. Cloutier*, 351 Or. 68, 75-76 (2011).

<sup>54</sup> See Landau, *supra* note 41, at 696-698.

to a bill's consideration is considered part of the context. Post-enactment statements by members are generally not considered at all.<sup>55</sup>

With a three-day special session, there was very little contemporaneous written<sup>56</sup> legislative history and almost all of it was focused on the residential eviction moratorium's connection to the public health benefits of allowing individuals to stay in their homes. Nothing clearly states that the bill changes the status quo with respect to whether rent is due or whether a landlord may sue to collect it. The lack of legislative history discussing any change to the rights of landlords to sue for rent could provide a slight argument against finding that the legislature did not intend such a change. However, courts are reluctant to surmise much from legislative silence.<sup>57</sup>

The amendments to the bill also do not give significant information regarding the legislative intent to prohibit suits by landlords, but they do provide an alternative explanation for the existence of subsection (4) of the commercial eviction moratorium. Previously, the end of the emergency period was defined as 90 days after the eventual end of the Governor's original emergency declaration.<sup>58</sup> Under the introduced version, the section 6 repeal was also tied to the emergency declaration, occurring "270 days after the date" the declaration was no longer in effect.<sup>59</sup> This explains one possible original purpose of the grace period within the introduced version of the bill: to help explain the timing of various parts of the bill that were themselves tied to an external event with an uncertain date.<sup>60</sup> Among other things, the adopted -14 amendments addressed some inconsistencies and used firm dates rather than references to the Governor's orders for the emergency period, grace period and repeal.<sup>61</sup> Although the amendments to subsection (4) became more redundant once the bill settled on using firm dates, in the context of its history and the original confusing calculations that the bill required, the interpretation that the subsection (4) "grace period" was intended only to clarify the Act's operation, rather than to provide new substantive rights for tenants to avoid paying rent.

Subsequent legislative history can occasionally be relevant to the interpretation of a statute.<sup>62</sup> Therefore, it may be argued that subsequent amending of the residential eviction moratorium in section 3 of House Bill 4213 (first special session) by House Bill 4401 (third special session) to explicitly include a prohibition on "fil[ing] an action to recover the nonpayment balance" has some value in evaluating the unamended commercial eviction moratorium.<sup>63</sup> The amendment's potential relevance is that it demonstrates that the Legislative

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<sup>55</sup> *Id.*

<sup>56</sup> Time constraints on this opinion have not allowed our office an opportunity to review oral committee testimony or floor speeches, which may contain additional information that is relevant to analyzing legislative intent.

<sup>57</sup> *Wyers v. Am. Medical Response Nw.*, 360 Or. 211, 227 (2016) ("[D]rawing conclusions from silence in legislative history misapprehends the nature of legislative history itself, which often is designed not to explain to future courts the intended meaning of a statute, but rather to persuade legislative colleagues to vote in a particular way. Thus, for example, a proposed legislative change to the status quo might not prompt comment precisely because everyone understands that the law will have that effect or because supporters do not wish to draw attention to it.").

<sup>58</sup> Introduced House Bill 4213 (2020 first special session), section 5 (1)(a).

<sup>59</sup> *Id.*, section 6. Confusingly, in the introduced version of HB 4213, section 6 refers to the end of the Governor's March 22, 2020, eviction moratorium in EO 20-13, while section 5 (1) refers to the March 8, 2020, EO 20-03.

<sup>60</sup> *Id.*, section 5 (5). Section 5 (5) of the introduced version of House Bill 4213 was renumbered to section 5 (4) by the -14 amendments. It is unclear whether it was in error that the introduced bill's emergency period (which includes 90 days after the Governor's emergency ends) and the grace period (ending another 90 days after the emergency period) do not add up to the 270-day period after which the section is repealed. Whatever the reason, this incongruity was resolved by the adopted amendments.

<sup>61</sup> -14 amendments to House Bill 4213 (2020 first special session).

<sup>62</sup> *State v. Cloutier*, 351 Or. 68, 103-104 (2011) (discussing, but not concluding, the amount of weight that the court should give subsequent legislative history).

<sup>63</sup> Section 3 (2)(f), chapter 13, Oregon Laws 2020 (first special session), as amended by section 8, chapter 3, Oregon Laws 2020 (third special session).



Assembly of the 2020 third special session, the same legislative body that enacted the original eviction moratorium, understood a need to be explicit in barring landlords' access to the courts. That the legislature made the change to the residential moratorium but did not make the same change to the commercial eviction moratorium, which was still in effect at the time, could imply that the legislature was aware of this difference and intended that the two moratoria provide different protections for residential and commercial tenants. And therefore "fil[ing] an action to recover the nonpayment balance" was explicitly and intentionally not prohibited with respect to commercial tenants.

This subsequent history is not definitive evidence. A tenant could also argue that the HB 4401 amendment demonstrates that the legislature had originally intended that each moratoria provide tenants' protection from suits for rent and included the amendment for clarification. That it did not do likewise for the commercial eviction moratorium could be explained by the limited nature of the one-day special session and the priorities of the membership that only afforded an opportunity to make this clarification to the residential moratorium while already making additional substantive overhauls to this program.

Even though the legislative history is scarce and subject to significant discount, it primarily reinforces the same interpretation best supported by the textual analysis: that the commercial eviction moratorium did not intend to prohibit landlords from suing tenants to recover unpaid rent.

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Very truly yours,

DEXTER A. JOHNSON  
Legislative Counsel



By  
Robert Mauger  
Deputy Legislative Counsel