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"Fair Enough"? Revising the Yellowstone Injunction to Fit New York's Commercial Leasing Landscape and Promote Judicial Economy

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"FAIR ENOUGH"? REVISING THE *YELLOWSTONE* INJUNCTION TO FIT NEW YORK'S COMMERCIAL LEASING LANDSCAPE AND PROMOTE JUDICIAL ECONOMY

ABSTRACT

The Yellowstone injunction is an equitable remedy that tolls any applicable cure period and gives tenants a better opportunity to maintain their leasehold when they have defaulted under their lease. The remedy is available to commercial tenants in New York City and to commercial and residential tenants throughout the State. This Note examines the Yellowstone injunction in the context of New York City's commercial tenants, who employ it most frequently and benefit most from its protections. This Note examines the development and application of the Yellowstone injunction and proposes changing the doctrine to exclude cases of monetary defaults and expired or nonexistent cure periods from the realm of Yellowstone relief.

INTRODUCTION

There is, perhaps, no jurisdiction in the world in which landlord-tenant relations have such a prominent place in the law as New York City (the City or New York). In the City, a business's reputation and recognition can mean the difference between success or failure, especially in the realm of commercial leasing. One of a business's most valuable assets in the City may be the leasehold itself.[1] Even shorter-term leases in the City tend to last for a decade or more, though long-term ground leases can last up to ninety-nine years.[2] Some run even longer than that, and the value of such an interest is difficult to calculate.[3] Over the years, a tenant may rely on their leasehold to build up a dedicated clientele within the neighborhood, earn an international reputation for excellence that draws customers from around the world, or invest time and money to improve the leased premises to

1. *See* Empire State Bldg. Assocs. v. Trump Empire State Partners, 667 N.Y.S.2d 31, 36 (App. Div. 1997). This case is a clear example of the potential value of a leasehold in the City. "[T]he harm to Empire from losing the lease could well be irreparable, since it is difficult to imagine how damages could adequately compensate Empire for the value of the approximately 79 years remaining under the lease and its potential renewals in a building of such notable character as the Empire State Building." *Id.*

2. Barbara Thau, *In Profit and Loss, for 99 Years*, THE REAL DEAL (Mar. 31, 2010), https://therealdeal.com/issues_articles/in-profit-and-loss-for-99-years/.

3. The Empire State Building was subject to a 114-year ground lease. *See* Mark Lewis, *Soap Opera Ends as Trump Sells Out*, FORBES (Mar. 19, 2002), https://www.forbes.com/2002/03/19/0319empire.html#1fffe476e380.

create a space that is their own.[4] As long as the business is doing well, or well enough that the rent can be paid, and personal relations are maintained, neither tenant nor landlord is likely to try to leave or terminate the tenancy.

However, landlord-tenant relations are not always so amicable[5] and New York is surprisingly one of the least profitable cities for landlords nationwide.[6] Many factors, including rent control, rent stabilization, and other statutory and case law that tends to favor tenants, encumber the City's landlords.[7] A judicial remedy unique to New York State[8] is the *Yellowstone* injunction (or *Yellowstone*), originating in the eponymous *First National Stores, Inc. v. Yellowstone Shopping Center, Inc*.[9] The *Yellowstone* injunction operates by tolling the cure period of a tenant, allegedly in default, until the underlying judicial action is concluded; thus, it prevents the tenant's otherwise inevitable forfeiture of the leasehold.[10] The implied harm in every *Yellowstone* case is the tenant's loss of their leasehold[11] and in a city with powerful landlords it seems consistent with public policy to readily provide injunctive relief to tenants, who are traditionally seen as having less bargaining power.[12] Leasehold forfeiture was the driving concern behind the original construction of the *Yellowstone* injunction and

4. *See, e.g.*, Donohue v. New York, 105 N.Y.S. 1069 (Sup. Ct. 1907) (recognizing that tenants' leaseholds and other investments in rented property were significant factors, which should be given weight in equity considerations).

5. Unlike many jurisdictions, the City has separate housing courts, which may be a product of the complicated landlord-tenant relations and tenancy laws in the City as much as it is the result of the City's sheer size and inevitably large judicial docket. *See* Liz Lent, *The New York City Housing Court*, THE COOPERATOR (June 2010), https://cooperator.com/article/the-new-york-city-housing-court/full.

6. Angela Hunt, *Least Profitable County for Rentals? New York, Data Shows*, THE REAL DEAL (Apr. 1, 2014), https://therealdeal.com/2014/04/01/least-profitable-county-for-rental-landlords-new-york-data-shows/ (showing that in 2014, "Manhattan's New York County [was] the least profitable market for landlords of all U.S. counties.").

7. *See, e.g.*, Warren E. Estis and Jeffrey Turkel, *HSTPA-2019: Some Observations*, N.Y. L.J. (July 2, 2019), https://www.law.com/newyorklawjournal/2019/07/02/hstpa-2019-some-observations/ (describing implications of the Housing Stability and Tenant Protection Act of 2019).

8. Though they are typically limited to the City, less than a dozen reported Third and Fourth Department Appellate Division cases address *Yellowstone* injunctions as of October 2019.

9. First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 237 N.E.2d 868 (N.Y. 1968).

10. Long Island Gynecological Servs., P.C. v. 1103 Stewart Ave. Assocs. Ltd. P'shp, 638 N.Y.S.2d 959, 962 (App. Div. 1996).

11. *Yellowstone* cases generally involve commercial leaseholds, though tenants with long-term ground leases have also sought *Yellowstone* relief on occasion. *See* 330 Hudson Owner, LCC v. Rector Church-Wardens & Vestrymen of Trinity Church in the City of N.Y., 889 N.Y.S.2d 884, 884 (Sup. Ct. 2009); 384 Bridge St. LLC v. RK&G Assocs. LLC, No. 09 CV 1704 (ILG), 2009 U.S. Dist. LEXIS 113715, at *2 (E.D.N.Y. Dec. 7, 2009); E.C. Elecs., Inc. v. Amblunthorp Holding Inc., No. 101194/2006, 2008 N.Y. Misc. LEXIS 8048, at *1 (Sup. Ct. Apr. 23, 2008).

12. The City provides tenants, particularly residential tenants, a bevy of rights and protections. *See generally* N.Y. REAL PROP. ACTS. § 753 (Consol. 2018); N.Y.C. ADMIN. CODE § 26-1302 (2018) (guaranteeing basic legal assistance for residential tenants facing eviction proceedings).

is the basis for its continued use.[13] However, if courts are assuming the nature of the harm based on the form of relief being sought, then the *Yellowstone* doctrine should be modified to ensure that the tenant is facing genuine and significant pecuniary loss.[14] Moreover, the merits of the *Yellowstone* injunction should be examined according to its value and efficacy as a judicial remedy and not with respect to the power dynamics between landlords and tenants.

It seems intuitive that a remedy like the *Yellowstone* injunction would already have been available to tenants in the City. In a way, it was available under the traditional forms of injunctive relief provided for in New York State. This was recognized in *First National*, which was decided based on the usual standards for injunctive relief[15] in the New York Civil Practice Law and Rules (CPLR).[16] The availability of these traditional forms of injunctive relief is a foundation of this Note. Without the CPLR, the *Yellowstone* injunction would be more indispensable. Fortunately for aggrieved tenants and many other plaintiffs across New York State, the CPLR codifies their ability to seek injunctive relief.

Part I of this Note presents the development of the *Yellowstone* injunction and briefly outlines the tension between traditional injunctive relief and the *Yellowstone* injunction. Part II examines *Yellowstone's* application in (1) cases turning on monetary versus non-monetary defaults and with tenants facing bankruptcy as a subset of monetary defaults, and (2) cases involving leases with expired or nonexistent cure periods. Finally, Part III analyzes these situations as broader reflections of the tenuous outcomes associated with *Yellowstone* relief and, more narrowly, as wedge issues which the courts can resolve and thereby curtail the inevitable expansion or misapplication of the *Yellowstone* doctrine. This Note does not suggest that the New York State Court of Appeals (Court of Appeals)

13. *See* Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 715 N.E.2d 117, 120 (N.Y. 1999) ("These injunctions have become commonplace, with courts granting them routinely to avoid forfeiture of the tenant's substantial interest in the leasehold premises.").

14. For example, not all leaseholds are the same. Some are unique and in extremely small supply. See *supra* text accompanying note 1. Conversely, we might not ascribe the same leasehold value to a typical commercial space occupied by a large fast-food chain, cell-service provider, or bank, and in such a case it is less likely a court will find the tenant has demonstrated irreparable harm required under the CPLR. *But see* 112 W. 34th St. Assocs., LLC v. 112-1400 Trade Props. LLC, 944 N.Y.S.2d 68, 73 (App. Div. 2012) (noting that the 114-year term of the lease should be considered); Grand Manor Health Related Facility, Inc. v. Hamilton Equities, Inc., 926 N.Y.S.2d 100, 100 (App. Div. 2011) ("Without the injunction, plaintiff, which operates a residential health care facility, would be at risk of losing its valuable leasehold and incurring significant permanent damage to more than 30 years of hard-earned goodwill.").

15. First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 237 N.E.2d 868, 869 (N.Y. 1968). *See also* Donohue v. New York, 105 N.Y.S. 1069 (Sup. Ct. 1907) (recognizing that tenants' leaseholds and other investments in rented property were significant factors, which should be given weight in equity considerations).

16. *See* N.Y. C.P.L.R. §§ 6301, 6311, 6313 (Consol. 2018).

abolish the *Yellowstone* doctrine.[17] Instead, this Note will propose that the Court of Appeals should (1) limit the application of *Yellowstone* relief to non-monetary defaults and monetary defaults in only the most exceptional circumstances, (2) bar tenants in bankruptcy from seeking *Yellowstone* relief, and (3) affirm certain Appellate Division standards regarding cure periods and timely filings to develop the *Yellowstone* doctrine in a manner consistent with the original purpose and rationale of the Court of Appeals' holding in *First National.*

I. BACKGROUND

A. CREATION OF THE YELLOWSTONE INJUNCTION

The *Yellowstone* injunction was created in *First National* in 1968.[18] In *First National*, the tenant and landlord each alleged that the other was responsible under the lease for the installation of a sprinkler required by the New York City Fire Department.[19] The Appellate Division, Second Department, ruled unanimously that the tenant was responsible for the installation but could not agree on the remedy.[20] The majority held that "the landlord had properly invoked the applicable provisions for terminating the lease and the court could, therefore, declare the lease at an end,"[21] but refused to:

> [t]erminate the lease because the "tenant was acting in good faith when it brought the declaratory judgment action". Accordingly, the court preserved the lease upon performance by the tenant, within [twenty] days, of its duty to install a satisfactory sprinkler system, or to pay therefor if it had already been installed by the landlord, and permanently enjoined the landlord from instituting summary proceedings to evict the tenant.[22]

The Court of Appeals reversed on the grounds that the Appellate Division did not have the authority to issue injunctive relief on the facts without some "showing of fraud, mutual mistake or other acceptable basis of reformation."[23] The courts were rendered powerless by the timing of events, as the lease had already expired on its own terms and the tenant had

17. *See* David Frey, Note, *The Yellowstone Injunction, or "How to Vex Your Landlord Without Really Trying,"* 58 BROOK. L. REV. 155, 174 (1992) ("The New York Court of Appeals should make it clear that the test for a *Yellowstone* injunction, as described in *Finley*, is inappropriate, and that lower courts should adhere to the traditional burden for injunctive relief.").

18. Mark C. Dillon, *The Extent to Which "*Yellowstone *Injunctions" Apply In Favor of Residential Tenants: Who Will See Red, Who Can Earn Green, and Who May Feel Blue?*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 287, 312 (2011).

19. *First Nat'l*, 237 N.E.2d at 869.

20. *Id.* at 869–70.

21. *Id.* at 870.

22. *Id.*

23. *Id.* at 871. Ironically, in *First National*, the case that established the *Yellowstone* injunction, the Court of Appeals refused to grant the plaintiff-tenant injunctive relief.

failed to seek a declaratory judgement or stay while the lease was still in effect.[24] In the case that created the *Yellowstone* injunction, the expiration of the lease was dispositive in explaining why no injunction was issued. Thus, the existence of a valid lease became the first court-developed requirement for a tenant seeking a *Yellowstone* injunction; other requirements subsequently emerged from the Court of Appeals and Appellate Division decisions which have calcified the *Yellowstone* doctrine.[25]

B. THE FOUR FACTOR TEST: LEGAL HURDLES IN EQUITY

Over time the standard for a *Yellowstone* injunction has crystallized. The four-factor test, adopted by the Court of Appeals in *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.,* requires that a tenant show:

> (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.[26]

The fourth factor is alternatively characterized as, "*whether a basis exists for believing* that the tenant desires to cure and has the ability to do so through any means short of vacating the premises."[27] The four factors may be the root of all criticism of the *Yellowstone* doctrine: an unnecessary procedural formality that simultaneously lowers the threshold for granting equitable relief.[28]

C. TRADITIONAL INJUNCTIVE RELIEF IN NEW YORK

In contrast, the standards for traditional forms of equitable relief are far more stringent. A party moving for injunctive relief under the CPLR has a

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24. *Id.* at 870–71. *See* Paul A. Batista, *'Yellowstone' Revisited: The Pendulum Has Swung*, 190 N.Y. L.J. 123 (Dec. 29, 1983) (discussing the essentiality of timing in *Yellowstone* cases).

25. Dillon, *supra* note 18, at 317.

26. Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 715 N.E.2d 117, 120 (N.Y. 1999) (quoting 225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp., 621 N.Y.S.2d 302, 303 (App. Div. 1995)).

27. Herzfeld & Stern v. Ironwood Realty Corp., 477 N.Y.S.2d 7, 8 (App. Div. 1984) (emphasis added). Whether a tenant's "desire" to do anything is truly dispositive is unclear but it seems unlikely that the courts will ever drop the "ability" requirement. One may come across tenuous language such as: "The law is clear that a tenant is *not required to prove its ability to cure* prior to obtaining a *Yellowstone* injunction, as '[t]he proper inquiry is whether a basis exists for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises.'" Ray & W Cut Inc. v. 240 W. 37 LLC, No. 111411/2007, 2008 N.Y. Misc. LEXIS 7635, at *3 (Sup. Ct. Jan. 15, 2008) (emphasis added) (quoting WPA/Partners LLC v. Port Imperial Ferry Corp., 763 N.Y.S.2d 266, 269 (App. Div. 2003)). If there is a meaningful difference between a tenant showing its ability to cure and the court having reason to believe that the tenant has the ability to cure, that difference is slim.

28. *See, e.g.*, Frey, *supra* note 17, at 172–175.

much higher evidentiary burden than one moving for a *Yellowstone* injunction; however, they may also have a much higher likelihood of success on their claim.[29] It is the relative ease of obtaining a *Yellowstone* injunction that renders it problematic. Therefore, the difference between traditional injunctions and the *Yellowstone* injunction is foundationally significant to arguments within this Note.[30]

Courts wield traditional injunctive powers under CPLR Article 63.[31] A party seeking a preliminary injunction or temporary restraining order (TRO) must show (1) the likelihood of success on the merits, (2) irreparable injury absent injunctive relief, and (3) a balancing of the equities that favors granting the injunction.[32] The two forms of relief are inextricably related, a TRO is merely the mechanism by which a court can provide equitable relief before a hearing for a preliminary injunction.[33]

As is widely acknowledged, the *Yellowstone* test is a lower evidentiary burden than the showing required for a TRO or preliminary injunction.[34] First, a 'likelihood of success' is supplanted in the *Yellowstone* test by the fourth factor: the ability, or desire, to cure.[35] When courts have, on rare occasion, offered a reason for this drastic departure, they generally suggest that "[b]ecause of the nature of the problem[,] the standards normally applicable to temporary injunctive relief have little application to a *Yellowstone* situation."[36] Additionally, while a showing of the potential and irreparable harm or loss to the tenant is required under the CPLR, there is no similar requirement, even nominally, for a *Yellowstone* injunction.[37] Furthermore, the denial or grant of a *Yellowstone* injunction does not preclude a party from subsequently seeking a preliminary injunction.[38]

29. They naturally should, as 'likelihood of success' must be shown before a court will grant a preliminary injunction. *Compare* Doe v. Axelrod, 532 N.E.2d 1272, 1273 (N.Y. 1988) ("[T]he first prong of the test for preliminary injunctive relief [is] likelihood of success on the merits . . . ."), *with Herzfeld & Stern*, 477 N.Y.S.2d at 8 ("[T]he tenant need not, as a prerequisite to the granting of a *Yellowstone* injunction, demonstrate a likelihood of success on the merits.").

30. *See generally* Frey, *supra* note 17 (discussing the "balancing of the equities" inherent to injunctive relief).

31. *See* N.Y. C.P.L.R. § 6301 (Consol. 2018) (grounds for temporary restraining orders and preliminary injunctions).

32. *See* Dillon, *supra* note 18, at 304.

33. *See* N.Y. C.P.L.R. §§ 6311, 6313 (Consol. 2018).

34. *See* Dillon, *supra* note 18, at 323–25.

35. *See* Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 715 N.E.2d 117, 120 (N.Y. 1999).

36. Finley v. Park Ten Assocs., 441 N.Y.S.2d 475, 476 (App. Div. 1981). *See also* Meyer v. Valverde, No. 23407-02, 2003 N.Y. Misc. LEXIS 2039, at *4 (Sup. Ct. Apr. 10, 2003).

37. *See*, *e.g.*, Trump on the Ocean, LLC v. Ash, 916 N.Y.S.2d 177, 180–81 (App. Div. 2011); Orange Tea, Inc. v. Am. Wild Ginseng Ctr., Inc., No. 4175/12, 2012 N.Y. Misc. LEXIS 2958, at *9–10, 12 (Sup. Ct. Jun. 4, 2012) (granting *Yellowstone* injunctions but denying relief under CPLR section 6301 based on a failure to show irreparable harm).

38. *See In re* Artisanal 2015, LLC, No. 17-12319 (JLG), 2017 Bankr. LEXIS 3813, at *34 (Bankr. S.D.N.Y. Nov. 3, 2017).

Comparisons between the CPLR and *Yellowstone* test should be drawn in light of the fact that the CPLR is a creature of statute. If the courts want to create a new form of equitable relief they should do so with the powers, remaining strictly within the confines thereof, granted to them by the state legislature.[39] While the CPLR arguably restricts the courts from otherwise making unchecked equitable decrees, the *Yellowstone* injunction functions as an alternative that lets the courts work around the requirements of the CPLR. The universal availability of the TRO and preliminary injunction should always be kept in mind when evaluating the merits of the *Yellowstone* doctrine because these traditional remedies are always present, independent of *Yellowstone*.[40]

D. JUDICIAL TRENDS

Courts and practitioners have critiqued the *Yellowstone* doctrine since its inception. The decades following *First National* saw a trend of "reassessment—and retrenchment" of the *Yellowstone* injunction by "the lower and appellate courts," as a result of "[increasing concern] with the automatic nature of the injunction."[41] Courts "started to limit the extent to which they [would] enjoin the landlord from exercising its right to terminate a lease under appropriate circumstances."[42] No cases reveal a significant recanting of this retrenchment, and it would be disingenuous to suggest that the courts have simply doled out *Yellowstone* injunctions without genuine legal and factual analyses; there are certainly notable decisions constraining or refining the *Yellowstone* doctrine.[43] Though the willingness of the First Department and other courts to issue *Yellowstone* injunctions is difficult to measure, it is unlikely, based on the sheer number of *Yellowstone* cases in recent decades, that the remedy has been reined in since the 1980s.[44] A survey of New York Supreme Court cases with motions for *Yellowstone* injunctions over the last several years did not reveal significant judicial bias, with roughly equal denials and grants of *Yellowstone* requests. However, minimal application of *Yellowstone* does

39. *See* N.Y. CONST. art. VI, § 30.

40. *See, e.g.*, 233 E. 86th St. Corp. v. Park E. Apartments, Inc., 499 N.Y.S.2d 853, 856 (Sup. Ct. 1986) (stating that when *Yellowstone* relief is unavailable "[t]he appropriate standard is, therefore, the general standard for injunctive relief").

41. Batista, *supra* note 24, at 1, 3.

42. *Id.* at 3. *See*, *e.g.*, Caspi v. Madison 79 Assocs., Inc., 445 N.Y.S.2d 459, 460 (App. Div. 1981) ("this measure, designed to protect against the forfeiture of tenant's substantial property interest, should not provide a license to withhold the monthly maintenance and other charges from the defendant co-operative corporation . . . for an indefinite period of time.").

43. Most recently, in *159 MP Corp.*, the majority held that a waiver of *Yellowstone* injunctions in a lease agreement was enforceable and not against public policy. 159 MP Corp. v. Redbridge Bedford, LLC, 71 N.Y.S.3d 87, 98 (App. Div. 2018).

44. *See* Frey, *supra* note 17, at 162 (suggesting that courts grant Yellowstone injunctions to tenants "as freely as candy is given to children on Halloween").

not guarantee fair decisions for present parties or preclude the possibility of the doctrine's future expansion.

E. PROPER APPLICATIONS OF THE *YELLOWSTONE* INJUNCTION

Before analyzing the controversial cases, two examples of proper *Yellowstone* relief are presented for contrast. In *Stix Restaurant Group, LLC v. Christos Realty Inc*. the plaintiff-tenant, Stix, entered a commercial lease in May 2012.[45] After work was done to renovate the space for Stix's needs, a contractor filed a mechanic's lien against the property.[46] Shortly after, the landlord served Stix with a notice of default based on the lien stating that the lease would be terminated if the default was not cured within ten days.[47] Stix answered that it had cured and "alleged that if it could not reach an agreement regarding the mechanic's lien, it could provide a bond for the lien but needed additional time to secure the bond."[48] The court granted the *Yellowstone* injunction on the condition that the lien be bonded within three weeks, reasoning that the tenant could *only* cure "by bonding the mechanic's lien but that it should be given an opportunity to do so."[49] In deciding to grant the *Yellowstone* injunction, the court may have considered the relatively quick actions taken by the tenant and the fact that it had brought a separate action against the contractor to cancel the lien.[50]

Several factors rendered *Stix* paradigmatic for *Yellowstone* relief. The defaults were limited in both size and scope. An easily resolved mechanic's lien does not necessarily indicate the same undesirable traits in a tenant that a landlord could reasonably infer from months of undue rent or bankruptcy. Timing and initiative are also critical. Nearly nine years remained on the ten-year lease. The court may have recognized this as indicating the importance of maintaining this leasehold, especially for a tenant in the restaurant industry. Stix not only acted quickly in[51] response to the default notice and court filings, but also sought to remedy the issue in the separate claim against the contractor. These are all indicia of good faith and clean hands, which are fundamental qualities of any plaintiff seeking equitable relief.[52]

45. Stix Rest. Grp., LLC v. Christos Realty Inc., 156833/2013, 2013 N.Y. Misc. LEXIS 4211, at *1 (Sup. Ct. Sept. 16, 2013).
46. *Id.* at *1–2.
47. *Id.*
48. *Id.* at *2.
49. *Id.* at *3.
50. *Id.* at *3–4.
51. *Id.*
52. *See*, *e.g.*, Williams v. Fitzhugh, 37 N.Y. 444, 452 (1868) ("[H]e who seeks equity must do equity . . . .").

Another case where *Yellowstone* relief was proper, though for different reasons, is *Pomodoro Grill, Inc v. I.M.V. 1290, LLC*. [53] The court, "considering the substantial property interest of Plaintiffs, [and] the ongoing dispute between the parties,"[54] granted the *Yellowstone* injunction with respect to the alleged mechanic's lien, fire code violations, and a disputed sign. "[S]ince the parties have disagreed to almost every fact concerning the sign[] and their credibility" could not be determined on its face to maintain the status quo, the court ordered that "the original sign or a substantially similar sign [be returned to] where the original sign was located until further determination of [the] Court, unless the parties agree[d] otherwise."[55] In a tumultuous situation like *Pomodoro*, maintaining the status quo could be the court's most equitable approach. Unable to determine which party was being exploitative, the court acted fairly and allowed both sides more time to gather evidence and credible testimony.[56]

However, most cases dealing with *Yellowstone* relief have less convoluted facts than *Stix* or *Pomodoro*. They typically feature mundane conflicts on less contentious issues, such as unpaid rent or unprocured insurance,[57] which overwhelmingly should not require a court's equitable intervention.

II. IMPROPER SETTINGS FOR THE YELLOWSTONE DOCTRINE

The thrust of this Note turns on the second and fourth factors of the *Yellowstone* test, which require that the tenant must be in default under its lease and have the ability to cure in order to seek *Yellowstone* relief.[58] Defaults are generally categorized as monetary or non-monetary. Monetary defaults may result from a tenant's failure to pay rent, common expenses or payments required under the lease. Bankruptcy could be considered an

53. Reasonable minds may disagree over whether this was really a *Yellowstone* injunction. Though the decision explicitly ordered a 'Yellowstone Injunction,' "even assuming the Yellowstone application was untimely, [the plaintiff] has met the standard for injunctive relief pursuant to C.P.L.R. 6301 by establishing a likelihood of success on the merits, irreparable injury if the injunction is not granted and a balancing of equities in its favor." Pomodoro Grill, Inc v. I.M.V. 1290, LLC, 2015/3872, 2015 N.Y. Misc. LEXIS 3396, at *12–13 (Sup. Ct. Aug. 13, 2015).

54. *Id.* at *14.

55. *Id.* at *19–20.

56. *See id.*

57. Gaps in insurances coverage are incurable according to the Court of Appeals so deciding such cases is nearly automatic. *See* Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296-97 (N.Y. 1987). *See*, *e.g.*, Julianna Collection Corp. v. VBG 990 AOA Member LLC, No. 153218/2018, 2018 N.Y. Misc. LEXIS 3424 (Sup. Ct. Aug. 9, 2018); Schulman, Blitz & Williamson, LLP v. VBG 990 AOA LLC, No. 155798/18, 2018 N.Y. Misc. LEXIS 3396 (Sup. Ct. Aug. 7, 2018) (explaining insurance gaps in *Yellowstone* cases).

58. Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 715 N.E.2d 117, 120 (N.Y. 1999).

inherently monetary default[59] but it may be examined separately due to its unique nature and the requirements of the Bankruptcy Code (the Code). Non-monetary defaults may relate to, *inter alia*, gaps in or lack of insurance coverage, improvements and alterations, and assignment or subletting against the terms of the lease.

Another requirement implied by the second and fourth factors is that the tenant has a cure period, prescribed by their lease, which the court may toll. Cases decided based on the existence or expiration of the tenant's cure period will be examined subsequently. Again, this Note does not suggest that New York's courts have been cavalierly issuing *Yellowstone* injunctions to undeserving tenants or that the doctrine has been misapplied or overused.[60] However, some plaintiffs have sought to exploit *Yellowstone* relief,[61] and there are aspects of the doctrine that may be clarified or modified to render it a more effective judicial tool.

A. *YELLOWSTONE* INJUNCTIONS AND TENANTS IN MONETARY DEFAULT

An exemplary case of a monetary default is *Definitions Personal Fitness, Inc. v. 133 E. 58th Street LLC*. The tenant chronically failed to pay rent, thus forcing the landlord to bring ten nonpayment actions in seven years.[62] The Appellate Division, First Department, affirmed the denial of the tenant's request for a *Yellowstone* injunction.[63] Monetary defaults, uniquely, are effectively curable instantaneously if the tenant can pay. Chronic nonpayment, as in *Definitions Personal Fitness*, may indicate to a judge an obvious unwillingness and inability to cure.

However, in cases where the nonpayment has been less egregious, judges may have a harder time discerning which tenants are caught in dire straits and which have savvy legal counsel. In *M.J.G. Merchant Funding Group LLC v. Matlin Patterson Global Advisers LLC*, the tenant was late on several months of rent.[64] The court denied the *Yellowstone* injunction request, unconvinced by the tenant's inapposite affidavits and the assertion that his "bank account had been 'hacked,' and that the funds to cover the

59. Notwithstanding those clever, if not, manipulative individuals who are not insolvent but strategically file for bankruptcy protection.

60. *See* Frey, *supra* note 17.

61. *See generally* 330 Hudson Owner, LCC v. Rector, Church-Wardens & Vestrymen of Trinity Church in the City of N.Y., 889 N.Y.S.2d 884 (Sup. Ct. 2009) (denying a *Yellowstone* injunction and concluding that the tenant attempted to "use its shutdown in construction as leverage to force [the landlord] to renegotiate its lease").

62. Definitions Pers. Fitness, Inc. v. 133 E. 58th St. LLC., 967 N.Y.S.2d 647, 647 (App. Div. 2013).

63. *Id.*

64. M.J.G. Merch. Funding Grp. LLC v. Matlin Patterson Glob. Advisers LLC, No. 657502/2017, 2018 N.Y. Misc. LEXIS 2878, at *8 (Sup. Ct. Feb. 5, 2018).

rent checks had been fraudulently wired out of the account."[65] Like *Definitions*, the court in *M.J.G.* was confident in denying *Yellowstone* relief based on a continued pattern of monetary default. The Court of Appeals could remove these cases, often decided with apparent ease, from the realm of *Yellowstone* without jeopardizing its efficacy for tenants in non-monetary default.

Finally, tenants in monetary default, particularly for failure to pay rent, may find themselves subject to a substantial undertaking[66] submitted to the court until the dispute is resolved.[67] Though undertakings are discretionary for TROs[68] and *Yellowstone* injunctions, they remain an imperfect solution which can require tenant to make large payments[69] while denying the landlord the use of those funds.[70] They can also burden the judicial docket by necessitating additional hearings[71] or creating subsequent disputes related to the appointed amount.[72] Undertakings can be serious obstacles, particularly for tenants already in financial distress, and while they are not mandatory, a judge might feel obligated to require an undertaking to compensate for the lesser burden for *Yellowstone* relief.[73] Conversely, a judge may require a smaller undertaking from a tenant, who has requested traditional injunctive relief and is willing and able to meet that higher evidentiary burden, because such a tenant is more likely to ultimately succeed than one seeking only a *Yellowstone* injunction.[74]

Another indicator that *Yellowstone* should only apply to non-monetary defaults is the difference in judicial precedent regarding whether a

65. *Id.* at *12–13.

66. "A promise, engagement, or stipulation. . . . 'Undertaking' is frequently used in the special sense of a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the court or the opposite party." *Undertaking*, THE LAW DICTIONARY https://thelawdictionary.org/undertaking/ (last visited Nov. 19, 2019).

67. *See* N.Y. C.P.L.R. §§ 6312(b), 6313(c) (Consol. 2018).

68. N.Y. C.P.L.R. § 6313(c) (Consol. 2018).

69. *See* 51 Park Place LH, LLC v. Consol. Edison Co. of N.Y., 939 N.Y.S.2d 255, 258 (Sup. Ct. 2011) (ordering plaintiff to give an undertaking of $781,519.00). The amount is subject to judicial discretion, a judge may only require a nominal undertaking. *See, e.g.*, LF 420 W. Broadway, LLC v. 420 W. Broadway Corp., No. 653630/2011, 2012 N.Y. Misc. LEXIS 6674, at *13 (Sup. Ct. Jun. 29, 2012) (ordering a nominal undertaking of $1000).

70. *See* Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 715 N.E.2d 117, 120–21 (N.Y. 1999).

71. *See, e.g.*, 159 MP Corp. v. Redbridge Bedford, LLC, 71 N.Y.S.3d 87, 111 (App. Div. 2018).

72. *See, e.g.*, Bldg. Serv. Local 32B-J Pension Fund v. 101 Ltd. P'ship, 981 N.Y.S.2d 682, 686–87 (App. Div. 2014).

73. *See, e.g.*, Weitzen v. 130 E. 65th St. Sponsor Corp., 445 N.Y.S.2d 744, 745 (App. Div. 1982) (increasing the undertaking from $20,000 to $150,000 because injunctive relief would "not provide under the circumstances herein adequate and complete relief").

74. *See supra* text accompanying note 29.

conditional limitation[75] based on the failure to pay rent is enforceable. For residential tenants in New York, "a conditional limitation based solely on a failure to timely pay rent has been found to be against public policy."[76] The same is not true for commercial tenants. In the commercial setting, courts will enforce such conditional limitations absent a showing of fraud, unconscionability, or bad faith.[77] This distinction between monetary defaults by residential and commercial tenants is significant, and the State should be more concerned with preventing unnecessary residential evictions than with protecting commercial leases of for-profit entities. However, *Yellowstone*'s explicit availability to commercial tenants, who already must adhere to a higher standard of timely rent payments with respect to conditional limitations, tracks precedential threads across common law which reflect the merits of limiting *Yellowstone*'s application to cases with non-monetary defaults.

The dearth of cases granting *Yellowstone* relief to tenants in monetary default is a silent acknowledgement by the courts that the remedy is essentially inappropriate in such situations.[78] In *Hollymount Corp. v. Modern Business Associates., Inc.*, the Second Department stated that "most of the violations in the instant case were rent related and thus not deserving of *Yellowstone* protections."[79] Nevertheless, the court granted a *Yellowstone* injunction because "certain alleged violations *were not rent related* and were indeed curable."[80] The Court of Appeals should rule that *Yellowstone* relief is inappropriate in cases of monetary default; such a holding would make the doctrine clearer and reduce the caseload by eliminating, from the outset, standing for the same claims that are most likely to be denied in court.

B. *YELLOWSTONE* INJUNCTIONS AND TENANTS FACING BANKRUPTCY

Bankruptcy itself may be grounds for a default in a commercial lease.[81] A tenant filing for bankruptcy may be completely unable to continue paying

75. A conditional limitation is, "a term found in a lease that states that the lease is terminated if certain conditions are not met." *Conditional Limitation*, THE LAW DICTIONARY, https://thelawdictionary.org/conditional-limitation/ (last visited Dec. 27, 2018).

76. Queen Art Publishers., Inc. v. Animazing Gallery, Inc., No. 52706/2002, 2002 N.Y. Misc. LEXIS 159, at *6 (N.Y. Civ. Ct. Feb. 26, 2002).

77. *Id.*

78. There is, apparently, no case in which a court flippantly granted *Yellowstone* relief to a tenant with a complete inability to meet their monetary obligations.

79. Hollymount Corp. v. Modern Bus. Assocs., Inc., 528 N.Y.S.2d 113, 114 (App. Div. 1988).

80. *Id.* (emphasis added).

81. *See, e.g.*, NEW YORK CITY BAR ASS'N, MODEL RETAIL LEASE AND COMMENT., ARTICLE 18. DEFAULT, § 18.1(d) https://www2.nycbar.org/RealEstate/Forms/Retail%20Lease%20form%20-%20FINAL%20_5-17-10_.pdf (last visited Oct. 26, 2019); Taubes v. Stuart, 580 N.Y.S.2d 474, 474 (App. Div. 1992) ("Under the agreement a 'default' included 'lessee's becoming insolvent or bankrupt'").

rent or its assets may be tied up in other courts and with other creditors.[82] Bankrupt tenants may quickly lead to vacant storefronts, which provide no practical or economic benefit for anyone.[83] In such a situation, the ability to terminate a lease and reclaim possession of the space is in the landlord's, and arguably the general public's, best interest. Landlords can then re-let the property and begin generating new income, rather than trying to extract those same earning from other sources (i.e., other tenants). Adequate cash flow is essential to landlords' ability to stay afloat in the City, since it has some of the highest commercial real estate taxes in the nation.[84] The public generally benefits when a new business opens in the space formerly occupied by a bankrupt tenant.[85] Broadly, the public may benefit through the higher taxes that an active business would generate, compared to lower revenue from taxing unoccupied real estate. More narrowly, there are those individuals, or corporate actors, who can benefit directly by leasing the now-available space and becoming the new tenants to provide goods or services to the general population while personally profiting.[86] This is all especially true in the City, where shuttered storefronts are anathema to many important industries, including real estate, tourism, retail,[87] etc.[88]

Bankruptcy by tenants is another scenario, essentially a subset of monetary default, which demonstrates the appropriateness of drawing a distinction between monetary and non-monetary defaults in the *Yellowstone* context. As with other monetary defaults, bankruptcy could hypothetically be resolved quickly. However, one does not, for good reason, expect that bankruptees will suddenly find the means to pay their debts. Accordingly,

82. *See, e.g.*, 4 USS LLC v. DSW MS LLC, 992 N.Y.S.2d 515, 516 (App. Div. 2014).

83. *See* Daphne Howland, *New York City Moves to Collect Retail Vacancy Data*, RETAIL DIVE (July 25, 2019), https://www.retaildive.com/news/new-york-city-moves-to-collect-retail-vacancy-data/559499/ ("There's no doubt that the epidemic of street level retail vacancies in New York City is devastating from a loss of access to goods for New Yorkers, loss of employment for new Yorkers, loss of rent revenue for landlords and loss of tax revenues for the City and State").

84. *See*, LINCOLN INST. OF LAND & POLICY & MINN. CTR. FOR FISCAL EXCELLENCE, 50-STATE PROPERTY TAX COMPARISON STUDY FOR TAXES PAID IN 2017 76–77 tbl. 3b (Apr. 2018), https://www.lincolninst.edu/sites/default/files/pubfiles/50-state-property-tax-comparison-for-2017-full_1.pdf.

85. *See* Jeffrey S. Battershall, *Commercial Leases and Section 365 of the Bankruptcy Code*, 64 AM. BANKR. L.J. 329, 331–32 (1990).

86. *See generally 4 Ways to Capitalize on the "Retail Crisis" in NYC*, STOREFRONT MAGAZINE, https://www.thestorefront.com/mag/4-ways-capitalize-retail-crisis-nyc/ (last visited Oct. 4, 2019) (presenting "Monitor[ing] Competitor Closures" as the first way to capitalize on the retail crisis).

87. Moreover, the rise of online shopping has made it increasingly difficult for even the biggest-name retailers to maintain big physical spaces in New York City. Major trends affecting tenants and businesses like this will inevitably impact landlords as well. *See* Rachel Abrams, *Stores Take Flight from Fifth Avenue in Manhattan*, N.Y. TIMES (Apr. 4, 2017), https://www.nytimes.com/2017/04/04/business/stores-fifth-avenue-manhattan-ralph-lauren.html.

88. *See generally* VACANT NEW YORK: MAPPING MANHATTANS SHUTTERED STOREFRONTS http://www.vacantnewyork.com/ (last visited Dec. 21, 2018) (mapping the vacant commercial spaces throughout the City).

the differences between monetary and non-monetary defaults are reflected by the Bankruptcy Code (the Code). Bankruptcy trustees cannot assume commercial leases under which the tenant is in monetary default, i.e., if they owe several month's rent. First, the Code distinguishes[89] between residential and nonresidential leases, counterintuitively providing fewer protections for residential leaseholders than New York State law.[90] A bankruptcy trustee may assume a nonresidential lease, under which the debtor is in default, as long as the trustee "cures, or provides adequate assurance that the trustee will promptly cure, such default . . . arising from any failure to perform *non-monetary obligations* under an unexpired lease of real property."[91] Although this distinction arises in a vastly different legal context, the driving policy concerns are related. The Code, like *First National*, recognizes the potential value of a commercial leasehold and extends tenants certain protections. Like many *Yellowstone* cases, the Code recognizes that a tenant's likelihood of maintaining a leasehold is vastly diminished when their defaults are monetary. But unlike *Yellowstone*, the Code does not readily provide protections to such tenants.

An additional parallel to bankruptcy law is the priority of a landlord-creditor's claim. The bankruptcy trustee's duty to cure non-monetary defaults is distinct from the general duty to pay the debtor's creditors. If there is a default in a commercial lease, that default must be cured, and the landlord must be compensated before other creditors can be satisfied with such funds.[92]

Finally, the Code bars a trustee from assuming any nonresidential lease which, "has been terminated under applicable *nonbankruptcy* law prior to the order for relief."[93] The *Yellowstone* doctrine should not burden New York's federal bankruptcy courts[94] or complicate the role of a New York bankruptcy trustee, who represents either a tenant or landlord, by saddling them with the potential for long legal battles over whether a lease was

89. *See* 11 U.S.C. § 365(b)(1)(A) (2016).

90. *See*, *e.g.*, N.Y. REAL PROP. ACTS. § 753 (Consol. 2018); Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 572–75 (2009) (explaining why the Code provides less protection for residential property than other assets).

91. 11 U.S.C. § 365(b)(1)(A) (2016) (emphasis added).

92. Gary P. Spencer Jr., *A Simple Solution for Stub Rent? How Proposed Changes to the Treatment of Stub Rent Could Lead to Unforeseen Consequences*, 36 REV. BANKING & FIN. L. 915, 927 (2017) (suggesting that one reason for this priority is a landlord's ongoing requirement to provide certain services to the tenant with little guarantee of compensation and regardless of the tenant's financial status).

93. 11 U.S.C. § 365(c)(3) (2016) (emphasis added).

94. *See e.g.*, *In re* Family Showtime Theatres, Inc., 58 B.R. 679 (Bankr. E.D.N.Y. 1986); *In re* Seven Stars Rest., Inc., 122 B.R. 213 (Bankr. S.D.N.Y. 1990); Hotel Syracuse, Inc. v. City of Syracuse Indus. Dev. Agency, 155 B.R. 824, 832 (Bankr. N.D.N.Y. 1993); 1633 Broadway Mars Rest. Corp. v. Paramount Grp., Inc. (*In re* 1633 Broadway Mars Rest. Corp.), 388 B.R. 490 (Bankr. S.D.N.Y. 2008); *In re* Artisanal 2015, LLC, No. 17-12319, 2017 Bankr. LEXIS 3813, at *34 (Bankr. S.D.N.Y. Nov. 3, 2017) (bankruptcy cases dealing with *Yellowstone* injunctions).

properly terminated. As the *First National* court suggested, this should remain a bright-line rule[95] and the Code's acknowledgement of distinctions between monetary and non-monetary defaults should persuade the courts that this is an appropriate line to draw.

C. *YELLOWSTONE* INJUNCTIONS AND LEASES WITH EXPIRED CURE PERIODS

Paradoxically, the courts have refused to extend *Yellowstone* relief in some cases because the lease did not provide for a cure period at all.[96] At first glance this is logically consistent with the *Yellowstone* doctrine and its requirements: a court cannot extend what does not exist in the first place—an expired or unprovided cure period—to allow the defaulting party to cure. However, the public policy concern over the forfeiture of a leasehold has, at times, surmounted this logical obstacle. There are several cases where courts granted *Yellowstone* relief to tenants whose cure periods had technically expired. These rulings are contrary to the spirit and rationale of the *First National* decision.[97] The origins of this trend were presaged by Judge Titone's dissent in *TSS-Seedman's, Inc. v. Elota Realty Co.*:

> [i]n effect, the majority has held that, regardless of the lease provisions, the law will imply a right to cure that extends until such time as the landlord acts upon the tenant's default. I cannot agree to such a result, however, since it violates the well-established principle that, absent a showing of fraud, mutual mistake or other acceptable basis of reformation, the court is powerless to read into a lease a right to cure beyond the rights specified in the lease itself.[98]

In 1988, Judge Titone was writing ahead of his time. Some recent cases have professed loyalty to *First National* yet simultaneously issued judgements that seem inherently at odds therewith.[99] In *Long Island Gynecological Servs., P.C. v. 1103 Stewart Ave. Assocs. Ltd. Pshp.* (*LIGS*), the landlord sent the tenant a notice of default for multiple violations of the lease.[100] The tenant had thirty days to cure the alleged defaults, but failed to cure and filed for a *Yellowstone* injunction nine days after the cure period

95. First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 237 N.E.2d 868, 871 (N.Y. 1968).

96. *See* Boyarsky v. Froccaro, 479 N.Y.S.2d 606, 610–11 (Sup. Ct. 1984).

97. Frey, *supra* note 17, at 168 ("It is ironic that *Yellowstone*, which dictated judicial control over sympathy, has now become the label for a doctrine that twists traditional standards for equitable relief precisely for sympathetic purposes.").

98. TSS-Seedman's, Inc. v. Elota Realty Co., 531 N.E.2d 646, 649 (N.Y. 1988).

99. *See*, *e.g.*, Long Island Gynecological Servs., P.C. v. 1103 Stewart Ave. Assocs. Ltd. P'shp, 638 N.Y.S.2d 959, 962–63 (App. Div. 1996); WPA/Partners LLC v. Port Imperial Ferry Corp., 763 N.Y.S.2d 266, 269 (App. Div. 2003); Ray & W Cut Inc. v. 240 W. 37 LLC, No. 111411/2007, 2008 N.Y. Misc. LEXIS 7635 at *10 (Sup. Ct. Jan. 15, 2008).

100. *Long Island Gynecological Servs.*, 638 N.Y.S.2d at 961.

expired.[101] The Supreme Court denied on the *Yellowstone* application as untimely.[102] However, the Second Department reversed on the grounds that because the default could not have been cured within a thirty-day period, the tenant was "therefore entitled to more than [thirty] days to cure, and its motion for a *Yellowstone* injunction was, under the particular circumstances of this case, timely, and should have been granted."[103] In effect, by extending the cure period, *LIGS* revived a lease that should, by its own terms, have terminated before the tenant filed for *Yellowstone* relief.[104] Though the decision was at odds with *First National* because, as in *First National,* the tenant's cure period had expired prior to the application for injunctive relief, one might consider the position of a judge forced to choose between stretching a narrow legal doctrine or shutting down an abortion center by judicial decree.

Admittedly, in *LIGS* and *TSS-Seedman's*, the court was extending, or reviving, a pre-existing cure period.[105] An even greater affront to *First National* would be to create a cure period when there was none provided for in the lease.[106] Thus far courts have declined to do this[107] and have prevented, in this respect, the expansion of the *Yellowstone* doctrine. Notably, the Second Department reversed the *LIGS* holding in 2010.[108]

However, the First and Second Department disagree on whether the expiration of a tenant's cure period and receipt of a termination notice preclude an application for a *Yellowstone* injunction.[109] The First Department allows an exception akin to the *LIGS* rule, which the Second Department abandoned in *Korova Milk Bar of White Plains, Inc. v. PRE Props., LLC*.[110] The Second Department adopted a stricter formulation that a tenant who fails to "file for *Yellowstone* relief within the cure period is

101. *Id.*

102. *Id.*

103. *Id.* at 962.

104. This case might have come out differently in the First Department, which, *at that time*, took an opposing position regarding already-expired leases/cure periods. *See* Soho Elec., Inc. v. Petbar Rlty. Co. Inc., 2008 N.Y. Misc. LEXIS 8428, at *4 (Sup. Ct. Jan. 22, 2008) ("Where, there is no right to cure, or where the cure period has ended prior to the seeking of a *Yellowstone* injunction, the motion for a *Yellowstone* injunction must be denied.").

105. *See* TSS-Seedman's, Inc. v. Elota Realty Co., 531 N.E.2d 646, 649 (N.Y. 1988); *Long Island Gynecological Servs.*, 638 N.Y.S.2d at 961.

106. *See* First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 237 N.E.2d 868, 871 (N.Y. 1968).

107. *See, e.g.*, 380 Yorktown Food Corp. v. 380 Downing Drive, LLC, 957 N.Y.S.2d 267, 267 (Sup. Ct. 2012) (denying relief because no notice to cure had been issued and therefore the was no cure period to extend); Queen Art Publishers., Inc. v. Animazing Gallery, Inc., No. 52706/2002, 2002 N.Y. Misc. LEXIS 159, at *8–9 (N.Y. Civ. Ct. Feb 26. 2002) (denying relief because the lease did not provide for a cure period for the failure to pay rent).

108. Korova Milk Bar of White Plains, Inc. v. PRE Props., LLC, 894 N.Y.S.2d 499, 501 (App. Div. 2010).

109. *See* Vill. Ctr. for Care v. Sligo Realty & Serv. Corp., 943 N.Y.S.2d 11, 13–14 (App. Div. 2012).

110. *Korova Milk Bar*, 943 N.Y.S.2d at 501.

forever barred from such relief, *no matter what the provisions of the lease* [state] concerning defaults incapable of cure within the stated time and *regardless of what efforts they had undertaken* to effectuate the cure."[111] Conversely, the First Department still follows a more flexible convention: for tenants who are unable to cure their defaults "within the time provided in the notice to cure, [where] all that the terms of the lease require from the tenant is commencement of diligent efforts to cure the defaults within the allotted time, service of a notice of termination *does not necessarily bar necessarily bar subsequent Yellowstone injunctive relief*."[112] While the First Department's softer standard may appeal to one's sensitivities, it is contrary to *First National*'s holding and rationale[113] as compared to the rule in the Second Department.[114] If the Court of Appeals wished to disregard the import of termination notices and freedom of contract, they might have done so in *First National* by creating a constructive lease or directly enjoining the termination. Instead, the original narrow holding has evolved into the present-day doctrine, which, at least in the First Department, essentially allows what was previously prohibited under a strict reading of *First National.*[115]

The most appealing aspect of a *Yellowstone* injunction is the low evidentiary burden for tenants. This should be the *only* departure from traditional CPLR relief permitted by the Court of Appeals: the "ability to cure" instead of the "likelihood of success." The courts should not have the power to revive leases by extending or creating cure periods. The Court of Appeals should adopt the Second Department's rationale in *Korova Milk Bar*, which clearly comports with *First National* and eliminates the First Department's exception. Having the same standard in the First and Second Departments would also promote judicial economy in two inextricably linked jurisdictions with overlapping landlords, tenants, and lawyers.

111. *Vill. Ctr. for Care*, 943 N.Y.S.2d at 14 (emphasis added) (discussing the rule adopted by the *Korova* court).

112. *Id.* at 11 (emphasis added).

113. First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 237 N.E.2d 868, 871 (N.Y. 1968) (noting, "*[s]tability of contract obligations must not be undermined by judicial sympathy.*").

114. *Compare Korova Milk Bar*, 894 N.Y.S.2d at 501 ("[A]n application for *Yellowstone* relief must be made not only before the termination of the subject lease . . . but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure."), *with Vill. Ctr. for Care*, 943 N.Y.S.2d at 14 ("[T]he existence of a period in which a violation may be cured *does not depend on the contents of the notice of default, but upon the terms of the lease*.") (quoting Empire State Bldg. Assocs. v. Trump Empire State Partners, 667 N.Y.S.2d 31, 34 (App. Div. 1997)).

115. The *First National* court refused to grant a request for a TRO and a preliminary injunction because the landlord served the notice of termination prior to the tenant's obtaining a TRO from the Appellate Division and the lease had therefore expired on its own terms. *First Nat'l.*, 237 N.E.2d at 870–71.

III. NARROWING THE *YELLOWSTONE* DOCTRINE

The *Yellowstone* doctrine is here to stay as a judicial remedy so, where possible, courts should take steps to improve it. This will help trial judges and lawyers by streamlining cases in which *Yellowstone* injunctions are sought. And, more importantly, it will benefit the City's landlords and tenants.

A. BENEFITS TO LANDLORDS AND JUDICIAL ECONOMY

If anything is to be gleaned from the veritable mountain of cases turning on the *Yellowstone* injunction, it is helpful to recognize that the Court of Appeals had its hands tied in *First National.* Before the first *Yellowstone* injunction was ever issued, the court cited Professor Borchard for the proposition that, "declaratory relief is *sui generis* and is as much legal as equitable."[116] Equitable considerations suggest that "in a proper case, a court has the fullest liberty in molding its decree to the necessities of the occasion. But, it cannot grant equitable relief if there is no acceptable basis for doing so."[117] Alternatively, the legal aspect of declaratory relief is somewhat akin to standing: is this tenant in a situation which renders its request for declaratory relief legitimate? This tug of war between law and equity has dogged the *Yellowstone* injunction throughout its development. As in *LIGS,* lower courts, when seeking to extend their powers of equity to fact patterns which too closely resemble those in precedential cases decided by higher courts, are constrained by reliance on the *Yellowstone* factors, restrictive precedents, and the general principles of *First National*.

Perhaps, this is another unforeseen consequence of the *Yellowstone* doctrine: the four-factor test may prevent New York courts from truly flexing their equitable powers and using their judicial discretion to mold equitable remedies to individual situations. These tensions between law and equity underlie the three issues examined in this Note. Cases where tenants cannot cure simply because their leases do not contain a cure period provision are perfectly suitable for equitable relief. Yet, the lower courts are shackled by the *pro forma* requirements of the four-factor test. This argument assumes a degree of determinism in the courts,[118] but the solutions advanced in this Note apply with equal force, regardless of the extent to which *Yellowstone* acts as a formal judicial restriction. This Note advances a tightening of the *Yellowstone* doctrine, which might be seen as further restricting those judges who choose to act within *Yellowstone'*s framework rather than granting relief under the CPLR. However, the net

116. *Id.* at 870 (quoting EDWIN BORCHARD, DECLARATORY JUDGMENTS 239 (2d ed. 1941)).
117. *Id.*
118. Particularly judges on the lower courts, who may feel constrained by the legal framework and procedures of the *Yellowstone* doctrine, what might be termed 'judicial framework determinism.'

result would be to decrease the range of scenarios, and thus the pool of potential claimants that currently fall within *Yellowstone's* scope, and thereby increase the number of cases which must be resolved under the traditional standards of injunctive relief.

It is unclear whether *Yellowstone*'s potential benefits for tenants outweigh the costs for landlords and the general public, especially in the City. The traditional view that tenants are the underdog and therefore need a significant array of protections from their landlords might be reconsidered in a market defined by high vacancy rates caused by growing online retail, rising rents, and regulatory burdens.[119] Douglas Elliman surveys showed that 7% of all retail space in Manhattan was vacant in 2016 while in 2017 the figure rose to 20%.[120] Some suggest this is because landlords are holding out for development, sale deals, or larger, more reliably solvent tenants.[121] In 2018, Mayor Bill de Blasio said he would like to see a vacancy tax imposed on landlords who maintain empty retail spaces for too long.[122] However, this view is both cynical and financially irresponsible. Landlords often heavily depend upon their incoming rent cash flow. Therefore, landlords presumably prefer any tenant that is doing business, able to pay rent, and uses the space peacefully, to a closed storefront.[123] Empty spaces deprive the landlord of rent and may injure their reputation. They also require more maintenance, and therefore expenses, by the landlord compared to rented spaces where such responsibilities and costs are typically borne by the tenant under the lease.[124] Thus, some landlords are willing to take below market rent if they can find a quality tenant because they "care about the city and they know there's nothing worse for the neighborhood than a dark store."[125] Against this backdrop of the City's

119. SCOTT M. STRINGER, CITY OF N.Y. OFF. OF THE COMPTROLLER, RETAIL VACANCY IN NEW YORK CITY: TRENDS AND CAUSES, 2007-2017 (2019).

120. Corey Kilgannon, *This Space Is Available*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/interactive/2018/09/06/nyregion/nyc-storefront-vacancy.html.

121. *Id. See also* Erin Hudson, *Why One Fifth of Manhattan Storefronts Are Vacated*, THE REAL DEAL (Sept. 9, 2018), https://therealdeal.com/2018/09/09/why-one-fifth-of-manhattan-storefronts-are-vacant/.

122. Rich Calder, *De Blasio: I Will Lobby for Vacancy Tax on Landlords of Empty Storefronts*, N.Y. POST (Jan. 9, 2018), https://nypost.com/2019/01/09/de-blasio-i-will-lobby-for-vacancy-tax-on-landlords-of-empty-storefronts/.

123. *But see* Rich Calder et. al., *De Blasio Eyes Vacancy Tax for Greedy Landlords Seeking Top Dollar*, N.Y. POST (Mar. 30, 2018), https://nypost.com/2018/03/30/de-blasio-eyes-vacancy-tax-for-greedy-landlords-seeking-top-dollar/ ("[I]f these landlords have deep pockets and large property portfolios, it may make more financial sense to claim a tax loss on vacant property than to rent at a non-optimal value.").

124. *See* COMPREHENSIVE GUIDE TO COMMERCIAL LEASING IN NEW YORK CITY, N.Y.C. DEP'T OF SMALL BUS. SERVS., at 17–18, https://www1.nyc.gov/assets/sbs/downloads/pdf/about/reports/commercial-lease-guide-accessible.pdf (last visited Oct. 26, 2019); NEW YORK CITY BAR ASS'N, MODEL RETAIL LEASE AND COMMENT., ARTICLE 10. REPAIRS AND MAINTENANCE, https://www2.nycbar.org/RealEstate/Forms/Retail%20Lease%20form%20-%20FINAL%20_5-17-10_.pdf (last visited Oct. 26, 2019).

125. Kilgannon, *supra* note 122.

ailing retail market, it does not behoove the court system to create its own inefficiencies for commercial landlords or to promote inefficiencies for itself. Rather, the courts should, within the confines of their judicial powers and limitations, promote a flexible leasing environment to produce more equitable results for landlords and tenants. Limiting the scope of the *Yellowstone* injunction is a small step in that direction which would have few, if any, negative consequences for either the landlord or the tenant, since tenants have a variety of other similar remedies and *Yellowstone* injunctions rarely, if ever, benefit a commercial landlord.

Moreover, sometimes tenants use *Yellowstone* to the landlord's detriment and landlords are rightfully concerned about its potential abuse.[126] *Glaze Teriyaki, LLC v. MacArthur Properties I, LLC*, resolved in 2017, is a likely example of savvy counsel taking advantage of the City and State protections for tenants.[127] In November 2013, the judge ordered *Yellowstone* relief subject to the tenant curing the certain violations at the tenant's expense, to which the tenant's lawyer replied "fair enough."[128] But the violations were never cured and the tenant's *Yellowstone* request was rejected in February 2014.[129] In February 2016, a hearing was held to determine whether the tenant had cured the violations.[130] Despite the landlord's expert's testimony that the violation remained uncured, the court found that the landlord had failed to prove any code violation and enjoined it for terminating the lease.[131] Finally, the case reached the Appellate Division, First Department, which reversed, reinstated the landlord's counterclaims, granted a judgement of possession and a warrant of eviction and remanded the issue of monetary damages to the Supreme Court.[132] This case took over three years, sat in front of at least three judges, and leaves one feeling that this unnecessary, prolonged process should have been avoidable. Without significantly more information about the expenditures and obligations of the parties, at least one incontrovertible observation can be gleaned from *Glaze Teriyaki*: it took too long and occupied too many court resources to resolve this issue. The two *Yellowstone* injunctions the tenant sought could only have added to these impediments. Limiting

126. *See, e.g.*, 1633 Broadway Mars Rest. Corp. v. Paramount Grp., Inc. (*In re* 1633 Broadway Mars Rest. Corp.), 388 B.R. 490, 504 (Bankr. S.D.N.Y. 2008) ("Landlord is concerned that dismissal of the case will result in continuing litigation in the state court, including additional attempts at injunctions, which will lead to Debtor's continued occupancy, nonpayment of rent, non-construction of the Cooling Tower, unauthorized nightclub events, and possibly other mischief.").

127. Glaze Teriyaki, LLC v. MacArthur Props, 65 N.Y.S.3d 127 (App. Div. 2017).

128. *Id.* at 128.

129. *Id.*

130. *Id.* at 129.

131. *Id.*

132. *Id.* at 130.

Yellowstone's availability would prevent tenants from using it in this manner and promote judicial economy.

B. BENEFITS TO TENANTS

While narrowing the scope of *Yellowstone* will benefit landlords and the courts, tenants are the party that *Yellowstone* was designed to help and any changes to the doctrine must be weighed against the benefits it provides them. From the tenant's perspective, the *Yellowstone* injunction is a valuable tool for maintaining a lease, which should not be given up lightly or abandoned. However, the Second Department recently ruled that waivers of the right to seek a *Yellowstone* injunction, in commercial leases, are enforceable and not against public policy.[133] Hawkish landlords, especially those with hawkish real estate counsel, will recognize this and such waivers will soon become boilerplate in commercial leases.[134] The decision to waive the right ultimately rests with the tenant-lessee, who can now use the waiver as a bargaining chip. But, the enforceability of such waivers will ultimately reduce the number of tenants who can seek *Yellowstone* relief in the first place,[135] and while *Yellowstone* has its flaws, it is undeniably a viable remedy for New York's commercial tenants which the courts should preserve for the proper situations.

CONCLUSION

The *Yellowstone* injunction is a valuable remedy for the City's commercial tenants.[136] However, several changes would improve its efficacy and functionality. First, limiting standing for *Yellowstone* relief to non-monetary defaults would reduce the number of applications the courts must hear and inevitably deny. A non-monetary requirement might also prevent bankrupt tenants from getting *Yellowstone* relief. Second, the Court of Appeals should adopt the *Korova Milk Bar* rule, in which tenants who neglect to "file for *Yellowstone* relief within the cure period [are] forever

133. 159 MP Corp. v. Redbridge Bedford, LLC, 71 N.Y.S.3d 87, 90 (App. Div. 2018).

134. David B. Saxe & Danielle C. Lesser, *Goodbye 'Yellowstone' Road: Is This the End of the 'Yellowstone' Doctrine?*, N.Y. L.J. (Mar. 20, 2018), https://www.law.com/newyorklawjournal/2018/03/20/goodbye-yellowstone-road-is-this-the-end-of-the-yellowstone-doctrine/.

135. *See, e.g.*, Native Winiarsky, *Commercial Tenants and Waiver of Real Property Law § 227; Outside Counsel*, N.Y. L.J. (Aug. 25, 2014), https://www.law.com/newyorklawjournal/almID/1202667802527/Commercial-Tenants-and-Waiver-of-Real-Property-Law-sect227/ (discussing how waivers which establish that a "tenant is not liable to pay rent subsequent to its surrender of the premises in the event that the destruction occurred without its fault or neglect," became standard in commercial leases in New York City).

136. *See also* Caldwell v. Am. Package Co., Inc., 866 N.Y.S.2d 275, 278–79 (App. Div. 2008) (extending the *Yellowstone* injunction to Loft tenants who, under Multiple Dwelling Law Article 7-C, are considered residential though they may hold a commercial lease). This is an interesting case, and there may be other classes of tenants in New York to whom *Yellowstone* should be extended.

barred from such relief."[137] The courts should be relatively unshackled when crafting remedies in equity. However, reviving an expired cure period, or simply pulling one out of thin air, is exactly the type of judicial behavior that the *First National* court steered clear of when it declined to revive the tenant's expired lease. The *Yellowstone* injunction is a useful, yet imperfect, doctrine. By addressing the issues presented herein, the New York Court of Appeals could improve access to justice and provide an amiable, more stable legal environment for landlords and commercial tenants throughout New York.

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137. Vill. Ctr. for Care v. Sligo Realty & Serv. Corp., 943 N.Y.S.2d 11, 14 (App. Div. 2012) (citing Becker Parkin Dental Supply Co. v. 450 Westside Partners, LLC, 725 N.Y.S.2d 547 (App Div. 2001)).

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